UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CENTRAL PENINSULA HOSPITAL, INC.

and

Cases 19-CA-32835
19-CA-32977

RAY SOUTHWELL, An Individual

John H. Fawley, Esq., for the General Counsel.

Paul L. Davis, Esq., (K&L Gates, LLP) and
James H. Juliussen, Esq., (Davis Wright Tremaine LLP) of Anchorage, Alaska,
for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL Administrative Law Judge. This case was tried in Kenai, Alaska, on May 15–17, 2012. Ray Southwell filed the first charge on November 17, 2010,[1] and the General Counsel issued the order consolidating cases and consolidated complaint on February 24, 2012. That complaint alleges that Central Peninsula Hospital, Inc. (CPH) violated Section 8(a)(1) by reprimanding and suspending Southwell because he engaged in protected, concerted activities and then discharging Southwell because he engaged in protected, concerted activities and because he filed a charge against CPH in an earlier case, thereby violating both Sections 8(a)(1) and (4). The complaint also alleges that CPH maintained two unlawful work rules. CPH filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, supervisory and agency status, maintenance of the work rules, and the disciplinary actions against Southwell; it denied, however, that it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and CPH, I make the following.

[1] All dates are in 2010 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

CPH, a corporation, is engaged in the business of providing acute medical care services at its facility in Soldotna, Alaska, where it annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 within the State of Alaska directly from points located outside that state. CPH admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning Section 2(14) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The main issue in this case is whether the otherwise protected, concerted speech that Southwell engaged in lost the protection of the Act under the analysis of *New York Times v. Sullivan,* 376 U.S. 254 (1964). The background that follows is necessary in assessing the nature of the statements made by Southwell that precipitated his discipline and termination.

The Kenai Peninsula Borough owns the hospital and has a contract with CPH to operate the hospital. Ryan Smith was CPH's chief executive officer from May 1, 2006 until some point prior to the hearing in this case. Andrea Posey is CPH's chief nursing officer. CPH employs about 700–750 persons. Joseph Marchetti was an employee who was fired by CPH in November 2008. Marchetti returned to the hospital with a semi-automatic rifle and killed one person, wounded another, and shot at others; Marchetti also died. This incident shocked CPH's staff and the community. It also provoked discussion of the possible causes of the tragedy.

The nurses at CPH are represented by the Alaska Nurses Association. Janet Hilleary, who has worked for CPH as a registered nurse since 1995, was president of the Alaska Nurses Association from about 2005 to 2010. The most recent contract between that union and CPH runs from January 1, 2009, through December 31, 2012. Negotiations for that contract began in October 2008 and lasted 15 months. During those negotiations the Union proposed contractual language that would bind successor-employers to the contract in the event that CPH was sold, leased, or the like. The Union proposed that language because of rumors that the hospital might be sold. Ryan Smith, CPH's CEO, responded at the bargaining table to that proposal that the hospital was not going to be sold; CPH did not accept the "heirs and assigns" language proposed by the Union and it was not included in the contract. After the contract was signed there were discussions at CPH employee meetings, on its email site, and in the Kenai Borough Assembly meetings that there could be a change in ownership of the hospital; several options were considered, including a sale, lease or joint venture. Then CPH announced a proposed change whereby joint governance would be created with a for-profit hospital having 51 percent ownership. The change, however, never materialized.

Ray Southwell, a registered nurse since 1976, worked at CPH beginning in 2003 in the emergency room under Posey's general supervision. CPH admits that Southwell was a very good nurse who received excellent annual reviews. Southwell also served as grievance officer at CPH for the Alaska Nurses Association from 2003 until late 2009. As grievance officer

Southwell was well aware of employees' workplace concerns. For example, in 2008 employees in the radiology department gave him a written timeline of issues that had been occurring that included the following:

> Staff Meeting with Administration. In attendance Sally Walker, Matt Dammeyer, Margaret Stroop, Ryan Smith and the Radiology Department.
> …
> [Smith] enlightened the department about a philosophy he holds in great esteem (Square Root Rule). The square root of the total number of employees in the Department (in our case square root of 30 = 5) determines the number of leaders (5) and the number of undesirables. (5). Those 5 undesirable employees must be eliminated in order for the department to succeed. [Smith] stated that he would fire every employee in the department if that's what it took to change attitudes.
> [Smith] indicated that when he was hired he had gone to the board and promised to clean up Radiology. He listed three components to this: The radiologist, the Department manager, and the staff. The first two had already been completed and it was time to work on the third. He repeatedly referred to the staff as "dysfunctional" and a "cesspool of garbage."

Southwell later met with Smith in Smith's office; Smith admitted referring to the situation as a "cesspool" but denied he had used "garbage." In any event Smith expressed his regret to those employees for having used the word "cesspool."

Also, as Posey and Smith admitted, there was a meeting during which Smith provided clarification regarding the need to improve performance standards. Posey noted that those expectations were "kind of a shock to all of us" and that some employees were in tears as a result. Smith was asked "[D]id the nurses there all start crying as a result of what you said?" Smith answered "No." I credit Smith's testimony only to the extent that it shows that not *all* of the nurses started crying as a result of his comments. This incident was relayed to Southwell.

On January 29, 2009, Southwell made a presentation to CPH's Board of Directors concerning the subject of unions at CPH and also the Marchetti shooting incident. Nurses were in attendance and some applauded after Southwell's presentation. On February 11, 2009, Ryan Smith, CPH's CEO, responded in a written message to all employees as follows.

> Ray Southwell (Emergency Room Nurse) requested and was invited by the CPGH, Inc. Board of Directors to express his opinions regarding issues at CPH at their January 29th meeting. While Ray's presentation to the Board addressed union representation, he also spoke of the events of November 26th. Reactions to Ray's presentation have ranged from support (employee applause at the meeting) to fear, anxiety, shock, and anger. Some individuals were troubled and viewed his statements as veiled threats. Personally, I was extremely disappointed with the words Ray used to express his opinions.
> I have purposefully not responded to Ray's comments until I had the opportunity to speak with Ray. I have spent a significant amount of time with Ray in an attempt to understand why he said the things he said, and whether or not he stands by his comments. Ray let me know that he does stand by his comments; thus, I feel obligated to respond
> I appreciate the time Ray spent with me and still respect Ray as an individual. Ray and I were able to "agree to disagree" on several items, and I was able to express to Ray my

disappointment with the words he used to express his opinions. Some of the statements Ray made during his presentation to the Board were in reference to the shooting incident and were as follows:

- "Now I believe that behavior (hospital shooting) is within each and every one of us. Each and every one of us has the potential of doing what happened that day with the right circumstances."
- "Our age of innocence is gone, the environment is ripe for another shooting, no one was to blame for the first one."
- "The next shooting will be on your shoulders if action is not taken."

While Ray is vocal about his desire for union representation for all employees, not just nurses, his statements were perceived by some as intending to create fear to accomplish this objective. I believe that anyone who uses the tragedy that occurred at CPH for any ulterior motive, including a platform for a union agenda, is promoting fear and is inappropriate.

During his presentation Ray requested two things:

1. "That the Board acknowledge that a union contract is the best way to constructively communicate with Administration."
2. "To have Administration, at their hospital forums, have debates on the pros and cons of unions. No lawyers, just protected individuals and Administration have open debates."

I explained to Ray my opinion that there is no such thing as a fair debate about unions in a work setting. Ray can say whatever he wants at a debate; however, administration is limited to expressing only facts, opinions and experiences. This does not lead to open debates without the worry of receiving an Unfair Labor Practice (ULP) complaint from the union. As I stated before, in my opinion, unions introduce third party representation that is not conducive to a collaborative work environment. I would rather spend my time working in an organization that is willing to promote and reward behaviors that support our mission, vision or values in order to foster significantly improved patient, physician, and employee satisfaction, quality outcomes, and financial success that will lead to continued reinvestment in personnel and capital equipment. I believe we are moving in this direction.

The next morning Southwell sent Smith an email message asking for the opportunity to respond in writing to all employees who received Smith's message; Smith rejected the request but offered to meet with Southwell to explain why. Smith and Southwell then met. During the meeting Smith said that he had his venue to communicate to employees and Southwell would have to find his own venue to respond. So Southwell responded by placing an advertisement in the Peninsula Clarion, the local newspaper, on February 18, 2009, as follows:

TO CPH EMPLOYEES

This is my response to Ryan Smith's letter, received by the employees, on February 11th.

1. First and foremost, I am not any kind of threat to any person at CPH. I have no power and have not threatened, directly or indirectly, anyone. I talk freely, because of my protection through the nurses contract and speak from my heart. I was challenged a few months ago, to "shout at the top of the mountain," if I was fearful about the processes at the hospital. I continue to climb the mountain, shouting as I go.
2. There were multiple nurses and other[s] that demonstrated heroic activities the day of the shooting. From the Chief Nurse Officer (CNO) to some of the newest nurses, they demonstrated what makes us caring professionals. Administration and the Board of Directors show no interest to recognize and support the heroes of the day. Perhaps, showing the community how the nurses rose above their fears, would put nurses in too strong of bargaining position with contract talks in progress.
3. Ryan has stated "I was extremely disappointed with the words Ray used to express his opinions." As I said earlier I speak from the heart. No one was listening until now. I do not use name calling and think Ryan is a bright financial manager. He on the other hand uses name calling and intimidation to force employees into his and the boards compliance. Radiology techs asked for RN support, to have the same protections nurses have. The Alaska Nurses Association (AaNA) is in the process to achieve the same protection for x-Ray techs, which the nurses have. They reported to me, and Ryan confirmed, he called the imaging department a "cesspool of garbage" in July of last year. It has been said, Ryan, recently apologized to the techs. Perhaps, nurses do not have a contract, because we are being punished for helping the techs.
4. The tragedy at CPH has not been addressed: Employees have been abused by management. To state that I have an "ulterior motive, including as a platform for a union agenda" shows Ryan does not know me or the history of unions. Unions, which are portrayed as evil today, were conceived out of the abuse from employers. CPH nurses formed our union because of abuses in the past. Speak with nurses that worked here, when the AaNA came to the rescue. Today, nurse abuse continues, but the nurses have a constructive way to fight back. As the nurses' grievance officer, I have seen nurses constructively fight back, protecting themselves through our contract. Every grievance that has been filed we have won. We win because of the protection of the contract, nurses peer review and because justice prevails. Ryan has acknowledged they have not complied with the nurse's contract, in the past. I raise the question: do you believe they comply with their ever changing policies?
5. I do not know if the firing of Joseph [Marchetti] was justified. I do believe he perceived it was unjust. Two are dead another significantly injured and countless others in the hospital and community will never be the same. I have said that this shooting was no one's fault, but all our faults. We missed, giving Joseph an alternative constructive process to fight back. In my opinion, administration and the Hospital Board of Directors continue to hide what I call "our dirty little secret."

Ray Southwell, RN
CPH Emergency Room Nurse

In 2009 CEO Smith searched online and discovered that Southwell had been a member of the Michigan Militia[2] before he moved to Alaska. Smith gathered a good deal of information about Southwell and sent it to John Nelson, an active member of the community. On February 26, 2009, Nelson sent Smith a message with the subject "Disavowal" and that read:

> I need to let you know that, after reflection, research, and conversations with friends, I totally disagree with and distance myself from the material you gave me that references Ray Southwell's association with the Michigan Militia. It appears that the Michigan Militia was a perfectly legal organization under state and federal law, representing conservative political views and not that dissimilar from the National Rifle Association and like organizations. Impugning or questioning Southwell's character by linking him to the Michigan Militia is an *ad hominen* attack with the undertones of McCarthyism. The issues generated by the nurses' contract need to be addressed in terms of their substance.

The message included Wikipedia definitions of "Ad hominen" and "McCarthyism". Smith replied with a message indicating that he did not understand Nelson's need to distance himself from the Southwell information because the material he sent only contained facts. Smith indicated:

> I agree that the Michigan Militia is a perfectly legal organization, etc. . . . I hope that you do not believe that I was impugning or questioning Ray's character by linking him to the Michigan Militia.

In a reply to Smith's message Nelson indicated:

> Please take another, closer look at the material you gave me, which contains references to Southwell's involvement with the Michigan Militia and the Patriot Movement. The first six pages consist of nothing more than bomb-bulleted illustrations of ". . . some of the crimes . . . of the Patriot movement." Another page links the Michigan Militia to the Oklahoma City bombing. There are two pages of political quotes by Southwell. And so on . . . *ad nauseum.*
> The material serves no purpose whatsoever except to smear and vilify Mr. Southwell. It's my opinion that Central Peninsula Hospital would be wise to disavow the material, disassociating itself totally from such character assassination.

Nelson then informed Southwell about the matter. Southwell responded:

> John, Was he really this foolish to give you that information? I understand it is being spread throughout the hospital. I have a union meeting tomorrow and expect we will be spending a great deal of time on that subject. I am a co-founder of the Michigan Militia. I recently met with the AST and FBI and they acknowledge we were lawful.

[2] Documents in the record indicate that Wikipedia describes the Michigan Militia as "[A]n organized paramilitary founded by Norman Olson of Alanson, Michigan, USA. The organization formed around 1994 in response to perceived encroachments by the Federal Government on the rights of citizens during the early Clinton Administration. The MMC declined during the late 1990's and was essentially defunct as a statewide organization by 2000."

In a message to Southwell on February 27, 2009, Nelson described the information Smith had sent him as follows

> I have before me 21 pages of material on the Michigan Militia/Patriot movement with quotes by you highlighted, 10 pages of material with emails between you and Ryan [Smith], and 12 pages of positive emails received by Ryan. All, it appears, gleaned from Internet sources. You are welcome to see and copy the material if you're interested. I don't like talking about people behind their backs.

In April 2009 Southwell addressed the Kenai Borough Assembly on the topic of workplace bullying at CPH. Later the Laborers Union placed an advertisement in the Peninsula Clarion that indicated that a local elected official, Norman Olson, was calling for an investigation of CPH. In pertinent part the ad indicated:

> "I believe the public needs to know about abuses, threats, and gross mishandling of the situation Marchetti found himself in while employed by CPH. From what I have been able to determine, the chain of events that led up to the incident was not examined or resolved then and continues today," Olson said
> That pattern, according to Olson, was reiterated at the August Service Board Meeting when several employees gave testimony of bullying, threats, retaliation, and sexual harassment. Other employees complained of racial discrimination. "Their testimony troubled me greatly. The board heard about highly irregular management practices which I personally believe to be criminal violations of Federal labor and discrimination laws."
> Those irregularities are further supported by a ruling handed down by the National Labor Relations Board, which addressed unfair labor practices. The ruling was rejected by hospital management. The Equal Employment Opportunity Commission continues its on-going investigation regarding complaints of discrimination, sexual harassment, and retaliation. When "non-professional" workers filed labor violations with the NLRB and sought protection by union organizing, they too were retaliated against.
> …
> Ray Southwell, Emergency Room registered Nurse, recently stepped down as Grievance Officer after nearly four years of hearing weekly complaints from employees. "I just couldn't help people-it was frustrating. The management refused to change its behavior and it is that behavior that was existent last year and remains unchanged today. I fully support and endorse Olson's pending motion to call for an investigation. Other victims of abuse are ready to come forth with recorded evidence of threats of being fired if they don't keep silent," said Southwell.
> …
> **SHOW YOUR SUPPORT FOR CPH HOSPITAL WORKERS**
> **REMEMBER AN INJUSTICE TO ONE IS AN INJUSTICE TO ALL**

The advertisement had the signatures of over 100 persons, including Southwell's. On October 12, 2009, the Central Kenai Peninsula Hospital Service Area Board voted to advise the Kenai Peninsula Borough to conduct an audit of CPH, including the Marchetti incident, but the Borough rejected the recommendation. On about October 19, 2009, the general assembly of the Alaska Nurses Association unanimously adopted resolution concerning workplace bullying;

Janet Hilleary, the Union's president, sent a message to Southwell indicating that the resolution passed "I believe thanks to all your hard work."

Meanwhile, the Laborers' International Union of North America, Local 341 had filed a petition to represent CPH's nonprofessional employees and an election was conducted sometime during the week of October 15, 2009. CPH opposed union representation for these employees and the employees resoundingly voted against such representation.

Misty Blue Rose works for CPH as a housekeeper. Southwell and his wife spoke with Rose on many occasions concerning the problems she said that she experienced working for CPH. She told Southwell that she was forced to change into her uniform in her manager's office and that she feared there was a camera there. Rose then secretly recorded conversations she had with persons employed by the hospital. Some of the tape recordings had been sent to elected representatives and the recordings were a topic of discussion at the hospital and on the online version of the Peninsula Clarion. On October 15, 2009, CEO Ryan Smith conducted an open forum meeting with employees. Brenda Trefren, who works as a nurse for CPH, attended that meeting. This meeting was held in the hospital's largest conference room and over 100 employees attended; it was standing room only. Tom Boedeker, president of CPH's board of directors, was also present. The primary topic of the meeting was the secret tape recordings. Smith addressed the topic by saying that yes, the recordings did exist and yes, he had listened to them. Smith said that Misty Blue Rose, the housekeeper, was responsible for the recordings. The atmosphere at the meeting became very, very tense. People began talking out of turn, raising clenched fists in the air, and shouting for Rose to be fired. Smith made no effort to calm the anger directed at Rose. Trefen attributed the anger generated by Smith's remarks as follows:

> He had – through the course of his dialogue, he had given the impression that we all could be on those recordings. And so people were saying well was it me, was it me. And so everyone felt like there was nothing sacred and nothing safe at the hospital, and so that all of their private conversations were being recorded.

Afterwards Trefen called Rose and told her about the meeting. Trefen suggested that Rose take some time off before coming to work for fears of Rose's physical and emotional safety. Trefen also suggested that Rose get an attorney and offered her financial help in doing so if needed. Trefen called and reported the meeting to the EEOC because Trefen felt that CPH was retaliating against Rose because of the charge Rose had filed with that agency. Trefen called Southwell and told him about the meeting; Southwell, like Trefen, regarded Smith's conduct at this meeting as retaliation against Rose. Finally, Trefen spoke to Matt Dammeyer, CPH's assistant administrator, about her concerns for Rose's safety resulting from the meeting. The foregoing facts are based on Trefren's credible testimony. The events seem vividly etched in her memory and her actions after the meeting are consistent with her testimony concerning what had occurred; her demeanor was convincing. I have considered Smith's testimony that although he knew that Rose had made the recordings and sent them to elected officials—indeed he talked to her about it and she admitted doing so to him—and that at the meeting he brought up the subject of the secret recordings, he nonetheless did not identify Rose as the secret tape recorder but instead other employees brought up her name. Smith also testified that he did not "remember fists in the air or that kind of stuff, but it was a–it was a sensitive subject for the group for sure." This testimony strikes me as strained and his demeanor was not convincing. I do not credit Smith's testimony to the extent that it is inconsistent with Trefren's.

Trefren also was concerned about an attendance policy implemented under Smith. The new policy gave employees a demerit for each unscheduled absence even if the employee was sick. After a certain number of demerits the employee could be terminated. Trefren feared that the new policy might result in employees coming to work sick and therefore spread disease to employees and patients. She spoke about the new policy with Posey, Smith, and Southwell. She called the Center for Disease Control. Trefren then prepared to make a presentation on the subject to the Kenai Borough Assembly. Before making the presentation she spoke to Posey about it. After discussing the subject, Posey told Trefren that if she made the presentation Smith "will annihilate you." Trefren nonetheless made the presentation. I have considered Posey's testimony concerning this incident. According to Posey, Trefren came to her right before going to the meeting of the Assembly and asked Posey's opinion about what she should do. Posey answered; "I would not speak out in front of the Assembly because there's a potential that you could be annihilated." Posey's explanation—that she did not refer to Smith but was just making a general observation because Trefen often speaks out without having all the facts—was unconvincing. I credit Trefren's testimony instead.

CPH then enlisted the services of Gary Namie, PhD, to conduct a survey of workplace bullying. Smith conceded that Southwell's efforts played a significant role in the CPH's decision to conduct the survey. Dr. Namie conducted the survey in December 2009 and published the results in January 2010. Among other things, 34 percent of nurses responding to the survey indicated that they felt they had been bullied at CPH. Dr. Namie recommended that CPH implement a workplace bullying policy, but CPH chose not to do so.

Meanwhile, on June 24, 2009, Southwell filed a charge in case 19–CA–31979 on behalf of the Union against CPH alleging that CPH discriminated against Union President Janet Hilleary in violation of Section 8(a)(3). That charge and 5 others, including 3 filed by the Laborers' International Union of North America, Local 341, were the basis for the issuance of a consolidated complaint; the trial was estimated to last 4 days. On February 23 the trial opened and Judge John J. McCarrick severed the 3 Alaska Nurses Association charges from the Laborers charges after a non-Board settlement agreement of ANA charges. Among other things, the non-Board settlement stated that for "settlement purposes only" Hilleary would be provided a modified version of a verbal warning; it also required that the settlement agreement be posted on the CPH and union bulletin boards for 60 days. After a 1-day trial on the remaining charges Judge McCarrick issued his decision on June 7 finding that,

> Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:
>
> a. Interrogating employees about their union and other protected concerted activities.
>
> b. Promulgating and maintaining an overly broad no solicitation rules prohibiting employees from engaging in solicitation during "duty hours."
>
> c. Promulgating and maintaining a rule which limits employees' rights to engage in Section 7 activity.
>
> Respondent violated Section 8(a)(1) and (3) of the Act by:
>
> a. Issuing written discipline to Janet Nilles for violating an overly broad no solicitation rule and for engaging in union and other protected-concerted activity.

b. Denying Janet Nilles quarterly bonuses for violating an overly broad no solicitation rule and for engaging in union and other protected-concerted activity.

Nilles worked as a unit clerk in CPH's surgery department. Judge McCarrick dismissed an allegation that Nilles' hours had been unlawfully reduced. On July 30 CPH posted the notice to employees required by Judge McCarrick's decision.

Mace Manire worked for CPH in its x-ray department. CPH has a grievance procedure that is available for its unrepresented employees; that procedure culminates in arbitration that is entirely paid for by CPH. Manire used this procedure and in 2009 he won an arbitration award against CPH that entitled him to backpay. The arbitration award indicated:

> Conclusion- Having considered the entire it is concluded that CPH failed to conduct a fair and reasonable investigation into the allegation of workplace violence against Mace Manire and that the conduct of its investigation into charges against Mr. Manire is evidence of disparate treatment compared with other investigations CPH conducted since 2006.

A dispute arose concerning the amount of backpay CPH owed Manire and that dispute was not resolved until the arbitrator later ruled in favor of CPH on the amount of money it owed Manire.

Patricia Trujillo worked as a housekeeper at CPH. After she quit her employment there, she told Southwell that she felt she had been subjected to racial discrimination; she gave Southwell examples.

B. Work Rules

CPH maintains a number of written work rules that apply to its employees. Policy # HR-210 provides, in pertinent part:

> PURPOSE: To establish guidelines for outside employment and activities.
> POLICY: CPH shall allow employees to engage in employment with other employers and to participate in outside activities except when that activity or employment conflicts with the interests of CPH. Human Resources should be notified before outside employment is accepted.
> RESPONSIBILITY: All hospital employees.
> PROCEDURE: 1. CPH recognizes the desire of employees to do as they wish outside of regular working hours and to use their skills and knowledge to augment their incomes. However, employee desires in this area must be balanced against the hospital's need for full productivity during working hours, for loyalty from employees, and competitive market issues.

The rest of that rule deals with outside employments and ethical issues.

Policy # HR-302 provides, in pertinent part:

> PURPOSE: To give guidance and direction for appropriate behavior of employees.

> POLICY: Notwithstanding CPH status as an at-will employer, certain rules and regulations regarding employee behavior are necessary to ensure the safe, effective and efficient operation of CPH. Conduct that interferes with operations, brings discredit to CPH, or is harmful to patients, visitors, or fellow employees cannot be tolerated. The following nonexclusive list of rules is provided to employees in an effort to avoid misunderstanding about what constitutes acceptable behavior in the workplace. Although any violation of this policy may result in implementation of the corrective action policy, no cause is required to terminate the employment of any employee. (see HR-314 Corrective Action)
> RESPONSIBILITY: Employees shall be responsible for following the guidelines in this policy. Directors shall be responsible for ensuring compliance.
> PROCEDURE: 1. Employees are expected to conduct themselves and behave in a manner which is conducive to the effective and efficient operation of CPH business.

The rule then lists expectation on matters such as attendance and punctuality, absence, safety and health regulations, dress code, assigned task performance, and workplace cleanliness. The rule then continued:

> 2. The following conduct is prohibited and considered to be serious in nature. Although instances of serious misconduct will normally result in immediate termination, no cause is required to terminate the employment of any employee. Serious misconduct includes, but is not limited to, the following:
> …
> s. Outside business or outside activities that conflicts with CPH business (See HR 210 Outside Employment and Activities).

C. Southwell's Disciplines

1. Written Warning

On March 16, Southwell posted comments on the website of the Peninsula Clarion in response to comments posted earlier by a coworker at CPH. Those comments included the following:

> The judge has not decided the case. Remember I did not bring the suit, the NLRB did. Also remember the letter to employees regarding the disciplined nurse was forced on management by the Union and the NLRB. It was part of the discipline toward management who were unjust in their punishment of a nurse. That case was also heading to trial and was settled days before the trial was to start. The judge had planned an addtional [sic] three days for that trial."

Southwell's comments continued, referring to the bullying survey by Dr. Namie, comments made by nurses at CPH to him concerning that survey, and other matters.

On June 21, Southwell posted an online letter to the Peninsula Clarion. The letter criticized the "corporate culture" that existed of "what is good for the corporation is good for America." The letter also stated:

> Sometime ago, the hospital corporation board president was asked where are the checks and balances on Management of CPH. His response – "why do we need checks and balances?" This corporate culture is pervasive at Central Peninsula Hospital Corporation. What is good for the hospital corporation is good for the Borough. The long list of hospital corporate abuses is documented and continues today. I believe this national corporate paradigm led to the destruction of life at my hospital.

In the last statement Southwell was referring to the Marchetti incident.

On June 30 CPH gave Southwell a discipline action statement indicating that he was being given a written reprimand for the following reasons:

> On March 16, 2010, Ray Southwell posted the following comments online in conjunction with a letter that he sent to the editor of the Peninsula Clarion regarding an NLRB hearing conducted as a result of an Unfair Labor Practice filed against the hospital:
> "The judge has not decided the case. Remember I did not bring the suit, the NLRB did. Also remember the letter to employees regarding the disciplined nurse was forced on management by the Union and the NLRB. It was part of the discipline toward management who were unjust in their punishment of a nurse. That case was also heading to trial and was settled days before the trial was to start. The judge had planned an addtional *[sic]* three days for that trial."
> On June 21, 2010, Ray posted the following comments online is a blog hosted by the Peninsula Clarion:
> "The long list of hospital corporate abuses is documented and continues today. I believe this national corporate paradigm led to the destruction of life at my hospital."
> The above statements are false and misleading in material respects. By the way of example, "the letter to employees regarding the disciplined nurse" was <u>not</u> "forced on management by the Union and the NLRB." Indeed, the underlying settlement agreement specifically acknowledges that the settlement was not an admission of wrongdoing by the Hospital." For that reason, Ray's conclusion that the settlement constituted "part of the discipline toward management who were unjust in their punishment of a nurse" is not only false and misleading but also defamatory. Similarly, Ray's statement that the judge had planned an additional 3 days for the trial is simply untrue. In truth, the judge stated, on the record, that he was unaware that the matter was scheduled for hearing. Finally, Ray's statement that he did not "bring the suit" is, at best, disingenuous, since the "suit" arose from an unfair labor practice charge that he filed with the NLRB.
> Ray's online comments on June 21, 2010 are equally false and misleading, but more importantly, are inflammatory and injurious to the reputation of the Hospital in the community. In short, there is no "long list of hospital corporate abuses," except in Ray's imagination, and the Hospital has done nothing that "led to the destruction of life at the [his] hospital." It should go without saying that statements suggesting that the policies of the Hospital are destroying life in our community are outrageous as well as unfounded.

The disciplinary action statement also indicated that Southwell's conduct violated:

> Hospital policy HR -302 prohibits conduct that "interferes with operations" or "brings discredit to CPH." For those reasons, the policy prohibits "outside activities that conflict [] with CPH business." Making statements that are false, misleading and defamatory

both interferes with Hospital operations and brings discredit to CPH. In the future, Ray must adhere to both the spirit and the letter of HR-302 by refraining from making false, misleading or defamatory statements about the Hospital.

In addition, Hospital policy HR-210 "recognizes the desire of employees to do as they wish outside regular working hours," but also recognizes that "employees desires in this area must be balanced against the hospital's need for … loyalty from employees." In the future, Ray will honor his duty of loyalty to the Hospital by refraining from making false, misleading or defamatory statements about the Hospital.

…

Ray has been advised that pursuant to paragraph 6 of Hospital policy HR-210, he must discontinue making false, misleading, or defamatory statements about the Hospital. If he continues he may receive further discipline up to and including termination.

…

Analysis

I begin by assessing whether the conduct for which Southwell was disciplined was concerted activity protect by Section 7 and Section 8(a)(1). The Act protects communications about working conditions by an employee to other employees for the purpose of enlisting collective action by them to address the working conditions. *Meyers Industries,* 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB,* 835 F.2d 1481(D.C. Cir. 1987), *cert denied* 487 U.S. 1205 (1988). The Supreme Court has held that such protected activity includes appeals to third parties not directly involved in an employment relationship with the employees. *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978). See also *Endicott Interconnect Technologies,* 345 NLRB 448, 450 (2005). The actions taken by Southwell that lead to his written warning must be viewed in their context. That context showed that Southwell was an outspoken advocate concerning workplace violence, bullying, and mistreatment of employees by management, and the need for unionization to deal with those issues. And those remarks came about as a result of talking to other employees and serving as grievance officer for the Union. Southwell made his public statements to a wide audience that include CPH employees, the community, members of management, and elected public officials. Those remarks were designed to highlight perceived workplace issues and gain support among employees and the community to address those issues.

In its brief CPH argues that Southwell's activities were not concerted and that in any event CPH was not aware of their concerted nature. I disagree. Given the highly public nature of those activities CPH knew of their concerted nature. For example, in Smith's February 11, 2009 response to Southwell's earlier presentation to CPH's Board of Directors, Smith acknowledged that "employee applause at the meeting" indicated "support" for Southwell's presentation, that Southwell "is vocal about his desire for union representation for all employees, not just nurses," and that Southwell wanted, "[t]hat the Board acknowledge that a union contract is the best way to constructively communicate with Administration." Southwell's advertisement in the newspaper that followed was addressed "TO CPH EMPLOYEES." It was quite obvious that Southwell was seeking support from the employees to address his workplace concerns. Southwell was quoted in the April 2009 advertisement sponsored by the Laborers Union; his remarks there indicated that he had been speaking with employees about working conditions at CPH and he expressed his frustration in dealing with management there over those issues. That Advertisement ended "SHOW YOUR SUPPORT FOR CPH WORKERS REMEMBER AN INJUSTICE TO ONE IS AN INJUSTICE TO ALL" and was supported by

the signatures of over 100 persons, including Southwell's. The conduct for which Southwell was disciplined was simply an extension of those protected, concerted activities. Southwell's March 16 public comments included a discussion of the charge he had filed on behalf of the Union alleging, among other things, that Union President Hilleary was subjected to unlawful treatment. His June 21 public comments were critical of the "corporate culture" and a "long list of hospital corporate abuse" at CPH that were continuing and that had lead to workplace violence at the Hospital. I conclude that Southwell's March 16 and June 21 comments were concerted activity about working conditions and that CPH disciplined him because of that activity.

I now address whether Southwell's comments were protected by the Act. I apply *New York Times v. Sullivan,* 376 U.S. 254 (1964). In *Linn v. Plant Guards Workers of America, Local 114*, 383 U.S. 53 (1966), the Supreme Court noted that Congress intended "to encourage free debate on issues dividing labor and management," and that "cases involving speech are to be considered 'against the background of a profound commitment to the principle that debate should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks.'" Id. at 62 (quoting *New York Times v. Sullivan,* supra.) In *Letter Carriers v. Austin,* 418 U.S. 264 (1974), the Supreme Court noted:

> The Court has often recognized that in cases involving free expression we have an obligation … to review the facts to insure that the speech involved is not protected under federal law. We must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.
> While this duty has been most often recognized in the context of claims that the expression was entitled to First Amendment protection, the same obligation exists in cases involving speech claimed to be protected under the federal labor laws.

Id. at 282

CPH's discipline indicated that some of Southwell's comments were "false" or "misleading." But the Board in *Veeder-Root Co.*, 237 NLRB 1175 (1978) held that employee literature did not lose the protection of the act because it was false, misleading, or inaccurate, provided that the statements were not deliberately or maliciously false or made with reckless disregard for the truth. See *National Steel Corp.*, 173 NLRB 401 (1968). The Board has also held that "absent a malicious motive [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum." *Allied Aviation Service,* 248 NLRB 229, 231 (1980). To that extent CPH's arguments are plainly inadequate as a basis for denying Southwell the protection of the Act.

I rely on *Jolliff v. NLRB,* 513 F. 3d 600 (6th Cir. 2008)[3] to complete my analysis of whether Southwell's comments lost the protection of the Act. In *Joliff* the Court identified a 3-step analysis in applying the *New York Times v. Sullivan* test. First, the Court examined whether the statement was capable of a defamatory meaning. In this regard the court pointed out the need

[3] In this case the Court reversed the Board and found, as I had, that the employer had not shown that the employees' comments violated the *New York Times v. Sullivan* standards. *TNT Logistics,* 347 NLRB 568 (2006).

to rely on the general tenor of the context in which the statement was made in order to determine whether it was the sort of loose, figurative, or hyperbolic language that does not amount to statements of facts.[4] Second, if the challenged statement was capable of a defamatory meaning, the court examined whether the statement was actually false. In this regard the court noted that the truth is a defense to any defamation action, but it is the burden of the speaker of the facts to establish that the statements are true. Third, if truthfulness has not been established then an examination is made of whether it was made with actual malice. In this regard the court noted that to make a statement with actual malice it must have been made with either (1) knowledge that the statement is false or (2) a reckless disregard for whether or not the statement is true or false.

Having established the legal parameters, I turn now to the facts underlying Southwell's written warning. The warning condemns Southwell for asserting that the settlement of some earlier unfair labor practices charges by CPH was "forced" on it by the Union and the NLRB. In one sense, CPH was not forced to enter into the settlement; it did so voluntarily. But in another sense had the Union not filed the charges and had the NLRB not issued the complaint, CPH would not have been forced into a situation of either settling the matter or going to trial and risk being found to have violated the law. These remarks obviously amount to hyperbole and therefore cannot serve as a basis for discipline in otherwise protected speech. Southwell's comments that the resulting settlement was part of the "discipline" of management who were unjust in their punishment of a nurse were also noted in his written warning. Remember that in that settlement CPH made a number of promises and obligated itself to post the settlement so that employees could read it. Under these circumstances the use of the word "discipline" is again mere hyperbole and would be recognized as such. Next, CPH claimed that Southwell's statement that the judge had planned an additional 3 days for trial was false. But mere the falsity of a statement is insufficient to support the discipline. And in any event the statement was true because the trial in that case was estimated to last 4 days but lasted only one due to the settlement of some of the charges. Similarly, CPH's assertion Southwell's statement that he did not "bring" the lawsuit was at best "disingenuous" fails. This is because "disingenuousness" is not the standard and because the statement is true; the General Counsel decides whether to initiate a lawsuit and he issues a complaint in only a fraction of the charges that are filed. Next, CPH faults Southwell's statement concerning a "long list of hospital corporate abuses." But Southwell relies on Judge McCarrick's "list" of unfair labor practices committed by CPH, on CPH's improper termination of employee Mace Manire, and other treatment of employees that he perceived to be unfair or abusive. And whether the list is "long" and whether the incidents amount to corporate "abuses" are, at most hyperbolic expression.

Finally, in Southwell's written reprimand CPH asserts that the:

[4] In assessing this issue the court identified four factors:(1) The common usage or meaning of the allegedly defamatory words themselves, whether they are commonly understood to be loose, figurative or hyperbolic words;

(2) The degree to which the statements are verifiable, whether the statement is objectively capable of proof or disproof;

(3) The immediate context in which the statement occurs; and

(4) The broader social context into which the statement fits.

> Hospital has done nothing that "led to the destruction of life at the [his] hospital." It should go without saying that statements suggesting that the policies of the Hospital are destroying life in our community are outrageous as well as unfounded.

Here I describe in greater detail my assessment of the four factors to be considered in determining whether Southwell's statement is capable of a defamatory meaning. What Southwell actually said was "I believe this national corporate paradigm led to the destruction of life at my hospital." He described the "corporate culture" as being "what is good for the corporation is good for America" and indicated this corporate culture is "pervasive" at CPH. In this context the words used by Southwell appear to be hyperbolic. And whether CPH's corporate culture, as described by Southwell, led to the Marchetti incident is not something that appears to be verifiable in an objective way. The statement was made in the immediate context of Southwell's complaint that CPH's board president had made remarks indicating a disdain for the need for "checks and balances" on CPH management. This likewise indicates that Southwell's statement was hyperbolic. Finally, Southwell's statement was made in the greater social context of discussions of the contributing factors to workplace violence and the role "bullying" plays in the workplace and elsewhere. Weighing these factors I conclude that Southwell's statement is not capable of bearing a defamatory meaning. I continue with the 3-step analysis in the event the Board might consider that useful. The General Counsel has clearly *not* met his burden of showing that Southwell's statement is true. But neither has CPH shown that Southwell's statement was made with a reckless disregard for the facts. Remember that Southwell received reports of how Smith called a department a "cesspool of garbage," how Smith's presentation to employees about the Misty Blue Rose matter prompted raised fists and angry calls for Rose's termination, how a nurse was warned that Smith would "annihilate" her if she made a public presentation critical of CPH, and how Smith's presentation on workplace standards left many employees in tears. And also remember how Southwell himself was targeted by Smith when Smith attempted to disseminate information about Southwell's past involvement with the Michigan Militia. Given this type of "corporate culture," and assessed in the context of a broader discussion of the factors contributing to workplace violence, I cannot conclude that Southwell's comments concerning the causes of workplace violence at CPH were made with a reckless disregard for the facts. I repeat that in *Linn v. Plant Guards Workers of America, Local 114*, 383 U.S. 53 (1966), the Supreme Court noted that Congress intended "to encourage free debate on issues dividing labor and management," and that "cases involving speech are to be considered 'against the background of a profound commitment to the principle that debate should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks.'" This seems applicable to the statement made by Southwell.

I conclude that the statements for which CPH issued Southwell the written warning were made in the course of concerted activity and remained protected under the Act. It follows that by issuing Southwell a written warning for engaging in protected, concerted activity, CPH violated Section 8(a)(1).

2. Suspension

On July 20 Southwell posted the following letter to the editor to the Peninsula Clarion:

> In April 2009 I spoke before the Kenai Borough Assembly as a "whistleblower" at Central Peninsula Hospital (CPH). I continue in that role. Today, my employment is threatened by continuing to expose the management style at the hospital.
> American Capitalism is the best financial system for economic success in Alaska. China understands and is experimenting with capitalism. Free market capitalism is the best form of checks and balances that our national founders understood.
> Central Peninsula Hospital is a monopoly. With Alaska's current statute Title 18, Chapter 07 Section 31 "certificate of need required," CPH has no competition and will never have any. Under capitalism, monopolies are accepted if they fall under some public or governmental oversight. Currently the Hospital Service Area Board and Assembly are the publicly elected oversight for the hospital. The non-public self appointed hospital incorporation board is aloof and almost impossible to contact. Try to find their mailing address. Employees are not allowed to e-mail most of the corporation board and must receive permission from the CEO before bringing any issue to the corporate board.
> I am disappointed how the assembly has ignored the management style at CPH. It is however the "check and balance" for the monopoly of CPH and allows me to continue to expose the management style of the hospital.
> I am opposed to the change in governance of CPH unless the certificate of need statute is repealed and competition is allowed. Competition may and I repeat may increase health care costs in the community but it is the best form of checks and balances to change the management style of CPH.
> Please contact our elected Hospital Service Area Board and Assembly members. Ask them to consider what they are doing to our community by relinquishing their oversight of that corporate monopoly called Central Peninsula Hospital.

Southwell posted the following blog reply on July 22:

> That's a great question that may get me fired, if answered. I do not know if you are really interested or just hope I will get fired. Mmmmmm, Here goes. I have called it bullying over the last 18 months or so. It is far worse. If you are an employee that stands up to management you will be isolated and attacked. These attacks will be personal. Standing up to senior management will bring attacks to destroy you. Hopefully all can withstand this destructive behavior from senior management. Today, most employees understand the consequences of standing and are not in a financial situation to object to the management style. (most cannot afford to be fired) I can document senior management finding some personal information they believe is embarrassing to the employee and use it in an attempt to destroy the individual. It was used on me and believe it was used on Joseph Marchetti. It was attempted to be used on Mace Manire he fought back constructively and received a legal judgment against CPH a year ago. I spoke to Mace earlier this month and one year after his judgment he has not received his back pay with interest as ordered. Who is going to make senior management pay the awarded judgment? The Hospital Board could care less. It happened to Patricia Trujillo, a courageous housekeeper who finally could not take the abuse after her fellow housekeepers turned on her because of the manipulation from senior management. She quit. Some employees feel there is an undertone of racism at CPH regarding Hispanics. I am aware of other minority employees that have been treated unfairly but I am not clear it was because of racism. Misty Rose, my greatest hospital hero, she stood against more than any other employee at

> the hospital. I am still not sure how she endured the attacks and continues to work at CPH. Janet Nilles is the classic example on how senior management attacks an employee to generate fear in all employees. She also won a legal judgment against the hospital and continues to wait for her back pay with interest as ordered. Again the Corporation Board cares little for the employees. Janet is pro-union. She stood against senior management, but the fear generated, worked on other employees. Many believed if they voted for the union they would be attacked next. During a nurse management meeting, senior management threatened the nurses present and most were in tears. There is a sales philosophy, "The fear of loss is more powerful than the hope for gain." Senior management uses it often. I cannot go on publicly because most of the others still work for CPH. I cannot give their names. I fear for their safety. An operational audit by the Borough Assembly would have given employees the protection needed under the State "Whistleblower law." We keep quite [sic] because of fear or confusion on what to do.

At the time Southwell had spoken to Manire about the arbitration award in Manire's favor, the backpay issue had not yet been fully resolved.

On July 28 CPH gave Southwell a discipline action statement indicating that he was suspended for 5 days. The disciplinary statement followed the format of the previously described written warning. The disciplinary statement quoted the two postings described in the previous paragraph and then indicated:

> The blog dated 7/20/10, by itself, did not rise to the level we felt necessary for corrective action, but in combination with his blog dated 7/22/10, indicates that Ray is not listening or understanding our view of his blogging. In addition to being outrageous, many of his statements are untrue and are intended to bring discredit to CPH, its employees and its leadership. Simply put, these false, misleading and defamatory statement [sic] are injurious to the hospital.
>
> More specifically, Ray's comments that individuals who stand up to management will be "isolated and attacked," subjected to "personal" attacks, and that the attacks will be brought "to destroy you" are inflammatory, defamatory, and without any basis in fact. Similarly, Ray's statements that management will use personal information to destroy employees are bad enough, but to suggest that such personal attacks attributed to the tragedy perpetrated by Joseph Marchetti is simply outrageous, as well as shameful.
>
> On the other hand, Ray's statement that Mace Manire has not received the judgment awarded him by an arbitrator is simply a lie. Indeed, just within the past few days, the arbitrator issued a final order closing the case. In that same order, the arbitrator concluded that the payments CPH made to Mr. Manire almost a year ago fully compensated him for any loss he may have suffered,
>
> Ray's comments about Janet Nilles are reflective of his attempts to intentionally mislead his audience. Although Ray states that Ms. Nilles is still waiting to receive the "back pay" as ordered, he fails to mention that the judge in that case concluded that Ms. Nilles was not entitled to the thousands of dollars in back wages sought by the NLRB and the union, but instead, was entitled only to a couple hundred dollars in bonus - not wage - payments.
>
> Ray also fails to mention that those bonus payments have not been made because CPH does not yet know whether the union or the NLRB will appeal the judge's ruling. Neither

does Ray mention that CPH has already notified the NLRB that the hospital will not appeal the decision.

Ray's comments concerning racism at the hospital are equally unsupported, and for that reason, constitute further evidence of Ray's ongoing efforts to portray his co-workers and management in a false light.

As a final example, Ray's statement that he cannot comment further about employee issues at the hospital because **"**I fear for their safety," suggests yet again that management actions imperil employees' lives or their physical well-being. Any such insinuation is not only outrageous, but leads one to the conclusion that Ray does not care about the truth or bringing about any needed change at the hospital. Instead, Ray's comments are intended to inflame passions, cause divisions within the workplace, and to provide a continuing soapbox from which to express his destructive rantings.

The discipline statement also stated that, by making false, misleading or defamatory statements about the CPH, Southwell had violated HR-302's prohibition against conduct that interferes with hospital operations and brings discredit to Respondent, and had violated HR-210's requirement to honor the duty of loyalty to the hospital. The discipline statement concluded "If Ray chooses to engage in similar conduct in the future, he will leave us with no choice but to terminate his employment."

Analysis

The comments posted by Southwell on July 22 were a continuation of his earlier concerted activities. That posting again addressed concerns of bullying by management at CPH, and perceptions of racism, all in the context of what not only happened to Southwell but to other employees as well. It was again an effort by Southwell to garner support from employees and the community to support a change in working conditions at CPH.

In the suspension notice CPH punished Southwell for his comments that individuals who stand up to management will be "isolated and attacked," subjected to "personal" attacks, and that attacks will be brought "to destroy you." However, as I described above, reports made to Southwell show that those comments, if not true, were certainly *not* made with a reckless disregard for the facts. The suspension notice also faults Southwell for suggesting "that such personal attacks attributed (sic) to the tragedy perpetrated by Joseph Marchetti." But what Southwell actually stated was that CPH's use of personal information it believed to be embarrassing to an employee 'was used on me and believe it was used on Joseph Marchetti." In other words, Southwell did not make a direct connection between use of embarrassing personal information by CPH and the Marchetti shootings. Moreover, Southwelll was careful to phrase the statement as his belief and not as a statement of fact. Given the context in which the statement was made and the Supreme Court's admonition to take care not to interpret the Act in a manner that stifles free expression even about extremely sensitive subjects, I conclude this statement cannot carry a defamatory meaning. The remaining comments made by Southwell that CPH list in the suspension notice do not detailed analysis. Southwell's comments regarding Mace Manire's backpay were again, if not true at the time he made them, were in any event certainly not made recklessly. Southwell's comments about Janet Nilles winning a legal judgment against CPH and still awaiting her backpay are true: Judge McCarrick ordered CPH to make Nilles whole for the wages she lost, with interest and at the time Southwell made the statement CPH had not yet done so. Southwell's comments concerning racism were not phrased

as facts but instead as concerns expressed by employees; even then those concerns were not made with a reckless disregard for the facts. Finally, Southwell's comment about his fear for the safety of employees was made in the context of his expressed concerns that management would retaliate against employees if he publicly named names and in the further context of the need for whistleblower protection for those employees; it is the type of hyperbolic statement that cannot carry a defamatory meaning.

Having concluded Southwell's comments were made in the course of concerted activity and those comments remained protected under the Act, I further conclude that by suspending Southwell because he engaged in those activities CPH violated Section 8(a)(1).

3. Termination

Southwell nonetheless continued to make public statements concerning the working conditions at CPH. On October 12 Southwell gave a presentation to the Kenai Borough Assembly. This presentation was critical of CPH and its CEO. The following day Southwell reprinted his presentation on his Facebook page and on online newspaper blog. The reprinted presentation stated, in pertinent part:

> The CEO was quoted as saying; (regarding the mayor's task force) "it seemed like the task force was changing on the fly**."** The CEO promised the nurses, during contract negotiations, the hospital would not be sold. The ink was not dry, on the contract, when the announced sale was presented. Talk about "changing on the fly**."** The Hospital Corporate Board questions the Mayor's trustworthiness, and they ignore the CEO's behavior. Under his leadership there have been multiple unfair labor practices filed, forced policy changes, a murder/ suicide, unfair firings, sexual and racial harassment, workplace bullying, by the way, the developed policy was never implemented and there is immeasurable fear generated by the hospital CEO at all levels.

On October 18 CPH terminated Southwell's employment. The discipline action statement quoted the portion of Southwell's presentation set forth above and indicated that:

> [I] is untrue and is seemed to be designed to bring discredit to CPH leadership. These types of false and defamatory statements are injurious to the hospital, its employees and the community in general.

The discipline statement also cited HR-302 and HR-210 as the rules Southwell violated.

Analysis

Consistent with my earlier analyses, Southwell's remarks were again a continuation of his concerted activity to identify and rectify workplace issues. Southwell's comments concerning CEO Smith's promise that CPH was not going to be sold was true; his comments that shortly thereafter CPH announced a "sale" as opposed to more precisely identifying the transaction as a "joint governance" is the type of rhetorical flourish that does not carry a defamatory meaning. I summarily assess as follows: Southwell's remaining comments that under CEO Smith's administration there were "multiple unfair labor practices filed"; true, "forced policy changes"; true, "a murder/suicide" true, "unfair firings" (at least one unfair firing), "sexual and racial harassment" (was based on reports made to Southwell by employees

and therefore not made with a reckless disregard for the facts), "workplace bullying"; true, according to Dr. Namie's study), "the developed policy was never implemented"; true, and "there is immeasurable fear generated by the hospital CEO at all levels", based on what happened to Southwell himself and based upon reports from others, if not true then certainly not made with a reckless disregard for the facts.

In its brief CPH argues that there were other reasons why CPH could have lawfully fired Southwell. Those other reasons were not listed in the disciplinary notices given to Southwell. I conclude those other reasons were not actually relied upon by CPH; rather, they amount to after-the-fact efforts to strengthen its legal position. I therefore do not consider those other arguments.[5] By discharging Southwell because he engaged in protected, concerted activity, CPH violated Section 8(a)(1).

The General Counsel also argues that CPH violated Section 8(a)(4) by discharging Southwell because he filed a charge with the NLRB. But the termination notice makes no mention of the unfair labor practice charge, so the General Counsel instead points to the written reprimand. That discipline did mention the charge filed by Southwell, but the problem is that the General Counsel did *not* allege that the reprimand violated Section 8(a)(4); instead the complaint only alleged a violation of Section 8(a)(1); it specified only that the reprimand was given because of Southwell's protected, concerted activities. Of course, the legal theories underlying the different sections are different and the defenses may differ. And the General Counsel fails to explain how, under those circumstances, he has supplied CPH with due process. In any event, such a finding would not materially affect the remedy. I dismiss the 8(a)(4) allegation.

D. Back to the Work Rules

The General Counsel argues that because CPH applied HR-210 and HR-302 to restrict activity protected by the Act, those sections of the work rules are unlawful. I agree. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647, (2004). By applying those rules to restrict Section 7 activity CPH violated Section 8(a)(1).

The General Counsel also argues that those work rules are facially invalid. The complaint alleges that the language in HR-302 that "prohibits employee conduct that interferes with Respondent's operations, or discredits Respondent or prohibits outside activities that conflict with Respondent's business" is unlawful. For the convenience of the reader I repeat the critical portion that rule:

> Conduct that interferes with operations, brings discredit to CPH, or is harmful to patients, visitors, or fellow employees cannot be tolerated. The following nonexclusive list of rules is provided to employees in an effort to avoid misunderstanding about what constitutes acceptable behavior in the workplace.
>
> …
>
> s. Outside business or outside activities that conflicts with CPH business (See HR 210 Outside Employment and Activities).

[5] CPH also argues that President Obama improperly appointed certain members to the Board and that therefore the Board is functioning without a proper quorum. But that matter has nothing to do with my authority to hear and decide a complaint properly issued by the General Counsel.

Because sections of HR-302 refers the employee back to HR-210, I will deal with that allegation in the next paragraph. I first focus on that portion of the allegation in the complaint that challenges a rule that prohibits employee conduct "that interferes with operations" of an employer. It is difficult to see how such a rule, on its face, would reasonably cause employees to hesitate to exercise their Section 7 rights; nothing in the Act directly allows an employee to interfere with her employer's business operations. Of course the Act protects the right of employees to engage in strikes and other work stoppages; the result of which certainly interfere with an employer's business operations but it seems to me that a reasonable employee would not read the rule and fear that he and others could not engage in a strike. I emphasize that the test is the viewpoint of a reasonable employee and not that of lawyers who are experts in labor law and skilled at creating legalistic arguments. In his brief the General Counsel directs me to a rule found unlawful in *Lutheran Heritage,* id. The rule in that case read as follows:

> Class III Offenses :5. Engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any Martin Luther Memorial Home facility or official business meeting.

The judge there concluded and the Board affirmed without additional comment that.

> In my opinion, this rule can reasonably be read as encompassing Section 7 activity. For example, the rule as written would prohibit employees from engaging in protected concerted activities concerning wages, conditions of employment, or safety issues if it interfered with production or a business meeting. It could be construed to prohibit employees from voicing concerns over terms and conditions of employment during a group meeting and if the concerns escalated they could interfere with production. While the first portion of the rule regarding unlawful strikes, work stoppages, and slowdowns protects legitimate business interests, the later portion of the rule is overly broad and has a tendency to chill employees in the exercise of their protected rights.

Id., at 655. The judge's rationale served to emphasize the difference between that rule and this one; that rule spoke of the "interference with production" in the context of "strikes, work stoppages, slowdowns." It conjured up the very connection to concerted activity that is entirely missing from the more garden variety prohibition of employee conduct "that interferes with operations." I certainly do not understand that the Board in *Lutheran Heritage* meant to hold that all work rules that prohibit employees from interfering with an employer's production are unlawful. Remember that in *Lutheran Heritage* the Board held:

> In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.

Id., at 646. I conclude that this portion of HR-302 is not facially unlawful. As noted, the complaint also challenges that portion of HR-310 that prohibits employee conduct that "brings discredit" to CPH. I have examined my dictionary's definition of "discredit" and I find nothing there that could reasonably be read by an employee as covering any Section 7 right. And just because CPH relied on that rule to discipline Southwell, it certainly does not necessarily follow that absent such reliance employees would interpret that rule in that manner. Moreover, I note

that in his brief the General Counsel gives no legal authority or argument to support the allegation. And I decline to speculate how, given the broad variety of conduct protected by the Act, some possible protected conduct might be seen as bringing "discredit" to CPH. To do otherwise would intrude upon an employer's legitimate interests in maintaining a proper work environment and fostering employee productivity. I dismiss the allegation in the complaint that HR-310 facially interferes with Section 7 rights.

Turning to HR-210, the complaint alleges the rule is unlawful because it "requires that its employees balance their desires to do as they wish outside of regular working hours against Respondent's need for employee loyalty. What the rule actually says is:

> CPH recognizes the desire of employees to do as they wish outside of regular working hours and to use their skills and knowledge to augment their incomes. However, employee desires in this area must be balanced against the hospital's need for full productivity during working hours, for loyalty from employees, and competitive market issues.

The rest of that rule deals with outside employment and ethical issues none of which the General Counsel challenges. I conclude, however, that employees, without more, would not reasonably believe that loyalty to their employer may require them to forego their statutory rights. In his brief the General Counsel cites *GHR Energy Corp.,* 294 NLRB 1011, 1012, 1030 (1989) a standing for the proposition that rules that demand loyalty from employees are overly broad. That case involved a unilateral implementation of the following rule:

> Any actions or statements made by employees against the Company's interests which expose the Company to public contempt and/or ridicule or damages its business reputation or interferes with its ability to expand and grow shall be considered as disloyalty

The Board stated:

> We agree with the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally issuing its May 21, 1980 "Policy Statement on Disloyalty" [ ] and thereby imposing excessively broad restrictions on employee "actions and statements" protected under Section 7 of the Act, because they could be interpreted by the Respondent as "interfering with its ability to expand and grow" and thus "disloyal." [ ]
> Our adoption of the 8(a)(5) finding, however, is based on the test set forth in *Peerless Publications,* 283 NLRB 334 (1987), issued since the judge's decision in this case. In *Peerless* the Board held that an employer who issues a code of conduct governing employee behavior enforceable by discipline may overcome the presumption that it must bargain over such a matter by showing that the subject matter of the code goes to the "protection of the core purposes of the enterprise." If it does, the code still must at least be, on its face, unambiguous and narrowly tailored to the employer's legitimate and necessary objectives.
> In this case we find the Respondent has not overcome the initial presumption of mandatory bargainability. Further, even if it did, the policy statement as promulgated is substantially overbroad, as found by the judge. The policy's proscription of employee behavior is so general and ambiguous that the Respondent is not able to sustain

> "disloyalty" as a "core" concern under the *Peerless* balancing test. That is, the policy is not in any manner restricted to subject matter shown to be necessary to the "protection of the core purposes of the enterprise." Further, the policy is simply not drawn narrowly so as to infringe on employee rights only to the extent necessary to serve legitimate interests in employee loyalty. (footnotes omitted).

Id., at 1012. I do not read this case as standing for the proposition that work rules that expect employee loyalty violate Section 8(a)(1). Rather, it was the specific definition of disloyalty in that case that the Board found was overbroad. Here there is nothing HR-210 that puts a gloss on the word "loyalty" that would implicate Section 7 rights. And the Board in *GHR* explicitly recognized an employer's "legitimate interests in employee loyalty." I dismiss this allegation too.

CONCLUSIONS OF LAW

By disciplining, suspending, and discharging Ray Southwell because he engaged in concerted activity protected by the Act, and by applying work rules HR-210 and HR-302 in a manner that interferes with activity protected by Section 7 of the Act, CPH has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily suspended and discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

I have found that Respondent unlawfully applied sections of its work rules in an unlawful manner, but I have concluded that those work rules are not themselves unlawful. Balancing the need for the Respondent to maintain a proper work environment and foster productivity through a proper use of work rules against Respondent's unlawful conduct I shall not require it to rescind those work rules; rather I shall require it to cease and desist from applying them in a manner that interferes with activity protected by Section of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[6]

[6] 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.

ORDER

The Respondent, Central Peninsula Hospital, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, suspending, discharging or otherwise discriminating against any employee for engaging in concerted activity that is protected by the Act.

(b) Applying work rules HR-210, HR-302, or any other work rule in a manner that interferes with activity that is protected by Section 7 of the Act.

(c) 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 from the date of the Board's Order, offer Ray Southwell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ray Southwell whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline, suspension, and discharge, and within 3 days thereafter notify the employee in writing that this has been done and that those matters will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Soldotna, Alaska, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 19, 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, the notices shall be distributed electronically, such

[7] 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."

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 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 June 30, 2010.

(f) 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.

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

Dated, Washington, D.C., August 2, 2012.

_____
William G. Kocol
Administrative Law Judge

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 discipline, suspend, discharge or otherwise discriminate against any of you for engaging in concerted activity that is protected by the Act.

WE WILL NOT apply work rules HR-210, HR-302, or any other work rule in a manner that interferes with activity that is protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Ray Southwell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ray Southwell whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline, suspension, and discharge of Ray Southwell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that those matters will not be used against him in any way.

Central Peninsula Hospital, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948
Seattle, Washington 98174-1078
Hours: 8:15 a.m. to 4:45 p.m.
206-220-6300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSTNOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.