

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

CALIFORNIA NURSES ASSOCIATION,
NATIONAL NURSES ORGANIZING
COMMITTEE

Case No.: 31-CB-12913

and

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TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel submits this Answering Brief in opposition to Respondent's Exceptions to Associate Chief Administrative Law Judge Mary Miller Cracraft's Decision in the captioned matter.¹

I. PROCEDURAL HISTORY

This case was tried before the Honorable Mary Miller Cracraft on April 9, 2012, in Los Angeles, California based on a Complaint and Notice of Hearing issued on April 29, 2011 (Complaint). The Complaint alleges that California Nurses Association, National Nurses Organizing Committee (Respondent) violated Section 8(b)(3) of the Act by unilaterally altering the terms and conditions of a collective-bargaining agreement it had reached with Henry Mayo Newhall Memorial Hospital (Hospital) and that the Respondent violated Section 8(b)(1)(A) of the Act by inserting on or inside the back cover of collective-bargaining agreements with the Hospital and other employers, an ambiguous statement concerning employees' *Weingarten* rights that implies that employees must request a union representative during investigatory meetings.

On July 9, 2012, ALJ Cracraft issued her decision finding merit to the alleged violations of Sections 8(b)(3) and 8(b)(1)(A) set forth in the Complaint. On August 6, 2012, Respondent filed 43 exceptions to ALJ Cracraft's 12-page decision. As explained below, the ALJ's well-reasoned decision correctly applies extant law to the facts of this case. Respondent's exceptions are without merit and should be denied.

II. STATEMENT OF FACTS

As noted by the ALJ, the critical facts of the case are not in dispute. (ALJD at 3). The Hospital, a corporation with an office and place of business in Valencia, California, is engaged in the operation of a

¹ Citations are as follows: Administrative Law Judge Decision (ALJD at ___); Respondent's Brief in support of Exceptions (R Brief at ___); Transcript (Tr. ___); Exhibits (AGC Exh. __; R Exh. __; Jt. Exh. __)

hospital providing inpatient and outpatient care. (AGC Exh. I (d), ¶ 2(a).) Since at least 2000, the Respondent has been the exclusive collective-bargaining representative of the employees of the Hospital. (AGC Exh. I (d) ¶ 5 (c).) Respondent has also been the exclusive collective-bargaining representative of employees employed by numerous other employers. (Jt. Exh. p. 2.)

In 2000, the Hospital and the Respondent entered into their initial collective-bargaining agreement. (Tr. 40:13-20.) The agreement did not contain a *Weingarten* rights statement. (Tr. 40:13-15.) In 2003, the Hospital and Respondent entered into their first successor collective-bargaining agreement. (Tr. 41:7-9.) Respondent printed a *Weingarten* rights statement on the back cover of the 2003 agreement without the Hospital's consent. (Tr. 33:2-8; 38:3-6.) The Hospital filed an unfair labor practice charge at that time alleging that the Respondent violated Section 8(b)(3) and 8(b)(1)(A) of the Act. (Tr. 47:1-4.) The unfair labor practice charge was subsequently resolved pursuant to a non-Board settlement agreement that the Respondent and the Hospital entered into prior to the commencement of the unfair labor practice hearing. (Tr. 36:2-6; 44:25; 45:1-22.) As part of the settlement agreement, the Respondent agreed to reprint the agreement with the back cover blank. (Tr. 47:5-8.) In 2005, the Respondent and the Hospital negotiated the 2006 successor agreement, which did not include a *Weingarten* rights statement. (Tr. 49:7-22.)

In about April 2009, the Hospital and the Respondent reached another successor agreement on terms and conditions of employment to be incorporated in a collective-bargaining agreement, which was effective from January 22, 2009, until January 21, 2012. Per the 2009-2012 collective-bargaining agreement, Respondent was to print the agreement and provide copies to the Hospital. (Tr. 20:8-15; AGC Exh.2.) After the parties reached and signed the final agreement, the Respondent printed copies of the agreement and unilaterally included a *Weingarten* rights statement on the back cover. (Tr. 27:17-21.) The Respondent's statement in its entirety was printed as follows:

The Weingarten Rights

The Supreme Court has ruled that an employee is entitled to have a CNA Representative present during any interview which may result in discipline. These rights are called your Weingarten Rights.

You must request that a CNA rep be called into the meeting.

You must have a reasonable belief that the discipline will result from the meeting.

You have the right to know the subject of the meeting and the right to consult your CNA rep prior to the meeting to get advice.

Do not refuse to attend the meeting if a rep is requested but denied. We suggest you attend the meeting and repeatedly insist upon your right to have a CNA rep present. If this fails, we suggest that you not answer questions and take notes.

(AGC Exh.2; Jt. Exh. P. 1-2.)

This *Weingarten* rights language was not discussed during bargaining and the Employer did not consent to the language or to the printing of the *Weingarten* language on the back cover of the parties' agreement. (Tr. 25:13-17; Jt. Exh. p. 1.) Respondent's collective-bargaining agreements with a number of other employers contain or contained within or on the back cover of the agreements a *Weingarten* rights statement identical to the statement on the back cover of Respondent's collective-bargaining agreement with the Employer. (Jt. Exh. p. 2.)

III. THE ALJ CORRECTLY FOUND THAT THE AMBIGUOUS *WEINGARTEN* STATEMENT DRAFTED BY RESPONDENT RESTRAINS AND COERCES EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS IN VIOLATION OF SECTION 8(b)(1)(A) OF THE ACT

A. The *Weingarten* Statement Is Ambiguous in That It Is Subject To Different Reasonable Interpretations

In *NLRB v. J. Weingarten, Inc.*², the Supreme Court held that employees have the right not only to request the presence of a union representative at a meeting they believe could lead to discipline, but also to participate in such an interview unaccompanied by a union representative. 420 U.S. 251, 257-260 (1975). In the immediate case, the ALJ correctly found that the *Weingarten* statement the Respondent

² *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)

printed on the back cover of its contract with the Hospital, and numerous other employers, infringed upon employees' right to participate in investigatory interviews *without* the presence of Respondent's representatives. Respondent's argument that the language of the *Weingarten* statement cannot be reasonably construed by employees to require them to request the presence of a CNA representative is belied by the express language of the statement it crafted: "You must request that a CNA rep be called into the meeting." Of course, this same clause is subject to a second interpretation, *i.e.*, that it is merely an instruction for employees regarding how to exercise their *Weingarten* rights. Based on these two readings of the language, ALJ Cracraft correctly concluded that the language of the *Weingarten* statement promulgated by the Union was ambiguous. (ALJD at 4.) ALJ Cracraft also appropriately applied the well-established principle that ambiguities should be construed against the party that drafted the language. (ALJD at 4 (and cases cited therein)).

In arguing that the *Weingarten* statement was not ambiguous, Respondent mistakenly relies on the fact that "the Complaint never alleged, and the ALJ did not find, that the Union actively misled employees or otherwise engaged in conduct evidencing an intent to coerce or restrain them in the exercise of their rights guaranteed by the Act." (R Brief at 5.) However, as the Board applies an objective employee standard to determine whether a statement coerces or restrains employees, the Respondent's subjective intent is irrelevant. *National Association of Letter Carriers, Branch #47 (U.S. Postal Service)*, 330 NLRB 667, fn.1 (2000) (violation of 8(b)(1)(A) does not turn on respondent's motivation in making statement, but upon examination of whether statement would have a reasonable tendency to restrain or coerce an employee in the exercise of statutory rights). Moreover, Respondent was clearly aware of ambiguities in the language as early as 2006, when it settled an earlier complaint on the identical issue. Any argument that Respondent was unaware of the ambiguity, or had no intent in promulgating an ambiguous statement, is disingenuous.

B. The *Weingarten* Statement Restrains and Coerces Employees in the Exercise of Their Section 7 Rights

ALJ Cracraft properly determined that the ambiguous *Weingarten* statement restrained and coerced employees in exercising their Section 7 rights. (ALJD at 5.) To determine whether a union's actions violate Section 8(b)(1)(A), the Board will examine whether the actions would have a reasonable tendency to restrain or coerce employees in the exercise of statutory rights. *National Association of Letter Carriers, Branch #47 (U.S. Postal Service)*, 330 NLRB 667, fn.1 (2000). There, the Board found that a union restrained and coerced an employee in the exercise of his statutory rights when it refused to provide him with information that he wanted to file a charge with the Board against the union. The union did not threaten the employee in any way; it merely refused to provide him with the information he needed to file a charge against the union. Despite the absence of threats or violence, the Board concluded that this refusal to provide information restrained and coerced the employee in the exercise of his statutory right to access the Board and violated Section 8(b)(1)(A) of the Act.

The *Weingarten* statement in the instant case similarly restrains and coerces employees in the exercise of their statutory rights. Employees' fundamental rights under the National Labor Relations Act are set forth as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, **and shall also have the right to refrain from any or all such activities** except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Section 7 of the Act (emphasis added).

The faulty *Weingarten* statement, currently printed on the cover of 42 collective bargaining agreements, communicates to employees that they do not have the right to refrain from requesting a CNA representative at covered investigatory interviews that could result in discipline. Unlike the union rule requiring members to have union representation at investigatory meetings at issue in *Sheet Metal*

Workers, Local 550 (Dynamics Corp.), 312 NLRB 229 (1993), the employees here cannot escape the reach of the *Weingarten* statement simply by resigning from the Respondent. Respondent's *Weingarten* statement in the instant matter was not communicated solely to Respondent's members. Rather, it was included on the cover of Respondent's collective-bargaining agreements, documents which are of particular importance in labor relations. See *Auciello Iron Works, Incl., v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.") As the terms and conditions of employment set forth in the collective-bargaining agreement apply to bargaining unit employees, these same employees would likely conclude that the language on the back cover was an additional term and condition of their employment. Bargaining unit employees, regardless of whether they are members of the Respondent, could reasonably read the ambiguous language on the cover of the collective-bargaining agreement as requiring they request CNA representation, thus restraining and coercing them from exercising their statutory right to refrain from doing so.

C. The ALJ Did Not Conclude That the 8(b)(1)(A) Violation Derived in Part From the Section 8(b)(3) Violation

Respondent mischaracterizes the ALJ's decision when it contends that she rested her finding of a Section 8(b)(1)(A) violation partially on the theory that it derived from the Section 8(b)(3) violation. (R. Brief at 4.) Respondent accuses the ALJ of attempting to "bolster" her finding of a Section 8(b)(1)(A) violation with Respondent's failure to bargain with the Hospital. (R. Brief at 13.) However, the cited portion of the ALJ's decision merely mentions that the placement of the statement on the cover of the collective-bargaining agreement "could lead a reasonable employee to believe that it was just as binding on them as the substantive terms of the agreement." (ALJD at 5:14-16.) In discussing the Section 8(b)(1)(A) violation, the ALJ made no reference to the fact that the Respondent *unilaterally* placed the language on the collective-bargaining agreement and that its conduct constituted a Section 8(b)(3) violation. Rather, the ALJ focused on how the placement of the language on the cover could lead

reasonable employees to believe that the statement was just as binding on them as the terms set forth in the collective-bargaining agreement. This would be true regardless of whether the statement was placed on the agreement unilaterally by Respondent or after the parties bargained to agreement on the issue.

Accordingly, ALJ Cracraft's finding that Respondent violated Section 8(b)(1)(A) of the Act was well-grounded in fact and extant Board law.

IV. THE ALJ CORRECTLY FOUND THAT THE RESPONDENT VIOLATED SECTION 8(b)(3) OF THE ACT BY UNILATERALLY MODIFYING THE TERMS OF THE PARTIES' COLLECTIVE-BARGAINING AGREEMENT.

ALJ Cracraft properly found that the Respondent modified the disciplinary procedure provided for in the Respondent's collective-bargaining agreement with the Hospital in a material, substantial and significant manner when it placed the *Weingarten* statement on the cover. (ALJD at 6). While Respondent asserts that the Board has consistently held that the contents of the cover of a duly executed collective bargaining agreement is a permissive subject of bargaining, it cites only one case for this sweeping assertion. *IBEW Local 3 (Eastern Electrical)*, 306 NLRB 208 (1992). That case dealt with a disagreement over the employer's name on the contract's cover. There the Board held that the employer's name on the contract cover did not "materially or significantly affect" employees' terms and conditions of employment. Disagreements over an employer's name or a union bug³ on the cover of a contract are certainly not on par with the statutory right accorded employees under *Weingarten*. *Weingarten* rights are derived from Section 7's guarantee of the right of employees to act in concert for mutual aid and to protect their job interests, an important facet of the employees' terms and conditions of employment.

As correctly noted by the ALJ, disciplinary procedures and the role played by union representatives in them are mandatory subjects of bargaining. (ALJD at 6). See *Washoe Medical Center, Inc.*, 337 NLRB 202, 205 (2001) ("Employee discipline is unquestionably a mandatory subject of bargaining, and any alteration of a disciplinary system is also a mandatory subject of bargaining."); *Service Employees Local 250 (Alta Bates Medical Center)*, 321 NLRB 382, 384 (1996) (denying access

³ *IBEW Local 1464 (Kansas City Power)*, 275 NLRB 7557 (1985)

to stewards as a mandatory subject). By including the *Weingarten* statement on the back cover of the agreement, Respondent modified and contradicted the disciplinary procedure provided for in the agreement in a “material, substantial, and significant manner.” *Service Employees*, 321 NLRB at 385 (citing *Peerless Food Prods*, 236 NLRB 161 (1978)). The provision of the contract contradicted is article 12, section C which states, “Nothing in this Agreement shall prevent a Nurse from resolving any problem consistent with this Agreement with or without the presence of a [sic] Association Representative.” *See Service Employees*, 321 NLRB at 384 (1996) (finding a violation of the duty to bargain in good faith where respondent union inserted a foreword found to contradict provisions of the contract). (ALJD at 6).

V. THE ALJ PROPERLY FOUND THAT THE INSTANT CASE SHOULD NOT BE DEFERRED

Respondent claims the facts in this case satisfy all of the requirements under the deferral analysis. However, deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), is inappropriate for a number of reasons. First, in a variety of contexts, the Board has held that deferral is not appropriate where the issue involved is not arguably covered under the contract.⁴ The issues in this case do not require the interpretation of the parties’ collective-bargaining agreement. The Section 8(b)(3) allegation is not based on an interpretation of the agreement, but rather on Respondent’s action in unilaterally altering the agreement itself. Even were the Section 8(b)(3) issue appropriate for deferral, an arbitral award interpreting the agreement would not address the central issue underlying the Section 8(b)(1)(A) allegation — whether the existence of the language on the cover of the contract restrains and coerces employees in the exercise of their Section 7 rights. Also, deferral to the grievance-arbitration process would not address the remaining allegations of the Complaint concerning the existence of the *Weingarten* statement on the Respondent’s agreements with other employers.

The Board does not defer allegations that involve the application of statutory policy, standards and criteria, since questions of statutory construction are within the special competence of the Board

⁴ See, e.g., *Stephens Graphics, Inc.*, 339 NLRB 457, 461 (2003); *Pepsi-Cola Co.*, 330 NLRB 474 (2000).

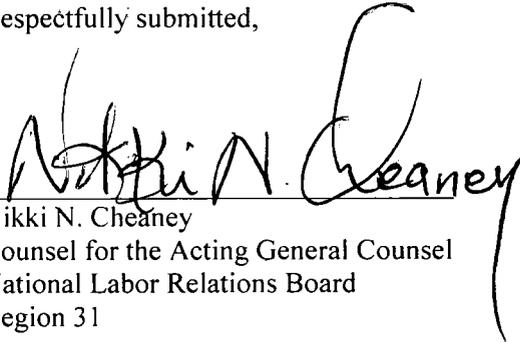
rather than an arbitrator.⁵ A central issue in the instant case is whether the Respondent restrained and coerced employees within the meaning of Section 8(b)(1)(A) of the Act. This allegation implicates the statutory right of employees to engage in union or other concerted activities or to refrain from such activities. Thus, the Board will not defer allegations that are closely connected to an allegation that would not be appropriate for deferral, in this case, the Section 8(b)(1)(A) allegation.⁶

The Section 8(b)(1)(A) allegation arises from the same set of circumstances and is entwined with the Respondent's unilateral inclusion of the *Weingarten* rights language on or inside the cover of collective-bargaining agreements with the Hospital and 42 other employers in violation of Section 8(b)(3). To defer only the 8(b)(3) allegation would result in precisely the sort of "piecemeal" approach disfavored by the Board.⁷

IV. CONCLUSION

Contrary to Respondent's exceptions and contentions, the ALJ's decision is squarely supported by the relevant record and applicable case law. For the reasons discussed above, Counsel for the Acting General Counsel respectfully requests that Respondent's exceptions be dismissed in their entirety.

Respectfully submitted,


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August 20, 2012.

⁵See, *District Council of New York City and Vicinity (Mfg. Woodworkers Assn.)*, 326 NLRB 321, 322 (1998).

⁶See, e.g., *Everlock Fastening Systems*, 308 NLRB 1018, 1018 fn. 8 (1992).

⁷See, *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 671 (2001).

Re: CALIFORNIA NURSES ASSOCIATION NATIONAL NURSES ORGANIZATION COMMITTEE
Case No.: 31-CB-12913

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was served on the 20th day of August, 2012:

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