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8 UNITED STATES OF AMERICA
9 NATIONAL LABOR RELATIONS BOARD
10 REGION 31

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12 ENCINO HOSPITAL MEDICAL CENTER-PRIME,) Case No. 31-CA-066945
13 Respondent,)
14 and)
15) SEIU, UNITED HEALTHCARE
16 SERVICE EMPLOYEES INTERNATIONAL UNION,) WORKERS – WEST’S BRIEF IN
17 UNITED HEALTHCARE WORKERS – WEST,) SUPPORT OF EXCEPTIONS TO
18) THE ADMINISTRATIVE LAW
19) JUDGE’S DECISION
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1 The Charging Party, SEIU, United Healthcare Workers – West (the “Union” or “UHW”),
2 joins in the exceptions and support of exceptions of the General Counsel. In addition, the Charging
3 Party hereby submits the following in support of its exceptions to the Decision of the
4 Administrative Law Judge, Gerald A. Wacknov.

5 **I. RESPONDENT TERMINATED PAT AGUIRRE BECAUSE OF HER UNION**
6 **ACTIVITY.**

7 Several witnesses testified to Pat Aguirre’s Union activities. For example, Pat Aguirre
8 testified to her Union support, specifically, Pat testified that during her 13 years of employment she
9 participated on three bargaining teams, was a chief shop steward, and also worked for the Union in
10 March 2001, for a short time after she was fired from October through February of 2012, and again
11 for a couple of weeks in April of 2012. Pat handled grievances and met with management on
12 various workplace issues. The most current contract negotiations that Pat was participating in were
13 the first negotiations for a collective bargaining agreement with Prime since it purchased and began
14 operating the Hospital. Pat was also featured in several Union flyers. Similarly, Richard Ruppert,
15 Union Representative, testified that “Pat was the Union” at the Encino Hospital. Kenton Smart,
16 per diem employee and Union steward, testified that Pat was the only steward for a long time until
17 Kenton became a steward in or about 2010. Kenton also testified that he had only handled one
18 grievance in the entire time that he was a steward. Finally, Maggie Macias, Union Representative
19 also testified about Pat’s substantial Union involvement. Yet, the ALJ completely disregarded all
20 of this evidence in error.

21 Most significantly, Pat testified at a hearing protesting the sale of Victor Valley Community
22 Hospital to Prime. Aguirre testified at the hearing about the changes in working conditions at
23 Encino Hospital since Prime purchased and began operating the Hospital. Present at that hearing
24 were Lex Reddy, Prime CEO; Susan Richards, Prime CNO, and the Ancillary person in charge of
25 Radiology at Encino and Sherman Oaks.

26 It should be no coincidence that at the next collective bargaining session between the Union
27 and the Hospital, Bob Bills, Encino Hospital CEO, said that it was the Union’s fault that Prime lost

1 the ability to purchase Victor Valley Community Hospital. Both Richard Ruppert and Pat Aguirre
2 testified to Bob Bills making this statement at the bargaining session on September 22, 2011.
3 Respondent obviously knew of Aguirre's active participation in the Union, so it is also no
4 coincidence, that less than one month later, on October 13, 2011, the Hospital terminated Aguirre.
5 These facts satisfy four of the elements set forth in *Wright Line*: (1) the employee's protected
6 activity; (2) Respondent's knowledge of that activity; (3) adverse action taken by the Respondent
7 against the employee; and (4) the timing of the adverse action.

8 The remaining elements are Respondent's animus against the Union and Respondent's
9 motivation in discharging the two employees. It is undisputed that "Prime Healthcare Foundation
10 (Prime) owns and operates Respondent." (ALJ Dec. at 2.) It is also undisputed that Prime had
11 animus toward the Union. Indeed, Respondent distributed flyers against the Union, entitled, "The
12 SEIU is DESTROYING Your Jobs." The flyer states:

13 Since its purchase Prime Healthcare has invested millions of dollars in
14 much needed capital equipment at Encino Hospital. But, instead of
15 working with hospital management, the SEIU has reacted by doing
16 everything possible to destroy the Hospital. It looks like they want to
17 ensure that Encino closes.

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19 How do you gain anything if the SEIU is successful in destroying the
20 company that you work for? SEIU leaders are fond of talking about how
21 you are the union. If that's true, then its time to say ENOUGH! Tell the
22 SEIU leadership to start focusing on bargaining and stop using lies that
23 threaten to put Encino out of business.

24 Clearly, the statements by Bob Bills at the bargaining session in September and the flyer show the
25 Respondent's animus towards the Union. The ALJ, however, cites to and relies on irrelevant
26 information about SEIU 121 representing the Hospital's nurses. This evidence should not have
27 been admitted into evidence and should not have been relied on by the ALJ. Because SEIU 121

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1 was not the charging party, SEIU 121 is a different entity and because any evidence about SEIU
2 121 is irrelevant, the General Counsel and Charging Party did introduce any evidence to
3 demonstrate union animus by Respondent toward SEIU 121.

4 Furthermore, Respondent's motivation for terminating Pat Aguirre is shown by its lack of
5 uniform application of imposition of discipline, failure to follow its own practice and its attempt to
6 create unfounded reasons and justifications for the discharge. For instance, Richard Ruppert
7 testified that he met with the former Human Resources representative, Gail Brow, who explained
8 to Ruppert that progressive discipline and how it was imposed was based on each type of
9 misconduct. Additionally, the very action that Pat engaged in - where Back claims Pat "lied" and
10 therefore merited termination - was in her capacity as Union steward. In the course of Pat's
11 representation of Arse involving Arse's termination, Pat reached an agreement with Gail Brow, the
12 former Human Resources representative, that the Hospital would not challenge Arse's ability to
13 collect unemployment benefits. The actions Pat took in attempting to confirm whether or not the
14 Hospital was going to keep to its end of the bargain, i.e. by not challenging Arse's unemployment
15 benefits, were actions done in her capacity as a Union steward. Yes, admittedly, Pat attended the
16 unemployment hearing with Arse both as a friend and steward, but Pat's attendance at the
17 unemployment hearing is a red herring and irrelevant to the determination of whether Pat was
18 illegally fired for her Union activity. Instead, it was Pat's alleged conversations with Soto and
19 Armenia that Pat "lied about" that Respondent used as a pretext to fire Pat.

20 Indeed, the General Counsel introduced several examples of discipline imposed by the
21 Hospital that showed a practice by the Hospital as to imposition of progressive discipline based on
22 the same type of conduct. (GC Exh.'s 26, 27, 28, 29 & 30.) Furthermore, Respondent's own
23 witness, Thomas Callahan testified that discipline and whether to move to the next level depends
24 on the circumstances. Callahan testified that serious situations, such as dangerous situations,
25 would call for more serious discipline. Respondent's own lack of uniformity in the imposition of
26 discipline illustrates that Respondent's stated reason for the discharges was a pretext. *See*
27 *McBurney Corp.*, 351 NLRB 799, 800 (2007) (employer "fatally undermined by the fact that ... it

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1 used the priority hiring system selectively and systematically to avoid the hiring of union
2 applicants”); *Zurn/N.E.P.C.O.*, 345 NLRB 12, 16-17 (2005) (employer deviated from long-standing
3 policy in discriminating against union applicants), review denied, 154 Lab. Cas. P 10,881 (6th Cir.
4 2007); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (employer failed to follow its own progressive
5 discipline system); *Embassy Vacation Resorts*, 340 NLRB 846, 848-49 (2003) (animus shown by
6 employer’s failure to give employees a chance to defend themselves and its deviation from its past
7 practice of discipline), pet. for review dismissed, 2004 WL 210675 (D.C.Cir. Jan 28, 2004);
8 *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn.1(2003) (employer failed to follow its
9 progressive discipline policy), affd. 177 L.R.R.M. (BNA) 2447 (6th Cir. 2005). The ALJ should
10 conclude that Respondent discharged Pat Aguirre in violation of Section 8(a)(3) of the Act.

11 **II. THE CREDIBILITY OF RICHARD RUPPERT, PAT AGUIRRE AND BACK.**

12 The ALJ discredits the testimony of Union Representative, Richard Ruppert, without any
13 explanation or analysis. On the other hand, the ALJ overwhelmingly credited Back’s testimony.
14 Here, it is hard to believe that Back is going to admit to firing Pat Aguirre for Union activity as she
15 was one of the decision makers and could be found to have violated Section 8(a)(3). Clearly,
16 Back, too, has an incentive to lie in order to avoid liability, yet the ALJ blindly credited all of
17 Back’s testimony. In fact, Pat’s alleged dishonesty involved an insignificant matter that did not
18 make much of a difference in her ability to perform her job. More importantly, Pat’s alleged
19 dishonesty was done in the course of Pat’s actions as a Union steward – following up on an
20 agreement with management involving the termination of Arse. The ALJ should not have credited
21 Back and discredited Ruppert and Aguirre.

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III. CONCLUSION

Based on the above and exceptions of the General Counsel, the Charging Party seeks appropriate remedies as reflected in the Exceptions, including the return of Ms. Aguirre to work with backpay and interest, and a reading by company officials to the employees.

Dated: August 23, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ Monica Guizar
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Attorneys for Charging Party
SEIU, United Healthcare Workers – West

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**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Los Angeles, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On August 23, 2012, I served the following documents in the manner described below:

SEIU UNITED HEALTHCARE WORKERS-WEST'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

✓ [X] (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Los Angeles, California.

✓
On the following part(ies) in this action:

Original to: Lester A. Heltzer
Executive Secretary
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Copies to:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 23, 2012, at Los Angeles, California.


Guadalupe Issa