JD(SF)-58-12
Manteca, CA

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

PALM HAVEN NURSING AND REHAB, LLC
d/b/a ST. JUDE CARE CENTER

and **Cases 32-CA-062707**
32-CA-073376

SEIU UNITED HEALTHCARE WORKERS-WEST

Catherine L. Ventola, Esq., Oakland, CA, for the Acting General Counsel.
Manuel A. Boigues, Esq., Alameda, CA, for the Union.
Christopher A. Monroe, Modesto, CA, for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Oakland, California on September 17, 2012. This case was tried following the issuance of an Order Consolidating Cases and Consolidated Complaint (the complaint) by the Regional Director for Region 32 of the National Labor Relations Board (the Board) on May 23, 2012. The complaint was based on a number of unfair labor practice charges as captioned above, filed by SEIU United Healthcare Workers-West (the Union or the Charging Party).[1] It alleges that Palm Haven Nursing and Rehab, LLC d/b/a St. Jude Care Center (St. Jude, the Employer, or the Respondent),[2] has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair practices.[3]

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs.[4] Based upon the record, my consideration of the briefs filed by

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[1] Subsequent to the issuance of the complaint, the Regional Director issued an Order Withdrawing Portions of Consolidated Complaint and Dismissing Certain Unfair Labor Practice Charges. Only those charges remaining are reflected in the caption above.

[2] The correct name of the Employer appears as amended at the hearing.

[3] All pleadings reflect the complaint and answer as those documents were finally amended at the hearing.

[4] Counsel for the Respondent declined to file a brief.

counsel for the Acting General Counsel and counsel for the Union,[5] and my observation of the demeanor of the witnesses, I now make the following findings of fact and conclusion of law.[6]

Findings of Fact

I. Jurisdiction

The complaint alleges, the Respondent's answer admits, and I find that at all times material herein, the Respondent has been a limited liability corporation with a place of business in Manteca, California, herein called the Manteca facility, where it has been engaged in the business of operating a nursing home and providing medical care to its residents. Further, I find that in conducting its operation during the calendar year ending December 31, 2011, the Respondent derived gross revenues in excess of $100,000; and during the same period of time, purchased and received at its Manteca facility, goods or services valued in excess of $5,000, which originated outside the State of California.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, the Respondent's answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. The Undisputed Facts and Legal Conclusions Regarding the Failure to Furnish Information

The following facts and legal conclusions are not in dispute. The Respondent operates St. Jude Care Center, a nursing home facility with approximately 99 beds located in Manteca, California. St. Jude provides residential care, nursing assistance, and rehabilitation services to its residents, some of whom have physical impairments, and/or impaired cognitive abilities, dementia, and/or Alzheimer's disease.

The complaint alleges and the answer admits that since June 15, 2006, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the following unit of its employees (the Unit): "All full-time and regular part-time certified and non-certified rehabilitation aides, housekeeping employees, laundry employees, maintenance employees, dietary employees (including cooks), and nursing employees (including NAs and CNAs)

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[5] While counsel for the Union did not file an independent brief, he incorporated by reference and adopted as his own the brief filed by counsel for the Acting General Counsel.

[6] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

employed by the Employer at its Manteca, California facility; excluding department heads, assistant department heads, charge nurses, activity employees, office clerical employees, guards, watchmen, assistant supervisors, and supervisors as defined in the Act." Further, the complaint alleges, the answer admits, and I find that the Unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Additionally, the complaint alleges and the answer admits that the Respondent's recognition of the Union was embodied in a collective bargaining agreement, which was effective for the period of June 15, 2006 through June 15, 2008. The complaint alleges, the answer admits, and I find that at all times since June 15, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the employees in the Unit.

In paragraph 9 (a) of the complaint the Acting General Counsel alleges that since July 7, 2011, the Union has requested, both in writing and orally, that the Respondent furnish it with the following information: (1) all disciplinary action issued to Unit employees since March 11, 2011 (the Disciplinary Action Information); (2) all investigation notes of all such disciplinary action (the Investigation Notes Information); and (3) any statements and letters relating to all such disciplinary actions (the Statements and Letters Information). In the Respondent's answer it admits this allegation.

In paragraph 9(b) of the complaint the Acting General Counsel alleges that the Disciplinary Action Information, the Investigation Notes Information, and the Statements and Letters Information requested by the Union is each necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the Unit. In the Respondent's answer it admits this allegation.

In paragraph 9(c) of the complaint the Acting General Counsel alleges that since July 7, 2011, the Respondent has failed and refused to furnish or timely furnish the Union with the Investigation Notes Information and the Statement and Letters Information. In the Respondent's answer it admits this allegation.

In paragraph 9(d) of the complaint the Acting General Counsel alleges that from July 7, 2011 until late April or early May 2012, the Respondent delayed in furnishing the Union with the Disciplinary Action Information. In the Respondent's answer it admits this allegation.

In paragraph 10(a) of the complaint the Acting General Counsel alleges that since July 7, 2011, the Union has requested, both in writing and orally, that the Respondent furnish it with an updated list of Unit employees' hire dates, job classifications, and telephone numbers (the Unit Information). In the Respondent's answer it admits this allegation.

In paragraph 10(b) of the complaint the Acting General Counsel alleges that the Unit Information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the Unit. In the Respondent's answer it admits this allegation.

In paragraph 10(c) of the complaint the Acting General Counsel alleges that since July 7, 2011, the Respondent has failed and refused to furnish or timely furnish the Union with the Unit Information. In the Respondent's answer it admits this allegation.

In paragraph 11(a) of the complaint the Acting General Counsel alleges that the Union has requested, in writing, that the Respondent furnish it with an updated list of Unit employees' wages (the Unit Wage Information). In the Respondent's answer it admits this allegation.

In paragraph 11(b) of the complaint the Acting General Counsel alleges that the Unit Wage Information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the Unit. In the Respondent's answer it admits this allegation.

In paragraph 11(c) of the complaint the Acting General Counsel alleges that since November 9, 2011, the Respondent has failed and refused to furnish or timely furnish the Union with the Unit Wage Information. In the Respondent's answer it admits this allegation.

B. Analysis and Conclusions Regarding Failure to Furnish Information

As noted above, the Respondent's answer admits all the factual allegations and legal conclusions set forth in complaint paragraphs 9, 10, and 11, and their respective subparagraphs. However, despite those admissions, the Respondent's answer also denies the legal conclusion set forth in paragraph 13 of the complaint, which alleges that the by its conduct the Respondent has been failing and refusing to bargain collectively and in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act.

In its answer, the Respondent raises the following affirmative defenses: " (Question Concerning Representation) On or about January 27, 2009 the Union was placed under trusteeship which dramatically altered the identity of the Union, such that it raised a question concerning representation and nullified Respondent's obligation to bargain [;] (No Majority Status) The Complaint is barred as, at all times material herein the Union has not been the recognized or certified collective bargaining representative of the employees of Respondent and/or has not enjoyed the support of a majority of Respondent's employees in the appropriate unit for collective bargaining [; and] (Objective Considerations) Respondent was privileged to withdraw recognition of the Union as it had objective consideration that the Union no longer enjoyed the support of a majority of Respondent's employees in the unit that was previously designated for collective bargaining." During the hearing, the undersigned on several occasions offered counsel for the Respondent the opportunity to present evidence, either documentary or testimonial, in support of these affirmative defenses. However, counsel declined to do so, and no such evidence was offered, despite being informed that he had the burden of proving these affirmative defenses.[7]

As the allegations in complaint paragraphs 9, 10, and 11, and their respective subparagraphs, have been admitted by the Respondent, I conclude that counsel for the Acting General Counsel has established, by a preponderance of the evidence, that the Respondent has been failing and refusing to bargain collectively and in good faith with the Union. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in complaint paragraph 13.

C. The Suspension and Termination of Marisela Alaniz

[7] Counsel for the Respondent indicated that his affirmative defenses were based on a contention that the Union was placed under trusteeship, which allegedly negated any prior obligation to recognize the Union or furnish information to it for collective bargaining purposes. However these affirmative defenses were not supported by any evidence of record.

Counsel for the Acting General Counsel alleges in complaint paragraphs 7, 8, and 12 that the Respondent suspended and then terminated its employee Marisela Alaniz (Alaniz) because of her union activity, in violation of Section 8(a)(1) and (3) of the Act. However, the Respondent contends that it suspended and ultimately terminated Alaniz because of "insubordination towards licensed nurses and harassment of co-worker CNAs." (Jt. Ex. 1A.)

Prior to her termination on July 8, 2011,[8] Alaniz had been employed by the Respondent as a certified nursing assistant (CNA) for approximately six years. She had been the union shop steward since April or May 2010. In that capacity, Alaniz attended and actively participated in bargaining sessions, conducted investigations, and represented employees during grievance meetings and disciplinary actions.

The Respondent's facility is divided into two areas, referred to by employees as "the front and the back." For the most part, those residents with impaired mental functioning are assigned to the "back," also called the "SCU," area of the facility. The Respondent operates two employee shifts, day and night. At the time of her termination, Alaniz worked the night shift, which is also referred to as the NOC shift. The night hours are 10 p.m. to 6:30 a.m. The day shift employees start work at 6:00 a.m., so there is a thirty minute overlap in the morning between the two shifts. Alaniz was assigned to work the "back" of the facility at the time she was discharged.

During the hearing, Alaniz testified at length. I generally found her testimony to be credible. She testified in a simple straight forward manner, with no obvious exaggeration or embellishment. While she was rather emotional and cried on several occasions, I found her emotion genuine, rather than staged, and apparently brought on by the facts surrounding her discharge. Her testimony had the "ring of authenticity" to it, was plausible and reasonable, and was not really challenged by the only witness called by the Respondent, Roma Kaur, the facility Director of Staff Development (DSD).[9] Therefore, I accept the facts as testified to by Alaniz.

Alaniz testified that prior to May 2011, the practice at the facility was for the night CNAs to help those residents who wanted to get up early and ready for breakfast, do so. Typically, the night CNAs would provide this aid to the residents prior to the time that the day shift CNAs arrived at 6:00 a.m., or during the 30 minute overlap prior to the time that the night shift ended at 6:30 a.m. It was the responsibility of the day shift CNAs to feed the residents' their breakfast, which was served from 7:00 a.m. to 8:00 a.m., either in the dining area or in their beds. To the extent that the night shift CNAs were able to assist those residents who wished to get up early, it was a benefit to the day shift CNAs.

In May 2011, a notice was posted to the attention of the night shift CNAs and nurses, which named five residents and instructed the night staff to get these residents "up on a daily basis," and "ready for breakfast." Further, the night shift CNAs were instructed to dress, groom, and clean these residents. (G.C. Ex. 2.) According to Alaniz, this was a change from the past practice where the night shift CNAs only got ready for breakfast those residents who wanted to

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[8] Hereafter, all dates are in 2011 unless otherwise indicated.

[9] It should be noted that the Respondent's counsel presented a very limited defense. The Respondent's counsel and counsel for the General Counsel stipulated to the admission of the affidavits of the Respondent's Administrator, Martin Gittleman, and Licensed Vocational Nurse (LVN) Velia Angelica Durate, in lieu of testifying. However, I found those affidavits superficial, lacking in detail, and totally inadequate to challenge the credibility of Alaniz.

do so. The change reflected in the notice meant that the night shift CNAs were now also responsible to get ready for breakfast those five residents, who might not want to be up early, and, thus, would be difficult to handle.

According to Alaniz, the Union complained to the Respondent's administrator, Martin Gittleman, twice about the new policy and the added work that it created for the night CNAs just before the end of their shifts. The second time the issue was raised with Gittleman was during a bargaining session on June 8. Alaniz and one other CNA specifically spoke up and complained about the new practice. Alaniz testified that at that time Gittleman relented and agreed that the night CNAs could return to the former practice, which was just to help those residents who wished to get up early for breakfast, do so. As far as Alaniz was concerned, the issue had now been resolved with Gittleman. She proceeded to inform her co-workers on the night shift that the facility had returned to its past practice and the night shift CNAs no longer were required to get those residents ready for breakfast early who did not want to do so.

In the early morning hours of July 1,[10] shortly before her shift ended, Alaniz and another CNA, Jerome, were approached by the Respondent's Director of Staff Development (DSD), Roma Kaur, who instructed them to go to her office at the end of their shifts. Alaniz and Jerome proceeded to Kaur's office, and, on route, they encountered two other night CNAs who had also been instructed to go to Kaur's office. In Kaur's office were Kaur, Charge Nurse Velia Angelica Duarte, Charge Nurse Singh, and CNA Ruta Gebramarian.[11] Alaniz was allowed in the office, but the other CNAs who had come with her were asked to wait outside. Kaur informed Alaniz that she was allowed to be present since she was the union steward.

Once the door was closed, Kaur informed the group that the meeting was being held to discipline Gebramarian for failing to get residents up in the morning. Alaniz testified that she informed Kaur that the matter had been resolved with Administrator Gittleman who had agreed to return to the Respondent's former practice, whereby the night CNAs were not required to get designated residents up for breakfast, but only those residents who wanted to get up early. Kaur was not satisfied that Alaniz' position was correct, and she handed Gebramarian a document, which was designated as "Verbal Counseling." Under explanation, the document charged Gebramarian with "Non-Compliance with assigned Resident getting up and provide morning care."[12] (Jt. Ex. 1(B).)

Alaniz testified that she informed Gebramarian that Gebramarian did not have to sign the document, and Gebramarian could request the presence of union representative Al Green. At that point Kaur handed Alaniz a similar "write-up" for a failure to get residents up for breakfast. Alaniz stated that she was not going to sign the document unless Green was present, and she reiterated that the matter had been addressed with Administrator Gittleman who had agreed that the night CNAs did not have to get up residents who did not wish to get up early. According to Alaniz, Kaur seemed upset and Kaur asked again if Alaniz would sign the document. Alaniz again refused to sign the discipline notice unless Green was present.

Alaniz asked Kaur whether the meeting was over. According to Alaniz, Kaur confirmed that the meeting was done, and Alaniz and Gebramarian left Kaur's office. The other night CNAs who had been waiting then entered Kaur's office. Apparently they were all issued disciplinary "write-ups" similar to those issued to Alaniz and Gebramarian.

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[10] This was the shift that started on June 30 at 10 p.m., and ended on July 1 at 6:30 a.m.

[11] Both Kaur and Duarte are admitted supervisors.

[12] The document mistakenly refers to Gebramarian as "Guillermo."

Alaniz testified that while in Kaur's office she did not use any profanity, or make any threatening, offensive, or derogatory remarks towards Kaur, nor did she make any threatening gestures. However, she did testify several times that she normally speaks in a loud voice and may have done so during the meeting in Kaur's office. While acknowledging that she spoke in a loud tone, she denied that she yelled or shouted during the meeting.

Following the meeting, Alaniz returned to work. However, from her testimony it is not clear to the undersigned whether she is referring to the morning of what had now become July 1, or the next day. In any event, Alaniz testified that she approached a day shift CNA, Samantha Watts, and asked her if she knew who had informed Kaur that the night shift CNAs were not dressing the residents. In their conversation Alaniz must have gotten loud, as she testified that she apologized to Watts for speaking loudly and was not angry with her, but merely felt "really bad" for getting the night shift CNAs into trouble. Alaniz denies using any profanity or making any threatening or derogatory remarks or gestures during her conversation with Watts.

Shortly thereafter, Alaniz had even a briefer conversation with CNA Imelda Crystobal who approached her and attempted to tell Alaniz that she (Crystobal) knew who had reported the night shift CNAs to Kaur. However, Alaniz declined to discuss the matter at that time, and she told Crystobal that they could talk about the issue later.

Sometime around July 4, Alaniz received a voicemail message from Kaur informing Alaniz that she was suspended for three days. The message did not give a reason for the suspension. Thereafter, Alaniz received a letter from Administrator Gittleman dated July 8. That letter stated that she was being terminated because of "written complaints registered by two licensed nurses and three CNAs." Further, the letter stated that the discipline was "for insubordination towards licensed nurses and harassment of co-worker CNAs." (Jt. Ex. 1(A).)

It is important to note that Alaniz testified that at no time was she questioned by Gittleman regarding the events of July 1. He simply made no attempt to learn her side of the story.

As I noted earlier, I have found Alaniz to be a credible witness. On the other hand, I found the Respondent's defense, to the extent that a defense was even offered, to be unclear, confusing, inconsistent, contradictory, and plainly incredible. Martin Gittleman was the person who made the decision to terminate Alaniz. However, counsel for the Respondent did not bother to call him to testify. His "story" is reflected in his affidavit, which the parties stipulated would be admitted into evidence in lieu of personal testimony. (G.C. Ex. 4.)

According to Gittleman's affidavit, he, as Administrator, and the Nursing Director are the only supervisors of the Respondent with the authority to terminate employees. He indicates that "[t]he primary reason for my decision to terminate [Alaniz] was her yelling at the CNAs and yelling at the DSD and charge nurse." Gittleman does not say, but I assume that the CNAs that Alaniz allegedly yelled at are Samantha Watts and Imelda Crystobal, and the DSD was clearly Roma Kaur, with the charge Nurse being Velia Angelica Durate. The affidavit further indicates that Gittleman learned about the "incident with [Alaniz]" from Kaur when he arrived at work on about June 30. (G.C. Ex. 4.)

Gittleman further says in his affidavit that he instructed Kaur to call Alaniz and tell her that she was suspended, "while we gathered more information about the incident." He collected a written statement from Durate, and he "felt that the statements from the staff were sufficient grounds to terminate [Alaniz]." While he does not indicate the names of the "staff" who allegedly

gave statements, the Respondent's file on Alaniz does contain written statements from Roma Kaur (Jt. Ex. 1(B)) and from Velia Angelica Durate (Jt. Ex. 1 (C)).[13] Gittleman indicates that he talked to Kaur about his decision to terminate Alaniz, and "she agreed with me." Finally, Gittleman says in his affidavit that he tried to call Alaniz "to tell her that she was being terminated," but that he was not able to reach her and did not leave a message. He admits that he "did not attempt to get [Alaniz'] side of the story." (G.C. Ex. 4.)

It is very important to note that neither Samantha Watts nor Imelda Crystobal testified at the hearing and no written statement from either was admitted into evidence. Outside of the events that occurred in the early morning hours of July1 in Roma Kaur's office, no evidence has been offered by the Respondent to establish that Alaniz "yelled" or spoke "loudly" to any of the Respondent's CNAs or other employees. The statement in Gittleman's affidavit and Alaniz' termination letter that Alaniz was yelling at CNAs is totally unsupported by any evidence of record. Accordingly, the only evidence offered by the Respondent in support of its contention that Alaniz was terminated for misconduct relates solely to the events that occurred in Kaur's office on the morning of July 1.

Roma Kaur testified on behalf of the Respondent, the only witness called by counsel for the Respondent. I was very unimpressed with Kaur as a witness. She was highly nervous, her testimony was confusing and sometimes contradictory, and she offered general statements with no specific information to support them. I found her incredible.

According to Kaur, the Respondent's policy is for the night shift CNAs to get residents up early so that they are ready for breakfast. However, I was uncertain as to whether this was the policy in effect prior to the posted notice to CNAs in May, or the new policy. In any event, Kaur testified that she went to the facility in the early morning of July 1 to counsel the night shift CNAs for not properly performing those duties. Pursuant to her counseling, most of the CNAs gave a "commitment" to comply with the policy. Allegedly, Alaniz did not give such a commitment, and Kaur testified that she reported that refusal to Gittleman. However, it is important to note that while Gittleman says in his affidavit that Alaniz was insubordinate, he does not say in what way she acted so.

On cross-examination, Kaur said for the first time that Alaniz used foul language towards her and made derogatory comments to her during their meeting. However, she never specified what words Alaniz used which were allegedly either foul or derogatory. She testified that she reported to Gittleman that Alaniz made derogatory comments, was disrespectful, unprofessional, and insubordinate. But, she then acknowledged that in an affidavit which she gave to the Board during the investigation of this case, she had never used the term insubordinate when referring to Alaniz. Further, she testified that Alaniz was loud during the meeting and seemed "angry" and upset.

According to Kaur, Alaniz had not been getting residents up early for breakfast as required to do. During their meeting, Alaniz had insisted that she had talked with Gittleman who had agreed that the night shift CNAs were not required to get residents up early when the residents did not wish to do so. Finally, Kaur seems to be saying that Alaniz was in the meeting on the morning of July 1 to be counseled, which was the reason all the night CNAs had been

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[13] I found the handwritten statements from Durate and Kaur somewhat illegible and generally hard to read. However, an affidavit taken from Durate is in evidence (G.C. Ex. 3.), and Kaur testified at the hearing.

summoned to Kaur's office. However, clearly Alaniz was also in the room with Gebramarian to represent her, which Alaniz did with gusto.

Velia Angelica Duarte, an admitted supervisor, is a Licensed Vocational Nurse and one of the Respondent's Charge Nurses. For some unexplained reason, counsel for the Respondent also did not call Durate as a witness. The parties agreed to admit her affidavit, taken by the Board during the investigation, into evidence in lieu of testimony. (G.C. Ex. 3.) In her affidavit she says that around June 30, Kaur asked her to be present for the "write-up" of a CNA. She acknowledges that present to represent the CNA was Alaniz. According to Duarte, when Kaur tried to explain to the CNA that she was being written up for failing to get assigned residents up early for breakfast, Alaniz would interrupt her. Allegedly, Alaniz was very "confrontational" and had a "raised voice." Alaniz argued that Gittleman had resolved the issue by deciding that the night shift CNAs did not have to wake up those residents who did not want to get up early for breakfast. According to Duarte's affidavit, Alaniz continued to insist that the night shift CNAs did not have to wake up the residents, despite Kaur saying that as Gittleman had signed the write-up, Kaur could not believe he had told Alaniz something different.[14]

In her affidavit, Durate claims that Alaniz said, "We're done, I'm going to call Al Green." Allegedly, Alaniz went on to say "that per the union's [contract with the Employer], they had the right to have union representation within 24 hours of a write up." At this point Kaur said, "OK, we're done." However, Alaniz did not immediately leave the office, but waited a minute, and then said, "OK, we're leaving."

Finally, Duarte's affidavit ends with her acknowledging that at their meeting "[Alaniz] was just acting as the shop steward on behalf of the NOC [night] shift CNAs." Further, she states that Kaur never told Alaniz not to leave the meeting. (G.C. Ex. 4.)

I found Duarte's affidavit fairly consistent with Alaniz' testimony, and I believe she was making a reasonable effort to credibly recall the events in question. It is important to stress that in this affidavit she never claims that Alaniz used profanity or was derogatory, or insubordinate. She merely claims that Alaniz used a raised voice and was confrontational. As Durate acknowledges, Alaniz, as the union steward, was engaged in a vigorous defense of fellow CNA Gebramarian.

D. Legal Analysis and Conclusions Regarding Termination of Marisela Alaniz

No credible, probative evidence was offered by the Respondent during the hearing to establish that Marisela Alaniz was terminated for any conduct occurring outside of Roma Kaur's office in the early morning of July 1. A stipulation of the parties reads in part, "The alleged 'insubordination towards licensed nurses' referred to in the termination letter consists of conduct which Respondent contends that Marisela Alaniz engaged in during a disciplinary meeting involving, at least, Ruta Gebramarian, Marisela Alaniz, and licensed nurses Roma Kaur and Angelica Duarte on June 30, 2011." (Jt. Ex. 1.) Accordingly, I conclude that the Respondent's decision to terminate Alaniz was based entirely on those events occurring in Kaur's office.

The facts of this case clearly demonstrate that Alaniz was functioning as a union steward representing unit employee and CNA Ruta Gebramarian who was at the time being disciplined by Roma Kaur. It is Alaniz' conduct during this meeting that is the gravamen of this dispute.

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[14] See Jt. Ex. 1(D), a write up of employee Gebramarian (mistakenly referred to as Guillermo) signed by Gittleman.

The Respondent argues that Alaniz' conduct was insubordinate, confrontational, loud, and derogatory such that the Respondent had good cause to terminate her. On the other hand, counsel for the Acting General Counsel contends that Alaniz' conduct was the acceptable behavior of a union steward, engaged in legitimate vigorous union activity, and, as such, entitled to the protection of the Act.

In situations where an employer has disciplined an employee for conduct allegedly separate and apart from any union activity engaged in by that employee, the Board resolves such "dual motivation" cases using the analysis it developed in *Wright Line, A Division of Wright Line, Inc.,* 251NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and its many progeny. However, in circumstances where an employee is terminated for conduct that is part of the *res gestae* of the protected union activity, in fact arising out of that same conduct, the *Wright Line* analysis does not apply. See *Neff-Perkins Company,* 315 NLRB 1229 fn. 2 (1994) (when Board finds that conduct for which employer claims to have discharged employees was protected concerted activity, and rejects employer's defense that employee conduct exceeded the protection of the Act, *Wright Line* need not be applied); *Valley Hospital Medical Center,* 351 NLRB 1250, 1251 fn. 5 (2007) (*Wright Line* applies where the motive for a challenged employment action is in dispute; where employer admittedly discharged employee for making certain statements, the sole issue is whether employee enjoyed the Act's protection in making such statements).

For the reasons that I noted earlier, I found Alaniz credible, but did not find Kaur credible. The only other witness to the events in Kaur's office on the morning of July 1 whose recollection was recorded was Durate, who while she did not testify at the hearing, did have her Board affidavit admitted into evidence. (G.C. Ex. 3.) As I said earlier, I believe Duarte's affidavit is reasonably credible and, for the most part, supports Alaniz' testimony regarding the events in question. Duarte's affidavit is entitled to considerable weight as she is a Charge Nurse and admitted supervisor. In that capacity, she would be expected to support the Respondent. However, to her credit she accurately reports the events in question, even where doing so appears to be contrary to the Respondent's interests in this case.

In reviewing Duarte's affidavit (G.C. Ex. 3.), it seems that the most negative comment that she makes regarding Alaniz' conduct is that Alaniz raised her voice and was confrontational. Significantly, she does not claim that Alaniz used profanity, was derogatory, or was insubordinate.[15] This conforms with Alaniz' testimony that she raised her voice, as she was upset that her direction to the night shift CNAs regarding not having to get unwilling residents up for breakfast had resulted in the entire shift being "written-up." Clearly, she was vigorous in her defense of CNA Gebramarian, telling her that she did not have to sign the write-up form and could request the presence of a representative of the Union. Alaniz was present in Kaur's office in her capacity as the union steward, and it appears that she was representing Gebramarian to the best of her ability. Finally, the credible evidence shows that Alaniz was not insubordinate, did not use profane or derogatory language, and did not leave Kaur's office against Kaur's direction.

There is a long line of Board cases standing for the proposition that an employee engaged in union activity is awarded a certain amount of leeway in how the employee conducts him or herself. The Board, understanding the realities of the workplace, has recognized that Section 7 protections would be meaningless if the Act failed to take into account those realities

[15] In the statement that Durate gave to Gittleman before he terminated Alaniz, Durate said that Alaniz had acted unprofessional, confrontational, and had raised her voice. (Jt. Ex. 1(C).)

and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. *Consumers Power Company,* 282 NLRB 130, 132 (1986). Parameters exist within which employees may act when engaged in protected concerted activities. Conduct that is flagrant and egregious may cause an employee's union or other concerted activity to lose the protection of the Act. However, impropriety alone, such as using a loud tone during the course of engaging in protected activities, does not cause such conduct to forfeit the Act's protection. See *Fairfax Hospital,* 310 NLRB 299, 300 (1993), enfd. 14 F.3d 594 (4th Cir. 1993) (distinction between intemperate remarks, which Act protects, and actual threats); *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 204-205 (2007), enfd. 519 F. 3d 373 (7th Cir. 2008) (line drawn where communications are "so violent or of such character as to render the employee unfit for further service).

The seminal case regarding whether an employee who is engaged in protected activity has, as part of that activity, engaged in conduct so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service is *Atlantic Steel Company,* 245 NLRB 814 (1979). In that case, and it progeny, the Board set forth the following four factors to consider: (1) the place of the discussion between the employer and the employee; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's conduct or unfair labor practices. Analyzing Alaniz' conduct in conjunction with these four factors establishes conclusively that she remained protected by the Act. Her conduct did not come even remotely close to crossing the line established by the Board.

The meeting in the early morning hours of July 1 was in the private office of Director of Staff Development Kaur, and the participants were those employees invited by Kaur. Other members of the staff, residents, and the public did not overhear the conversation in question. Alaniz' conduct did not disrupt the work of any employees, nor did it adversely impact the Respondent's business operation.

Of particular significance was the subject of the meeting, namely Kaur's intent to issue disciplinary "write-ups" to Gebramarian, and then to the other night shift CNAs including Alaniz. The reason Alaniz was present was so that she could represent Gebramarian, as well as the other night CNAs. In her capacity as the union steward, she argued that no discipline was warranted as the Administrator had agreed that the night CNAs were not required to get residents up early if the residents did not wish to do so. The Board has held that in such instances where employees are engaged in an effort to challenge disputed employer conduct, the subject matter of the discussion weighs heavily in favor of finding the conduct protected. See, e.g. *Stanford Hotel,* 344 NLRB 558 fn.7 (2005).

Looking specifically at what Alaniz did during the meeting to determine whether it was improper behavior by an employee, leads to the obvious conclusion that she did nothing wrong. Alaniz acknowledges that she was loud. Duarte's affidavit indicates that Alaniz raised her voice and was confrontational. Apparently being confrontational related to Alaniz informing Gebramarian that she did not have to sign the write-up and could request the presence of union representative Al Green, and/or to Alaniz insisting that the Administrator had agreed the night shift CNAs did not have to wake up unwilling residents. While Kaur alleged Alaniz' use of foul and derogatory language, she gave no specifics and I have already concluded that Kaur's testimony was not credible.

The Board has in many instances found that employees whose conduct was much more egregious than that of Alaniz were, never the less, engaged in protected activity. *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1322-1323 (2006) (*Atlantic Steel Company, supra,*

factor three favored protection where employee told a fellow employee, in the presence of other employees, "to mind [her] fucking business."); *Fresenius USA Manufacturing,* 358 NLRB No. 138, slip op. at 4-6 (2012) (nature of pro-Union employee's offensive, vulgar, and possibly threatening written statements did not weigh against protection). In the case at hand, all Alaniz did was to raise her voice and vigorously defend Gebramarian and the conduct of the other night shift CNAs. She used no profanity nor made any offensive or threatening remarks. In this regard, she was properly performing her duties as the shop steward, conduct obviously protected by the Act.

There is no contention that the Respondent provoked Alaniz' conduct. Never the less, that does not alter the fact that Alaniz was, in the words of charge nurse Durate, "just acting as the shop steward on behalf of the [night] shift CNAs." The Board has consistently held that communications occurring during the course of protected activity are also protected unless they are "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers, supra* at 205. The conduct of Alaniz was certainly "mild" when compared to many other cases where the Board has found aggressive, disrespectful conduct, never the less, protected. See, e.g., *Burle Industries,* 300 NLRB 498 (1990), enfd. 932 F.2d 958 (3rd Cir. 1991) (employee did not forfeit protection when, in the course of encouraging employees to leave the facility due to a possible chemical spill, called a supervisor a "fucking asshole," for wanting employees to work despite the fumes);*Carval Tool Division, Chromolloy Gas Turbine Corp.,* 331 NLRB 858, 863 (2000) (employee argumentative and confrontational and according to company "disparaged company official in front of other employees" and made official "look like a fool").

It is clear that Alaniz' mild conduct as shop steward in advocating on behalf of the night shift CNAs falls well within the parameters of conduct which the Board has found to be protected. The credible evidence establishes that Alaniz did not engage in any misconduct which comes even close to meeting the standard of egregious behavior required to forfeit the Act's protection.

Accordingly, I conclude that the Respondent suspended and subsequently discharged Alaniz for engaging in protected activity while carrying out her duties as union shop steward. Therefore, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged in complaint paragraphs 7(a), (b), 8, and 12.

Conclusions of Law

1. The Respondent, Palm Haven Nursing and Rehab, LLC d/b/a St. Jude Care Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, SEIU-United Healthcare Workers-West, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time and regular part-time certified and non-certified rehabilitation aides, housekeeping employees, laundry employees, maintenance employees, dietary employees (including cooks), and nursing employees (including NAs and CNAs) employed by Respondent at its Manteca, California facility: excluding department heads, assistant department heads, charge nurses, activity employees, office clerical employees, guards, watchmen, assistant supervisors, and supervisors as defined in the act.

4. At all material times, since June 15, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the above described Unit.

5. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) Suspending and terminating its employee Marisela Alaniz because she engaged in union and other protected concerted activity.

6. By the following acts and conduct the Respondent has violated Section 8(a)(5) and (1) of the Act:

(a) Failing and refusing to furnish or timely furnish the Union with requested relevant information necessary for the Union to perform its role as collective bargaining representative.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence having established that the Respondent discriminatorily suspended and discharged its employee Marisela Alaniz, my recommended order requires the Respondent to offer her immediate reinstatement to her former position, displacing if necessary any replacement, or if her position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges previously enjoyed. My recommended order further requires that the Respondent make Marisela Alaniz whole for any loss of earnings, commissions, bonuses, and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F.W. Woolworth, Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizon for the Retarded,* 283 NLRB 1173 (1987), plus daily compound interest 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). [16]

Further, the Respondent shall be required to immediately furnish to the Union the documents containing the information previously requested by the Union as specified in this Order.[17]

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[16] In the complaint, the Acting General Counsel requests as part of a remedy for the Respondent's unfair labor practices "an order requiring reimbursement by the Respondent of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination…. [and] that the Respondent be required to submit the appropriate documents to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods." However, counsel for the Acting General Counsel cites no Board authority for such an extraordinary remedy. As I am unaware of any such authority, I hereby decline to order such a remedy, or to deviate from that which is standard in such cases.

[17] In order to provide a meaningful remedy, the Respondent is directed to furnish the Union

Continued

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring,* 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue that following recommended[18]

ORDER

The Respondent, Palm Haven Nursing and Rehab, LLC d/b/a St. Jude Care Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Suspending, discharging or otherwise discriminating against any of its employees because they engaged in union and/or other protected concerted activity;

(b) Refusing to bargain collectively with the Union since July 7, 2011, by refusing to furnish the Union with or to furnish it timely with the following information: (1) all disciplinary action issued to Unit employees since March 11, 2011 (the Disciplinary Action Information); (2) all investigation notes of all such disciplinary actions (the Investigation Notes Information); and (3) any statements and letters relating to all such disciplinary actions (the Statements and Letters Information);

(c) Refusing to bargain collectively with the Union since July 7, 2011, by refusing to furnish the Union with or to furnish it timely with an updated list of Unit employees' hire dates, job classifications, and telephone numbers (the Unit Information);

(d) Refusing to bargain collectively with the Union since November 9, 2011, by refusing to furnish the Union with or to furnish it timely with an updated list of Unit employees' wages (the Unit Wage Information); and

(e) 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 of the Board's Order, offer Marisela Alaniz full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed;

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with the information requested in the documents, as specified in this Order, from the time periods listed in the respective information requests to the date by which the Respondent complies with this Order.

[18] 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.

(b) Make Marisela Alaniz whole for any loss of earnings, commissions, bonuses, and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision;

(c) Within 14 days of the Board's Order, remove from its files any reference to the unlawful suspension and discharge of Marisela Alaniz, and within 3 days thereafter, notify her in writing that this has been done, and that her suspension and discharge will not be used against her as the basis of any future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her;

(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) On request, bargain collectively with the Union by furnishing it with the following information: (1) all disciplinary action issued to Unit employees since March 11, 2011 (the Disciplinary Action Information); (2) all investigation notes of all such disciplinary actions (the Investigation Notes Information); and (3) any statements and letters relating to all such disciplinary actions (the Statements and Letters Information);

(f) On request, bargain collectively with the Union by furnishing it with the following information: an updated list of Union employees' hire dates, job classifications, and telephone numbers (the Unit Information);

(g) On request bargain collectively with the Union by furnishing it with the following information: an updated list of Unit employees' wages (the Unit Wage Information);

(h) Within 14 days after service by the Region, post at its facility in Manteca, California, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event 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 July 4, 2011; and

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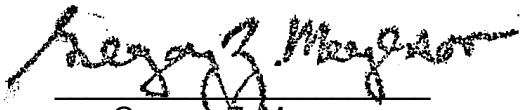
[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations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

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

Dated at Washington, D.C. December 27, 2012



Gregory Z. Meyerson
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 do anything that interferes with these rights. Specifically:

WE WILL NOT suspend, discharge, or otherwise discipline you because of your membership in, support of, or activities on behalf of, SEIU United Healthcare Workers-West (the Union).

WE WILL NOT unreasonably delay in providing, or refuse to provide, the Union with information that is relevant and necessary to its role as your collective bargaining representative.

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 National Labor Relations Act.

WE WILL within 14 days of the Board's Order, offer Marisela Alaniz full reinstatement to her former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Marisela Alaniz whole for any loss of earnings, wages, commissions, bonuses, and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, compounded on a daily basis.

WE WILL within 14 days from the date of the Board's Order, remove from our files any and all records of the discrimination against Marisela Alaniz, and WE WILL within 3 days thereafter, notify Marisela Alaniz in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against her or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her.

WE WILL provide the Union with the information that it previously requested including: all disciplinary action issued to bargaining unit employees since March 11, 2011; all investigation notes of all such disciplinary actions; any statements and letters relating to all such disciplinary actions; an updated list of unit employees' hire dates, job classifications, and telephone numbers; and an updated list of unit employees' wages.

PALM HAVEN NURSING AND REHAB, LLC d/b/a
ST. JUDE CARE CENTER
(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.

1301 Clay Street, Federal Building, Room 300N
Oakland, California 94612-5211
Hours: 8:30 a.m. to 5 p.m.
510-637-3300.

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 MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3270.