

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

ENCINO MEDICAL CENTER

and

Case 31-CA-066945

SEIU UNITED HEALTHCARE WORKERS-
WEST

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for the General Counsel.

Jonathan A. Siegel, Esq. (Jackson Lewis LLP),
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Magdalena Macias, of Los Angeles, California, for SEIU.

SUPPLEMENTAL DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: On July 26, 2012 I issued my initial decision in this matter. On March 19, 2013, the Board issued an Order Remanding (359 NLRB No. 78), remanding this matter to me for further findings, analysis, and conclusions consistent with its Order Remanding.

Findings of Fact

I. Alleged Unfair Labor Practices

A. Issues

The principal issue in this proceeding is whether the Respondent has terminated an employee in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

**B. Background,
Facts and Analysis**

The Respondent operates a hospital. Two unions represent the hospital employees, the Union herein and SEIU United Healthcare Workers-West (SEIU121), which Union represents the Respondent's registered nurses. There are a total of approximately 400 employees who work at the hospital, about 80 percent of whom are represented by the two Unions. The Respondent and the Union have entered into at least two prior collective-bargaining

agreements, the last agreement extending for over 4 years, from January 1, 2007, through March 31, 2011.¹

5 Barbara Back began working for the Respondent on July 5 as human resources manager. Among her other duties and responsibilities, *infra*, Back deals with the two Unions representing the hospital employees; she handles grievances, and participates in negotiations for both union contracts. Patricia Aguirre worked for the Respondent for some 13 years as a lab technician/Phlebotomist from 1998 to 2011. She was terminated by Back on October 11. She was a shop steward and a member of the Union's bargaining team. As a shop steward, she
10 handled grievances. As a member of the Union's bargaining team, she attended bargaining meetings with Respondent's representatives including HR Representative Barbara Back and the Respondent's CEO, Bob Bills.

15 At the time of Aguirre's discharge, negotiations for a successor contract were ongoing and the relationship between the Respondent and the Union was contentious, although discussions at the bargaining table were apparently less adversarial.

20 Prime Healthcare Foundation (Prime) owns and operates the Respondent. The Union, among other things, was attempting to block the sale of a different hospital, Victor Valley Community Hospital (Victor Valley), to Prime. On August 17, Aguirre spoke on behalf of the Union's political department as a patient advocate at a hearing before the attorney general of California, attended by between 100 to 200 individuals, regarding the adverse changes at the Respondent's hospital after it had been purchased by Prime. She spoke about the negative effects on patients, the employees, and the community as a result of the acquisition, implying
25 that the same negative effects would befall Victor Valley.²

30 Aguirre, as well as other employees, were featured on many union handbills, posted or otherwise disseminated at the Respondent's facility, supporting the Union's positions against the Respondent's practices and policies.

The sale of Victor Valley Community Hospital to Prime was not approved. The record evidence herein does not show why the license was denied. Richard Ruppert, a business agent and negotiator for the Union, testified that at a negotiating session on September 22, CEO Bob Bills mentioned the hearing before the attorney general, stating that employees had testified
35 against the acquisition of Victor Valley.³ He said that the license had been denied, and that in his opinion "he thought that was unfortunate and very sad." He also said that the Union had "conducted ourselves professionally in our bargaining and had non-adversarial type of conversations, though we disagreed in bargaining." Aguirre, who also attended the session as a bargaining committee member, testified that Bills said it was the Union's fault that Prime lost
40 the sale of Victor Valley, and that as a result Victor Valley may have to go bankrupt.

It appears that the Union was accusing Prime of engaging in some type of illegal conduct, and on September 19 the Respondent distributed a handbill to its employees entitled "The SEIU is DESTROYING Your Jobs." The handbill goes on to state:

¹ All dates or time periods hereinafter are within 2011, unless otherwise specified.

² The record reflects that 47 other individuals also spoke at the hearing for and against the acquisition. It appears that no supervisors or managers of the Respondent attended this hearing. I find, *infra*, that the record herein does not establish that either Bills or Back were aware of Aguirre's participation at the hearing.

³ I discredit this portion of Ruppert's testimony as discussed below.

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

10 * * *
How do you gain anything if the SEIU is successful in destroying the company that you work for? SEIU leaders are fond of talking about how you are the union. If that's true, then it's time to say ENOUGH! Tell the SEIU leadership to start focusing on bargaining and stop using lies that threaten to put Encino Hospital out of business.

15 The incident resulting in Aguirre's termination involves a grievance matter over the termination/resignation of former employee Iris Arse. Aguirre had assisted Arse, a union member and friend, in a grievance matter that resulted in an agreement between Arse and the Respondent's former HR manager, Gail Brow, that Arse would resign rather than be terminated for some unexplained infraction; further, it was agreed that if Arse chose to apply for unemployment the Respondent would not contest her claim to receive unemployment benefits.

20 Arse's claim for unemployment was denied; the reason for the denial is not contained in the record and there is no showing or contention that the Respondent contested the claim. Arse appealed the denial of her claim, and a hearing on the appeal was scheduled for September 27. Arse advised Aguirre of this, and asked if Aguirre would assist her and take her to the hearing, as Arse did not drive. Aguirre agreed.

30 On September 23, Aguirre went to the Respondent's HR department to attempt to elicit some information from HR personnel regarding the unemployment appeal hearing. Rather than ask HR Manager Back whether any representative of the Respondent would be attending or representing the Respondent at the hearing, she first approached Christina Armenia, human resources assistant, who occupied a cubicle in the office. Armenia testified that Aguirre walked over to her desk, "lowered her tone and asked if I knew about a hearing regarding Iris Arse, which would take place on September 27. " Armenia replied that she didn't know anything about it. Aguirre asked if she knew whether Carmen Soto, the human resources coordinator, would be attending the hearing. Armenia told her that she could ask Soto who was in the adjoining cubicle. Aguirre went to Soto's cubicle, and Armenia heard her tell Soto, "Barbara [Back] told me that you or Bob [Bills] would be attending the hearing." Soto told Aguirre that she was unaware of the hearing, and advised her to speak with Back herself.⁴

40 Soto testified that she overheard Aguirre whispering to Armenia but could not make out what Aguirre was saying. She did hear Armenia tell Aguirre to speak with Soto. Then Aguirre approached Soto and asked, in a normal tone, "Do you know who will be attending Iris Arse's hearing?" Soto said she was not aware of such a hearing, and Aguirre replied, "Barbara [Back] told me that either you or Bob [Bills] would be attending." Soto, who had recently returned from a 3-month maternity leave, told Aguirre that she was not sure.

Soto asked Armenia about Aguirre's whispered conversation with her. It concerned her that Aguirre, by whispering to Armenia, seemed to be attempting to obtain information in a

⁴ I credit the testimony of Armenia, who appeared to be a credible witness and had no reason to fabricate her testimony.

secretive fashion, as there simply was no reason to whisper. Soto was also concerned that in her absence perhaps she had been assigned by Back to attend a hearing that she knew nothing about. Later in the day Soto approached Back, explained what had happened and what Aguirre had said to her and had whispered to Armenia, and asked whether she was supposed to attend any type of hearing. Back replied that she and Aguirre had never had the conversation that Aguirre had related to Soto.⁵

Upon receiving Soto's report of the incident and, upon further questioning learning exactly what had happened, Back spoke with Armenia and with Laboratory Director Erlinda Roxas, Aguirre's supervisor. She also reviewed Aguirre's personnel file. Back, who had never had such a conversation with Aguirre, and had never been contacted by Aguirre about the matter, concluded from the foregoing reports and circumstances that Aguirre was lying and was using Back as leverage in attempting to manipulate Back's subordinates into eliciting information.

The review of Aguirre's personnel file disclosed the following:

- October 13, 2010 written warning and 3-day suspension for attempting to take a cell-phone photo of a patient in the geropsychology unit.
- May 12, 2011 written warning for two separate infractions:

March 17, 2011 warning for compromising the quality of patient care by mislabeling specimens;

April 5, 2011 warning for compromising the quality of patient care by mislabeling a urine sample specimen with another patient's name.

Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to meet standards will result in further disciplinary action up to and including termination.

- May 12, 2011 verbal and written warning for two, separate infractions:

May 3, 2011 warning for barging in and interrupting a May 3, 2011 meeting to which she had not been invited between Respondent's managers and a union representative;

May 5, 2011 warning for interfering with the security guard and nursing supervisor in the performance of their jobs.

Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to comply with standards of conduct and/or interfere with other employees from performing their work will result in further disciplinary action up to and including termination.

⁵ I credit the testimony of Soto, who appeared to be a credible witness and had no reason to fabricate her testimony.

- May 12, 2011 written warning for bossing around a mentally challenged employee on May 5, 2011, during a Biohazard Medical Waste Inspection and throwing an open bag of biohazard waste materials at him while he was performing his duties.

5 Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to comply with patient and employee safety standards in the workplace and to continue to interfere with other employees from performing their work will result in further disciplinary action, up to and including termination.

10 None of the foregoing warnings had been issued to Aguirre during the tenure of HR Manager Back, who did not begin working for the Respondent until July 2011. Back testified that any inappropriate behavior that is unlawful or violates protocol, policy, procedure, or is otherwise impermissible, is considered collectively in the application of the Respondent's progressive discipline system; progressive discipline does not begin anew for each distinct or
15 unrelated type of infraction.⁶ The Union has never argued that each succeeding step in the progressive discipline system may only be imposed for the same or similar misconduct. Suspension and final warning are the same in terms of severity, so that if a person has received a suspension it is the same as having received a final warning.

20 Upon a review of all the circumstances, including Aguirre's personnel file, Back determined that Aguirre's conduct in falsifying a conversation and using her name as leverage to gain information was dishonest and manipulative, and recommended that Aguirre should be discharged. Back testified as follows:

25 I talked with Erlinda [Roxas] and reviewed the personnel file. My main concern was that Pat's [Aguirre] communication with the HR team, not only the whispering, but the communication in using my name as leverage to get confidential information. That was a concern for me because, number one, it's
30 dishonest. Number two, it's trying to manipulate the girls to try and gain information that she easily could have come to ask me for.⁷

On October 11,⁸ after receiving authorization to terminate Aguirre, Back, with Laboratory Director Erlinda Roxas as a witness, summoned Aguirre, accompanied by Union Representative Ruppert, into the office and confronted her with the reports of Armenia and Soto. Back testified
35 that Aguirre denied that any such conversations had taken place and repeatedly accused the two HR representatives of lying. Aguirre did say that she had asked Armenia for the phone number of a former supervisor.⁹ Ruppert argued that Aguirre was performing her duties as a union steward in assisting Arse with the unemployment matter. Aguirre, however, disagreed

⁶ I discredit Union Representative Ruppert's testimony to the contrary.

⁷ Back, who convincingly attested to her high regard for and insistence upon honesty by and between her, her HR staff, and other employees, was a particularly forthright witness, and I have no reservations about crediting her testimony in its entirety. I do not credit the testimony of Aguirre or Ruppert to the extent that their testimony differs from that of Back.

⁸ Back testified that Aguirre would have been terminated a week earlier had she appeared at work on October 6, as scheduled.

⁹ This particular conversation, according to Armenia's testimony, which I credit, had occurred several weeks prior to the September 23 conversations. Aguirre testified that in attempting to assist Arse with her unemployment claim, she had asked Armenia for the phone number of Olga, a former supervisor. Olga spoke Spanish and had been helpful in assisting Aguirre speak with Arse, who apparently was not fluent in English.

with Ruppert, and maintained that she had been attempting to assist Arse only as a friend and not as union steward. Ruppert asserted that Back was discharging Aguirre because of her union activities, and again Aguirre shook her head and said, “No, I just wanted to support my friend.”

5 Back testified that as Aguirre merely denied the conversations and offered no credible response to the accusations, or any witnesses, or any excuse or explanation warranting a lesser degree of discipline, there was simply no reason to defer the termination and continue the investigation. She handed Aguirre her final paycheck and terminated her. The paycheck had been prepared in advance in conformity with State law that requires final payment at the time of
10 termination.¹⁰

Back testified that although she had had grievance and related discussions with other union stewards, she had never had any prior meetings or interaction with Aguirre other than their mutual attendance at bargaining sessions. Back specifically denied that the discharge of
15 Aguirre was motivated by Aguirre’s conduct in her capacity as a union steward or union advocate.

There is no showing that the Respondent has terminated or otherwise discriminated against any other union stewards or union advocates for engaging in activities on behalf of the
20 Union.

C. Additional Facts and Analysis Consistent with the Board’s Order Remanding

25 In my initial decision I stated that the record evidence did not reflect whether the Respondent’s CEO, Robert Bills, and HR Manager Barbara Back had knowledge of Pat Aguirre’s participation as a speaker at the California attorney general’s hearing regarding the approval of Prime’s purchase of Victor Valley Hospital. The Board, citing *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), has directed that I address certain record evidence to
30 determine whether to draw a reasonable inference that the Respondent knew about Aguirre’s testimony at the hearing prior to her discharge.

The attorney general’s hearing at which Aguirre spoke took place on August 17. The attorney general’s rejection of Prime’s application to purchase Victor Valley Hospital was announced on September 20, just 2 days before the September 22 bargaining session during
35 which Bills referenced the attorney general’s determination. The union flyer headed “SEIU-UHW Members Stop Prime,” in which Aguirre’s photo prominently appears is dated September 20, and Aguirre testified that it was posted on the Respondent’s bulletin boards and distributed to employees on about that date. The flyer begins with a quote from Aguirre as follows: “When we stand up for patients and the workers who serve them, people listen—even the Attorney
40 General.” The quote is attributed to “Pat Aguirre, phlebotomist, Encino Hospital Medical Center.” The flyer states, inter alia, “Up Next—the Governor! The Attorney General Sided with SEIU-UHW members—and now we’re pushing the Governor to do the same by urging him to sign into law a bill to keep Prime in check.”

45 As noted, the bargaining session was held on September 22. The prior collective-bargaining agreement had expired, and bargaining for a successor contract, which would be the first contract under Prime’s ownership, had commenced in August or September 2010,

¹⁰ During a subsequent conversation in the cafeteria that same day, Aguirre again said to Back that the HR representatives were lying, and added that Back, too, was lying.

5 approximately a year earlier. Representing the Respondent at the negotiating meeting were Bills, Back and the Respondent's assistant general counsel, Mary Schottmiller. These three individuals comprised the Respondent's customary bargaining team. Representing the Union were Richard Ruppert, the union's chief negotiator, Maggie Macias, the Union's Encino Medical Center organizer-representative, and three additional members of the bargaining committee, employees Kenton Smartt, Cathy Begelfer, and Aguirre; these five individuals represented the Union's customary bargaining committee.

10 According to Ruppert, the meeting convened and and Schottmiller said that Bills "had some things he wanted to address to the union." Ruppert's full testimony on this point continues as follows:

15 We turned the floor to Bob [Bills] and Bob said that something happened at a local medical center and employees and the union had testified at a hearing. The license for Prime [to] buy Victorville (sic) Hospital was denied. In his opinion, he thought that was unfortunate and very sad. He said that we had conducted ourselves professionally in our bargaining and had non-adversarial type of conversations, though we disagreed in bargaining.

20 He said there were a number of leaflets that had gone out that had inaccurate information and the hospital was going to be giving a leaflet with the paychecks this week, and that they were going to be holding meetings with all the employees, Encino and Ontario, telling them that the SEIU was trying to destroy jobs and close the hospital.

25 There was no union response to Bills' remarks. Ruppert described Bills' demeanor as follows: "He seemed very angry, kind of spoke through clenched teeth and parsed his words until he got to the end."

Aguirre's full testimony on this point is as follows:

It started by Bob Bills saying that he wanted to make a statement. He said something to the effect of it was the Union's fault that Prime lost the sale of—of Victor Valley Community Hospital, and that the Hospital was probably going to go bankrupt if—he may have said it did go bankrupt.

30 Macias' full testimony on this point is as follows:

35 Bob Bills came in—this was after the Victorville (sic) hearing and decision. Bob Bills came in and he said that the union was working hard to destroy the organization, that we were causing people to lose jobs, that—He said the union's working hard to destroy the—it could have been the company, but he also said that Victorville (sic) Hospital was going to close, people were going to lose jobs, the hospital would go bankrupt, it would affect Encino.

He said they would be putting memos in all the employees' paychecks. It would have to be a Thursday, so they were going to get paid on Friday. He also said that flyers about it would be posted throughout the hospital as we spoke.

40 He wasn't specific [about how it would affect Encino Hospital]. He said it would affect Encino Hospital and then he also mentioned people losing jobs, employees losing jobs.

Macias describe Bills’ demeanor as follows: “I wouldn’t interpret it that he was upset, but he was red in the face and he had raised his voice, and then he calmed himself down.”

Smartt’s full testimony on this point is as follows:

I don’t recall [Bills’ statement] verbatim, but I could summarize what he said.

5 He said the union was spreading untrue—you know, about the working conditions of the hospitals, he said negative publicity. He said it with a demeanor that was –he was upset by it, almost like he was hurt.

. . . . He didn’t make any specific references as to why. He didn’t like our conduct—his demeanor, he was upset.

10 Asked whether the issue of Victor Valley Community Hospital was raised by Bills, Smartt testified, “He didn’t—no, I don’t recall that.” Asked if he saw Bills looking at anyone in particular when he made the statement about the union spreading untruths, Smartt testified:

15 Yes. He glanced in the general direction of Pat Aguirre. I know this because [we] always sit in the same place all the time. I’m sitting here, Richard Ruppert is to my left, Cathy [Begelfer] is to my right, Pat [Aguirre] is to her right. To the right of Pat is Maggie [Macias]. We always sit like that. Yes, he did glance—he never looked at me.

20 Asked to describe Bills’ demeanor, Smartt testified: “He was upset, as I said before, as if it was personal.”

In my initial decision I stated that at the negotiating session Rupert testified that Bills mentioned the hearing before the attorney general and stated, “[T]hat employees had had testified against the acquisition of Victor Valley.” Ruppert’s testimony in this regard, which stood un rebutted and unchallenged, was taken at face value as there was no need to determine whether in fact Bills actually made this particular remark. Upon analyzing the foregoing testimony of the other members of the Union’s negotiating team in juxtaposition with Ruppert’s testimony, however, I conclude that Bills made no such statement.

30 Thus, Ruppert was the only one of the four union witnesses who so testified. Obviously, the Respondent’s knowledge of Aguirre’s participation at the attorney general’s hearing was highly significant as an element of the General Counsel’s case in establishing animus and possible motivation for Aguirre’s subsequent discharge, yet none of the other three witnesses corroborated Ruppert in this regard. Indeed, Aguirre would have been particularly attuned to such a remark by Bills as she was the only Encino employee who spoke at the hearing and such a remark indicating displeasure with her testimony would likely have registered with her as an expression of disapproval or even a veiled threat.

35 On balance, given the un rebutted and unchallenged testimony of Rupert, weighed against the fact that the General Counsel’s witnesses failed to corroborate his testimony which, if accurate, should have been abundantly corroborated, I am constrained to conclude that

Ruppert's testimony in this regard was not accurate and I do not credit it.¹¹ Moreover, I have discredited Ruppert's testimony on other points in this proceeding as noted herein.

Smartt, who testified that he did not recall Bills saying anything about the matter of Victor Valley Community Hospital—the very matter that the attorney general's hearing was convened to address—testified that Bills “glanced in the general direction of Pat Aguirre” as he was speaking about the “Union” spreading untruths. Smartt used the word “glance” twice. He was not asked to otherwise describe what he observed, or the duration of the glance. He did not testify that Bills was focused on Aguirre or that Bills pointedly directed his remarks to Aguirre. And that the glance was “in the general direction” of Aguirre, who was sitting on Smartt's right, between Begelfer and Macias, is similarly vague and imprecise, as Begelfer and Macias (who also represented the Union in various capacities) were also in the “general direction” of Aguirre from Smartt's vantage point,. Moreover, no one corroborated this testimony of Smartt. If Aguirre had observed that Bills was somehow singling her out during his remarks, there is no doubt that she would have so testified. I find that Smartt's ambiguous and uncorroborated testimony in this regard is insufficient to establish that Bills pointedly directed any remarks toward Aguirre.

On the basis of the foregoing, I conclude that the evidence is insufficient to show that Bills said or did anything at the September 22 bargaining session that would indicate animus toward Aguirre as distinguished from animus toward the Union.

As noted above, the record shows that on September 19 the Respondent posted a handbill dated September 19, headed “The SEIU is DESTROYING Your Jobs,” on the same bulletin boards throughout the hospital premises where the Union posted its handbills, including the handbills featuring and quoting Aguirre. Apparently the following day, or perhaps the day after, the Union posted another flyer on the various hospital bulletin boards, again featuring and quoting Aguirre. This handbill, is dated September 20 and is headed “SEIU-UHW MEMBERS STOP PRIME.” It features a photo of Aguirre and quotes her as follows:

When we stand up for patients and the workers who server them, people listen—even the Attorney General.

Pat Aguirre, Phlebotomist
Encino Hospital Medical Center

The flier goes on to state:

¹¹ Assuming arguendo that Bills did make the statement attributed to him by Ruppert, such statement does not indicate that Bills knew of Aguirre's participation at the attorney general's hearing that had occurred over a month before. As noted above, neither Bills nor any supervisors nor anyone from the Respondent's management attended the hearing. Accordingly, Bill's knowledge of who spoke at the hearing had to have been related to him by a third party. It is reasonable to assume under the circumstances that Bills was simply told that employees had participated in the hearing, as Ruppert testified Bills stated, but was not told that Aguirre, specifically, had participated in the hearing or the substance of her testimony. I find that there is no predicate in the record that would support the inference that Bills was aware that Aguirre had participated in the hearing. (See my reference to inferences, *infra*.)

In a victory for area patients, caregivers, and the Victor Valley community, State Attorney General Kamala Harris has sided with SEIU-UHW members and rejected Prime's bid to purchase Victor Valley Community Hospital.

5 Prime is currently facing a variety of allegations, including possible Medicare fraud, tax evasion, unusually high blood infection and malnutrition rates at its facilities, and even holding patients captive in its hospitals to increase revenues. It also has a track record of cutting unprofitable services and laying off experienced caregivers in hospitals it buys.

10 Members came out to oppose the sale at an August 17 hearing and then sent hundreds of letters to the Attorney General's office urging her not to approve Prime's bid—AND WE WON!

Up Next—the Governor!

15 The Attorney General sided with SEIU-UHW members—and now we're pushing the Governor to do the same by urging him to sign into law a bill to keep Prime in check.

20 If the two handbills were posted on the dates appearing on the handbills, the Union's handbill was posted 1 day after the Respondent's handbill. Accordingly, the Respondent's handbill, *infra*, could not have been responsive to the Union's handbill featuring Aguirre. There is no showing that either Bills or Back saw the Union's September 20 handbill or any other handbills posted or distributed by the Union prior to that date. There is no evidence that Bills or Back either posted handbills or entered the areas where handbills are posted. The only other handbill posted and distributed by the Union which links Aguirre with her testimony at the attorney general's hearing is the handbill dated August 17, a month earlier. And there is no evidence that during that 1-month period any supervisor or manager of the Respondent mentioned that handbill to Aguirre or anyone else.

30 The General Counsel presented evidence through Organizer-Representative Macias to show that supervisors or managers entered areas of the hospital where handbills are posted. Macias testified that in "sub-acute" she has seen Jenney, the director of that department, in the bulletin board area; in "med-surg" she has seen Tom, the director of that department, in the bulletin board area; and in "mental health" she has seen Carlos, the director of that department, in that department's bulletin board area. She has also seen Christina Armenia, HR Director Back's assistant, who is not a supervisor, "at least on three occasions standing in front of the union bulletin board in the basement cafeteria." From the foregoing, I conclude that the record evidence is insufficient to show that either Bills or Back had seen or read any of the Union's handbills.

35 As noted, on September 19, the day prior to the attorney general's decision, and 3 days prior to the September 22 bargaining session, the Respondent posted a notice on bulletin boards throughout the hospital. The notice, dated September 19, is as follows:

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

5 What else can anyone reading the SEIU's attacks conclude? They just recently sent out another flier which features CNA Martha Alvarez of Centinela Hospital. The SEIU is using Martha to make it sound like Prime is running this hospital and other Prime hospitals illegally. On the flier, the SEIU flat out lies about a Federal investigation for fraud. This investigation DOES NOT EXIST! It also talks about a state investigation that the SEIU instituted based on its own lies! But then, when has the truth mattered to the SEIU?

10 This is not a game. The SEIU may not care if it puts your hospital out of business, but others do. We provide much needed care to the community and this is where you work. We can have fights about contracts and bargaining, but when they use lies to call us criminals and destroy your jobs, that goes too far.

It's time to ask yourself—What does the SEIU think it will gain by destroying Encino Hospital?

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

Speak Up

20 Significantly, this handbill references CNA Martha Alvarez, who is apparently represented by a different local than Aguirre, and not Aguirre. It states that "[The Union] just recently sent out another flier which features CNA Martha Alvarez of Centinela Hospital." There is no showing that the referenced flier, which was not introduced into evidence in this proceeding and which the Respondent describes as being "sent out," was posted on the Union's bulletin boards at the
25 hospital. Accordingly, the handbill posted by the Respondent does not indicate that it learned of Alvarez' union activities by reading anything posted by the Union, and no inference may be drawn that the Respondent generally obtains information from the Union's postings on its bulletin boards. Nor does this handbill support any inference about the Respondent's knowledge of or animus towards Aguirre's activities as a union spokesperson.

30 Back testified at length in this proceeding. She was instrumental in investigating and recommending Aguirre's discharge. The conduct for which Aguirre was discharged not only directly involved and was confined to employees in the HR department which Back managed, but also directly involved Back herself. Obviously, her testimony was critical to all parties. It is surprising that no party questioned Back about her knowledge of Aguirre's remarks at the
35 attorney general's hearing, that no party asked her whether she had seen and read the fliers featuring Aguirre that were posted by the Union, and that no party questioned her regarding any conversations she may have had with Bills or anyone else regarding the fliers or Aguirre's presentation to the attorney general. Indeed, no party asked Back about the conversation she admitted to having with Bills prior to her memorandum to Bills, HR Director Tari Williams, and
40 Assistant General Counsel Schottmiller in which she recommended Aguirre's discharge.¹²

¹² This and other similar memoranda, between the dates of October 4 and 6, were extensively discussed at the hearing. The Respondent's counsel, subject to the General Counsel's subpoena, listed such memoranda in a privilege log, and took the position that they

The extent of Barbara Back's testimony regarding her knowledge of Aguirre's testimony before the attorney general is as follows:

Q. (BY RESPONDENT'S ATTORNEY): Barbara, was Pat Aguirre terminated because of her union activity?

5 A. Absolutely not.

Q. Was she terminated for testifying in any kind of hearing?

A. No.

Q. Have you ever terminated someone for testifying in a hearing or a legal process?

10 A. No.

Q. Were you told by any individual outside of Encino Hospital to terminate Pat Aguirre because of her union activity or testifying in a hearing?

A. No, not at all. The first people (sic) I consulted was my direct boss.

15 Q. Did any of them tell you to terminate Pat Aguirre because of her union activity or testifying in any hearing?

A. Not at all.

Q. (BY ADMINISTRATIVE LAW JUDGE): Who is your direct boss?

A. Robert Bills, the CEO of Encino Hospital.

20 It could be argued that had Back not known anything about Aguirre's testimony at the attorney general's hearing it is reasonable to assume that when asked this series of questions about whether she discharged Aguirre for testifying in any kind of hearing, Back would have not only responded, "no," but, for emphasis would have affirmatively added that at the time she made her recommendation she was not even aware that Aguirre was involved in any such hearing. However, it is also reasonable to assume that Back was advised by the Respondent's
25 counsel to directly answer only the questions posited to her, or believed that pointed "yes or no" questions called for succinct responses, or anticipated follow-up questions regarding the extent of her knowledge, if any, regarding Aguirre's testimony. Accordingly, I do not believe that under the circumstances it would be reasonable to draw an inference that Back, by not volunteering that she was not aware of Aguirre's testimony before the attorney general, was implicitly
30 attesting to knowledge of Aguirre's testimony. As emphasized in my initial decision, and reinforced in this supplemental decision, I found Back to be a highly credible witness. Had Back been specifically asked about her knowledge of Aguirre's activity in this regard, or about reading bulletin boards, or about discussions with Bills regarding Aguirre's union activities, I have no

were memoranda subject to the attorney-client privilege. As this discussion took place at the end of the day on the final day of hearing, I closed the record with the understanding that I would reopen the hearing and receive further evidence in the event the General Counsel, after researching the matter, provided case law demonstrating that the memoranda were not privileged. The General Counsel elected not to pursue this matter.

reason to believe that Back would not have answered truthfully. She simply was not asked these questions.

5 The conduct for which Aguirre was discharged occurred on September 23, the day following the September 22 bargaining session. As set forth below, the matter was reported to Back. Back conducted an investigation, reviewed Aguirre's past history of disciplinary action, and recommended that Aguirre be discharged. After various communications by and between Back and others, Aguirre was authorized to discharge Aguirre. The interview and discharge of Aguirre was to occur on October 6 but Aguirre did not show up for work on that date. While the record does not show the date Aguirre first returned to work after October 6, she was
10 interviewed and discharged on October 11. There is no record evidence of intervening matters between September 23 and October 6 (or October 11) that would indicate acquired knowledge by the Respondent of Aguirre's testimony before the attorney general or animus toward Aguirre.

15 On the basis of the foregoing, I find that the record evidence is insufficient to show knowledge on the part of either Bills or Back that Aguirre had made a presentation on behalf of the Union at the attorney general's hearing.

20 Simply stated, as set forth in the Respondent's flier posted on September 19, the Respondent believed that the Union was attempting, by its various activities, to put the hospital out of business. If the Union was successful in this endeavor, the jobs of both Bills and Back, and potentially some 400 additional individuals, would be in jeopardy. Accordingly, the Respondent's animus toward the Union may be fairly characterized as substantial.

25 While it may be assumed that the animus the Respondent held for Aguirre or any number of union supporters—shown by the record evidence to be union stewards, or on the Union's bargaining committee as regular members or committee alternates, or, as noted in a union flier, a "contract action team" consisting of 21 employees in addition to the bargaining team—was coextensive with the animus the Respondent held toward the Union, this is not necessarily the case. Significantly, while the General Counsel and the Union attempted to portray Aguirre as the "chief steward" or more active than other employees on behalf of the Union, the credible record indicates that in fact during Back's tenure Aguirre's interaction with Back regarding grievances was nonexistent. Thus, Back credibly testified that although she had
30 meetings with Union Stewards Begelfer and Smartt regarding one or more grievances, she has never had a meeting with Aguirre, other than at bargaining meetings, about workplace issues. Insofar as the record shows, the extent of Back's knowledge regarding Aguirre's activities on behalf of the Union was limited to the following: that Back knew that Aguirre was a union steward and also knew her as a bargaining committee member. And in this latter capacity, there
35 is no evidence that Aguirre took an active role in contract negotiations or spoke up as much as other bargaining committee members or even spoke up at all. Accordingly, to the extent that the Respondent harbored animus toward union activists as being supportive of the Union's perceived attempts to put the hospital out of business, there is no reason to believe that the degree of animus toward Aguirre was any greater than the degree of animus toward any other
40 union activist. And there is no contention that the Respondent has discharged or otherwise discriminated against any other union activist.

45 At the September 22 bargaining session, Bills pointedly made it clear that he was unhappy with the Union but also noted that the bargaining committee "had conducted [itself] professionally in our bargaining." Similarly, the Respondent's September 19 flyer distinguishes bargaining from the Union's other activities: "We can have fights about contracts and bargaining, but when they use lies to call us criminals and destroy your jobs that goes too far." And, ". . . it's time to say ENOUGH! Tell the SEIU leadership to start focusing on bargaining and

stop using lies that threaten to put Encino Hospital out of business.” Thus, it is clear that the Respondent’s animus was directed toward the Union’s perceived attempts to put the hospital out of business and to the Union’s “lies to call us criminals,” and not to the ongoing collective bargaining that was, according to Bills, being conducted by the bargaining committee in a professional manner. Accordingly, I do not find that the Respondent harbored animus toward Aguirre because of her participation as a member of the bargaining committee.

On the basis of the foregoing I find that the General Counsel has not sustained her burden under *Wright Line*¹³ by demonstrating that the Respondent harbored animus toward Aguirre because of her known union activity.

However, assuming arguendo that both Bills and Back had knowledge of Aguirre’s testimony before the attorney general, and that the Respondent harbored the same degree of animus toward Aguirre as it harbored toward the Union, I nevertheless find, *infra*, that the Respondent has sustained its burden of proof under *Wright Line* by demonstrating that Aguirre would have been discharged regardless of any animosity it harbored against Aguirre or the Union.

The Board in its remand order has directed me to reconcile apparent inconsistencies in Back’s credited testimony in order to assess whether the manner in which Aguirre was discharged constitutes evidence of pretext.

Back testified that her normal practice in making a recommendation for termination was to conduct an investigation “if the investigation warrants.”¹⁴ She then interviews all the relevant witnesses in order to make her determination.

Back testified the termination process is as follows:

It starts with a recommendation, a review of the corrective action history with the employee. I prepare an overview of what steps have been taken in the past, along with an overview of the final incident, along with the recommendation.

The recommendation is “usually written,” and in this case it was written; however, Back testified that she first has a verbal conversation with Bills, and apparently Tari Williams, who oversees the HR functions of three hospitals but is not Back’s direct supervisor. Back testified that both Bills and Williams are “consulted” regarding all termination decisions and, after “talking it through” with them, any termination recommendations are subject to their approval.¹⁵ The decision to terminate is made at the local level. Then it is sent to Schottmiller, the Respondent’s assistant general counsel, for review, “to make sure that we’ve followed (sic) and that we have a legal process.”

Back also testified that her normal practice was to stop a termination if warranted, and that she would have done so during Aguirre’s interview, *infra*. Significantly, no one asked Back why she did not first interview Aguirre before making a recommendation to Bills that Aguirre be discharged. In my initial decision I credited Back’s testimony that she was prepared to reverse

¹³ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

¹⁴ I interpret this to mean she conducts an investigation if the situation warrants an investigation.

¹⁵ The record does not reflect whether the roles and authority of Bills and Williams in this process are identical.

the discharge decision if the interview of Aguirre so warranted, but I did not comment on or reconcile this with Back's further testimony that she never made a discharge decision by herself.

Back testified that during the discharge meeting she advised Aguirre that it had been reported to her that Aguirre "had used my name to obtain information from the HR team, using my name as leverage to get this information." At that point, according to Back, because "Pat [Aguirre] accused the HR personnel of lying and denied any such conversations with them. . . . There was no other information [Aguirre] offered that would cause me to continue an investigation or talk to anybody else. So, she was then terminated." Asked what she would have done if Aguirre had raised additional information that warranted further investigation, Back testified:

What I normally do, my practice is to provide the due process. If someone gave me information that would cause me to continue the investigation, the termination stops. We investigate whatever information they're providing to us.

Later in her testimony, Back reiterated that the decision to discharge Aguirre had been made prior to the October 11 discharge meeting, adding, ". . . and I have to say that the decision is always based on any additional—they may change based on any additional information we may obtain through that meeting."

The following lengthy question was posed to Back:¹⁶

Q. JUDGE WACKNOV: It seems to me that this is a fairly insignificant matter. There's manipulative and there's dishonesty, but this is like so what? The consequences don't really make that much difference for whatever reason Ms. Aguirre was asking these questions. Let's assume that these things happened as you believed they happened. It seems like sort of a minor incident that you're wondering why in the world would Ms. Aguirre make statements like that just to get them to divulge information that really didn't make any difference anyway. Who cares who's attending this [unemployment] hearing?

Why was it so important to the extent that it required termination? It seems to me to be sort of an innocuous—I don't know how you would characterize it, but it doesn't seem to be that serious. That's my question to you, if you can put that in the form of a question. Why is this so important as to warrant termination?

A. I think, Your Honor, as an HR professional, when these decisions are made, the decision is not made lightly. When you're reviewing an employee's history of corrective action or whatever timeframe we're allowed to review [18 months according to the expired contract] you always—you look at the big picture. Were there previous policy violations with this individual? Did this individual learn from those corrective actions?

¹⁶ I purposefully asked this question of Back because of its obvious significance to the outcome of this proceeding and because I wanted to carefully assess Back's demeanor and candor in giving her answer. It was clear from my observation of Back and her spontaneous, straightforward, and obviously candid and unrehearsed answer that she was genuinely taken aback with Aguirre's unexplainable behavior. I have no reservations regarding the truthfulness of Back's testimony.

In this case, the final [termination] reflects numerous policy violations. There doesn't seem to be a learning from these corrective actions from those incidents. At the final meeting with Ms. Aguirre, there was no, "You know what, oh my god, I didn't mean for them to perceive it this way." There was no self-accountability to say, "I didn't think I came across that way, I apologize, I didn't mean to." There was none of that. Everything with Ms. Aguirre was a deflection of, "It's not my fault, they're lying."

So there was—since there's no self-accountability, how do you coach and develop someone who continually doesn't have self-accountability with all these continuous violations?

Q. If Ms. Aguirre had not had any prior incidents in her file, this one incident would not have resulted in termination?

A. Correct.

Once again Back was asked, "You decided prior to October 4th that you would terminate her. Is that correct?" And once again Back responded, "Based on the events that happened in that final meeting, yes."

And yet again, Back was asked, "You didn't even talk to Ms. Aguirre about the incident until October 11th, 2011. Isn't that correct?" And Back answered as follows:

A. That's correct. I did discuss with her prior to termination. The beginning of our meeting was getting Ms. Aguirre's side of what happened and informing her of what we were told.

Q. Okay.

A. Once there was no further information that she offered to change that outcome of that meeting, I then proceeded with the termination.

Significantly, no one questioned Back about this very important element of her investigative authority which she had reiterated throughout her testimony. Thus, she was asked no questions regarding the source and extent of this authority to sua sponte change a termination decision, such as whether such authority emanated from Bills, or whether it was a written hospital HR policy, or whether the authority was standard operating procedure among HR professionals in general, or how often and why and under what circumstances she has chosen or would choose to exercise this authority as distinguished from choosing not to do so, or whether Bills' conditional approval of Aguirre's termination pending the interview was specific to this one instance or was applicable generally. Accordingly, there was no testing of Back's credibility in this regard by attempting to develop inconsistencies in an effort to show that, as the General Counsel contends: the final and irrevocable decision to terminate Aguirre had been made prior to the interview; the perfunctory interview was a sham; whatever Aguirre may have said in her defense during the interview would not have mattered; Back's testimony was false; and accordingly the discharge of Aguirre was discriminatorily motivated in order for the Respondent to rid itself of the leading union adherent, indeed the "face" of the union among the Respondent's employees.

The General Counsel's foregoing argument is not supported by the credible record evidence. Rather, I find the meeting was neither superficially brief nor contrived. Ruppert testified that the meeting lasted some "10 or 15 minutes." Neither Ruppert or Aguirre rebutted

Back's testimony, which I credit, that Aguirre repeatedly accused the two associates of lying. And as Aguirre proffered no defense other than to directly accuse the two HR associates of "lying," there simply was nothing more Back needed to know that would cause her to change her recommendation that Aguirre be terminated.

5 At the outset of her testimony Back described her duties as the human resources manager, which includes dealing with two unions, as follows:

I oversee the main functions of human resources, to include benefits, recruiting. I also administer collective bargaining agreement (sic), as well as internal policies and procedures, as well as coaching and development for employees.

10 Her duties with respect to the union employees are as follows:

With respect to the [union] employees, I handle any issues that they may be having, as far as coaching and guiding them. I ensure that the collective-bargaining agreement is adhered to for both employees and for the managers. I handle grievances. I participate in negotiations.

15 Given Aguirre's repeated accusations that the HR associates were lying while it was perfectly obvious that Aguirre knew she was the duplicitous one, Back's foregoing testimony is compelling:

Everything with Ms. Aguirre was a deflection of, "It's not my fault, they're lying."

20 So there was—since there's no self-accountability, how do you coach and develop someone who continually doesn't have self-accountability with all these continuous violations?

25 Back's testimony that one of her duties was to coach and develop employees who needed coaching and developing stands unrebutted. Back's rhetorical question is an eminently pragmatic one, and it is clear, and I find, that Back held a genuine and substantiated belief that Aguirre was not a trustworthy individual, and that her behavior was not likely to change.

30 The Board in its remand order states that Back's testimony on her customary procedures for termination was inconsistent "with her telling Aguirre's union representative at that interview that it was 'not necessary' to allow him to question Aguirre's accusers because 'the final decision [had] (sic) been made.'" In fact this quoted language was not taken from the transcript testimony. Rather, it is contained in an exhibit introduced into evidence by the General Counsel written by Erlinda Rojas, director of laboratory services, who was present during the interview meeting but did not testify in this proceeding. The exhibit is a memorandum from Rojas who had been asked by Back to provide a written account of her recollection of the meeting. The memorandum is dated October 18, and begins with the erroneous date of the meeting as follows: "On October 12 (sic), 2011, Patricia Aguirre was called into HR by Barbara Back to discuss violations of employee conduct as written on EMHC Employee Handbook." The memorandum contains the statement, "The Union representative requested for cross examination of the HR assistants and Barbara said that this was not necessary as the final decision has been made with prior consultations with Barbara's superiors." The memorandum concludes as follows: "This information is from what I recall. I did not take written notes of the meeting."

40 Ruppert testified that Aguirre was told by Back that, "[w]e have information about a complaint, a violation of a Code of Conduct. You were dishonest with two employees and HR.

You said you had a conversation with me about a hearing that was going to occur for another employee and said that I had said that either Carmen or Bob was going to attend.” Aguirre’s immediate reply, according to Ruppert, was, “[w]e never had such a conversation. Why would I say that? . . . I came in and wanted Christina to have Olga call me. Why would I say I had a conversation with you? We never had a conversation, did we? Barbara did we have that conversation?” After some “back and forth,” according to Ruppert,¹⁷ Back said, “We looked at what the girls said and you were dishonest and said we had a conversation. We discussed this with my superiors and we’re going to terminate your employment.” Then, according to Ruppert, near the end of the meeting, Back twice simply replied, “no,” to Ruppert’s requests to interview the witnesses and to be furnished their statements. Then Aguirre again said, “Why would I say we had a conversation that we didn’t have?” Back replied that there would be no discussion of this, and that she would tell her superiors what Aguirre had said. Then, according to Ruppert, Back said, “There’s not going to be any change to the decision and we’re not here to discuss this. I will talk to my superiors and tell them what you said.”

Accordingly, Back did not reply to Ruppert’s request for the interview of and statements from witnesses, as Rojas incorrectly, I find, stated in her memorandum, namely, “that this [the request for interviewing and obtaining Back’s statements from witnesses] was not necessary as the final decision has been made with prior consultations with Barbara’s superiors.” In fact, Back said nothing about a prior “final” decision,” but rather said that the decision would not be “changed.” This comports with Back’s abundant testimony that the decision to discharge Aguirre was subject to change depending upon the results of the interview.

I do not find that Back’s handling of the matter by not first interviewing Aguirre before recommending a course of action to Bills suggests pretext. Clearly, this was a distinctly different situation from the normal HR investigation in that it directly involved the HR director, her staff, and someone obviously attempting to manipulate her staff—by whispering and falsely invoking Back’s position as their boss—in an attempt to surreptitiously gain information. Back had no reason to disbelieve or doubt the corroborative reports of her assistants, and there could have been no doubt that Aguirre’s actions were both peculiar and dishonest. Moreover, I find it apparent from Back’s demeanor and pointed testimony that she was protective of her domain and was genuinely offended by Aguirre’s attempt to compromise the integrity of her department.

Back’s investigation then turned to Aguirre’s employment history. The review of an employee’s employment history under such circumstances is mandated by the Respondent’s policies, *infra*. Back learned that Aguirre had received a 3-day suspension in October 2010 for attempting to take a cell-phone camera photo of a patient in the geropsychology unit; that in May, 2 months prior to Back’s employment by the Respondent, Aguirre had been given a number of sequential warnings for various infractions, and had been admonished and advised that further misconduct “will result in further disciplinary action up to and including termination”; and that the last warning, dated May 12, was for bossing around a mentally challenged employee and throwing an open bag of biohazard waste materials at him while he was performing his duties. Back, who had not yet been employed during these disciplinary matters, and who, insofar as the record shows, had developed no relationship with Aguirre, took them at

¹⁷ I find that during this “back and forth” Aguirre repeatedly accused the HR associates of lying.

face value. Further, as a part of her investigation, Back also spoke to Rojas, the head of Aguirre's department.¹⁸

5 Upon being confronted with Aguirre's rather uncommon and ostensibly indefensible behavior that could not be credibly denied, coupled with Aguirre's prior suspension and recent past history of several work infractions including a blatant disregard for a mentally challenged coworker, Back's reaction—a recommendation of termination prior to conducting an interview with Aguirre—seems entirely reasonable. Accordingly, I find that no inference of pretext is warranted under these circumstances.

10 The personnel action form handed to Aguirre upon her termination states that she was being terminated for "Violation of Standards of Conduct #400.407." The standards of conduct are contained in a separate document. The document appears in the Respondent's human resource manual and is entitled "Standards of Conduct and Corrective Action"; and the entire three-page document itself is denoted as "Policy 400.407." The document lists two categories of prohibited behavior: those which warrant immediate termination and those for which an employee may be terminated "depending upon the nature and circumstances of the incident and the employee's prior performance records."¹⁹ The document states, inter alia, as follows:

POLICY

20 This facility mandates that there be an environment of mutual understanding, respect and cooperation and that its employees must maintain the highest standards of personal/professional conduct.

25 This is not intended to be a complete list of all standards of conduct and performance, but to promote an idea of what type of conduct and job performance is expected and what behavior may result in corrective action or discharge. In arriving at a decision, both the nature of the incident and prior record of the employee will be considered.

Conduct or job performance for which an employee may be immediately dismissed includes:

- 30 1. Falsification of any records, such as medical forms, worker's compensation claims, time cards or employment applications, or giving false testimony or witness.

35 Thus, the very first entry under this category of 17 entries provides that an employee who engages in conduct involving written falsification, or verbal falsification amounting to "giving false testimony or witness" is subject to immediate termination. While "giving false testimony or witness" is a rather antiquated phrase, Back's interpretation of it is clear from her testimony that she considered Aguirre's conduct to be manipulative and dishonest in falsely using Back's name as leverage to gain information from subordinates in her department. I find that Aguirre's misconduct, as determined by Back, is reasonably encompassed by the language contained in

¹⁸ Neither the General Counsel nor counsel for the Union questioned Back regarding her conversation with Rojas.

¹⁹ The same language and itemized list is set out beginning on p. 5 of the Respondent's "Employee Handbook," however, the handbook does not contain the introductory paragraph beginning, "This facility mandates"

the standards of conduct and the employee handbook upon which Back relied, and Back, during the interview and termination meeting, advised Aguirre of the reason for her discharge.

Insofar as the record shows, the only communication from the Respondent to the Regional Office during the investigation of this matter is contained in the following November 7 letter from Mary Schottmiller, the Respondent's assistant general counsel, to the investigating board agent:

Encino Hospital Medical Center is in receipt of the above-captioned charge and your letter dated October 28, 2011. In response to your letter, Pat Aguirre was not engaged in protected activity when she testified at the public hearing. She explicitly stated that she was being a "patient advocate." There was no discussion of any terms or conditions of employment. Moreover, the Hospital is unfamiliar with any fliers in which Ms. Aguirre was pictured.

Also, the Board supplied no reason for why the stated reason for Ms. Aguirre's termination—lying to the Hospital's Human Resource Department to obtain information—is not a valid basis for termination.

As the referenced letter from the investigating board agent was not introduced into evidence, there is no way of knowing what questions were posited by the board agent to Schottmiller, and therefore, what, specifically, Schottmiller was responding to. Indeed, Schottmiller seems to be asking the board agent a question, namely, to advise Schottmiller why, in the Board's view, lying is not a valid basis for termination. And Schottmiller's reference to the "stated reason for Ms. Aguirre's termination" seems to be referencing Back's statement to Aguirre during the October 11 meeting that Aguirre was being discharged for her dishonesty. There is no affirmative statement by Schottmiller that Aguirre's disciplinary history was not considered in determining that Aguirre be discharged, or that progressive discipline was not applicable in Aguirre's case.

As noted above, both the Standards of Conduct and Corrective Action document and the employee handbook state:

This is not intended to be a complete list of all standards of conduct and performance, but to promote an idea of what type of conduct and job performance is expected and what behavior may result in corrective action or discharge. *In arriving at a decision, both the nature of the incident and prior record of the employee will be considered.* [Emphasis added.]

Conduct or job performance for which an employee *may be immediately dismissed* includes:

1. Falsification of any records, such as medical forms, worker's compensation claims, time cards or employment applications, or giving false testimony or witness.

It is clear from the documentary evidence that in all discharge situations "both the nature of the incident and prior record of the employee will be considered." Accordingly, while an excellent employment history free of warnings will not insulate an employee from discharge for an infraction warranting immediate dismissal, neither will an employee with multiple infractions necessarily be discharged for the next infraction warranting immediate dismissal; in either event, the employee's employment history will be evaluated before a determination is made. This is the Respondent's policy as stated in its documents that Back was required to follow and that she

5 did follow as she credibly testified.²⁰ The fact that Schottmiller may not have advised the board agent of the policy may be because the questions posed to Schottmiller by the board agent were not sufficiently specific or because Schottmiller assumed the board agent had read the pertinent sections of the employee handbook and Standards of Conduct. Accordingly, the fact that the Respondent's counsel, in his opening statement, detailed the prior disciplinary history of Aguirre that was considered in her discharge does not constitute a shifting explanation for discharge indicative of pretext. Moreover, regarding the matter of the parameters of progressive discipline, this issue was first raised by the General Counsel through Ruppert's testimony and, as noted above, Ruppert's testimony on this matter was credibly rebutted by the Respondent's witnesses.

10 Clearly, the timing of Aguirre's discharge does not suggest pretext. The incident for which Aguirre was discharged coincidentally occurred on September 23, the day following Bills' statement to the Union's bargaining committee. Aguirre would have been discharged on October 6, some 13 days later had she not been absent that day. During the intervening period Back investigated the matter, spoke with Bills about the matter, and apparently with Tari Williams, and prepared a memorandum regarding the matter for Bills, Williams, and Schottmiller. Approval of Back's recommendation apparently was given prior to October 5. During the hearing no questions were asked of Back regarding the time sequence between Aguirre's infraction and her dismissal. Indeed, the fact that some 13 days transpired between the date of the infraction and Aguirre's dismissal indicates that the Respondent certainly was not acting precipitously as a reaction to the attorney general's September 20 determination.

15 As noted above, Back did not recommend the termination of Aguirre because of the nature of the information Aguirre attempted to elicit. Indeed, the information was innocuous and inconsequential, and could not have mattered much to the Respondent. Had Back recommended that Aguirre be discharged simply because the information she was seeking—whether certain individuals would be attending the unemployment appeals hearing on behalf of the Respondent—somehow constituted privileged information to which Aguirre was not entitled, then a valid argument of pretext could be made. But that is not the case. And the matter must be considered from Back's point of view, rather than from the perspective of a disinterested, uninformed observer who might simply discount Aguirre's behavior as childish but innocuous. Back was neither disinterested nor uninformed. Back's focus, as she abundantly and credibly testified, was not on the substance of the information Aguirre was seeking, but on Aguirre's duplicity which, as noted above, very much troubled Back. That, coupled with Aguirre's unfavorable employment history, also set forth above, convinced Back that Aguirre's discharge was warranted. Accordingly, I find that there was no disproportion between the nature of Aguirre's conduct, as interpreted by Back, and Aguirre's discharge, as recommended by Back.

20 Back was the Respondent's key witness. Her testimony was credible. The incident resulting in Aguirre's discharge was directly reported to Back by associates in her department. Back's subordinates and Back herself were the only individuals implicated in Aguirre's misconduct, and only Back knew whether she had had a prior conversation with Aguirre about the matter. Back alone conducted the investigation, and insofar as the record shows, Back alone reviewed Aguirre's file and spoke with Aguirre's supervisor. Back testified that she had a

²⁰ Back, asked by the Respondent's counsel whether she had reviewed Aguirre's personnel file prior to the October 11 interview meeting, testified as follows: "*I would have to, yes. (Emphasis added.) I reviewed Pat's personnel file and looked at the history back 18 months, what corrective action (sic), if any, were in there. I found numerous corrective actions over the last 18 months, to include verbal warnings, written warnings and a suspension.*"

conversation with Bills, and apparently Williams, regarding the matter, yet she was asked no questions regarding her discussion(s) with Bills or Williams, or the extent of their input, if any, or whether their input influenced Back's recommendation that Aguirre be discharged.

5 Accordingly, the record is devoid of any evidence or even inference that Bills or Williams played any role in the matter other than agreeing with Back's recommendation, or that Schottmiller played any role in the matter other than conducting a routine legal review required in all termination situations. Given this state of the record evidence, and particularly Back's convincing testimony and confident demeanor, there is simply no reason to suspect that Bills, Williams, or Schottmiller would have testified adversely to Back or to one another on factual
10 issues, and therefore no reason that would warrant drawing an adverse inference from the Respondent's failure to call these individuals as witnesses.

The case cited by the Board in its remand, *Champion Rivet Co.*, 314 NLRB 1097, 1098 fn. 8 (1994), is instructive. There, the Board permitted the drawing of an adverse inference by the ALJ where the record reflected that testimony of the employer's plant manager regarding a
15 particular matter—that the owner of a related company told him he could not discipline or fire certain employees because they worked for him and did not work for the employer—was so improbable that the ALJ was warranted in drawing an adverse inference from the employer's failure to call that owner, who was at the hearing site and readily available to testify. Similarly, in *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F2d 720 (6th
20 Cir. 1988), the case relied upon by the Board in *Champion Rivet*, supra, the Board permitted the ALJ to draw an adverse inference from the fact that the employer's production manager was not called as a witness even though he was the individual who held discharge interviews with alleged discriminates, and was physically present during other material events. The underlying principle to be derived from these cases is that the ALJ must have substantial justification to
25 convince the Board that an adverse inference is warranted in situations where material factual findings are based on such inferences.

In the instant case, there is no reason to disbelieve Back regarding her rationale for recommending Aguirre's discharge, or to conclude that Bills' approval or William's approval of Back's recommendation is implausible or contrary to sound judgment. Accordingly, there is no
30 foundation upon which an adverse inference would be justified.

On the basis of the foregoing, I shall recommend that this complaint allegation be dismissed.

D. The General Counsel's Alternative Theory

35 In my initial decision, I did not address the General Counsel's alternative theory, as alleged in the complaint, that the discharge of Aguirre was unlawful because the conduct for which she was discharged was protected union activity, and therefore her statements to the HR associates in connection with that activity did not lose the protection of the Act under *Atlantic Steel Co.*, 245 NLRB 814 (1979).

40 In crediting Back, I have found that during the termination meeting Aguirre contradicted Ruppert's assertions that Aguirre was being terminated for representing Arse in Aguirre's capacity as a union steward and therefore, according to Ruppert, her discharge was in retaliation for such union activity. Back testified that Aguirre contradicted Ruppert's assertion by

insisting that this was not the case; rather she was assisting Arse simply as a friend.²¹ As such, I find that Aguirre was not engaging in protected concerted activity in assisting Arse. See *D. A. Collins Refractories*, 272 NLRB 931(1984). Cf. *Tri-County Transportation, Inc.*, 331 NLRB 1153, 1155 (2000) (protected concerted activity found when three employees accompanied each other to the unemployment office not simply to help each other file an application, but “concertedly for mutual aid and protection”).

In *Atlantic Steel*, supra, the Board deals with whether employees’ outbursts consisting of obscenities, or other provocative verbiage, or conduct during the course of workplace discussions with supervisors should be protected by the Act when the discussion involves protected concerted activity. In attempting to fit Aguirre’s behavior into the *Atlantic Steel* analytical framework, the General Counsel, in her initial brief in this matter, maintains that Aguirre engaged in no obscene or threatening behavior, and indeed, as the Respondent but not the General Counsel maintained, even “whispered” during her conversations with the HR representatives. Assuming that *Atlantic Steel* is relevant at all to this matter, this line of cases attempts to balance employees’ rights under the Act with spontaneous, obscene, or other untoward behavior uttered during grievance or grievance-type discussions with management which would not be tolerated in other situations, so that the question for determination is whether the conduct is so opprobrious under the circumstances as to lose the protection of the Act.

Aguirre’s conduct by its very nature was premeditated and not a spontaneous reaction during an animated grievance-related controversy with management; indeed, Aguirre was not even speaking with supervision or management, but with Back’s staff. Nor was there a grievance or grievance-related issue that would have foreseeably given Aguirre the implicit justification to manipulate Back’s staff—by whispering, and lying about a conversation she never had with Back in an attempt to elicit information. Aguirre was seeking information from Back’s subordinates that could have readily been obtained directly from Back, but for some unexplained reason chose to obtain by subterfuge. The General Counsel has proposed no

²¹ Aguirre was asked three times by the Respondent’s counsel and once by me whether she told Back during the meeting that she was not representing Arse as a steward but she was representing her as a friend. While Aguirre did not deny making such a statement, she would not give a direct answer to the Respondent’s counsel. At one point she answered, “I’m sure I said I was her friend. I was a friend. I was her steward, I was her coworker.” At another point she said, “I don’t recall saying that I did not represent [Arse] as a steward.” Aguirre was requested by me to give a yes or no answer to the question. She remained evasive, and when it became clear that she would not comply with my request, I stated to the Respondent’s counsel, “Look, you asked her a question, I said say Yes or No. She doesn’t want to say Yes or No. I have to make a credibility determination, I’m ready to make it.” As noted, I credit Back’s testimony. Further, Aguirre testified that she did not know whether her duties as a union steward included a duty to accompany employees to unemployment hearings. I find that Aguirre’s spontaneous assertion that she was assisting Arse as a friend and not as a union steward constitutes an unequivocal admission that Aguirre, in eliciting information from the HR representatives, was not intending to do so in her capacity as a steward. Ruppert’s testimony differs from Aguirre’s. While Ruppert, but not Aguirre, denied that Aguirre said, “I was working on behalf of my friend. I wasn’t working as a shop steward,” he was asked whether he recalled Aguirre in that meeting “making a statement that Ms. Arse was her friend.” Ruppert answered, “Not in that meeting,” while, as noted, Aguirre testified, “I’m sure I said I was her friend.” I believe that Ruppert was either prevaricating or that he had a faulty recollection of what Aguirre did say. In either event, I discredit Ruppert on this point.

5 explanation for Aguirre's behavior, nor am I able to formulate one. Regardless of Aguirre's status either as a union steward or as Arse's friend and coworker, there is simply no plausible correlation between Aguirre's subterfuge and the obtaining of information regarding the Respondent's attendance at Arse's unemployment appeals hearing that would warrant the Act's protection under *Atlantic Steel*.

I find this alternative theory to be without merit and recommend that it be dismissed.

On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

10 1. The Respondent 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 of Section 2(14) of the Act.

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

3. The Respondent has not violated the Act as alleged in the complaint.

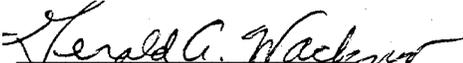
15 On these findings of fact and conclusions of law, I issue the following recommended²²

ORDER

The complaint is dismissed in its entirety.

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Dated: Washington, D.C. May 21, 2013


Gerald A. Wacknov
Administrative Law Judge

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²² 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.