

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

---

DHSC, LLC, D/B/A AFFINITY	:	Case Nos.	08-CA-090083
MEDICAL CENTER	:		08-CA-090193
	:		08-CA-093035
<i>and</i>	:		08-CA-095833
	:		
NATIONAL NURSES	:		
ORGANIZING COMMITTEE	:		

---

**RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION ISSUED  
BY ADMINISTRATIVE LAW JUDGE ARTHUR AMCHAN**

Bryan T. Carmody  
Attorney for Affinity Medical Center  
134 Evergreen Lane  
Glastonbury, CT 06033  
(203) 249-9287  
[bryancarmody@bellsouth.net](mailto:bryancarmody@bellsouth.net)

## TABLE OF CONTENTS

**STATEMENT OF THE CASE . . . 6**

**QUESTIONS PRESENTED . . . 7**

**ARGUMENT . . . 8**

- 1.) Affinity’s Refusal to Bargain Was Not Unlawful . . . 8
  - A.) The Third Affirmative Defense . . . 8
  - B.) The Second Affirmative Defense . . . 10
  - C.) The Fourth Affirmative Defense . . . 12
    - (1) Error, From the Very Start . . . 12
    - (2) The Notion of a “Red Herring” . . . 13
    - (3) Why Affinity Did Not, and Could Not, Offer Evidence . . . 14
    - (4) The Record Before the Judge *Via* Judge Laws’ Decision . . . 15
- 2.) Affinity’s Termination of Ms. Wayt Was Not Unlawful . . . 18
  - A.) The General Counsel’s *Prima Facie* Case Was a “House of Cards” . . . 19
    - (1) Ms. Wayt’s Gossamer Union Support . . . 19
    - (2) The Half-Measure of Evidence on Affinity’s Knowledge of Ms. Wayt’s Union Support . . . 21
    - (3) The Judge’s Imaginary Findings of “Direct Evidence” of Animus . . . 23
    - (4) Supposed Circumstantial Evidence of Discriminatory Motive . . . 25
      - (A) *The Timing of Ms. Wayt’s Discharge Subverts, Not Supports the General Counsel’s Theory of the Case . . . 25*
      - (B) *Ms. Kress’ Involvement – The True “Red Herring” of the Case . . . 27*
      - (C) *The Judge’s “Apples and Oranges” Disparate Treatment Analysis . . . 29*

(D) *The Judge’s Unfocused Review of Affinity’s Investigation . . . 34*

(E) *The Judge’s One-Eye Open, One-Eye Closed Review of Affinity’s Disciplinary Policy . . . 37*

B.) Even Under the Presumption, *Arguendo*, the General Counsel Established a *Prima Facie* Case, Affinity Established Ms. Wayt Would Have Been Terminated Irrespective of Her Union Support . . . 40

(1) The Judge Failed to Identify Accurately the Reasons for Ms. Wayt’s Termination . . . 40

(2) The Judge’s “Punt” on Key Factual Questions Subjected the Hospital to Clear Prejudice . . . 41

(3) Alternatively, the Record Shows the Hospital Had a Reasonable Good Faith Belief That Ms. Wayt Engaged in the Offenses of Which She Was Accused . . . 41

3.) Affinity’s Reporting of Ms. Wayt to the Board of Nursing Did Not Violate the Act . . . 44

4.) The Lawfulness of the Written Warning Imposed on Ms. Wayt Is Instantly Defensible and Was Challenged by the Union Only as an Afterthought . . . 45

5.) Lest the Mandates of HIPAA Be Ignored, and the Privacy Rights of Affinity’s Patients be Forsaken, Affinity Held Every Right to Exclude Ms. Mahon From the Facility . . . 47

6.) The Allegations Against Ms. Kress Collapse Upon the Premise the Completion of ADOs Qualifies as Protected Concerted Activity . . . 50

**CONCLUSION . . . 54**

## TABLE OF AUTHORITIES

<u>Advanced Architectural Metals</u> , 347 NLRB 1279 (2006) . . .	9, 11
<u>Alcoa, Inc.</u> , 352 NLRB 1222 (2008) . . .	40
<u>American Medical Response, Inc.</u> , 344 NLRB 1406 (2005) . . .	17
<u>Bluefield Hospital Company, LLC, et al.</u> , 359 NLRB No. 137 (2013) . . .	8, 12, 15
<u>Community Emergency Medical Services, Inc.</u> , 2004 WL 257777 . . .	32-33
<u>Consolidated Biscuit Co.</u> , 346 NLRB 1175 (2006) . . .	40
<u>Consolidated Freightways Corp. of Delaware</u> , 257 NLRB 1281 (1981) . . .	52
<u>CPS Chemical</u> , 324 NLRB 1018 (1997) . . .	16
<u>Durham School Services, L.P.</u> , 2013 WL 506705 . . .	30
<u>Efficient Medical Transport, Inc.</u> , 324 NLRB 553 (1997) . . .	21
<u>Fallbrook Hospital Corporation d/b/a Fallbrook Hospital</u> , 2013 WL 2146644 . . .	15
<u>Fresh &amp; Easy Neighborhood Market, Inc.</u> , 356 NLRB No. 85 (2011) . . .	23
<u>Independent Residences, Inc.</u> , 357 NLRB No. 42 (2012) . . .	18
<u>In Re Diamond Detective Agency, Inc.</u> , 339 NLRB 443 (2003) . . .	24
<u>Kennametal, Inc.</u> , 358 NLRB No. 108 (2012) . . .	24
<u>Kinder-Care Learning Centers</u> , 299 NLRB 804 (1990) . . .	51
<u>La Gloria Oil</u> , 337 NLRB 1120 (2002) . . .	26
<u>Lockheed Martin Information Systems &amp; Global Solutions, a Segment of Lockheed Martin Corporation</u> , 2011 WL 683827 . . .	21
<u>Mercy Hospitals of Sacramento, Inc.</u> , 217 NLRB 765 (1975) . . .	17
<u>Merrill Transportation Co.</u> , 224 NLRB 150 (1976) . . .	21
<u>Mike Basil Chevrolet</u> , 331 NLRB 1044 (2000) . . .	16
<u>Montefiore Hospital and Medical Center v. NLRB</u> , 621 F.2d 510 (2 <sup>nd</sup> Cir. 1980) . . .	52

<u>New Otani Hotel &amp; Garden</u> , 325 NLRB No. 168 (1998) . . .	30
<u>New York Center for Rehabilitation Care</u> , 346 NLRB 447 (2006) . . .	14
<u>NLRB v. Parkhurst Mfg. Co.</u> , 317 F.2d 513 (8 <sup>th</sup> Cir. 1963) . . .	12
<u>NLRB v. Special Touch Home Care Services, Inc.</u> , 708 F.3d 447 (2 <sup>nd</sup> Cir. 2013) . . .	51
<u>Noel Canning v. NLRB</u> , 705 F.3d 490 (D.C. Cir. 2013) . . .	8
<u>Orchard Park Health Care Center, Inc.</u> , 341 NLRB 642 (2004) . . .	52
<u>Raymond F. Kravis Center for the Performing Arts</u> , 351 NLRB 143 (2007) . . .	16
<u>Ronin Shipbuilding Inc.</u> , 330 NLRB 464 (2000) . . .	26
<u>S&amp;F Enterprises, Inc.</u> , 312 NLRB 770 (1993) . . .	23
<u>Sonotone Corp.</u> , 90 NLRB 1236 (1950) . . .	17
<u>St. Lukes Episcopal-Presbyterian Hospitals, Inc. v. NLRB</u> , 268 F.3d 575 (8 <sup>th</sup> Cir. 2001) . . .	52
<u>Syracuse Scenery &amp; Stage Lighting Co., Inc.</u> , 342 NLRB 672 (2004) . . .	33
<u>Yellow Enterprise Systems, Inc.</u> , 342 NLRB 804, 831 (2004) . . .	52

As the Respondent in the above-captioned cases, DHSC, LLC d/b/a Affinity Medical Center (hereafter, “Affinity” or the “Hospital”) hereby submits, by and through the Hospital’s Undersigned Counsel, this Brief in Support of Affinity’s Exceptions to the Decision issued by Administrative Law Judge Arthur Amchan (hereafter, the “Judge”) on July 1, 2013.

**STATEMENT OF THE CASE**

As part of an Election on August 29, 2012, Affinity’s Registered Nurses (hereafter, at times, the “RNs”) voted as to whether they wished to be represented by the National Nurses Organizing Committee (hereafter, the “NNOC” or the “Union”). See Case No. 8-RC-087639. The Union prevailed in the Election, but subject to determinative Challenges (hereafter, the “Challenges”), as well as Objections (hereafter, the “Objections”) filed by Affinity. The Regional Director (hereafter, the “Regional Director”) for Region 8 (hereafter, the “Region”) later resolved the Challenges and overruled the Objections. On October 5, 2012, the National Labor Relations Board (hereafter, the “Board”) issued a Certification of Representative (hereafter, the “Certification”) in favor of the NNOC.

The Hospital took the position that the Certification was improper, and accordingly, refused to bargain with the Union, which subsequently filed a related Unfair Labor Practice Charge (Case No. 8-CA-093035). In later Unfair Labor Practice Charges (Case Nos. 8-CA-090083 and 090193, respectively), the Union alleged that the Hospital took retaliatory action against Ms. Ann Wayt, a RN employed by Affinity, in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended (hereafter, the “Act”), and excluded one of the Union’s organizers, namely, Ms. Michelle Mahon, from the Hospital in violation of Sections 8(a)(1) and 8(a)(5) of the Act. The Union then filed another Unfair Labor Practice Charge (Case No. 8-CA-095833) based upon how a supervisor, namely Ms. Susan Kress, reacted to the

discovery of “Assignment Despite Objection” forms (hereafter, at times, “ADOs”) completed by some of the RNs. The Charges were ultimately the subject of an Amended Consolidated Complaint (hereafter, the “Complaint”) issued by the Acting General Counsel (hereafter, the “General Counsel”) on March 29, 2013. In response, Affinity filed an Answer (hereafter, the “Answer”), which set forth several Affirmative Defenses. In relevant part, (1) through the Second Affirmative Defense, the Hospital averred that Certification was unenforceable, because, contrary to an oral *ad hoc* agreement reached between Affinity and the NNOC (hereafter, the “Agreement”), an Arbitrator (hereafter, the “Arbitrator”) held exclusive jurisdiction over the Challenges and Objections, (2) through the Third Affirmative Defense, the Hospital averred that, by virtue of the Agreement, the Arbitrator held exclusive jurisdiction over the allegations of the Complaint, and (3) through the Fourth Affirmative Defense (hereafter, at times, the “Affiliation Defense”), the NNOC no longer had a continuity of representation given an affiliation between the NNOC and the National Union of Healthcare Workers (hereafter, the “NUHW”). The Second and Third Affirmative Defenses were the subject of a pre-hearing Motion *In Limine* filed by the NNOC, which was granted by the Judge.

From April 29 to May 3, 2013, the Judge presided over a hearing in Cleveland, Ohio. In his Decision, the Judge concluded that Affinity violated the Act in most of the ways alleged by the General Counsel.

### **QUESTIONS PRESENTED**

- 1.) Whether the Judge erred by concluding that Affinity’s refusal to bargain violated the Act (see Exception Nos. 6-27, 131-134);
- 2.) Whether the Judge erred by concluding that Affinity’s termination of Ms. Wayt violated the Act (see Exception Nos. 28-115, 126, 131-134);

- 3.) Whether the Judge erred by concluding that, by reporting Ms. Wayt to the Board of Nursing, Affinity violated the Act (see Exception Nos. 28-115, 126, 131-134);
- 4.) Whether the Judge erred by concluding that the written warning that Affinity imposed upon Ms. Wayt violated the Act (see Exception Nos. 55-59, 110-115, 131-134);
- 5.) Whether the Judge erred by concluding that, by denying Ms. Mahon access to the facility, Affinity violated the Act (see Exception Nos. 116-125, 131-134); and
- 6.) Whether the Judge erred by concluding that, through the actions of Ms. Kress, Affinity violated the Act (see Exception Nos. 126-134).

### ARGUMENT

For the reasons explained below, the Board should overturn all of the Judge's conclusions of law and dismiss the related allegations of the Complaint.

#### **1.) Affinity's Refusal to Bargain Was Not Unlawful**

To be sure, Affinity does not dispute that, as a factual matter, the Hospital has refused to bargain with the NNOC. However, the Judge's analysis of whether, as a legal matter, Affinity's refusal to bargain violated the Act can only be described as a morass of error.<sup>1</sup>

#### **A.) The Third Affirmative Defense**

Through the Third Affirmative Defense, Affinity averred that, by virtue of the Agreement, an arbitrator held exclusive jurisdiction over the allegations set forth by the Complaint, including the allegation that Affinity's refusal to bargain violated the Act. In response to the Union's Motion *In Limine*, the Judge issued an Order in which he ruled that

---

<sup>1</sup> As a preliminary matter, Affinity asserts the Certification is invalid under Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), and therefore, the Hospital's refusal to bargain could not be unlawful.

<sup>2</sup> For that reason, the case at bar is comparable to Bluefield Hospital Company, LLC, et al., which the Judge endeavored to distinguish. See Decision, page 5. Just as the Board remanded those proceedings to the Region because those employers did not have an opportunity to present evidence in support of their defenses based upon the very same affiliation, Affinity did not have

Affinity would not be permitted an opportunity to offer evidence in support of the Defense. In the Decision, the Judge explains the Order was based upon the Board's general rule against the re-litigation of representation issues (see Decision, page 3), even though the Order itself did not make any reference to such a policy. See Joint Ex. 6. The Order also reflects the Judge improperly confounded, and therefore, confused the Third Affirmative Defense with the Second Affirmative Defense. Id. Even under the presumption the Judge properly understood the Defense, the two reasons that he offered to justify his ruling are nonsensical.

Firstly, the Judge relied upon the fact that Affinity did not inform the Region that the Agreement precluded the Hospital from submitting any evidence or a position statement in support of the Objections. At the time the Region requested Affinity's response, the events underlying the Union's unfair labor practice charges, such as Affinity's refusal to bargain with the NNOC, were yet to even take place. Logically, therefore, the Judge lacked any reason to conclude that, so far as the Third Affirmative Defense was concerned, Affinity "waived any reliance" on the Agreement. See Joint Ex. 6, page 2. Secondly, the Judge concluded that the Board has "never allowed such matters to be determined by an arbitrator." See Joint Ex. 6, page 2. Advanced Architectural Metals, 347 NLRB 1279 (2006), which was the only case cited by the Judge, addresses only the question of whether the Board should defer to an arbitrator on a representation question, and therefore, does not support the Judge's determination that Affinity lacked the right to offer evidence in support of the Third Affirmative Defense.

In summary, the Judge has offered inconsistent reasons as to why he deprived Affinity of an opportunity to offer evidence in support of the Third Affirmative Defense, and even when taken in isolation, the reasons referenced by the Order have no logical or legal relationship with the Third Affirmative Defense.

**B.) The Second Affirmative Defense**

Through the Second Affirmative Defense, Affinity averred that, by virtue of the Agreement, the Arbitrator also held exclusive jurisdiction over the Challenges and the Objections. However, through the Order discussed above, the Judge also precluded the Hospital from offering any evidence in support of the Second Affirmative Defense. Similarly, as part of the Decision, the Judge explained that the Order, as applied to the Second Affirmative Defense, arose from the Board's policy against re-litigation of representation disputes, even though, as noted above, the Order did not make any mention of the Board's above-referenced policy. See Decision, page 3. Instead, the Order shows that the Judge precluded Affinity from offering any evidence in support of the Second Affirmative Defense for the very same reasons he took that opportunity away from the Hospital in connection with the Third Affirmative Defense. As before, the Judge's reasons do not pass muster.

As noted above, one of the Judge's reasons for denying the Hospital an opportunity to offer evidence in support of the Third Affirmative Defense was that the Hospital did not disclose the Agreement to the Region. In point of fact, the Hospital had a compelling reason for not disclosing the Agreement to the Region, but could only present the reason by evidence of the Agreement's terms, which, of course, was the very evidentiary opportunity taken from the Hospital by virtue of the Judge's rulings. See Tr. 33. Had the Hospital been afforded an opportunity to address the terms of the Agreement, the Hospital would have shown that, as part of the Agreement, the parties agreed to keep the existence and terms of the Agreement confidential. Thus, had the Hospital informed the Region that the Hospital could not offer the requested evidence and / or position statement because of an agreement between the Hospital and the Union, the Hospital would have doubly violated the Agreement, one by disclosure of the

Agreement, and two, by disclosure of a term of the Agreement. Again, however, by virtue of the Order, the Hospital was never afforded the opportunity to establish the explanation that would have (or at least, should have) reversed the Judge's rulings.

Though the Judge relied upon Affinity's non-disclosure of the Agreement as a reason to preclude the Hospital from offering evidence in the support of the Second Affirmative Defense, the Order also shows that the Judge did not view the Agreement as of any consequence, insofar as he believed that the Agreement was unenforceable under the Board's law. Put another way, the Judge impermissibly sought to have the matter both ways, as he recognized the existence of the Agreement for the sake of faulting the Hospital for not disclosing the Agreement to the Region, but at the very same time, viewed the Agreement as a nullity for deciding whether he was obligated to defer the Objections to arbitration.

At any rate, the Judge's declaration that the Board has "never" allowed arbitration of representation disputes is demonstrably untrue. See Joint Ex. 6, page 2. Even the Judge's own (and only) cited case, Advanced Architectural Metals, exposes the inaccuracy of his categorical statement. In Advanced Architectural Metals, the Board expressly recognized a class of cases in which the agency will defer a representation dispute to arbitration, specifically, a dispute that would require the interpretation of a contract. 347 NLRB No. 111, Slip Op. at \* 2. In the case at bar, but for the Judge's rulings precluding the Hospital from offering evidence as to the Agreement's terms, Affinity would have been able to establish that the standard by which the Arbitrator would have resolved the Objections was one arising from the Agreement, and not solely or simply the application of the Board's law. For that reason, Advanced Architectural Metals would actually support the agency's deferral to the Agreement, insofar as the Arbitrator's

role would not have been to turn upon statutory policy, but rather, interpret the parties' agreement.

Lastly, drawing from an Order issued by the Board in another case, Bluefield Hospital Company, LLC, et al., 359 NLRB No. 137 (June 20, 2013), the Judge ruled that, by entering into the Consent Election Agreement, Affinity had waived any right to seek review of the Regional Director's dismissal of the Objections or the issuance of the Certification. See Decision, page 4, fn. 3. The Judge's declaration as to the Regional Director's autonomy is undercut by the fact the Judge undertook a review of his own in terms of the Regional Director's actions, and similarly, stated a conclusion of his own in terms of the propriety of the Certification. See Decision, pages 2-3. In addition, under the Board's law, the fact that parties have entered into a Consent Election Agreement does not mean that the Regional Director operates in an impenetrable bubble. See e.g., NLRB v. Parkhurst Mfg. Co., 317 F.2d 513, 516 (1963).

### **C.) The Fourth Affirmative Defense**

#### **(1) Error, From the Very Start**

As recognized by both the General Counsel and the Union, Affinity had a clear entitlement to litigate the Affiliation Defense. In response to the Defense, the General Counsel withdrew a Motion for Summary Judgment pending before the Board, which clearly demonstrated the General Counsel's acknowledgement that Affinity had a right to a hearing on the Defense. Similarly, the Motion *In Limine* filed by the Union did not even mention the Affiliation Defense, which demonstrated the same acknowledgement by the Union. In spite of the parties' common recognition as to Affinity's right to litigate the Affiliation Defense, the Judge intervened, *sua sponte*, in order to jettison the Defense from the case. That, however, was only the Judge's first step on a long plank of reversible error.

As the next offense, the Judge improperly revoked Subpoenas that Affinity had served in connection with the Affiliation Defense. See Joint Exs. 1-2, 7-10. Specifically, contrary to Section 102.31(b) of the Board’s Rules, the Regional Director never issued an Order in which he referred the Subpoenas to the Judge. Nonetheless, here as well, the Judge simply took the offensive and ruled on the Petitions to Revoke. Due to the absence of the obligatory Order from the Regional Director, the Order issued by the Judge was *ultra vires*.

Even though the Judge ruled that Affinity was not entitled to obtain evidence related to the Affiliation Defense from the NNOC or the NUHW, the Judge also ruled that, to the extent the Hospital happened to already possess evidence relevant to the Affiliation Defense, the Judge would permit the Hospital to offer such evidence in the record. See Joint Exs. 2 and 10. Put another way, in the context of requiring the NNOC and the NUHW to come forward with evidence that related to the affiliation, the Judge deemed the Fourth Affirmative Defense to be irrelevant, but in the context of affording the Hospital an opportunity to come forward with any evidence the Hospital happened to possess, the Judge deemed the Fourth Affirmative Defense to be relevant. A defense is either relevant or not relevant and the Board ought to reject the Judge’s Janus-faced view of the Affiliation Defense.

**(2) The Notion of a “Red Herring”**

The Judge’s reference to the Affiliation Defense as a “red herring” (see Decision, page 5) appears to be based upon his finding that the affiliation between the NNOC and the NUHW took place after Affinity’s refusal to bargain with the NNOC. Yet, the record before the Judge did not include any evidence from which the Judge could reliably infer that the affiliation occurred before Affinity’s refusal to bargain. Indeed, the Judge merely noted that the affiliation “apparently” took place before Affinity’s refusal to bargain. See Decision, page 5, fn. 6. In

addition, the Judge deprived the Hospital of any meaningful opportunity to prove the affiliation occurred before Affinity's refusal to bargain.

Even under the presumption that the Judge had a proper basis in the record to infer the affiliation took place before Affinity's refusal to bargain, and properly deprived the Hospital of an opportunity to pursue facts that may have pointed to a different conclusion, the Judge's analysis is off-target. The General Counsel's allegation that Affinity refused to bargain is not one that looks at any moment frozen in time. Instead, as the Judge's own conclusions and remedy confirm, the General Counsel's allegation relates to Affinity's **continuous** refusal to recognize and bargain with the NNOC. See Decision, Pages 31, 33. Thus, irrespective of whether the affiliation occurred before or after the Hospital's refusal to bargain with the Union, the question of whether the affiliation severed the continuity of the NNOC's representation remains entirely relevant, both as to the merits (i.e., the ongoing nature of the alleged unfair labor practice) as well as the remedy. In New York Center for Rehabilitation Care, the very case cited by the Judge (see Decision, page 5), Chairman Robert Battista explained that, at least in the context of remedy, the timing of the affiliation is irrelevant. See 346 NLRB 447, fn. 6.

### **(3) Why Affinity Did Not, and Could Not, Offer Evidence**

More than once, the Judge points out that, notwithstanding the fact he precluded Affinity from obtaining evidence from the NNOC and the NUHW, he extended Affinity an opportunity to offer evidence in the Hospital's possession. See Decision, pages 4-6. As Affinity's counsel explained to the Judge during the hearing (see Tr. pages 1195-1199), the Hospital was not able to offer any evidence in the possession of the Hospital's counsel, because all of the evidence was the subject of a Protective Order issued by Administrative Law Judge Eleanor Laws in connection with another case that involved a different employer, Fallbrook Hospital, and the

NNOC. See Case Nos. 21-CA-090211, et al. Simply put, therefore, Affinity was not in any position to offer the evidence into the record.<sup>2</sup>

Affinity should also note that, as elsewhere (see page 11, above), the Judge faulted Affinity for not offering evidence in support of the Hospital's position only to later indicate that the evidence would have been completely ineffectual, at least under the Judge's analysis of the Affiliation Defense. In a vague footnote, the Judge appears to suggest that, given the outcome of the Fallbrook case, the evidence that Affinity was precluded from offering under Judge Laws' Protective Order would not have carried Affinity's burden under Kravis. See Decision, page 5, fn. 5. The Judge, however, did not account for the fact that, by virtue of Judge Laws' rulings, Fallbrook was not able to present the entirety of the evidence that was relevant to the NNOC's affiliation with the NUHW.

**(4) The Record Before the Judge *Via* Judge Laws' Decision**

Subsequent to the close of the record before Judge Amchan, on May 16, 2013, Judge Laws issued her Decision in the Fallbrook matter. Fallbrook Hospital Corporation d/b/a Fallbrook Hospital, 2013 WL 2146644. In her published Decision, Judge Laws effectively set her Protective Order aside, as she expressly referred to the evidence that was the subject of the Protective Order. Though Affinity made clear to Judge Amchan that, by virtue of his rulings on the Petitions to Revoke, the Hospital was asked to litigate the Fourth Affirmative Defense with one hand tied behind its back, Affinity also submitted to the Judge, that based largely upon the

---

<sup>2</sup> For that reason, the case at bar is comparable to Bluefield Hospital Company, LLC, et al., which the Judge endeavored to distinguish. See Decision, page 5. Just as the Board remanded those proceedings to the Region because those employers did not have an opportunity to present evidence in support of their defenses based upon the very same affiliation, Affinity did not have any full or fair opportunity to present evidence in support of its affiliation defense, both because of the complication of Judge Laws' Protective Order, but even more so, because of the Judge's bizarre determination to place the relevance of the Affiliation Defense in alternative universes.

factual findings set forth by Judge Law's Decision, he should have concluded that Affinity was relieved of any duty to recognize and bargain with the NNOC based upon their affiliation with the NUHW.

The fact an employer may be relieved of a duty to bargain with a labor organization due to an affiliation between that labor organization and another labor organization is beyond question. See Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143, 147 (2007). In deciding whether an affiliation has brought about a sufficiently dramatic change to the identity of the labor organization at issue, the Board will consider the totality of circumstances. See Mike Basil Chevrolet, 331 NLRB 1044 (2000).<sup>3</sup>

Here, the name of the Union, alone, tells the story of the NNOC's essential mission in the world of labor relations – the National **Nurses** Organizing Campaign. As found by Judge Laws, the NNOC is an affiliate of National Nurses United, which exists for the purpose of building a “national **nurses** movement.” 2013 WL 2146644, at \*6 (emphasis added). Undeniably, therefore, as a matter of identity, the NNOC is a labor organization that previously had existed solely for purposes as serving as a representative for Registered Nurses. Equally true is the fact that the NUHW does not exist for the purpose of serving as the representative of Registered Nurses, but rather, practically every other job classification that may exist within the walls of an acute care facility, ranging from cafeteria staff to back office employees to housekeepers.<sup>4</sup>

---

<sup>3</sup> The “totality of the circumstances” test applied by the Board explains why Affinity drafted the Subpoenas with such a broad scope. Thus, the Judge's speculation that the broad scope of the Subpoena unveiled some improper motive on Affinity's part is baseless. See Decision, page 4, fn. 4.

<sup>4</sup> Because Affinity's argument as to the Affiliation Defense is based upon the **identity** of the labor organizations, and not their relative **size**, the Judge's citation to CPS Chemical, 324 NLRB 1018 (1997), is inapposite. See Decision, page 6.

By virtue of the affiliation, the identity of the NNOC has changed, insofar as the NNOC has invested – literally, as the Hospital shall demonstrate momentarily – in the representation of virtually all workers, professional and non-professional alike, employed by the acute care industry. Notably, the significance of the mixture of professional employees, such as Registered Nurses, and non-professional employees, such as those represented by the NUHW, is a matter of statutory recognition. Under Section 9(b)(1) of the Act, the Board may not approve a bargaining unit that includes both professional employees and non-professional employees unless a majority of the professional employees votes for inclusion in the unit. To safeguard professional employees’ rights under Section 9(b)(1), the Board has adopted special procedures, which are commonly known as a Sonotone election, which refers to the agency’s lead case on the subject. Sonotone Corp., 90 NLRB 1236 (1950). In the event the professionals have been deprived of the opportunity to remain as an independent bargaining unit, the Board will set aside the election. See e.g., American Medical Response, Inc., 344 NLRB 1406 (2005).

In the particular case of Registered Nurses, the Board has repeatedly recognized the fact that, historically, they have organized amongst themselves as one, standalone unit. See e.g., Mercy Hospitals of Sacramento, Inc., 217 NLRB 765 (1975) (the Board notes Registered Nurses’ “impressive history of exclusive representation,” and stated “perhaps of greatest significance in establishing the separate interests of registered nurses is their singular history of separate representation”).

Given the policy evinced by the Act, as well as the Board’s particular recognition of Registered Nurses’ preference to be represented by labor organizations of their own, Affinity submitted to the Judge that, solely by virtue of the fact the NNOC has affiliated with a labor organization that represents non-professionals, he should have ruled that the affiliation brought

about a sufficiently dramatic change in the NNOC's identity.<sup>5</sup> However, even under the presumption, solely for the sake of argument, that a greater quantum of evidence would be necessary for the Hospital to reach the required threshold, surely the threshold is reached upon Judge Laws' recognition that the NNOC has essentially served as the NUHW's private banker. As part of the affiliation, the NNOC has made a number of substantial payments to the NUHW. Specifically, for the period January 2013 to April 2013, the NNOC made monthly payments to the NUHW in an amount no less than one million dollars and as much as one million, two hundred thousand dollars. 2013 WL 2146644, at \*6. In analyzing the question of whether an affiliation has effectuated a sufficiently dramatic change to the labor organization's identity, the Board expressly considers any change in assets that has taken place as a result of the affiliation. See Independent Residences, Inc., 357 NLRB No. 42, Slip Op. at 25 (May 18, 2012). In the case before Judge Laws, the record established that, on account of the NNOC's payments to the NUWH, the NNOC is now a labor organization with substantially fewer assets. For the reasons set forth above, the NNOC's payments to the NUHW carry relevance not merely from the standpoint of the hefty reduction in the Union's assets, but also from the standpoint that the labor organization now subsidized by the NNOC is not one that represents solely professional employees, let alone only fellow Registered Nurses.

## **2.) Affinity's Termination of Ms. Wayt Was Not Unlawful**

For the reasons set forth below, the Judge erred by concluding that the

---

<sup>5</sup> Given the identity of the labor organizations involved in the affiliation (one, the representative of RNs only, and the other, a representative of practically all other healthcare workers), Affinity had immediate reason to believe the affiliation had brought about a sufficiently dramatic change to the NNOC's identity. Accordingly, the Judge's speculation that Affinity did not have any factual basis for refusing to recognize and bargain with the NNOC based upon the affiliation is inaccurate. See Decision, page 4, fn. 4.

General Counsel established a *prima facie* case. Alternatively, even under the presumption, solely for the sake of argument, the General Counsel did make out such a case, the Hospital established that, irrespective of her support of the Union, Ms. Wayt would have been terminated based upon her callous neglect of the patient, specifically her failure to perform an assessment on the patient as well as hourly “rounds” on the patient<sup>6</sup>, in conjunction with her related falsification of the patient’s medical records.

**A.) The General Counsel’s *Prima Facie* Case Was a “House of Cards”**

In the Decision, the Judge determined that the General Counsel established that Ms. Wayt’s support of the NNOC was a motivating factor in the context of Affinity’s decision to terminate her employment. As shown below, every element of the Judge’s analysis is flawed. Consequently, the Board should reverse the Judge’s determination that the General Counsel established a *prima facie* case and dismiss the related allegations of the Complaint.

**(1) Ms. Wayt’s Gossamer Union Support**

On the subject of Ms. Wayt’s support of the Union, the Judge put all of his eggs in one basket. Based upon a flyer – one, solitary flyer – the Judge deduced that Ms. Wayt was not simply amongst the most prominent of the Union’s supporters, but also that support of the Union generally was most pronounced in her Department, Orthopedics. See Decision, page 25. As recognized by the Judge, Ms. Wayt was one of thirty-four nurses pictured by the flyer.<sup>7</sup> Similarly, Ms. Wayt was not alone in terms of the fact that, as to the flyer that was actually distributed to the RNs, she offered a quote. Unlike Ms. Wayt, a number of the other RNs were

---

<sup>6</sup> Patient assessments and hourly rounding were described by Affinity’s Chief Nursing Officer, Mr. William Osterman. See Tr. 904-915; see also Respondent’s Ex. 22 and 23.

<sup>7</sup> To the extent the Judge was swayed by the fact that Ms. Wayt appeared on the cover of the flyer, he failed to note that, as part of the poster displayed in the cafeteria, Ms. Wayt’s picture was placed to the side, as a picture of, and detailed letter from, the Union’s leading supporter, Ms. Pam Gardner, was featured. See General Counsel’s Ex. 14.

photographed against the backdrop of a NNOC poster, which would suggest they had met with the Union outside of the workplace, and therefore, pursued their Section 7 rights to a greater degree as compared to Ms. Wayt. Even the letter Ms. Mahon submitted on Ms. Wayt's behalf does not present her as the leader of the pack, but rather only as "a supporter of the NNOC." See Respondent's Ex. 8, page 1 (emphasis added). Furthermore, Ms. Mahon's letter makes no mention of the notion that the Orthopedics Department was a "stronghold" of Union support.

Indeed, looking at the flyer on which the Judge's findings teeter, the Department for which the highest number of RNs appear is not Orthopedics but "Med-Surg / Tele."<sup>8</sup> Similarly, the other two RNs quoted by the flyer work in a Department other than Orthopedics. Regardless, the fact that several of Affinity's Orthopedic RNs appeared in the flyer did not provide the Judge with a reliable basis on which to conclude that the Department, as a whole, supported the Union. The fact a RN appeared in the flyer is not necessarily evidence that the RN, in fact, supported the Union. The Judge ignored the fact that many of these RNs may have been pressured to appear in the flyer. Likewise, the record includes no indication that the Judge considered whether, between the time their pictures were taken (and the record, incidentally, includes no evidence as to how long ago that occurred) and the time the Election took place, the RNs may have changed their views on the Union.

Lastly, the Judge lost sight of the fact that the flyer was only one part of a much larger campaign that began in early July of 2012 (i.e., more than a month before the flyer was distributed to the RNs) and consisted of a team of no fewer than eight (8) NNOC organizers who had access to Affinity's break rooms, conference rooms and cafeteria. See Tr. 422-23. In

---

<sup>8</sup> Many of these RNs are pictured in front of the above-referenced NNOC poster, which does not appear in the picture of any of the Orthopedic RNs.

addition, though subject to an agreed-upon approval process, the record also shows that, as part of the campaign, the Union regularly distributed other flyers to the RNs. See Tr. 617, 1272.

Judged, as the question should be, within the context of the overall campaign, Ms. Wayt's modest support of the Union is clear. To take only a few examples, the record includes no evidence that Ms. Wayt ventured to the break room of any other Department in order to persuade her co-workers to support the NNOC. The record includes no evidence that Ms. Wayt looked to engage her co-workers in the employee parking lot, the lobby or the cafeteria. The record includes no evidence that Ms. Wayt distributed the flyer on which she was pictured, let alone any of the other flyers distributed as part of the Union's campaign. The record includes no evidence that she wore any buttons, clothes or lanyards that supported the NNOC. Simply put, Ms. Wayt's support of the NNOC was not lengthy, substantial or prominent.<sup>9</sup>

In unfair labor practice proceedings before the Board, the degree of an employee's protected activity is a subject of interest, and sometimes, even the fact that prevents the General Counsel from making out a *prima facie* case. See Lockheed Martin Information Systems & Global Solutions, a Segment of Lockheed Martin Corporation, 2011 WL 683827, at \*5; Efficient Medical Transport, Inc., 324 NLRB 553, 554 (1997); Merrill Transportation Co., 224 NLRB 150, 153 (1976).

**(2) The Half-Measure of Evidence on Affinity's Knowledge of Ms. Wayt's Union Support**

In the Decision, the Judge focused only upon evidence of the managers who were aware that Ms. Wayt's picture appeared on one of the Union's flyers. The Judge did not, notably, even

---

<sup>9</sup> Prior to the hearing before the Judge, Affinity served Ms. Wayt with a *Subpoena Duces Tecum*, which requested, amongst other documentation, any documents that evidenced her support of the NNOC. In response, Ms. Wayt produced only the flyer received into evidence as General Counsel's Exhibit 11. See Tr. 385.

address, let alone attempt to explain away the key importance of the fact that the record includes no evidence whatsoever that Ms. Angie Boyle, as Affinity's Vice President of Human Resources, was aware of Ms. Wayt's appearance in the flyer or otherwise had any knowledge of Ms. Wayt's support of the Union. As explained by her testimony, before any termination at Affinity is carried out, Ms. Boyle must review and approve the termination. See Tr. 1052-53. For that reason, even under presumption, solely for the sake of argument, that Affinity's nursing management was seeking to impose disciplinary actions upon Ms. Wayt due to her appearance in one of the NNOC's flyers, the Judge was obligated to view Ms. Boyle as the filter through which any unlawful motivation was purged.

The Judge did address the question of whether Ms. Paula Zinsmeister, as Ms. Wayt's direct supervisor, had any knowledge of Ms. Wayt's support of the NNOC. Even though the record includes no direct evidence that Ms. Zinsmeister was aware of Ms. Wayt's support of the NNOC, the Judge saw "plenty of reasons to infer such knowledge." See Decision, page 7. In fact, the Judge's reasons of plenty consist of only two, beginning with the fact that Ms. Zinsmeister attended a meeting at which the flyer was circulated.<sup>10</sup> The record includes no evidence, however, that Ms. Zinsmeister specifically held a copy of the flyer in her own hands and / or looked at the flyer with her own eyes.<sup>11</sup> Moreover, the record includes no evidence that, as part of any discussion about the flyer, Ms. Wayt was mentioned by name. As part of the proceedings before the Judge, Ms. Zinsmeister testified – twice – and neither the General Counsel nor the Charging Party questioned her as to her knowledge of Ms. Wayt's support of the

---

<sup>10</sup> While the Decision refers to management "meetings," in the plural (see Decision, page 7), the record includes evidence of only one meeting at which the flyer was a subject of some conversation.

<sup>11</sup> The version of the flyer at the management meeting did not include any quote from Ms. Wayt. See Respondent's Ex. 30.

NNOC. Accordingly, to the extent the Judge was looking to make any inferences on the subject of Ms. Zinsmeister's knowledge, the Judge should have drawn inferences against the General Counsel. See Fresh & Easy Neighborhood Market, Inc., 356 NLRB No. 85 (2011); S&F Enterprises, Inc., 312 NLRB 770, 814 (1993)

Because the sheer error is difficult to believe, the Judge's other inference as to Ms. Zinsmeister's knowledge of Ms. Wayt's support of the NNOC ought to be quoted:

"I infer that when Zinsmeister returned from vacation, she was cognizant of the fact it was the employees in her orthopedic unit that gave the Union its margin of victory in the representation election, and that Wayt was the most prominently depicted of her employees on the union flyer." See Decision, page 7.

The Judge's inference is based upon assumption stacked on top of assumption (not a single one of which, incidentally, is supported by the record), so that like a tower of cups reaching to the sky too high, the inference is destined to collapse and break apart. Specifically, the Judge presumed that (1) Ms. Zinsmeister was aware of the margin of the Union's victory, (2) Ms. Zinsmeister presumed a high turnout of her RNs at the polls, (3) Ms. Zinsmeister presumed that they all voted for the Union, and (4) Ms. Zinsmeister saw only her employees, as opposed to those of another Department (such, as Med-Surg / Tele), as the reason for the Union's election victory. Accordingly, the Board should reject the Judge's wayward inference.

### **(3) The Judge's Imaginary Findings of "Direct Evidence" of Animus**

According to the Judge, the record now before the Board includes direct evidence of the Hospital's animus toward union activity, specifically the fact (1) the Hospital filed Objections "for which there appears to have been no basis," (2) the Hospital has refused to bargain with the Union, (3) the Hospital's refusal to accept the ADOs, and (4) Ms. Kress' reaction to ADOs filed by some of the RNs. See Decision, page 25.

As explained above (see pages 10-11, above), due to the Judge's ruling on the Union's Motion *In Limine*, Affinity never had an opportunity to prove that, else the Hospital risk more than one breach of the Agreement, the Hospital was not able to provide the Region with evidence in support of the Objections.

The fact the Judge saw Affinity's refusal to bargain with the NNOC as direct evidence of the Hospital's animus is shocking. Under bedrock labor law, Affinity's refusal to bargain with the Union was the only way in which the Hospital could obtain review of the representation proceedings. By taking Affinity's exercise of a right open to the Hospital under the Act as evidence related to Affinity's possible violation of the Act, the Judge ignored the agency's precedent and turned black-letter labor law inside out. See Kennametal, Inc., 358 NLRB No. 108 (August 28, 2012); In Re Diamond Detective Agency, Inc., 339 NLRB 443, 444-45 (2003).

Though the Judge ruled that Affinity's refusal to accept the ADOs did not, itself, equate to a violation of the Act (see Decision, page 30), the Judge managed to use the refusal as a building block in terms of his finding that Ms. Wayt's discharge was unlawful. In the haze of the logic, the Judge failed to see that Affinity's refusal to accept the ADOs was supported by an entirely legitimate reason addressed by the record, specifically Affinity's commitment to, and efforts to protect the integrity of, the Hospital's own risk management system. See pages 50-51, below.

In addition, by relying upon Ms. Kress' reaction to the ADOs, the Judge has essentially attempted to put the case in a time machine. At the time Ms. Wayt's termination was carried out, Ms. Kress' reaction to the ADOs had not taken place, and in fact, would not take place for more than another three months. The fact the Judge felt the need to cast aside space and time for the sake of locating evidence of the Hospital's animus only proves the weakness of the Judge's

analysis when properly confined to the facts that actually existed at the time Ms. Wayt's discharge took place.

Lastly, while the Judge both referred back to history and peered into the future for evidence of Affinity's hostility toward union activity, the Decision does not suggest that the Judge gave any consideration to the evidence squarely before him in terms of the fact Affinity took specific steps to comply with the law and respect Ms. Wayt's invocation of her rights under the Act. At least by the Judge's view of the facts, the Hospital conducted an investigatory meeting with Ms. Wayt in order to avoid risking a violation of Section 8(a)(5). See Decision, page 17, fn. 27. Put another way, by the Judge's own findings, as part of the Hospital's investigation of Ms. Wayt, Affinity's mindset was one of seeking to comply with the Act. Indeed, Affinity honored Ms. Wayt's invocation of a Weingarten representative.

#### **(4) Supposed Circumstantial Evidence of Discriminatory Motive**

Aside from the Judge's findings of direct evidence of animus, which are, as shown above, soaked in error, the Judge also inferred Affinity's discriminatory motive from, supposedly, "a great deal of circumstantial error." See Decision, page 25. Below, Affinity shall address, and debunk, these findings, in turn.

##### ***(A) The Timing of Ms. Wayt's Discharge Subverts, Not Supports the General Counsel's Theory of the Case***

The Judge's analysis of the circumstantial evidence begins with what is a patent overstatement of the law on the effect that the timing of an adverse employment action may have in the context of evaluating the question of whether an employer carried a discriminatory motive. For the Judge, "where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive **is** raised." See Decision, page 25 (emphasis added). Not so. In fact, under the Board's precedent, the timing of the adverse action **may** be taken as

**some evidence** of the employer's discriminatory motive. See Ronin Shipbuilding, Inc., 330 NLRB 464 (2000). The case he cited by the Judge, La Gloria Oil, 337 NLRB 1120 (2002), does more to undercut, than support, the Judge's avowed proposition of law. In La Gloria Oil, the Board was swayed not by the timing of the employer's decision to terminate the employee, so much as the "abrupt" termination process followed by the Hospital. Indeed, as part of his dissent, Member Cohen noted that, many times, the timing of the termination can be of "little evidentiary value." 337 NLRB at 1126.

Thus, the Board should not accept the Judge's simplistic, erroneous logic to the effect, Ms. Wayt was terminated shortly after her picture appeared in the flyer, therefore, the Hospital terminated her employment for that reason. Indeed, upon close inspection, the timing of Ms. Wayt's discharge actually **severs** any connection between her appearance in the Union's flyer and her termination. As established by the uncontroverted testimony of Affinity's managers, the intent to proceed with Ms. Wayt's termination initially took effect on September 11, 2012. See Tr. 780-81; 868-69; 930-31; 1060-61. As of that moment in time, not only had the Certification not been issued by the Board, the outcome of the Election was very much an uncertainty. The Tally of Ballots showed 100 "yes" votes for the Union, 96 "no" votes against the Union, but most notably, 7 challenges, a number obviously sufficient to affect the outcome of the Election. The outcome of the Election remained unclear as of September 26, 2013, i.e., the date on which Ms. Wayt was informed of her termination. Not only was the issuance of the Certification still more than a week away, but, by virtue of the Regional Director's Report on Challenged Ballots and Objections, the Board was to open and count four of the challenged ballots, a number that was also sufficient to affect the outcome of the Election. See Joint Ex. 3, page 11. The ballots were opened and counted and the revised Tally of Ballots was issued on September 27, 2012,

i.e., the day after Ms. Wayt was informed of her termination. Even then, so far as the Hospital was concerned, the outcome of the Election remained the subject of doubt, given the fact that, while predictably dismissed by the Regional Director given the Hospital's inability to produce supporting evidence, the Objections filed by the Hospital in response to the Election had not been resolved by the Arbitrator.

**(B) Ms. Kress' Involvement – The True “Red Herring” of the Case**

The Judge also inferred a discriminatory motive from the fact that Ms. Kress began the investigation into Ms. Wayt's misconduct on the day of the Election. See Decision, page 25. The fact that Ms. Kress began the investigation on the day of the Election arises from the fact that she was informed that same day that one of the patients in the Orthopedic Department may have been neglected, and based upon her own, personal interaction with the patient the day before (see Decision, page 8), Ms. Kress knew that Ms. Wayt was the patient's assigned nurse. It was not for the Judge to exchange his gavel for a stethoscope and declare that, given the absence of any actual or potential harm to the patient, Affinity could have delayed its investigation. See Decision, page 25. As Affinity's Chief Nursing Officer, Mr. Osterman explained how Ms. Wayt's misconduct put the patient at risk. See Tr. 927-28. By assuming for himself the determination of whether patient care required a prompt or delayed investigation, the Judge has once again trespassed upon the prerogatives of management. See pages 39-40, below.

In addition, the Judge had no reasonable basis to infer Affinity's discriminatory motive based upon the fact Ms. Kress was the manager who commenced the investigation. In the context of drawing the inference, the Judge ignored the fact that, on the day in question, and through the days that followed, Ms. Kress was the *de facto* Manager of the Orthopedic Department, as Ms. Zinsmeister was on vacation. Ms. Kress did not, therefore, commence the

investigation “on her own volition.” See Decision, page 25. At the time Ms. Wayt’s misconduct took place, Ms. Kress was responsible for the Orthopedic Department. Moreover, Ms. Kress did not carry out the investigation covertly, but promptly brought her investigation to the attention of Mr. Osterman, who directed her to complete the preliminary investigation.<sup>12</sup>

The preliminary nature of Ms. Kress’ investigation also provides some of the explanation as to why she did not personally interview Ms. Wayt, which the Judge also inferred to be evidence of the Hospital’s discriminatory motive. See Decision, page 25. As part of making the inference, the Judge failed to realize that, for purposes of the preliminary investigation, Ms. Wayt’s interview by Ms. Kress was unnecessary given Ms. Kress’ own personal knowledge of some of the key facts, i.e., whereas Ms. Wayt’s notes suggested she performed the assessment at 9:00 am, Ms. Kress knew the patient was still in the Emergency Department at that time. Also, given the seriousness of the matter, Ms. Kress reasonably determined that Ms. Wayt’s interview should be conducted by Ms. Zinsmeister, who served as Ms. Wayt’s everyday supervisor. In any event, for purposes of assessing whether Affinity, as the employer, should be subject to an inference of discriminatory motive, the only fact of consequence should be that Ms. Wayt was ultimately afforded an opportunity to provide the Hospital with an explanation.

In addition, Ms. Kress’ reaction to the ADOs does not provide the elasticity to justify the Judge’s general inference that Ms. Kress “harbored great animus toward the Union and its supporters.” See Decision, page 25. In point of fact, so far as Ms. Kress was concerned, the record before the Judge established only that, roughly four months after her preliminary investigation of Ms. Wayt, Ms. Kress reacted adversely, on one occasion, to an ADO she

---

<sup>12</sup> Also of note, when meeting with Mr. Osterman, and later with Ms. Zinsmeister and Mr. Jason McDonald, another manager of the Orthopedic Department, Ms. Kress brought the pertinent documentation with her, so that the other managers could draw their own conclusions as to whether or not Ms. Wayt had engaged in misconduct. See Tr. 677, 920-21.

discovered in her unit, the ICU. The record is barren of any evidence that, in any context outside of ADOs, Ms. Kress has reacted adversely to employees seeking to exercise rights they claim under the Act. Even under the presumption that Ms. Kress' aversion to the ADOs existed at the time of her preliminary investigation of Ms. Wayt, the record includes no evidence that Ms. Wayt ever completed an ADO, much less any evidence that Ms. Kress believed that Ms. Wayt had ever completed an ADO. More than anything else, though, the Board ought to keep in mind that Ms. Zinsmeister, not Ms. Kress, was Ms. Wayt's everyday supervisor. Why Ms. Kress would seek retribution against an employee with whom she had virtually no workplace connection is a fact for which the Judge ventured no explanation.

Even under the presumption that Ms. Kress has hostile toward the Union, the record makes clear that, upon the conclusion of Ms. Kress' preliminary investigation, the Hospital's other managers carried out their own investigation, which included the interviews with the two "sitters" who observed Ms. Wayt's neglect of the patient, namely Ms. Rhonda Smith and Ms. Jonalee Lesjak, together with the investigatory interview of Ms. Wayt. The Hospitals' other managers also conducted their own review of the patient's chart. Indeed, Ms. Boyle arranged for Affinity's Compliance Officer, Ms. Patricia Kline, to conduct an entirely independent review of the patient's chart. And of course, Ms. Kress played no role whatsoever in terms of the decision to carry out Ms. Wayt's termination.

***(C) The Judge's "Apples and Oranges" Disparate Treatment Analysis***

In terms of some of the "other strong indicia of discriminatory motive," the Judge concluded that Ms. Wayt was disparately treated as compared to other similarly situated employees. See Decision, page 25. For the most part, the Judge refers to RNs who were disciplined, but not terminated for substandard patient care. Most of these disciplinary actions,

however, arose from errors with patient care that was **provided**, and therefore, are instantly distinguishable from the case of Ms. Wayt, who **neglected** to provide patient care. See General Counsel's Ex. 9, pages 12-15, 19-28. As to the minority of these disciplinary actions, which do arise from an omission of patient care (see General Counsel's Ex. 9, pages 10, 16, 17, 29-31), none of the RNs engaged in any deliberate omission of key patient care, only to then take the further, nefarious step of marking up the patient's chart to document care that they never, in fact, provided. Thus, while large in number, these other disciplinary actions are impotent in effect. See e.g., New Otani Hotel & Garden, 325 NLRB No. 168, slip op. at 19 (1998).

The record includes evidence of only one other RN, namely, Ms. Elizabeth Blair, who falsely documented care that she did not, in fact, provide.<sup>13</sup> As a threshold matter, the Judge should not have even considered the disciplinary actions taken against Ms. Blair – specifically, a written warning issued on November 27, 2012 and a final written warning issued on March 5, 2013 – as both actions occurred **after** Ms. Wayt's termination. For that reason alone, the Judge should have excluded these disciplinary actions from the record, or at the very least, deemed them of exceedingly low probative value. See Tr. 1236; Durham School Services, L.P., 2013 WL 506705, at \*5.

Even under the presumption, solely for the sake of argument, that the Judge properly considered the disciplinary actions imposed upon Ms. Blair, the Judge's factual construction of Ms. Blair's misconduct is not supported by the record. Looking at the final written warning issued on March 5, 2013 (see General Counsel's Ex. 9, page 4), the Judge found that nobody had

---

<sup>13</sup> Ms. Blair was also the recipient of two (2) verbal warnings, neither one of which suggested any omission of patient care by Ms. Blair, and therefore, do not bear any resemblance to Wayt's offenses. Additionally, the record includes no evidence that Mr. Osterman was aware of either verbal warning and the documents themselves do not suggest that Mr. Osterman was aware of the disciplinary actions taken by Ms. Blair's supervisor at the time. See Tr. 1210-1212.

completed hourly rounding on Ms. Blair's patient. See Decision, page 22. The disciplinary action form does not state, and the record includes no other evidence from which the Judge could have reasonably concluded, that no other employee (such as the nursing student referenced by the disciplinary action form) performed the hourly rounds on Ms. Blair's patient. See General Counsel's Ex. 9, page 4.

The Judge's findings as to the written warning of November 27, 2012 (see General Counsel's Ex. 9, page 3) suffer from an even greater lack of foundation. The disciplinary action form notes that Ms. Blair performed an assessment on the patient at 8:00 am, which was before the 10:00 am arrival of the patient's wife, who was the party that reported Ms. Blair's lack of care. Thus, the patient's wife was not in a position to contest Ms. Blair's representation that she performed the assessment at 8:00 am. Nonetheless, the Judge ruled that Affinity "had no way of knowing whether [Ms. Blair] performed the physical assessment or not."<sup>14</sup> And yet, at the very same time, the Judge divined for himself the ability to find that Ms. Blair did not, in fact, perform the assessment. See Decision, page 26. Moreover, based solely upon the disciplinary action form, the Judge determined that Ms. Blair falsely documented that she administered medication to the patient at 12:00 pm. Id. The disciplinary form, however, does not give rise to any such reasonable inference. Notably, whereas the form includes extension discussion of the hourly rounding that the patient did not receive, the form includes no discussion of any other care that the patient did not receive, such as any prescribed medication. As the Judge found in a context favorable to Ms. Wayt, a Registered Nurse may document care that is provided by one of her co-workers. See Decision, pages 20-21. Accordingly, the fact that Ms. Blair recorded the

---

<sup>14</sup> The Judge's remark that Affinity likewise had no way of knowing whether Ms. Wayt performed her assessment is ridiculous, as Ms. Smith and Ms. Lesjak were with the patient continuously between the patient's arrival at 9:15 am and Ms. Smith's departure at roughly 4:15 pm.

patient received medication was not necessarily a representation that she personally administered the medication.

The Judge's unsupported factual findings aside, Mr. Osterman did recognize that, as part of the events that gave rise to both disciplinary actions, Ms. Blair did falsely record that she performed hourly rounds on the patient. And yes, Ms. Wayt was guilty of the same offense.<sup>15</sup> The similarity between the employees' offenses, however, goes no further, as Ms. Wayt also falsely documented the entirety of the patient's 24-Hour Assessment form. Thus, Ms. Wayt represented that she conducted a variety of assessments, specifically: (1) psychosocial, (2) neuromuscular, (3) pulmonary, (4) cardiovascular, (5) genitourinary, (6) gastrointestinal, and (7) integumentary. See Respondent's Ex. 5. In point of fact, each entry was a fiction, as Ms. Wayt did not make any, let all of these baseline assessments. Offenses are, of course, a matter of degree. Because Ms. Wayt's offenses were of a greater degree as compared to Ms. Blair's offenses, so too was the disciplinary action carried out by the Hospital.

Lastly, the Judge ignored another reason, one rooted in the Board's law, as to why he should not have viewed the disciplinary actions taken against Ms. Blair as evidence of disparate treatment. As the Judge acknowledged (see Decision, page 22), Ms. Blair appeared in the very same NNOC flyer that was the subject of some discussion at the one managers' meeting. See Respondent's Ex. 30; see also Tr. 1276. Accordingly, the Judge should have declined any consideration of the November 12, 2012 and March 5, 2013 disciplinary actions imposed upon Ms. Blair, insofar as a case of disparate treatment must be based upon a comparison between the employee at issue and "employees without known union sympathies." Community Emergency

---

<sup>15</sup> Unlike Ms. Wayt, who continued to stack lie on top of lie, the disciplinary forms related to Ms. Blair suggest that she acknowledged the falsity of her documentation and accepted accountability for her misconduct. See General Counsel's Ex. 9, page 4 ("[w]hen asked if she had completed the [rounding], Liz replied, 'I did not.'").

Medical Services, Inc., 2004 WL 257777, at \*4. In an attempt to explain away the significance of Ms. Blair's picture on the NNOC's flyer, the Judge observed that "[n]o manager testified that they were aware that [Ms. Blair] supported the Union at any time." See Decision, page 22. And yet, at the same time, based simply upon her attendance at the very same meeting at which the very same flyer was a subject of discussion, the Judge was quick to infer that Ms. Zinsmeister was aware that Ms. Wayt supported the Union. See page 23, above.

To the extent the Judge would have stayed true to his inference, most of Affinity's management would have known the identity of each and every RN who appeared in the NNOC's flyer, and yet, the record does not include even an allegation that the Hospital has carried out any unlawful action against any of the other thirty-three RNs who appear in the flyer. Certainly, as the Judge nearly admitted, the Hospital had the opportunity to remove some of these other NNOC supporters from the workplace. Take, for example, Ms. Loretta Stockton, who was amongst the many Med-Surg / Tele RNs pictured in the flyer against the backdrop of the NNOC poster. See Decision, page 24. In December 2012, Ms. Stockton neglected a patient's care. See General Counsel's Ex. 9, page 29. And yet, even though Ms. Stockton had received four disciplinary actions over roughly the four previous years, the Hospital did not jump at the opportunity to terminate her employment, but rather, issued her a final written warning. Id.

In summary, upon consideration of the disciplinary actions taken against the other RNs, *in toto*, the Judge had no reasonable grounds upon which to draw inferences of discriminatory motive. See Syracuse Scenery & Stage Lighting Co., Inc., 342 NLRB 672, 673 (2004) (the Board rejects Judge Amchan's inference of a discriminatory motive based upon his faulty analysis of disparate treatment evidence). At best, the record includes one, and only one, example of a neglect of patient care fused with a falsification of the patient's record. Aside from

the fact her offenses were of a lesser degree, Ms. Blair was, herself, a documented supporter of the NNOC, so that the Judge's analogy to Ms. Wayt's case lacked any basis in logic or law.

***(D) The Judge's Unfocused Review of Affinity's Investigation***

The Judge's inference of a discriminatory motive also arises from the notion that the Hospital "decided to terminate Wayt long before it had adequately investigated Wayt's alleged misconduct." See Decision, page 26. In particular, the Judge was, apparently, struck by the fact: (1) Affinity did not interview Ms. Lesjak before making the decision to terminate Ms. Wayt's employment, (2) Affinity was relying upon inaccurate facts, and (3) Affinity did not afford Ms. Wayt an opportunity to respond to the allegations before making the decision to terminate her employment. Id. As shown below, the Judge's analysis here could not be more defective.

The reason why the Hospital did not interview Ms. Lesjak before making the (aborted) decision to terminate Ms. Wayt is clear, simple and perfectly understandable.<sup>16</sup> Prior to making the decision on September 5, 2012 to terminate Ms. Wayt's employment, she sat down for a face-to-face meeting with Mr. McDonald and Ms. Zinsmeister, who provided her with a copy of the chart and specifically asked her whether her documentation for the patient was accurate. In response, Ms. Wayt verified the "accuracy" of her documentation. See Decision, page 14. So importantly, aside from her confirmation that she rounded on the patient between, amongst other hours, 9:00 am and 11:00 am, Ms. Wayt confirmed that she preformed her assessment on the patient at 9:00 am. Based upon their own review of the chart, specifically the documentation from the Emergency Room, Ms. Zinsmeister and Mr. McDonald, together with Mr. Osterman, knew that Ms. Wayt's entries were false. See Charging Party's Ex. 1, page 5 ("[p]atient left the [ED] at 08/28/2012 09:10") (emphasis added). Accordingly, at that time, Ms. Lesjak simply was

---

<sup>16</sup> Affinity voluntarily rescinded its initial determination to terminate Ms. Wayt in order to provide her with an opportunity to confront and respond to the allegations.

not relevant to the investigation, as she did not begin sitting with the patient until 11:00 am. Ms. Lesjak would not be relevant to the investigation until the Hospital's receipt of Ms. Mahon's letter of September 19, 2012, whereby Ms. Mahon reported that, suddenly, Ms. Wayt now recalled that she did not perform the assessment at 9:00 am, but rather, between 11:00 am and 1:00 pm during which time Ms. Lesjak was serving as the patient's sitter. See Respondent's Ex. 19, page 4 (“[a]pparently Ann entered the wrong time for her assessment on the chart - she put some time in the morning although she had actually done the assessment mid-day”).

The Judge also appeared to react adversely to the fact that, when Affinity's management did meet with Ms. Lesjak, she was not asked any open-ended question about her recollection of the day, but rather, specifically about whether or not she used the restroom while serving as the patient's sitter. See Decision, page 10. In fact, according to Ms. Lesjak, Ms. Zinsmeister and Mr. McDonald asked her precisely the type of question the Judge believed to be most appropriate: “**they asked me what happened while I was sitting there.**” See Tr. 644 (emphasis added). Furthermore, even under the presumption, solely for the sake of argument, that Affinity's managers asked Ms. Lesjak the specific question of whether she used the restroom, the Judge had no good reason to view the managers' focus with any suspicion, given the fact that, so far as Ms. Lesjak's role in the case was concerned, the only material question raised by Ms. Mahon's letter was whether Ms. Lesjak had used the restroom during the time she served as the patient's sitter. The Judge did not venture any explanation as to how, given the approach of an open-ended question, the Hospital would have come across any information that would have exonerated Ms. Wayt.

Likewise, the Judge lacked any sensible reason to infer animus from the fact that Ms. Lesjak requested a change to her statement and the person who prepared her statement may not

have spoken with her. Whether the statement was generated by one of the managers who spoke with Ms. Lesjak, or the product of spontaneous combustion, the only fact that should have been deemed of any true consequence was the fact that the accuracy of the statement was confirmed by Ms. Lesjak. Also, the fact that Ms. Lesjak had an opportunity to make changes to the statement, and did make a change to the statement, should have been reason for the Judge to infer Affinity's good faith in the investigation. The Judge's guesswork as to the nature of the change was improper and arises from a patently inaccurate reconfiguration of the testimony offered by the Hospital's witnesses. See Decision, page 10.

In terms of the Judge's finding that the Hospital was relying upon a mistaken set of facts, the Judge, not Affinity, is the party operating under error. The Judge states that Ms. Wayt was terminated based upon the fact that she "did not enter the patient's room until noon." See Decision, page 26. In fact, at the time the Hospital originally decided to terminate Ms. Wayt's employment, the Hospital was relying upon the fact that, contrary to her representations, both on the chart and as confirmed in the context of her meeting with Ms. Zinsmeister and Mr. McDonald, Ms. Wayt had not performed any assessment of the patient at (or shortly after) 9 am, nor rounded on the patient for at least the period of time between Ms. Smith's arrival to the patient's room and the time at which Ms. Smith took her lunch break. Thus, Affinity had clear and corroborated evidence that Ms. Wayt had neglected the care of an especially vulnerable patient and engaged in a deliberate, page-by-page falsification of the 24-Hour Assessment Form.

The Judge seemed to be most disturbed by the fact that some of Affinity's documentation does not acknowledge the fact that Ms. Wayt did appear in the patient's room at roughly 10:00 am, 11:00 am, 2:00 pm and 3:00 pm. Ms. Wayt's appearance in the patient's room at 10:00 am was hardly noteworthy. As explained by Smith, a witness who the Judge found to be generally

credible, at 10:00 am, Ms. Wayt “[j]ust talk[ed] with the family.” See Tr. 572-73. Thus, Ms. Wayt’s appearance in the patient’s room at 10:00 am clearly did not involve the provision of any patient care. Ms. Wayt’s appearance in the patient’s room at 11:00 am did involve a modicum of patient care, specifically, she put the patient’s IV tubes in a pump. See Decision, page 9. However, the Judge ignored the fact that Ms. Wayt was not under investigation for, or terminated due to, her failure to put the patient’s IV tubes in the pump or any related, false entry to the patient’s chart.

In making an inference of discriminatory motive based upon the fact the Hospital did not provide Ms. Wayt with an opportunity to present a defense before making the (again, aborted) decision to terminate her, the Judge has truly lost the forest for the trees. The only fact that should be deemed of consequence is that, prior to making the lasting decision to terminate Ms. Wayt’s employment, the Hospital provided her with an opportunity to present an explanation.

In summary, whereas the Judge repeatedly looked the other way to the shortcomings teeming through the General Counsel’s case, for Affinity’s investigation, the Judge’s expectation was, at once, one so simple, but one impossible to reach – “no excuses” perfection. In the real world of workplace investigations, however, errors, of one type or another, to one degree or another, will frequently take place. Evidence of error, however, should not be treated as *per se* evidence of animus, which is precisely the close-minded approach taken by the Judge in the case now before the Board.

***(E) The Judge’s One-Eye Open, One-Eye Closed Review of Affinity’s Disciplinary Policy***

Finally, the Judge inferred a discriminatory motive because, contrary to Affinity’s policy and practice, the Hospital failed to consider Ms. Wayt’s age, tenure and disciplinary history. See Decision, page 26. The Judge’s inference as to Affinity’s general disciplinary practices is based

upon a solitary email from Ms. Veronica Benson, a corporate Quality Director. The record, however, does not establish that Ms. Benson has involvement in the Hospital's disciplinary actions to the degree that would permit the Judge to draw any inference as to the general workings of Affinity's disciplinary practices.<sup>17</sup> Of greater moment, the fact the Hospital considered only the nature and severity of Ms. Wayt's misconduct does not violate, but rather, is entirely consistent with the policy, which expressly provides:

“An employee will be subject to termination for repeated violations of Facility policies after receiving appropriate warnings **or may be terminated immediately for a serious policy violation** or with continued poor performance.” See Charging Party's Ex. 5, page 3 (emphasis added).

Equally important, in the context of identifying those serious policy violations that, even individually, “**may result in immediate termination**,” the policy lists both “[p]atient abuse or neglect” and “[f]alsification of documents including . . . medical records.” Id., page 4 (emphasis added). Thus, the fact that Affinity did not consider other factors, such as Ms. Wayt's disciplinary history, provided the Judge with no legitimate reason to draw any inference of a discriminatory motive.

In fact, the record shows that Affinity has previously invoked the policy's option for the immediate discharge of an employee guilty of a serious policy violation. For example, RN Justine Sockman was immediately terminated due to the fact she took a picture of the removal of

---

<sup>17</sup> Affinity should also address the Judge's finding that the Hospital never provided Ms. Benson with the information she requested. What the Judge does not mention, of course, is the fact the Hospital did provide Ms. Benson with a further explanation of Ms. Wayt's misconduct. In response, Ms. Benson did not repeat her requests for the other information she had originally requested, but responded, “[g]iven this information, I would support termination and notification of the State Board of Nursing.” See General Counsel's Ex. 19, page 2. Given the Judge's apparent, if mistaken view that Ms. Benson was generally knowledgeable about Affinity's disciplinary practices, he should have inferred that her lack of further interest in the other information (e.g., Ms. Wayt's tenure) was consistent with the fact that, under the policy, the severity of Ms. Wayt's misconduct was justification enough for her immediate termination.

a patient's eyeballs. See General Counsel's Exhibit 6, page 16. Irrespective of the fact Ms. Sockman immediately deleted the picture and no adverse effects flowed from the event, Affinity believed the grave nature of the offense, alone, required termination. Though taking place in a slightly different context, Affinity's termination of Ms. Erica Ford also, at once, disproves the General Counsel's case and supports the fact that no discriminatory motive lurked behind Affinity's termination of Ms. Wayt. Ms. Ford "deliberately omitted disclosure of narcotic medication" in the context of a substance abuse test that took place shortly after her hire. See General Counsel's Ex. 6, page 20. Though not the falsification of a medical record *per se*, Ms. Ford's misconduct was very much encompassed by the spirit, if not the letter, of the very same provision of Affinity's discipline policy that supported Ms. Wayt's immediate termination.

In summary, the record establishes both a policy that authorizes, and a precedent that confirms the occurrence of, immediate terminations carried out because of the severity of the employee's offense. Though the Judge acknowledged Ms. Sockman's summary termination, he deemed her offense as not "remotely comparable" to Ms. Wayt's offense. See Decision, page 21. Similarly, the Judge believed that, for some of the RNs who were not terminated by Affinity, their patient care errors were far more serious as compared to Ms. Wayt's neglect of an injured and confused elderly patient and her related falsification of the patient's medical records. Id. The subjective comparison between Ms. Sockman's offenses and Ms. Wayt's offenses, and even more so, the medical comparisons between Ms. Wayt's offenses and those of some of her co-workers are not for the Judge to resolve from an ivory tower, but for the Hospital to resolve as a matter of management rights and as the party expert in patient care. Indeed, the Judge has previously been reversed by the Board for treading upon the judgment of management on "a

significant safety issue.” See Consolidated Biscuit Co., 346 NLRB 1175, 1180 (emphasis added); see also Alcoa, Inc., 352 NLRB 1222, 1225 (2008).

**B.) Even Under the Presumption, *Arguendo*, the General Counsel Established a *Prima Facie* Case, Affinity Established Ms. Wayt Would Have Been Terminated Irrespective of Her Union Support**

As shown above, contrary to the Judge’s determination, the General Counsel did not establish a *prima facie* case, and therefore, the Judge should have dismissed the allegations related to Ms. Wayt without even a need to review Affinity’s defense. However, should the Board disagree, and believe that the burden did shift to the Hospital, the record shows that Affinity had every right, if not every obligation to terminate Ms. Wayt, who did not simply neglect a patient who was a sick and compromised elderly woman, but proceeded to falsely mark up the patient’s chart so that she (i.e., Ms. Wayt) would come across as a patient care provider worthy of even Hippocrates’ applause.

**(1) The Judge Failed to Identify Accurately the Reasons for Ms. Wayt’s Termination**

At the very least, Affinity would have expected that the Judge would have correctly understood why, exactly, Ms. Wayt was terminated, but here as well, the Judge fell well short of the mark. To begin with, the Judge seems to suggest that Ms. Wayt’s refusal to accept the patient’s admission played a role in her termination, which is not the case. Indeed, the record includes no evidence to suggest that Ms. Wayt’s termination was prompted, even in part, by Affinity’s finding that she refused a patient. Far worse, however, is the Judge’s misstatement of the fundamental reason why Ms. Wayt was terminated. The Judge states the decision to terminate Ms. Wayt was “based upon the assumption that Wayt did not come to the patient’s bedside between her admission at 9:15 [am] and noon.” See Decision, page 27. In fact, as explained elsewhere, Ms. Wayt was not terminated due to any assumption, but instead, the

specific determinations that (1) she had not performed the assessment at 9:00 am, or as she would change her story later, between 11:00 am and 1:00 pm, (2) she had not performed hourly rounds through the course of the day, and (3) she falsified the entirety of the patient's 24-Hour Assessment form.

**(2) The Judge's "Punt" on Key Factual Questions Subjected the Hospital to Clear Prejudice**

In spite of the obvious importance of the question to the case, the Judge expressly declined to decide whether or not Ms. Wayt performed the assessment. See Decision, page 9. Accordingly, the Judge has not even made the factual findings necessary for an evaluation of Affinity's defense that, primarily by virtue of Ms. Wayt's failure to perform the assessment and her related false documentation, she would have been terminated irrespective of her support of the Union. Similarly, the Judge declined to resolve other factual disputes that would have surely affected the credibility of Ms. Wayt, such as the accuracy of Ms. Wayt's testimony that, as part of her appearance in the patient's room at 10:00 am, Ms. Lesjak was present, or whether Ms. Wayt actually entered the patient's room at 2:00 pm, as she claimed was the case. See Decision, page 8, 13. In rejecting Affinity's defense, therefore, the Judge apparently failed to realize that he never even properly considered the defense. Accordingly, should the Board not dismiss the allegations related to Ms. Wayt for the independent reasons discussed elsewhere, the Board ought to remand the case to the Division of Judges for the further, necessary findings of fact.

**(3) Alternatively, the Record Shows the Hospital Had a Reasonable Good Faith Belief That Ms. Wayt Engaged in the Offenses of Which She Was Accused**

Contrary to the Judge's determination, the record plainly establishes that Affinity held a reasonable good faith belief that Ms. Wayt made repeated, deliberately false entries to the patient's medical records, and as the corollary, failed to provide her with basic nursing care. At

the outset, Affinity notes that, by her own admission, Ms. Wayt did not perform any skin assessment on the patient, a transgression that, by the General Counsel's own admission, may have alone warranted the imposition of a written warning. See Tr. 13 see also Charging Party's Ex. 1, page 1 (“[p]atient is at risk for skin breakdown”). Similarly, as demonstrated objectively by the documentation, Ms. Wayt also failed to provide the patient with a “now” dosage of Vitamin K. See Respondent's Exs. 6 and 7.<sup>18</sup> At the start therefore, based solely upon these acts of patient neglect, Ms. Wayt would have been faced with disciplinary actions at least at the level of written warnings. But of course, Affinity had good reason to believe that Ms. Wayt's was guilty of a much deeper treachery of patient care.

Indeed, on the subject of the patients' care, the Judge stated that Ms. Wayt “**may have taken shortcuts.**” See Decision, page 27 (emphasis added). The Judge's finding was based upon the fact that Ms. Wayt knew that, between the time the patient was admitted to the Orthopedic Department and the time that Ms. Smith left for the day at 4:15 pm, a RN was “at all times” standing by the patient's bedside. Id. Accordingly, rather than confine his findings to only the afternoon, the Judge should have found that Ms. Wayt's “shortcuts” took place through virtually the entirety of her shift. In any case, at the very least, the Judge found that Ms. Wayt did not perform any hourly rounds at 1:00 pm, 2:00 pm or 3:00 pm.<sup>19</sup> In terms of the related question of whether Ms. Wayt's entries to the “Community Cares / Rounding” box were false, the Judge stated that Ms. Wayt's entries may have indicated only that the rounding was

---

<sup>18</sup> Also of note, even though the patient's mental conditions would not have prevented Ms. Wayt from performing a pain assessment (see Tr. 347-48, 339), the “Community Cares / Rounding” box of the 24-Hour Assessment would suggest that, as part of her (supposed) hourly rounds, Ms. Wayt simply made no pain assessment for the patient, as she left the entire row blank. See Respondent's Ex. 5, page 6.

<sup>19</sup> For that reason, the Judge also should have found that Ms. Wayt's testimony that she performed rounding at these times was deliberately false.

performed, though not necessarily by her. See Decision, pages 20-21. Notably, the Judge's conjured excuse is one that Ms. Wayt, herself, expressly disavowed as part of her testimony, as she stated she did not delegate any of her patient responsibility to any other employee. See Tr. 286-87. Indeed, throughout her testimony before the Judge, Ms. Wayt specifically represented that she – **personally** – performed the hourly rounds on the patient. The Judge's refusal to acknowledge the false nature of Ms. Wayt's rounding documentation is obvious error.<sup>20</sup>

In the assessment of whether the Hospital had a reasonable belief as to Ms. Wayt's misconduct, the Judge also considered the question from the wrong moment in time. The Judge framed the question as whether, at the time the Hospital originally decided on September 12, 2012 to terminate Ms. Wayt, the Hospital held a good faith belief as to her misconduct. See Decision, page 9. To be clear, Affinity asserts that, by that date, the Hospital had a good faith belief as to Ms. Wayt's misconduct. Indeed, the Judge totally ignores the fact that, precisely because the Hospital was seeking to conduct an objective, thorough investigation, Ms. Boyle asked Ms. Kline to review the patient's chart, and when doing so, did not mention to Ms. Kline that Ms. Wayt was suspected of falsifying the patient's chart. See Tr. 1053-1054. However, the primary defect with the Judge's viewpoint was that he arbitrarily ignored the further signs of good faith unmistakably displayed by the Hospital after September 12, 2012. In particular, the Hospital afforded Ms. Wayt an opportunity to present an explanation, received and reviewed Ms. Mahon's letter, and duly investigated the new claims set forth by the letter, i.e., Ms. Wayt had actually performed the assessment when Ms. Lesjak took a bathroom break. Accordingly, the

---

<sup>20</sup> In another context, however, the Judge appears to have concluded that Ms. Wayt did falsify the patient's record. In particular, the Judge found that, because of the absence of any entry in the Medication Administration Record, Ms. Wayt's documentation of an administration of MMS04 at 1:00 pm was false. See Decision, page 13, fn. 20.

Judge's assessment of whether the Hospital held a good faith belief as to Ms. Wayt's misconduct should have extended up to the day on which Ms. Wayt's termination was actually effectuated.

**3.) Affinity's Reporting of Ms. Wayt to the Board of Nursing Did Not Violate the Act**

The Judge's analysis of whether Affinity violated the Act by virtue of reporting Ms. Wayt to the Board of Nursing is generally interwoven through (or perhaps stated more accurately, entangled with) the Judge's analysis of whether Ms. Wayt's termination violated the Act. Though not examined as part of his stated analysis (see Decision, page 25-27), the Judge does review some of the General Counsel's evidence of disparate treatment on the subject of Mr. Osterman's reporting of Ms. Wayt to the Board of Nursing. See Decision, page 24. Accordingly, Affinity should address, and demonstrate the inapplicability of, the evidence.

On July 5, 2012, Affinity terminated Mr. Samuel "Rick" Shapiro, who, over a six-week period, was responsible for two acts of "Substandard Work." See General Counsel's Ex. 6, page 1. On April 14, 2012, Affinity terminated Ms. Rebecca Bowser due to several acts of "Substandard Work." See General Counsel's Ex. 6, page 14. On January 7, 2010, Affinity terminated Ms. Lori Woods, who, due to a dispute with her supervisor, walked off the job before the end of her shift. See General Counsel's Ex. 6, page 22. Though every one of these RNs omitted care from their assigned patient, not one of them also made a false entry on a medical record, let alone engaged in a page-by-page falsification of an entire Patient 24 Hour Assessment form.

Mr. Osterman's testimony also covered Ms. Sockman, who, as mentioned above, was terminated by Affinity because she took a photograph of the removal of a patient's eyeballs. See General Counsel's Ex. 6, page 16. Mr. Osterman reported Ms. Sockman to the Board of Nursing because her conduct (again, taking a picture of a patient's eyeballs) violated law (to wit,

HIPAA). Similarly, in the case of Ms. Wayt, because the falsification of a patient's medical records violates the Ohio Nursing Practices Act<sup>21</sup>, Mr. Osterman felt compelled to report her as well.

In summary, the record does not support the Judge's conclusion that, by reporting Ms. Wayt to the Board of Nursing, Affinity violated Sections 8(a)(3) and 8(a)(1) of the Act. Though Mr. Osterman had knowledge of Ms. Wayt's support of the NNOC, the Judge had no basis upon which to infer that Ms. Wayt's support played any role in Mr. Osterman's decision to report her to the Board of Nursing.<sup>22</sup> Accordingly, the Board should dismiss the related allegations of the Complaint.

**4.) The Lawfulness of the Written Warning Imposed on Ms. Wayt Is Instantly Defensible and Was Challenged by the Union Only as an Afterthought**

The Judge's conclusion that Affinity violated the Act by virtue of the written warning imposed upon Ms. Wayt suffers from a number of defects, any one of which practically is sufficient for the Board to set his conclusions aside.

At the outset, Affinity notes that the record does not include any evidence that Mr. John Perone, as the manager who reported Ms. Wayt's misconduct, had any knowledge of her support of the NNOC or that he harbored any personal dislike toward employees who engaged in union activity. Indeed, the record demonstrates that, while he was offended by Mr. Wayt's disrespectful behavior towards him (and feared how she would treat some of the employees who

---

<sup>21</sup> See Section 4723-4-06 of the Ohio Revised Code, which provides that a Registered Nurse shall "not falsify any client record or other document prepared, or utilized in the course of, or in conjunction with, nursing practice."

<sup>22</sup> In spite of the Judge's overall theory of Affinity's motivation (see Decision, page 27), the record includes no evidence that, in the wake of Ms. Wayt's termination, Affinity sought to broadcast to the Hospital's RNs the fact that Mr. Osterman reported Ms. Wayt to the Board of Nursing. Instead, the record establishes that the reporting process took place simply, and confidentially, between Mr. Osterman and the Board of Nursing.

reported directly to him), his mindset was clearly one of fairness, as he promptly informed Ms. Zinsmeister of the fact that Ms. Wayt had later apologized to him. See Respondent's Ex. 20. Thus, the Judge's finding that, prior to meeting with Ms. Wayt, Ms. Zinsmeister and Mr. McDonald were unaware of the fact she had apologized is demonstrably untrue. See Decision, page 28.

Equally false is the Judge's finding that the Hospital "did not care" about Ms. Wayt's defense for her behavior. Ms. Zinsmeister explained that, as part of what is her personal practice, she will prepare verbal and / or written warnings before she meets with the employee. Then, as part of the meeting with the employee, Ms. Zinsmeister will afford the employee an opportunity to present and document an explanation. Thereafter, Ms. Zinsmeister will forward the documentation to Ms. Boyle, who will either approve or reject the disciplinary action. The Judge was not presented with any allegation that Ms. Zinsmeister's disciplinary practices violated the Act. Indeed, Ms. Zinsmeister was able to recall at least one concrete example of Ms. Boyle rescinding one of her (i.e., Ms. Zinsmeister's) warnings. See Tr. 863-67. Most importantly, in the case now before the Board, Ms. Wayt took advantage of the opportunity to address the allegations, but only to the extent of a *mea culpa*, as she noted the fact that she had apologized to Mr. Perone. See Respondent's Ex. 16; Tr. 252, 254, 364, 766.

Notably, as part of her meeting with Ms. Zinsmeister and Mr. McDonald, Ms. Wayt did not challenge Ms. Zinsmeister's determination that she violated the PYXIS policy. Nonetheless, the Judge concluded that Ms. Wayt did not violate the policy (see Decision, page 28), but neglected to address, let alone explain away, the significance of Ms. Zinsmeister's testimony that, whatever the black and white of the policy, the practice is to resolve medication discrepancies as soon as they are discovered. See Tr. 514-15, Tr. 868. To the extent the

rationale of Affinity's practice is not self-evident, the Hospital should note that both Mr. Perone and Ms. Zinsmeister testified to the fact that the medications being handled by Ms. Wayt were **controlled substances**, which must be carefully stored, accessed and monitored by the Hospital.

The Judge's finding that Ms. Wayt was disparately treated in connection with the warning is completely artificial, as the Judge excluded from his consideration the fact that Ms. Wayt did not comply with the known expectations of her supervisors in terms of the reconciliation of the discrepancy, and focused only upon Ms. Wayt's unprofessional conduct. The warning imposed upon Ms. Wayt results from the combination of these offenses. Accordingly, the General Counsel's evidence of disparate treatment is inapposite.

In summary, the record does not include any foundation for the Judge's conclusion that the written warning imposed upon Ms. Wayt violated the Act. Indeed, for Ms. Wayt and the Union, alike, even the allegation was an afterthought, insofar as Ms. Wayt noted no objection when meeting with her manager, and Ms. Mahon made no mention of the disciplinary action in the letter she prepared on Ms. Wayt's behalf. Affinity asks the Board to dismiss the related allegations of the Complaint.

**5.) Lest the Mandates of HIPAA Be Ignored, and the Privacy Rights of Affinity's Patients be Forsaken, Affinity Held Every Right to Exclude Ms. Mahon From the Facility**

In response to the Judge's conclusion that Affinity violated the Act by denying Ms. Mahon, and only Ms. Mahon, access to the Hospital's facility, Affinity should begin by asking the Board to recognize and appreciate the key role that HIPAA plays for a covered entity, such as Affinity.

The Health Insurance Portability and Accountability Act is a compelling and important statute, and HIPAA compliance is of paramount importance to every acute health care facility in

the nation. Federal regulations clearly designate an employer's Privacy Officer, in this case Ms. Kline, as the **only** individual qualified to reach a conclusion as to whether HIPAA has been violated by virtue of the disclosure or misuse of "protected health information." See 45 C.F.R. §164.530(a)(1).<sup>23</sup> "Protected health information" is defined by regulation as "individually identifiable health information," which covers any information from which "there is a reasonable basis to believe the information can be used to identify" a patient. 45 C.F.R. §160.03. The Privacy Rule of HIPAA establishes confidentiality mandates and explains that protected health information can only be disclosed for three reasons: (1) billing purposes, (2) the provision of health care services, or (3) hospital operations. See 45 C.F.R. §160. For violations of HIPAA, employers face serious consequences, such as fines and criminal sanctions levied by the Department of Health and Human Services. 42 U.S.C. §1320(d)(5). In addition, employers face the threat of loss of federal Medicare and Medicaid funding, as well as loss of accreditation by the Joint Commission, as a result of HIPAA violations. 42 C.F.R. §482.11; Joint Commission Standard CT-1.

In the case now before the Board, Ms. Kline properly determined that Ms. Mahon's letter did violate HIPAA. Though the letter did not identify the patient by name, as part of her testimony, Ms. Kline addressed the litany of "patient identifiers" that were included in Ms. Mahon's letter. See Tr. 1133. As Ms. Kline explained, based upon the sheer volume and variety of information about the patient, a person could identify the patient, even though the letter did not include her name. In particular, because the letter was delivered to some of Ms. Wayt's colleagues in the Orthopedic Department who served on the Facility Bargaining Council

---

<sup>23</sup> For that reason, Affinity submits that neither the Judge, nor respectfully, the Board has the jurisdiction to decide whether HIPAA has been violated in any particular case, and if so, the measures necessary for the violation to be remedied.

(hereafter, the “FBC”), the risk of the patient being identified was very real, as any one of these RNs could have easily “put two and two together” and come up with the identity of the patient. See Tr. 1153. The Judge’s remark that the record did not suggest that anyone would carry a motivation to identify the patient (see Decision, page 29) is utterly irrelevant under HIPAA.

The Judge’s determination that no HIPAA violation had taken place is based upon the fact that the Privacy Rule authorizes a covered entity to disclose protected information for the sake of “healthcare operations,” which, contemplates disclosures for the “resolution of internal grievances,” such as disclosures “to an employee and / or an employees’ representative” for purposes of the employee receiving an opportunity to demonstrate that an employer’s allegations of her misconduct are untrue. See Decision, pages 28-29. Clearly, the distribution of Ms. Mahon’s letter to, amongst many others, the RNs who comprised the FBC had no connection whatsoever to the “resolution of an internal grievance.” The record does not include a speck of evidence that the involvement of any of these RNs, let alone their receipt and review of a constellation of the patient’s medical information, was necessary in order for Ms. Wayt to demonstrate that Affinity’s allegations of her misconduct were untrue.

The record provides no support for the Judge’s determination that Ms. Mahon was excluded from the facility based upon Ms. Kline’s discriminatory motive. Ms. Kline did not exclude Ms. Mahon based upon the identity of the third party that had received her letter (i.e., employees who supported the Union), but rather, upon the fact the FBC was an outside third party, which had no entitlement to the patient’s information. Other key facts were treated by the Judge as though they did not exist. In particular, as a condition to her access to Affinity’s non-public areas, Ms. Mahon was required to provide the Hospital with specific assurances that she would abide by the Hospital’s HIPAA policies. In addition, for a Judge who saw specters of

union animus at practically every turn of the case, he neglected to consider, as part of whether any discriminatory motive was afoot, or as part of whether any violation of the Act took place, that Affinity permitted other organizers to continue their access after, and in spite of, Ms. Mahon's exclusion from the facility.

**6.) The Allegations Against Ms. Kress Collapse Upon the Premise the Completion of ADOs Qualifies as Protected Concerted Activity**

In the Decision, the Judge concluded that Affinity violated the Act based upon a variety of actions taken by Ms. Kress on January 3, 2013. See Decision, page 31. In every instance, however, the Judge's conclusion depends upon the premise that, by completing an ADO, an RN has engaged in protected concerted activity. Even though the Board is yet to confront the question, and these forms are used by the NNOC nationwide, as he neared the conclusion of what clearly presents as a hasty Decision, the Judge cared to devote only a single footnote to the question. Id., fn. 41. To the extent any substance can be extracted from the Judge's footnote, one only sees what, throughout the Decisions, appears as nearly omnipresent – the Judge's focus on employee's rights to the exclusion of any regard for employer's rights, or for that matter, responsibility.

Undeniably, the Judge ignored, rather cavalierly, Affinity's arguments as to why, else the safety of any acute care facility's patients be put at risk, the completion of ADOs must be deemed as outside of the scope of an employee's Section 7 rights. Though the ADOs pose a variety of dangers, the gravest danger is the fact that ADOs encourage the RNs' forfeiture of Affinity's risk management system. As Affinity's managers explained to the Judge, the risk management system, simply put, is how the Hospital keeps patients safe. Ms. Kline, as Affinity's Risk Manager, was able to explain to the Judge the different cogs in the risk management wheel. See Tr. 1138-1141. By way of prominent example, Ms. Kline, amongst

others, informed the Judge of Affinity’s chain of command and the incident reports that are available to RNs as part of the Hospital’s Event Reporting System. Id. Ms. Kline then explained to the Judge, as did Mr. Osterman, the concerns they held (and to this day, still hold) in connection with the NNOC’s efforts to seize control over the Hospital’s risk management system through the injection of the ADOs into the Affinity workplace. See Tr. 1150-51; 957-58.<sup>24</sup>

For any agency, irrespective of the work they carry out by assignment of Congress, the need for patients to be kept safe must be, and for the Board, has been, the subject of serious concern. In particular, the Board has developed the “imminent danger” exception to protected concerted activity, whereby an employee’s cessation of work is rendered unprotected in the event the employee does not take reasonable precautions to protect patients from foreseeable, imminent danger. See NLRB v. Special Touch Home Care Services, Inc., 708 F.3d 447, 457 (2<sup>nd</sup> Cir. 2013). In reviewing the Board’s application of the “imminent danger” doctrine, the Courts have made one point very clear: “[a]ctual harm to patients is not the issue, [rather] [t]he appropriate inquiry is focused on the *risk* of harm, not its realization.” 708 F.3d at 460 (emphasis in the original). Though the completion of ADOs does not, obviously, represent the type of cessation of work at play in Special Touch Home Care Services, where a number of employees did not show up for their patient assignments, the forms do present, from another angle, clear and present “*risk* of harm,” and therefore, should be added to the other forms of

---

<sup>24</sup> The fact the ADOs put patient care at risk is a key factor that distinguishes the case at bar from Kinder-Care Learning Centers, 299 NLRB 804 (1990). See Decision, page 31, fn. 41. In that case, aside from the fact the respondent was not an acute care facility, by itself a point of material distinction, the employer did not demonstrate any harm that would occur by virtue of the employees not taking their complaints to the parents before taking the complaints to the employer. In addition, whereas the Board was concerned that the employer’s rule might dissuade employees from approaching the employer with their complaints, RNs are a different category of employee, because, by virtue of their license, they are obligated to bring any concerns related to patient care to the attention of the Hospital.

activity that the Board has deemed unprotected in the context of the healthcare industry. See e.g., Montefiore Hospital and Medical Center v. NLRB, 621 F.2d 510 (2<sup>nd</sup> Cir. 1980); St. Lukes Episcopal-Presbyterian Hospitals, Inc. v. NLRB, 268 F.3d 575 (8<sup>th</sup> Cir. 2001); Orchard Park Health Care Center, Inc., 341 NLRB 642 (2004).

Affinity recognizes that, as part of the Board’s evaluation of whether the completion of ADOs equates to protected activity, the employees’ interest must, of course, be considered and counter-balanced. Like any employee, the RNs employed by Affinity may sometimes encounter a work assignment to which they have an objection, such as assuming care for another patient. However, as noted above, Affinity has in place a variety of measures by which the RN can voice their objection and seek out corrective action. Indeed, as shown by the record, RNs invoked Affinity’s chain of command to resolve, successfully, a problem that she had with patient care. See Tr. 1002-1003.<sup>25</sup>

Testimony from one of Affinity’s RNs, Ms. Cinda Keener, proved that, in point of fact, the ADO is nothing more than the wolf in sheep’s clothing. According to her un rebutted testimony, in the context of a meeting between the Union and some of Affinity’s RNs, Ms. Mahon admitted that the simple purpose of the ADO is to “**agitate.**” See Tr. 997-98. Indeed, as part of her own testimony, Ms. Mahon acknowledged that she had urged Affinity’s RNs to complete hundreds of ADOs. See Tr. 480; see also Tr. 1001. Ms. Keener also explained that the Union stated that, to the extent RNs were not completing ADOs, she (i.e., Ms. Keener) should take the lead and complete the forms on their behalf.

---

<sup>25</sup> The record includes no evidence to suggest that, should any RN skip a step in the chain of command (i.e., bring a complaint directly to the attention of Mr. Osterman), they would be subject to any disciplinary action, which was the case in Consolidated Freightways Corp. of Delaware, 257 NLRB 1281 (1981), and Yellow Ambulance Service, 342 NLRB 804 (2002). See Decision, page 31, fn. 41. Accordingly, neither one of these cases have any bearing on the questions now before the Board.

Ms. Erin Sullivan, an RN working in Affinity's ICU, reported an encounter of exactly the nature described by Ms. Keener. Specifically, Ms. Sullivan reported that, in the presence of a patient, Ms. Gardner encouraged her to sign an ADO to protest her (i.e., Ms. Sullivan's) patient assignment. See Tr. 1014-1015. Ms. Sullivan had no objection to her patient care assignment and declined to sign the ADO. See Respondent's Ex. 27. In response to the Union's effort to show that the ADOs are typically completed by the RNs directly affected, Ms. Sullivan stated: "[o]ur instructions, per Pam, were that every nurse needed to sign it in the unit, not just the ones affected by the situation." See Tr. 1025-1026. Accordingly, beyond the fact that ADOs generally put patient care at risk, the record now before the Board shows that, as part of the NNOC's efforts to weave the ADOs into Affinity's risk management system, the Union was perfectly willing to trample upon the RNs' Section 7 rights, at least as the Union would perceive such rights to exist. Specifically, the NNOC asserts that, under Section 7, RNs have a right to complete the ADOs, and yet, the record demonstrates the NNOC systematically pressured RNs to complete the ADOs, and therefore, systematically sought to coerce RNs in the exercise of their Section 7 rights, which equates to a clear-cut violation of Section 8(b)(1) of the Act.

In summary, lost upon the Judge was what for the Hospital's managers and employees remains an everyday reality – they do not manufacture widgets, but are entrusted with the medical care of human beings, some of whom are fighting for their lives. As explained above, the ADOs put that care at risk. Equally, in at least the case now before the Board, the uncontested evidence shows that ADOs are also a device by which the NNOC seeks to bully RNs in the exercise, or more to the point, non-exercise of their Section 7 rights. By ignoring all of these points for the sake of a form that exists only for the purpose of "agitation," the Judge has

denigrated the rights of employers, employees and patients, alike. The Board must now undo the Judge's wrongs.

**CONCLUSION**

For all the reasons set forth above, Affinity respectfully requests that Your Honor dismiss the Amended Consolidated Complaint.

Dated: August 23, 2013  
Glastonbury, CT

Respectfully submitted,

/s/ \_\_\_\_\_

Bryan T. Carmody  
Attorney for Affinity Medical Center  
134 Evergreen Lane  
Glastonbury, CT 06033  
(203) 249-9287  
[bryancarmody@bellsouth.net](mailto:bryancarmody@bellsouth.net)

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

_____	:		
DHSC, LLC, D/B/A AFFINITY	:	Case Nos.	08-CA-090083
MEDICAL CENTER	:		08-CA-090193
	:		08-CA-093035
<i>and</i>	:		08-CA-095833
	:		
NATIONAL NURSES	:		
ORGANIZING COMMITTEE	:		
_____	:		

**CERTIFICATE OF SERVICE**

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the Respondent’s Brief in Support of Exceptions to the Decision issued by Administrative Law Judge Arthur Amchan was served on August 23, 2013 upon the following:

Jane Lawhon, Esq.  
Counsel for the Charging Party  
2000 Franklin Street  
Oakland, CA 94612  
[JLawhon@CalNurses.Org](mailto:JLawhon@CalNurses.Org)

Sharlee Cendrosky  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 8  
1695 AJC Federal Office Building  
1240 East Ninth Street  
Cleveland, OH 44199  
[Sharlee.Cendrosky@nlrb.gov](mailto:Sharlee.Cendrosky@nlrb.gov)

Dated: Glastonbury, CT  
August 23, 2013

Respectfully submitted,

/s/ \_\_\_\_\_

Bryan T. Carmody  
Attorney for Respondent  
134 Evergreen Lane

Glastonbury, CT 06033  
(203) 249-9287  
[bryancarmody@bellsouth.net](mailto:bryancarmody@bellsouth.net)