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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DIGNITY HEALTH d/b/a ST. ROSE
DOMINICAN HOSPITALS,

Respondent,

vs.

MICHAEL S. DELA PAZ, an Individual,

Charging Party.

CASE 28-CA-094717

**BRIEF IN SUPPORT OF
RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

FACTS

The material facts in this case are not in dispute. Charging Party, Michael S. Dela Paz (also known as Mhike Sanchez), was employed in the Environmental Services Department of Respondent Dignity Health d/b/a St. Rose Dominican Hospital ("Hospital" or "Respondent") as an Environmental Tech II. (TR pp. 10-13). The Environmental Services Department, at all times material, was administered by the entity Aramark. Brad Duda was employed by Aramark as the Environmental Services Manager. (TR p. 10). Dela Paz was one of approximately 75 to 80 employees of Respondent working under Duda in 2012. (TR p. 11). Eddie Aguilar was a third shift lead person working under Duda. Lee Timothy was Duda's immediate supervisor.

On or about June 1, 2012, Dela Paz had a verbal altercation with employee Habiba Araru, an employee in the Hospital's Nutrition Services Department. Brad Wild was the Director of

Nutrition Services in 2012. (GC Exh. 9). The Environmental Services Department was charged with the task of cleaning the hospital. Dela Paz's duties included cleaning the Hospital cafeteria. Araru worked in the cafeteria as a cashier. According to statements submitted to the Hospital's Security personnel, the verbal altercation included shouting by Dela Paz at Araru and making the statement to Araru: "I'll take care of you." (GC Exh. 2, page 2).

On June 5 Gina Pedone of Hospital Security sent an e-mail to Allan Kaplan of Hospital Security attaching an "updated" statement of Araru concerning the incident. In Pedone's e-mail, Pedone stated that she asked Araru what she wanted the Security Department to do to make her feel safe. Pedone noted:

Habiba informed me that she only see's Mr. Delapaz on Mondays, Thursdays, and Fridays around 2300-0030 hrs and would like for security to make more patrols in the cafeteria around those times. . . . As of right now she feels comfortable walking to her vehicle since her and her co workers leave at the same time to the parking lot. Habiba did say that the only thing she would be concerned about is if Mr. Delapaz were to cause some sort of damage to her vehicle i.e. slash the tires."

(GC Exh. 2).

Duda became aware of the incident from Kaplan. Kaplan provided to Duda the documentation Kaplan had received. Duda then reported the matter to Timothy. Duda and Timothy, based on the Security Department statements, were concerned about the safety of Araru. (TR pp. 16-23). Duda then informed Dela Paz that he was being placed on administrative leave while Respondent conducted an investigation concerning the incident. Dela Paz confirmed that he was aware of the incident. Duda informed Dela Paz not to contact other employees during the investigation. Despite the assertion of Dela Paz to the contrary, Duda did

not tell Dela Paz not to contact the Service Employees International Union, Local 1107 (“Union”). In fact, Duda informed Debbie Miller, the Union business agent, and Cherie Mancini, the Union Vice President, of the investigation and Dela Paz’s administrative leave. (TR pp. 23-24).

Duda then conducted an investigation which included a review of Dela Paz’s personnel file and more information and documentation from the Security Department. (TR p. 25). He obtained, by the time of the disciplinary interview with Dela Paz on June 12, the original statement of Araru and statements of two other employees that supported the statement of Araru with their eye witness accounts. (TR pp. 91-92, Resp. Exh. 2, 3 and 4). At one point in time Duda saw the video of the June 1 incident, but he did not recall whether it was before or after the initial investigation and discipline of Dela Paz. (TR p. 27).

During the investigation Duda and Timothy consulted with the Hospital’s Human Resources personnel and considered suspension as a possible discipline. However, no ultimate decision on discipline was made until Dela Paz was interviewed. (TR pp. 28, 37).

On June 12, Duda conducted an investigatory interview with Dela Paz. Present were Pam Bylekeie, a supervisor in the Environmental Services Department, and Debbie Miller of the Union. At that time Dela Paz submitted three written statements of other employees (GC Exh. 4) and a petition (GC Exh. 3). He also presented his own handwritten statement. (TR pp. 92-94, Resp. Exh 5). All of these documents were reviewed by Duda prior to the decision to discipline Dela Paz. (TR pp. 30, 37). Duda determined that Dela Paz’s documents were simply negative attacks on Araru that had no bearing on the incident involved. None of three employees that provided statements were eye witnesses to the incident. (TR p. 31). Furthermore, the petition

did not address the incident in question. The first page of the petition, dated June 11, was addressed “To Whom It May Concern” and stated:

If at one time or another, you had ever had an encounter with Mustah, the cashier at the Cantina --- if she had ever been rude to you or if perhaps you had observed that she has treated someone else with disrespect or a sullen attitude, kindly sign your name on the attached paper in support of my signature campaign.

The second page was entitled: “Signature Campaign in Support of Mhike Sanchez” and contained approximately 17 signatures. (TR pp. 31-37, GC Exh. 3).

Although Dela Paz’s own handwritten statement provided a different version of the incident than that of Arura, none of his supporting documents, unlike Arura’s supporting statements, supported his version of the incident. Upon reviewing all of the documentation, Duda decided to move forward with discipline of Dela Paz. Respondent suspended Dela Paz retroactively, to make his administrative leave his suspension. (TR p. 30).

Debbie Miller of the Union agreed with the discipline, noting that Dela Paz was fortunate that he was only suspended. (TR p. 30). In this regard, based on the progressive discipline provisions of the collective bargaining agreement, Respondent could have terminated Dela Paz on June 12 based on his past “performance” discipline. Duda chose the lesser discipline of suspension because he did not want to lose Dela Paz as an employee. (TR pp. 95-97). Duda also provided a written counseling report which contained an “Action Plan for Opportunity.” The Action Plan provided, *inter alia*: “Employee will not retaliate against co-workers when information or feedback given.” Furthermore, the Action Plan provided: “There will be ZERO tolerance for any perceived retaliation against coworkers.” (GC Exh. 5). Duda informed Dela

Paz that he considered the matter closed and that there was to be no retaliation against Arura. (TR pp. 31-32).

On Saturday, June 16, Dela Paz approached Brad Wild and asked if Wild knew him. Wild responded that he did not. Dela Paz then said: "So you haven't heard anything about me?" Dela Paz then said that his name was Micahel Dela Paz. That did not mean anything to Wild who responded that he had not heard of him. Dela Paz then said that he had gotten into a little bit of trouble with one of Wild's workers. He asked Wild if Wild wanted a copy of a petition he had concerning the matter and Wild agreed to receive it. Dela Paz then left and returned to Wild and gave him a copy of the petition. The petition now had approximately 27 signatures on it. (TR pp. 102-104, GC Exh. 11). He also gave Wild a copy of his written statement (Resp. Exh. 5) that he had given to Brad Duda on June 12.

After the weekend, Wild contacted Timothy concerning the encounter with Dela Paz. On Wednesday, June 20, Timothy and Duda requested Wild to provide to them the information that Dela Paz had given Wild and asked Wild to provide a brief statement. On that same day Wild provided the information and an e-mail statement of the encounter to Timothy and Duda. (GC Exh. 9).

Thereafter there was a decision by Timothy and Duda to terminate Dela Paz based on his approaching Wild in an effort to retaliate against Arura. (TR p. 54-56). The decision was addressed by Respondent's Human Resources personnel for a period of time. On July 3, Dela Paz was informed that he was being terminated. Duda, LeRoy Walker, of Human Resources, and Debbie Miller and Cherie Mancini of the Union were present in this meeting. (TR pp. 56-58). Dela Paz was given an Employee Counseling Report advising him of his termination. Said report provided, *inter alia*:

One expectation of the action plan outlined zero tolerance for any retaliation against the employee with whom he had the altercation. Mr. Dela Paz has failed to meet this expectation. Since returning from his suspension, he has continued to actively pursue measures to have the other employee disciplined. He has approached coworkers and management alike in an attempt to smear the reputation of the other employee and try to get her fired.

(GC Exh. 10).

Duda acknowledged that he was concerned about Dela Paz's continued circulation of the petition and that he considered it a violation of the action plan. However, Duda testified that it was the act of approaching Arura's department head, Brad Wild, which caused the termination of Dela Paz. Duda testified that if Wild had not been approached, the continued circulation of the petition would not have resulted in the termination of Dela Paz. (TR pp. 48-59).

ARGUMENT

A) The Decision to Suspend

At the outset, it should be noted that the decision to suspend Dela Paz on June 12 is not in issue. The suspension is not alleged to have violated the Act and there is no evidence that it violated the Act. Respondent made a decision to discipline Dela Paz based on evidence submitted to it during an investigation, including documentation submitted by Dela Paz. In this regard, the circulation of a petition by Dela Paz prior to June 12 was not a factor in the decision to suspend. (TR pp 48, 52). Counsel for General Counsel, in questioning Duda stated:

Q Mr. Dela Paz's petition was not considered retaliation at the time he presented it to you on June 12th, correct?

MR. WINKLER: So stipulate.

JUDGE BIBLOWITZ: Okay.

TR p. 52, lines 17-20.

B) The Protected Concerted Activity Issue

The primary issue in this case is whether Dela Paz was terminated for protected concerted activities. As to this issue, Respondent agrees with the Judge that Dela Paz did not engage in protected concerted activity. Allegations of protected concerted activities are governed by the Board's decision in *Meyers Industries*, 268 NLRB 493 (1983) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Under *Meyers*, for employee conduct to be protected by Section 7, it must be both concerted and engaged in for the purpose of mutual aid or protection. These are separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

The Board addressed the *Meyers* test in *Holling Press, Inc.*, 343 NLRB 301 (2004). In *Holling*, an employee complained to her union steward that her leadman was sexually harassing her. The union investigated the matter and determined that the accusation was unfounded. The employee then filed a claim with a state agency claiming that she had been subjected to sexual harassment. Thereafter she again raised the harassment issue, this time with her production manager. Company officials met with her, with her union representative present, and determined that the accusations were not substantiated. The employee then asked another employee to testify to the state agency. She told the other employee that she could be "hit" with a subpoena. The employer then suspended and later terminated the employee for attempting "to coerce

coworkers into corroborating an unsubstantiated charge of sexual harassment against one of [her] supervisors.” *Id.*, at 301.

Citing *Meyers*, the Board noted that for concerted activity to be protected it must be for the purpose of mutual aid or protection. The Board stated:

However, in the instant case, the employee sought to pursue a personal claim before a State agency. When she sought other employees to help her, that conduct was concerted. But, inasmuch as the claim before the State was personal, that conduct was not for mutual aid or protection.

Id., at 302. The Board also noted that “from the outset, [the employee] charted a course of action with only one person in mind – [the employee] herself.” *Id.*, at 302.

In Respondent’s brief to the Judge Respondent relied heavily on the *Holling Press* case. The Judge agreed. Citing extensively from *Holling Press* the Judge found that Dela Paz’s actions were in furtherance of his own personal dispute and that his solicitation of “support of his fellow employees did not convert . . . [his actions] to activities protected by Section 7 of the Act.” (JD p. 6, line 42 through p. 7, line 18).

In this case none of the conduct by Dela Paz was in furtherance of the mutual aid or protection of employees. The purpose of the petition can best be described by the heading on the top of the signature page: “**Signature Campaign in Support of Mhike Sanchez.**” To paraphrase the Board and the Judge in this case: From the outset, Dela Paz charted a course of action with only one person in mind – Dela Paz himself. It should be noted that even the circulation of the petition may not be “concerted” activity in the circumstances of this case. There is no evidence that other employees solicited signatures on behalf of Dela Paz. His own circulation of a petition that purports on its face to be a signature campaign solely to support him

does not support a finding that he was engaged in concerted activity within the meaning of Section 7. Nevertheless, even if the solicitation of signatures is considered to be concerted activity, the purpose of such activity was certainly not for the mutual aid or protection of employees.

C) The Alleged Overly Broad Solicitation Rules

Although the Judge found that Dela Paz did not engage in protected concerted activity, he found that Dela Paz's discharge violated the Act because it was allegedly based on overly broad no solicitation rules. In doing so, the Judge appeared to merge two alleged solicitation rules that had nothing to do with each other. The Judge noted that Duda's admonition to Dela Paz not to contact other employees while Dela Paz was away from the hospital on administrative leave was overly broad and violated the Act. (JD p. 6, lines 28-29). For purposes of argument, in this portion of the brief, we will assume that this ruling by the Judge is correct.

The Judge also noted that Duda's admonition that Dela Paz was not to retaliate against other employees, given to Dela Paz in his Action Plan when he was disciplined on June 12, was susceptible to various interpretations, some lawful and some unlawful. The Judge then held that "future events" established that the no retaliation admonition was unlawful. (JD p. 6, lines 28-31). The Judge merged these two rules and stated:

I have found that Duda's no talking to other employees during his suspension, and the no retaliation rule are overly broad and unlawful. By firing Dela Paz for violating these rules, by obtaining additional signatures on his petition, the Respondent violated Section 8(a)(1) of the Act.

(JD p. 7, lines 23-26).

These two “rules” or admonitions were separate, and not related to each other. To address the Judge’s ruling, the admonitions should be addressed separately. Duda placed Dela Paz on administrative leave in a telephone call to Dela Paz. Dela Paz testified that he was told not to report for work during this administrative leave. (JD p. 3, line 12). It is undisputed that Duda told Dela Paz not to contact hospital employees during his administrative leave. This was confirmed by Duda in his e-mail to Timothy:

Michael was also instructed that he was not to contact any hospital employees during his administrative leave. I asked Michael if he understood my instructions regarding his administrative leave and not contacting any hospital employees and he said that he did and would follow them.

(JD p. 3, lines 18-21, emphasis added herein).

When Duda disciplined Dela Paz he made the suspension retroactive to the administrative leave. Dela Paz was immediately allowed to work at the hospital. The instruction not to talk to hospital employees was limited to the time he was on administrative leave/suspension and it ended there. Indeed, it would be nonsensical to have him return to work and to forbid him from talking to or having contact with other employees as he resumed work. There is simply no evidence that Dela Paz was terminated based on the admonition not to contact employees during his administrative leave/suspension.

Indeed, the Judge continually spoke of the “rule” as applying only to the time Dela Paz was suspended:

“He also told Dela Paz not to contact any hospital employees during his leave.”

(JD p. 5, lines 38-39, emphasis added herein).

“Duda’s June 7 email to Timothy states that he told Dela Paz not to contact any hospital employee during his leave.”

(JD p. 6, lines 7-8, emphasis added herein).

“I have found that Duda’s no talking to other employees during his suspension [rule is] . . . overly broad and unlawful.”

(JD p. 7, lines 23-25, emphasis added herein).

It is clear that Dela Paz did in fact contact employees during his administrative leave. Yet he was not disciplined for such at the hearing on June 12. Indeed, as the Judge noted, there is no allegation that Respondent violated the law on June 12 by suspending Dela Paz. (JD p. 2, lines 5-6). At that point in time, the administrative leave and suspension was over, and the admonition not to talk to hospital employees ended. There is simply no evidence that Dela Paz was terminated based on the admonition given to him concerning his conduct while on administrative leave.

Turning next to the requirement imposed on Dela Paz on June 12 not to engage in any retaliation against Arura, such admonition is clearly lawful on its face. The Judge, however, held that the rule was overly broad based on subsequent conduct - the discharge allegedly based on the continued circulation of the petition. However, assuming for purposes of argument that the discharge was based in whole or in part on the continued circulation of the petition, the Judge specifically found that such conduct was NOT protected concerted activity. The Judge’s decision that the discharge was unlawful is internally inconsistent with his decision that Dela Paz did not engage in protected concerted activity. The judge specifically noted that the conduct was individual in nature and was advanced only to support his personal cause. (JD p. 7, lines 15-18).

Action based on such unprotected conduct does not transform the facially valid prohibition against retaliatory conduct into an overly broad rule.

Indeed, the Judge dismissed a parallel allegation that Respondent threatened employees with discharge for engaging in concerted activities. The Judge noted Dela Paz's testimony that when he offered to submit the updated petition to Timothy, Timothy told him that he, Dela Paz, might be fired if he accepted the petition. The Judge again held that the petition was personal in nature and did not constitute protected concerted activity. The Judge concluded that the statement to Dela Paz therefore did not violate the Act. (JD p. 7, lines 39-44).

D) The Discharge Was Not Based on the Continued Circulation of the Petition

Assuming, for purposes of argument, that the discharge was based in whole or part on Dela Paz's continued circulation of the petition, the above conclusions are inescapable. Nevertheless, it is respectfully submitted that the discharge was not based on the continued circulation of the petition after the June 12 discipline. Although Brad Duda considered the continued circulation to be a violation of the Action Plan, he did not base the termination on such circulation. The decision to terminate Dela Paz was based on his solicitation of Arura's department head to smear Arura's reputation. Dela Paz went out of his way to engage Brad Wild when the opportunity presented itself. He asked Wild if he knew him, and when Wild responded that he did not, he said his name was Michael Dela Paz and asked if Wild had heard anything about him. When Wild responded in the negative, Dela Paz said that he had gotten into a little bit of trouble with one of Wild's workers. He then asked if Wild would like to see a copy of the petition and Wild agreed to see it. He then left and returned not only with the petition, but also with his acrimonious written statement concerning Arura.

There can be no doubt that his conduct in seeking out Wild and presenting him with his documentation on Arura was to smear the reputation of Arura and to get her in trouble with her department head. It should be noted that Dela Paz gave Wild more than just the expanded petition. He also gave Wild a copy of his vitriolic written statement that slammed Arura. The statement is a three page diatribe attacking Arura's alleged "unprofessional attitude," her alleged "derogatory racist comment," and her alleged "threat." The submission of the document to Wild was done by Dela Paz alone, and therefore was not concerted activity. Furthermore, the document has absolutely nothing to do with the mutual aid or protection of employees.

The Judge noted that the termination notice to Dela Paz mentioned that he continued to approach coworkers in an attempt to smear the reputation of Arura. However, the notice provides that he "approached coworkers and management alike in an attempt to smear the reputation of the other employee and try to get her fired." (GC Exh. 10, emphasis added herein). Furthermore, immediately preceding this sentence in the termination notice Respondent wrote: "Since returning from his suspension, he has continued to actively pursue measures to have the other employee disciplined." (GC Exh. 10, emphasis added herein). Approaching and politicking Arura's department head is the most direct avenue Dela Paz could have taken to get Arura disciplined. The Judge totally ignored the evidence that the discharge was triggered by, and based on, Dela Paz's solicitation of, and politicking of, Wild to the detriment of Arura.

E) Wright Line

Finally, even if the Board finds that Respondent discharged Dela Paz in part because of his continued circulation of his petition after returning to work, and even if such conduct is determined to be protected concerted activity, the evidence is overwhelming that Dela Paz's solicitation and politicking of Wild to get Arura disciplined was the primary reason for his

discharge. Even if the continued petition circulation had never occurred, the submission of Dela Paz's vitriolic written attack on Arura would have caused Respondent to terminate him. Such conduct was clearly retaliatory and Respondent made it clear that zero retaliatory conduct would be tolerated. Accordingly, the unlawful discharge action should be dismissed based on *Wright Line*, 251 NLRB 1083 (1980), *enf.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

F) The Admonition Not to Contact Employees During Administrative Leave

As noted earlier in this brief, when addressing the alleged unlawful discharge issue, we assumed for purposes of argument that the Judge was correct in finding that the admonition not to contact other employees during Dela Paz's administrative leave was unlawful. We respectfully submit that this finding be reversed and the allegation dismissed. It should be noted that the documentation submitted by the Hospital Security Department to Duda evidences the concern of security personnel with possible physical retaliation by Dela Paz. Duda testified that upon reviewing the documentation from the security personnel that he was concerned with Arura's safety. In *Banner Health*, 358 NLRB No. 93 (2012), the Board noted that curtailing communication among employees during an investigation would be justified if an employer is acting on a reasonable belief that a witness may need protection.

In any event, Dela Paz did in fact contact other employees during the investigation and no action was taken against him for engaging in such conduct. There is, therefore, no evidence that a prohibition against conferring with other employees during Dela Paz's administrative leave was "maintained." Furthermore, Duda's statement occurred prior to June 12 and prior to June 11 and therefore the assertion that the statement was in violation of Act is barred by Section 10(b). Dela Paz asserts that the statement was made to him on June 4. (TR pp. 72-74). The Complaint

alleges the charge was filed on December 11, 2012 and that it was served by mail on December 12, 2012. Respondent, in the Answer and the Amended Answer, asserted the Section 10(b) bar in its affirmative defenses. This Section 10(b) issue was ignored by the Judge.

CONCLUSION

Based on the above, and the record as a whole, the Complaint should be dismissed.

Dated in Las Vegas, Nevada, this 1st day of November, 2013.



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On November 1, 2013, I served the within document(s):

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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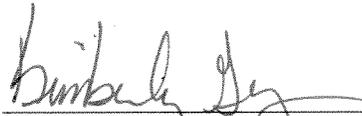
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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 2013 at Las Vegas, Nevada.



Kimberly Gregos

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