

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

BELLAGIO, LLC,

and

GABOR B. GARNER,

an Individual,

and

NAJIA ZAIDI,

an Individual.

Case No. 28-CA-106634
28-CA-107374

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

Paul T. Trimmer
trimmerp@jacksonlewis.com
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
PH: (702) 921-2460
FX: (702) 921-2461

**ATTORNEY FOR EMPLOYER
BELLAGIO, LLC**

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BELLAGIO, LLC'S BRIEF IN SUPPORT OF ITS EXCEPTIONS

Administrative Law Judge Robert A. Ringler (“ALJ”) conducted a hearing regarding Gabor B. Garner (“Garner”) and Najia Zaidi’s respective allegations and the Consolidated Complaint (“Complaint”) issued in the above-referenced matters on January 6-8, 2014.¹ The ALJ issued his Decision on March 20, 2014. He sustained the allegations that Bellagio violated Section 8(a)(1) of the Act with respect to Garner. He dismissed all of Zaidi’s allegations. Bellagio excepts to the ALJ’s decision with respect to his findings regarding Garner. As set forth in more detail below, the ALJ’s conclusions are wrong and contrary to established Board precedent. Bellagio’s exceptions should be sustained, and the Board should dismiss the Complaint in its entirety.

SUMMARY OF ARGUMENT

Garner’s case arises out of an incident which took place on May 12, 2013. A customer accused Charging Party Garner of holding out his hand, soliciting a tip, and then making a rude comment when the customer explained he did not have any cash on hand. Front Services Supervisors Brian Wiedmeyer and Max Sanchez met with Garner on May 13, 2013 so that they could get his side of the story. The Complaint alleges four violations of the Act occurred during and immediately after the May 13th meeting:

- In paragraph 5(f), the General Counsel contends that Bellagio violated Garner’s *Weingarten*² rights because Front Services Supervisor “Brian Wiedmeyer ... denied [Garner’s request] to be represented by the Union during an interview” during a May 13, 2013 meeting.
- In paragraphs 5(i), (j) and (k), the General Counsel contends that Bellagio violated Sections 8(a)(1) and 8(a)(3) because it “suspended” Garner in retaliation for “refus[ing]

¹ References to the transcript are in the following format: page # : line #. Joint Exhibits are referred to as “JX #.” Bellagio’s exhibits are identified as “RX #.” General Counsel exhibits are identified as “GCX #.”

² *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

to attend the [May 13th] meeting” and because Garner “assisted the Union and engaged in “concerted activities.”

- In paragraph 5(l) the General Counsel pleaded that the Company “orally promulgated and enforced an overly-broad and discriminatory rule prohibiting its employees from discussing the terms and conditions of employment[.]”
- In paragraph 5(m), the General Counsel contends that Bellagio engaged in unlawful “surveillance of employees engaged in union and concerted activities,” because after Wiedmeyer had placed Garner on SPI, he came upon Garner in the dispatch room – the busiest work area in the Bellagio Front Services Department – and instructed him to leave.

The ALJ sustained each of these allegations, *see* Decision at 12:29-13:11, but his conclusions are clearly contrary to both the record and Board law.

As to the first supposed violation of Section 8(a)(1), Bellagio did not violate Garner’s *Weingarten* rights. It did not deny Charging Party Garner’s request for union representation, **and the ALJ’s Decision conspicuously fails to make any factual or legal findings that would support that portion of his order.** *See* Decision 2:29-3:37; 8:10-12:25. In other words, the ALJ did not set forth any reasoning that would allow the Board to adopt his remedial order, and that failure alone is sufficient to sustain Bellagio’s exception to this holding. *See generally J.J. Cassone Bakery, Inc.*, 345 NLRB No. 111 (2005) (ALJ did not articulate a basis for his decision); *Dynatron/Bondo Corp.*, 326 NLRB 1170 (1998). Moreover, the record indisputably establishes that Bellagio fully complied with *Weingarten*’s requirements. As Garner admitted, once he made his request for representation, Wiedmeyer instructed Garner to “go ahead and get your steward,” and **all** questioning stopped. 115:6 (Garner); 185:19-186:5 (Garner admitting no further questions); 46:17 – 48:7 (Wiedmeyer); 93:1-4 (Sanchez). Because Garner refused to identify a steward or obtain one himself, Wiedmeyer contacted Employee Relations in an attempt to procure a representative. Unable to do so, Wiedmeyer ended the meeting, placing Garner on SPI, so that Garner could return with a representative and have the benefit of providing the

Company with his version of events. 44:21-45:3. None of these facts are in dispute. Wiedmeyer's actions were in full conformance with the spirit and the substance of *Weingarten*, and paragraph 5(f) of the Complaint should have been dismissed.

The General Counsel's second allegation, that Bellagio retaliated against Garner by placing him on SPI is equally meritless. This is a motive based allegation analyzed under *Wright Line*. The General Counsel, however, failed to establish a prima facie case. The ALJ found that Wiedmeyer may have been aggravated by Garner's request, but aggravation does not establish animus under *Wright Line*. Placing Garner on SPI was neither disciplinary nor adverse. As made clear by the hearing testimony, by Bellagio's collective bargaining agreement with the Union, and the SPI document itself, the purpose of SPI is to facilitate investigation and deliberation, not discipline.³ The SPI was brief, lasting less than a day, allowing Garner to cool off and for Bellagio to schedule a due process meeting during which a union representative would be available to assist Garner. It was fully paid. There was no loss of benefits.

The ALJ disregarded this evidence in a glib, one sentence footnote, claiming that SPI "contemplates further discipline." Decision 10, fn. 22. There is not a single piece of evidence to support such an assertion. Moreover, *Weingarten* expressly authorizes employers to suspend investigations when no shop steward is available. That is exactly what happened here. The investigation was suspended so that Garner could be supplied with a shop steward, and Garner was placed on a brief suspension pending investigation to allow for that process to take place. The ALJ's conclusion that the suspension could nonetheless be retaliatory is not supported by Board law. See *Roadway Express*, 246 NLRB 1127, 1130 (1979) (employer's suspension of two employees who refused to participate in interviews was proper).

³ Indeed, if the General Counsel had wished to contradict this fact, he could have called a witness from the Union who presumably would have testified favorably in support Garner's claim. His failure to call a Union witness warrants an adverse inference.

Just as importantly, even if one assumed that the General Counsel had set forth a prima facie case, the evidence demonstrates that Bellagio had legitimate grounds for placing Garner on SPI. It wished to complete its investigation, and by the end of the May 13th meeting, Garner had become extremely agitated, and was in no condition to return to work as a curbside bell man. As Wiedmeyer explained:

I don't want to exaggerate this, but he was beyond what I have seen him on an agitation scale ever before. And with him telling me he was going back to work if I don't contact his steward [which the evidence shows Wiedmeyer could not do, despite his best efforts], I couldn't let it happen. That's why he was SPI'd.

50:17-21. Wiedmeyer's decision was unquestionably proper under *Wright Line*, and as the Board explained in *Roadway Express*, 246 NLRB 1127, 1130 (1979), the fact that the SPI arose after an employee requested *Weingarten* representation is irrelevant. Where an employee refuses to attend an investigatory interview, and insists on returning to work in a manner that would be disruptive, the employer has a legitimate interest in maintaining plant discipline that justifies suspension and sending the employee off property. The ALJ rejected Bellagio's defense based on nothing more than his assessment of Garner's demeanor as a witness and his own personal view about what "should" have happened if Garner was agitated. In doing so, he disregarded the clear weight of the record and the fundamental inconsistencies in Garner's testimony and various statements. The Board should sustain Bellagio's exceptions and dismiss this allegation.

The General Counsel's third allegation, that Wiedmeyer orally promulgated an overly broad rule when he confronted Garner in the staging area/dispatch room and told him to go home, should also be dismissed. Under Board law, a supervisor will only be found to have orally promulgated an unlawful rule if the General Counsel can show that the alleged rule was intended to be of general applicability, as opposed to a one-time instruction to a single employee. Here,

all of the witnesses, including Garner, agree that Wiedmeyer was speaking only to Garner and his statement was part and parcel of the instruction to leave immediately. No one understood his statement to be announcing a new rule prohibiting a discussion of the terms and conditions of employment. In fact, all of the line employees, Garner included, testified that they have discussed the SPI and other discipline frequently since that time, and have no fear of breaking any supposed rule. The ALJ's ruling to the contrary is based on a misstatement of the law, *see* Decision at 12:3-5, and a total disregard for the facts. Bellagio's exceptions should be sustained, and this allegation should be dismissed.

Finally, the General Counsel's fourth allegation, that Wiedmeyer engaged in unlawful surveillance when he walked into the Front Services dispatch room, observed Garner speaking to another employee and then watched him depart is frivolous. The evidence at the hearing showed that the dispatch room is the Front Services Department's nerve center. Wiedmeyer and other supervisors walk through that area constantly throughout each workday. Wiedmeyer saw Garner in the dispatch room after he was placed on SPI, instructed him to leave, and then briefly watched Garner walk down the hallway. In other words, Wiedmeyer was not spying. Wiedmeyer encountered Garner in the dispatch room during the course of his normal duties. Board law is clear. Observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *See, e.g., Aladdin Gaming, LLC*, 345 NLRB 585, 585-586 (2005) (citing *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991)). The ALJ committed plain error in sustaining this allegation. Decision 12:9-15. It should be dismissed.

STATEMENT OF THE CASE

As noted above, the ALJ issued his Decision on March 20, 2014. He dismissed all of the Complaint allegations regarding Charging Party Zaidi. Decision 11:5-12:25. He nonetheless found that Bellagio violated Section 8(a)(1) of the Act in four ways with respect to Charging Party Garner: (1) it denied Garner's *Weingarten* rights; (2) it unlawfully suspended Garner because he requested a *Weingarten* representative; (3) it unlawfully surveilled Garner in the Front Services Dispatch Room; and, (4) it orally promulgated an unlawful rule when Wiedmeyer instructed Garner to comply with the aforementioned SPI. *See* Decision 12:29-13:11. The Decision contains cursory discussions of the SPI, surveillance and oral rule violations. *Id.* at 12:1-25. It contains no discussion whatsoever of the finding that Bellagio "refus[ed] to allow Garner to be represented by a Union representative during an investigatory interview[.]" *Id.* at 12:36-38.

STATEMENT OF FACTS

A. Bellagio Is A Five Diamond Resort Committed To Customer Service Of The Highest Level.

Bellagio is one of the leading luxury-class hotel casinos on the Las Vegas Strip. It prides itself on world-class guest service. 414:21-415:14. Its status as a Five Diamond resort is an essential component of its identity and its business model. *Id.* Its guests place a premium on the Company's customer service, and its employees' actions determine whether guests will choose to return to Bellagio or to patronize a competitor in the future. *Id.*

1. Bellagio has a longstanding collective bargaining relationship with Culinary Workers Union Local 226, and its collective bargaining agreement with the Union governs the terms and conditions of Garner's employment.

Garner works in the Bell Department and is represented by Culinary Workers Union Local 226 (the "Union"). During the relevant time periods, the terms and conditions of his

employment were governed by the Company's collective bargaining agreement with the Union. JX 1; 629:3-8. As Susan Moore, Bellagio's Employee Relations Manager, explained, the CBA "impacts everything that we do with employees. This supersedes our handbook and policies and procedures." 629:7-8.

Article 6 of the CBA sets forth the limits of Bellagio's ability to impose discipline. JX 1 at 9; 629:12-630:25. It requires Bellagio to have "just cause," and provides for a sequence of formal progressive discipline which *does not* include SPI's. *Id.* As Moore explained, SPI's are non-disciplinary and are used whenever circumstances suggest that an employee needs to be removed from the work environment, but further investigation is necessary. *Id.* In accordance with this fact, SPI's are not tracked and do not show up in employee personnel files as prior discipline or for any other purpose, and employee who are placed on SPI are compensated for the time they are out of work.⁴ RX 32 (Garner's PAN history); RX 33 (Garner's pay history for May 13-15, 2013); 631:14-634:19; *see also* RX 17 (Garner's May 15, 2013 verbal warning which does not list the SPI as prior discipline). Indeed, as Moore explained, the non-disciplinary nature of SPI's is confirmed by the fact that they **cannot be grieved under the collective bargaining agreement.** *Id.*

2. **To ensure guests receive Five Diamond service from the minute they arrive at the property to the time they depart, the Front Services Department maintains comprehensive policies and procedures regarding customer service.**

The Bell Department, which is part of the Front Services Department, is one of the most important customer service areas on the property. Bellpersons are often the first (and last) employees to interact with guests and they have access to guests' personal property and information. As Charles Berry, Director of Front Services, explained, the level of service

⁴ Wiedmeyer's testimony was similar. He testified that the SPI is not disciplinary and is used to prevent further escalation of a rapidly unraveling situation. 77:15-23.

delivered by the Bell Department is critical to ensuring that Bellagio maintains Five Diamond Status. 414:21-415:14.

To that end, the Bell Department maintains a number of policies and procedures designed to ensure that guests receive customer service. For example, the posters depicted in RX 6 and 7 have been affixed to walls just inside the area where curbside Bellmen, like Garner, work every day for at least the past two years. 74:23-75:10; 76:12-77:5. Those posters remind Bellmen to give each guest a proper departing salutation at the closure of each service transaction, such as “Hope you had a nice stay with us and we hope to see you again.” RX 6.

The posters are supplemented by detailed written policies and beginning of shift briefing. The Front Services Agreement, which contains detailed scripts for opening and closing guest interactions. RX 9. Garner admitted he was trained on these procedures several times, including in 2010 when he signed the policy. *Id.*; 167:24-171:7. Front Services Policy #D-03 contains similar sections, advising Bellmen to greet each guest properly, and for departing guests, ask if they enjoyed their stay. RX 14 at 2-4; 419:14-422:3 (Garner would have received the document). Finally, because soliciting for tips is one of the most egregious customer service mistakes, the department also maintains Policy #D-39, which provides “At no time are employees to solicit, hustle, or intimidate a guest in order to receive a gratuity. Employees will not suggest or indicate in any way that a gratuity is required, expected or not sufficient. RX 15; 422:10-423:22 (Garner was aware of policy). In the year prior to Garner’s discipline, three other individuals had been disciplined for hustling for tips, RX 35, and twenty-six other employees were disciplined as the result of guest complaints.⁵ RX 36.

⁵ The Judge rejected RX 35 and 36, which set forth comparative discipline as irrelevant. This decision was, respectfully, incorrect. The evidence is demonstrative of Bellagio’s fair and even handed treatment, and rebuts the General Counsel’s claim that Garner was singled out for exercising his *Weingarten* right.

B. Garner Was Placed On Suspension Pending Investigation Because He Became Irrate When His Supervisor Attempted To Speak To Him About A Customer Complaint And He Could Not Be Allowed To Return To Work.

- 1. Garner is a long-term Bellagio employee who has received extensive training regarding five diamond service expectations and has been counseled for soliciting tips or otherwise acting in a disrespectful and confrontational manner with guests in the past.**

As discussed above, Bellagio maintains comprehensive policies and procedures which govern guest service. Guests have accused Garner of violating these policies on a number of occasions. For example, on September 8, 2011, Berry spoke to Garner about a complaint from a Bellagio casino host. RX 16; 424:3-426:22. As Berry explained, Garner believed that the guest had “stiffed” him, and as a result complained loudly to casino host, insinuating that the host was responsible for ensuring that Garner received a gratuity. *Id.*; 424:3-426:22. In their conversation, Garner admitted that he had “let his emotion get the best of him and should have handled the situation better.” *Id.* Berry went on to explain that he had worked with Garner for 25 years, and that on occasion, Garner’s demeanor ranged from “A’s to F’s.” *Id.* In fact, Garner became upset with Berry during the due process meeting and when Berry issued the verbal. 433:20-434:19.

As Wiedmeyer and Sanchez testified, they had similar experiences with Garner. Wiedmeyer, who had worked with Garner for more than two years at the time of the incident, specifically described an incident that occurred in the past year in the dispatch area, where Garner had an unusually strong reaction to Wiedmeyer observing another employee named Austin, “giggling.” 549:15-550:15. He also discussed a September 5, 2011 note to file in which Wiedmeyer described a guest complaint that Garner had said “we work for tips you know.” RX 30.

Sanchez has worked with Garner for approximately 18 years. 616:11-618:14. In describing how Garner reacts whenever he is confronted with a guest complaint, Sanchez stated that “typically, it starts out, you know, okay, and he has always had the tendency of starting to get loud and very argumentative from the onset. It's never his fault. It's always someone else's. Someone is lying. So that type of thing, yes.” *Id.* Sanchez also specifically referenced a January 19, 2012 incident involving a guest named Rungapinan. RX 20. In that situation, Garner admitted that he had been “short” with the guest, but also implausibly denied the guest’s allegations. *Id.* Sanchez noted that Garner “has had other complaints against him due to losing his temper or is having a bad day. Being a long term employee, we have always tried to refocus and coach Bryan.” *Id.*

2. On May 12, 2014, a guest named Matthew Poland complained that Garner solicited a tip.

On May 12, 2013, Bellagio guest Matthew Poland decided to store his luggage after checking out of his hotel room in order to gamble one last time before departing the property. GCX 2. When he approached the Bell desk, Garner was there to receive the luggage. 554:7-557:2. According to the guest, Garner “acted as if he was waiting for a tip . . . [a]fter a long pause waiting for us to pull out our wallets, I left with my claim ticket and after I got 5 ft away, he said 'Appreciate it.'” GCX 2. This misbehavior was so offensive to the guest, he no longer wanted to gamble before leaving Bellagio: “I was so upset by it that instead of gambling a little longer (the reason for which I dropped off my bags in the first [place]), I decided to contact MLife. . .” GCX 2. Poland went on, “[s]o instead of making the hotel money, I left upset, something I usually don't feel walking out of the Bellagio.” *Id.*

When Poland contacted the MLife players club desk, they called Wiedmeyer. 554:7-557:2. Wiedmeyer spoke to the guest over the phone and then met with him in person. *Id.* As

Wiedmeyer explained, Poland informed him that the Bellperson who took his bags was suggesting a gratuity was expected. *Id.*; *see also* GCX 3(a). Poland also told Wiedmeyer that the Bellperson “sarcastically” said “I appreciate it” when Poland turned to walk away. *Id.* Wiedmeyer apologized, asked the guest to complete a written statement, then escorted him and his luggage to his car. *Id.* Poland was accompanied by a male, not female companion. *Id.* Wiedmeyer’s account was corroborated by the contemporaneous notes he took on the back of the guest’s claim ticket. RX 31.

3. Wiedmeyer met with Garner about the Complaint on May 13, 2014 and placed him on suspension pending investigation (“SPI”) after Garner became so agitated that Wiedmeyer lost confidence in Garner’s ability to give five diamond guest service.

By the time Wiedmeyer completed his meeting with the guest, Garner’s shift was over. Accordingly, Wiedmeyer determined that he would meet with Garner the following day, and as was his practice, Wiedmeyer scheduled it for the end of Garner’s shift.

Wiedmeyer, Garner, and another Front Services Supervisor, Max Sanchez, attended the May 13th meeting. Wiedmeyer started the meeting by describing the complaint from Poland and asking Garner to explain what happened. 20:5-11; 88:18-24. Garner initially denied the allegations, claiming the statement was a lie, and then said he did not recall the situation (and he thought it involved a female). GCX 22. Garner then asked whether the meeting could lead to discipline. 23:7-11; 29:5-23. Wiedmeyer candidly responded that it was an “open investigation” and therefore could lead to discipline, but he did not know for certain because he had not heard Garner’s side of the story. 29:5-23; GCX 3(a); GCX 4.

At that point, Garner stated words to the effect that he would like to “invoke” his *Weingarten* rights and ordered Wiedmeyer to bring his shop steward. 30:1-31:10. Wiedmeyer understood this request and stopped asking Garner questions. 32:6-7 (Wiedmeyer); 90:25-91:2

(Sanchez); 115:6 (Garner). He told Garner to “go ahead” and get a steward and that he would wait to continue the meeting until the steward arrived. *Id.*

Garner refused.⁶ He became “very condescending, like almost as to embarrass” Wiedmeyer, 93:17, became increasingly agitated, 36:20-37:4, 37:12-15, pointed his finger at Sanchez and spoke angrily about a supposed “list”, 94:7-94:22. Garner insisted that Wiedmeyer was obligated to locate a steward for him.⁷ 32:4-9. Garner effectively “ordered” Wiedmeyer to get him a shop steward. *Id.*

In an attempt to end the confrontation, Wiedmeyer and Sanchez left the room and contacted Human Resources. 32:4-34:7. Wiedmeyer explained Garner’s “temperament and agitation levels were just going higher and higher throughout this thing until [he] dismissed himself to call ER.” 37:12-15. He asked to speak to Susan Moore, but when told she and all other senior members of the department were unavailable, he spoke to Jessica Harbaugh. 34:15-

⁶ Garner contends that he “got up to leave but Brian told him to sit down.” 115:6-12. This claim is not credible. Wiedmeyer, 45:4-46:1, and Sanchez, 95:22, specifically denied it, and given that Bellagio had no notice of this allegation until the precise moment the question was asked during the General Counsel’s 611(c) examination, their denials are highly credible. Moreover, although Garner concedes that it is the basis of his contention that his *Weingarten* right was violated, 139:2, Garner has also conceded that he did not make such a claim in the statement he attached to the SPI document, nor did he make such a claim in the May 13th statement he presented to Employee Relations. GCX 21; 141:1-142:21. The fact that this critical fact was omitted until he filed his unfair labor practice charge proves that it should not be believed.

⁷ Garner contends that he was “calm” throughout the meeting, that he never raised his voice, and that he never pointed at Sanchez. 151:15-152:9. This is implausible given Garner’s history of becoming agitated whenever he was confronted about soliciting tips and the specificity of Wiedmeyer and Sanchez’ testimony. Moreover, Wiedmeyer and Sanchez’ testimony that Garner was worked up and not fit to return to a customer service position, even for ten minutes, is corroborated by the testimony of Russ Meyer, who said Garner was “distraught,” and Jason Weinmen, who stated that Garner was upset and talking loud enough to be heard around the corner, a distance of at least thirty feet. 213:22-241:22. Wiedmeyer and Sanchez’ testimony is also bolstered by uncontroverted evidence about Garner’s typical reaction when he is challenged regarding guest service, which is admissible under Fed. R. Evid. 406. Wiedmeyer had worked with Garner for more than two years and had at least two interactions with Garner where he inexplicably became angry. 546:5-553:5; RX 30. Sanchez had worked with Garner for eighteen years, and as he explained, the SPI was necessary because Garner was “agitated,” calling the guest a “liar”. Garner “was very agitated and, you know, in guest service there’s an aura about employees when they are upset and that’s the last thing or you can get the employee even into a worse jam where he may say something because he’s already angry. So regardless of whether it had been Bryan or any other employee, he would not have been allowed to go back on the floor at that moment.” 623:2-8.

35:10. Harbaugh confirmed that there was no list and that she was unaware of any other way to contact a shop steward at that time. *Id.*

Wiedmeyer had been considering placing Garner on SPI immediately before he excused himself to contact Employee Relations because of Garner's behavior. 36:20-37:4. Garner had insisted that unless Wiedmeyer was able to locate a steward, he was "going back to work." 37:8-11. In short, obtaining a steward was Wiedmeyer's only hope of defusing the situation. *Id.* When the call with Employee Relations confirmed that Wiedmeyer would not be able to obtain a steward – none was available and Garner had not told Wiedmeyer of Cherise, the Union employee in the Employee Dining Room – Wiedmeyer concluded that he must place Garner on SPI⁸:

[Garner] was extremely agitated and in no position to be in a guest service capacity and I would be placing him on SPI because he was refusing to contact a steward and basically telling me he was going back to work and I couldn't allow him to go back on the floor.

36:20-37:4.

Sanchez agreed, explaining that allowing Garner back on the floor was likely to be bad for both the Company and Garner.⁹

⁸ Wiedmeyer explained that a secondary goal of the SPI was to allow the investigation to be completed. 51:20-52:1. Although the General Counsel appears to believe that such a suspension is improper, that belief is not supported by the law. As made clear in *Weingarten*, once an employee requests representation, an employer may wait for the steward to arrive, or stop asking questions, end the interview and proceed with its investigation. *See, e.g., Pacific Gas & Electric Company*, 253 NLRB 1143, 1143 (1981). Regardless of how the General Counsel may wish to twist the facts, that is exactly what happened in this case. There is no basis in Board law for finding that the SPI was improper.

⁹ The General Counsel appeared to argue that Garner was placed on SPI solely because he would not go forward with the interview or provide a statement. This argument mischaracterizes the relevant testimony. The issue was not, as Wiedmeyer explained, that Garner was requesting a steward or refusing to provide a statement. Rather, the meeting had gone off track because Garner was doing three things all at once. He was refusing to speak without a steward, which is his right. He was refusing to seek out his own steward, and asserting that Bellagio was obligated to provide one, which is not correct. And, finally, he was insisting that he be allowed to return to work in an agitated state. Wiedmeyer was focused on defusing the situation, which required either a steward, which he could not find, or placing Garner on SPI. Under those circumstances, Bellagio was well within its right to take

His state of mind, he was very agitated and, you know, in guest service there's an aura about employees when they are upset and that's the last thing or you can get the employee even into a worse jam where he may say something because he's already angry. So regardless of whether it had been Bryan or any other employee, he would not have been allowed to go back on the floor at that moment.

623:2-8; *see also* GCX 3; GCX 4; GCX 25.

When Wiedmeyer returned to the room, there was one final discussion whereby Wiedmeyer agreed that Garner could, if he wanted to, allow another employee into the meeting as a representative. 44:24-45:3. That option was also declined, so Wiedmeyer proceeded with placing Garner on SPI. He presented Garner with the SPI notice and explained its requirements. GCX 25; 50:13-15; 54:23-55:3. As noted in the SPI form, it is “not a disciplinary action.” GCX 25(a). “It is a process that Bellagio uses to remove [an employee] from the work place in order to investigate a serious situation ... in which you may have been involved.” *Id.* Thus, Wiedmeyer informed Garner that he needed to leave the property “immediately” and the meeting ended. 54:23-55:3; GCX 25.

4. The events in the Bell Department dispatch room.

Garner left the office. Wiedmeyer and Sanchez did the same shortly thereafter. 58:4-25. Wiedmeyer left the room and saw Garner in the Bell staging or dispatch area. *Id.*; RX 3, 4, and 5. Garner was speaking loudly, leaning on a table. 58:17-59:7. Wiedmeyer approached Garner and stated: “You need to leave.”¹⁰ 60:7-23. Garner shot back “are you telling me that I can’t talk to other people” or words to that effect. *Id.* Because Wiedmeyer, as a supervisor, could not

action. Indeed, *Weingarten* expressly provides that an employer may proceed with its investigation and even discipline if the employee opts not to answer questions.

¹⁰ Garner claims that Wiedmeyer said words to the effect of “you can’t be discussing that matter here.” 122:9. This is implausible. “Matter” is a fairly formal word, and given that Wiedmeyer did not use the word “matter” a single time in three days of off and on testimony, it is unlikely that he would have chosen such a phrase in the heat of the moment.

reveal to the other employees that Garner was on SPI, even if Garner had already told them, Wiedmeyer said “in this situation, he had to leave.” *Id.*

Garner turned to depart, and because Wiedmeyer wanted to ensure that Garner was heading out towards the parking area, as opposed to back into the casino work area, Wiedmeyer walked approximately ten feet to the exit door and looked down the hallway. 61:6-12. Garner had left with Jason Weinmen, and after Garner saw Wiedmeyer had come to the hallway, Garner said “are you going to tell me who I can walk out with too?” or words to that effect. *Id.* Wiedmeyer responded “No, have a nice night,” and turned back into the dispatch room. 61:13.

On his way out, Garner went to Employee Relations and completed a statement. GCX 21. In that statement, Garner did not claim that he had been prevented from leaving the room. *Id.* Garner also did not claim that he had been forbidden from talking to coworkers or that Wiedmeyer had imposed a “gag order” on the Bell Department. *Id.* To the contrary, although the statement adopts a “kitchen sink” approach, and includes a claim that Garner was being harassed for unspecified “union involvement” – a claim which the General Counsel did not even attempt to litigate – there is no suggestion that Wiedmeyer told Garner to “sit down” and that he could not leave. *Id.*

5. Bellagio continued Garner’s due process meeting on May 14, 2013 and terminated the SPI, allowing Garner to return to work.

After Garner departed, Wiedmeyer contacted Berry and Susan Moore and apprized them of the situation.¹¹ They arranged for Garner to come in the following day, May 14th, for a due process meeting. 638:12-639:12. Although Garner had claimed during the May 13th meeting that he did not know how to contact a shop steward, he testified at the hearing that on the morning of the due process meeting, he arranged for Union employee named “Cherise” to meet

¹¹ Susan Moore’s summary of the due process meeting confirms Bellagio’s version of events and proves that Garner’s *Weingarten* rights were respected. RX 34.

him at Employee Relations so that he could arrange for a shop steward. As Garner explained, Cherise is located in the employee dining area, Manja, and is “in charge” of all the shop stewards. 125:22-25; 159:18-161:19.

When the meeting began, Garner requested that Bellagio provide a shop steward named Monica Smith. 638:12-639:12. Like Wiedmeyer, Moore explained to Garner that it was his responsibility to obtain a steward, but then proceeded to locate Smith and secure her attendance at the meeting. *Id.* Once Smith arrived, Garner consulted with her, and the meeting began. *Id.* As Moore explained:

It began with Bryan stating that Brian Wiedmeyer would not get him a shop steward, and then it continued into we talked about the guest complaint and what he remembered about the guest complaint, et cetera. And then at the end of the meeting, we talked about guest service and what's required of guest service.

639:14-19.

Berry, Director of Front Services, explained that Gamer had received several guest complaints over the years regarding rude behavior and/or soliciting tips. *Id.* Berry emphasized the importance of guest service to Bellagio. *Id.* After complaining about the prior day's meeting with Wiedmeyer and Sanchez, Garner again denied the conduct reported by Poland to Wiedmeyer. *Id.* He also stated that he says “nothing” when he gets “stiffed” — which Berry pointed out is inconsistent with Bellagio's policies. *Id.* Although Berry remained calm throughout, Garner once again became agitated and excited.¹² 639:22-640:25.

Garner ultimately completed a statement. GCX 22. In that statement, Garner implausibly claimed that he remembered Poland because of the name but could not recall

¹² Garner asserted that Berry became very upset and banged his fists on the table during the due process meeting. This allegation did not make sense in light of Garner’s admission that he apologized to Berry for the way that he had let “his emotions get the best of him” during the due process meeting. 181:7; RX 18. Why would Garner offer a gratuitous apology if he believed that Berry had acted inappropriately? 181:7-19. It is further evidence that Garner’s testimony cannot be trusted.

whether Poland had left a tip. *Id.* Garner also claimed that there is “definitely no mention of a standard greeting or salutation for the guest or about tipping that I have heard.” *Id.* Once again, Garner did not claim that he had been forbidden from leaving the room. *Id.*

6. Charles Berry completed the investigation and issued a verbal warning to Garner on May 15, 2013.

Berry contacted Poland on May 15, 2013. 437:13-440:7; RX 18. Berry wanted to speak to the guest himself and resolve the discrepancies presented by Garner’s account of the situation before he made any decision regarding discipline. *Id.* As Berry explained, he was struck by the guest’s sincerity. 439:18-440:7. The guest acknowledged that he had not given Garner a tip, and explained that he was unable to tip because he had no cash. *Id.* The guest was still upset about the incident because he felt that he was a good, repeat customer at the Company, and he was surprised that he had been treated poorly at a place like Bellagio. *Id.*

Berry concluded that Garner’s excuses had no merit. On May 15th, after the due process meeting, and in accordance with its progressive discipline policy, issued a verbal counseling to Garner for hustling tips and rude behavior in violation of Company policy. RX 17. Garner was returned to work and reminded of the importance of following Company and Department policies and procedures, including not hustling tips, not being rude and discourteous to guests, and to always provide a positive closing to all guest interactions, regardless whether he receives a tip. *Id.*

Garner was paid for all time off work. RX 32. The SPI was not tracked as discipline. RX 33. He did not file a grievance or challenge that the SPI was disciplinary and lacked just cause under the CBA. Instead, Garner filed his unfair labor practice charge approximately a month later, on June 6, 2013.

WITNESS CREDIBILITY

The General Counsel's case hinges on Garner's credibility as witnesses. Unless his testimony is fully credited, the General Counsel cannot establish a prima facie case for any of the allegations presented in the Complaint. Credibility determinations rely on a variety of factors, including the consistency of the witness' testimony, demeanor, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *See, e.g., Aliante Station Casino & Hotel*, 358 NLRB No. 153, slip. op. 79-80 (Sept. 28, 2012); *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001).

Garner was not a credible witness. First, significant portions of his testimony consisted of memorized narratives. His initial description of the critical May 13th meeting was obviously canned. 114:7-115:12. It was elicited by a single question, and the ALJ rebuked Garner for testifying in narrative form on a number of occasions. The Board has held that such testimony is unreliable. *See, e.g., St. George Warehouse, Inc.*, 349 NLRB 870, 889 (2007).

Second, Garner's testimony regarding obtaining a shop steward through Cherise is a critical issue for Garner's credibility and the ALJ ignored it completely. As discussed above, Garner knew that he could obtain a steward by calling Cherise, the Union official in the Employee Dining Area. If Garner simply wanted a steward, why did he purposefully fail to tell Wiedmeyer that Cherise was located there, and that Wiedmeyer could obtain a steward could be obtained by contacting her? The fact that Garner dissembled regarding that issue goes to the heart of his credibility and motivation as a witness. It shows that Garner was, as Wiedmeyer and Sanchez stated, being needlessly difficult and obstructionist. It makes Wiedmeyer's testimony far more credible.

Third, Garner's testimony was inconsistent with both his May 13th and May 14th statements, as well as his Board affidavit. For example, although his claim that Wiedmeyer prohibited him from leaving Berry's office is critical, it was not mentioned in the comments he wrote on the back of the SPI form, nor was it mentioned in his May 13th or May 14th statements. *Compare* GCX 21 with 141:1-142:21. This allegation was startling and the omission of this crucial piece of evidence speaks for itself. Clearly, Garner is not shy. If he were ordered to "sit down" and then prohibited from leaving the office, he would have mentioned it in his statement and during his May 14th due process meeting. The allegation should not be credited.

Fourth, several of Garner's statements regarding the underlying misconduct were false. For example, Garner claimed that there is "definitely no mention of a standard greeting or salutation for the guest or about tipping that I have heard." GCX 22. During the May 14th due process meeting, Garner repeatedly insisted that Bellagio did not require him to open and close guest transactions with a greeting, and that silence was acceptable. 435:18-436:13. As set forth above, however, Garner had *extensive* training on the types of "standard greetings" which were acceptable, and in fact, one such greeting was set forth in a poster in his work area. *See* RX6, RX7, RX9, RX14 and RX 15. This is a significant discrepancy and Garner tied himself into knots trying to parse his early statements and resolve the discrepancy. 146:1-148:3. It confirms Garner's fundamental lack of candor, and his willingness to dissemble on this issue in an effort to avoid responsibility should be considered when evaluating his credibility on other issues. If he is willing to feign ignorance and misstate the facts on this matter, it is likely that he would be willing to do the same thing with respect to his testimony regarding the May 13th meeting, especially when both his May 13th statement and his Board Affidavit contain omit several details which he now claims to be true.

Fifth, Garner incorrectly identified the location of the May 13th meeting in his Board affidavit. In the affidavit, he asserted that it took place in the Bell Captain's office, not Berry's office. 148:3-150:16. Garner said he "missed it" and when asked if he missed other misstatements, he glibly asserted "maybe." *Id.* Garner's cavalier approach to a misstatement made under penalty of perjury undermines the fine factual distinctions that the ALJ relied on in reaching his conclusions.

Sixth, several aspects of Garner's testimony were inherently implausible. For example, although he has been spoken to about hustling for tips on numerous occasions, he contends that whether he gets a tip or not is not "something [he] remember[s]." 146:1-7. This is disingenuous on its face. Similarly, his contention that he was "calm" during the May 13th meeting is belied by his personal history and the specificity of Wiedmeyer and Sanchez' testimony. It is improbable given that he was supposedly accusing Wiedmeyer of breaking federal law. It is also contradicted by the testimony of Meyer, who said Garner was "distracted," and Weinmen, who stated that Garner was upset and talking loud enough to be heard around the corner, a distance of at least thirty feet. 213:22-241:22.

Seventh, and finally, his testimony regarding the underlying guest complaint contained substantial inconsistencies because Garner was attempting to avoid responsibility. During the investigation, Garner insisted that he remembered this incident because of the name "Poland," GCX 22(a), and claimed Poland was accompanied by a woman. *Id.* As Wiedmeyer testified, however, that was clearly not true. Poland was joined by a male guest. 556:10-22. Garner also asserted that Poland was giving him a "bad vibe." 172:8-9. Garner stated "That's exactly what I'm saying." 167:10-23. Garner reiterated that he remembered Poland's "vibe" and this "vibe" led him to believe he should say nothing *twice* during the hearing. *Id.* However, on cross

examination, Garner contradicted himself on this issue, claiming that he “never said that Poland was giving [him] a vibe.” 172:15-17. There was no reason for Garner to misrepresent these facts other than to dissemble and avoid discipline.

In sum, the evidence establishes that Garner gave inconsistent statements and testimony regarding all of the material events. The ALJ nonetheless concluded that Garner was credible with respect to the events that took place on May 13th. He discounted Wiedmeyer’s testimony and disregarded both the obvious problems in Garner’s testimony based on his assessment of Garner’s demeanor and his own personal beliefs about how Wiedmeyer could have handled the situation differently. This was clearly wrong and the ALJ’s credibility determination should be reversed. “An administrative law judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word ‘demeanor.’” *Permaneer Corp.*, 214 NLRB 367, 368-69 (1974). The clear preponderance of the evidence demonstrates that Garner’s testimony regarding his behavior during the May 13th meeting and the events which took place thereafter should not be believed.

ARGUMENT:

**THE GENERAL COUNSEL FAILED TO ESTABLISH THAT BELLAGIO
COMMITTED ANY OF THE UNFAIR LABOR PRACTICES ALLEGED IN THE
COMPLAINT**

The General Counsel bears the burden of establishing each element of its contentions that the Respondent violated the Act. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975). That “burden never shifts, and ... the discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case.” *Id.*; *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) (“The mere disbelief of testimony establishes nothing.”). As set forth below, the General Counsel has not satisfied this standard.

A. The General Counsel Failed To Prove The Allegation In Paragraph 5(f) That Bellagio Violated Section 8(a)(1) of the Act Because Front Services Supervisor “Brian Wiedmeyer ... denied [Garner’s request] to be represented by the Union during an interview” During the May 13th Meeting.

In *NLRB v. J. Weingarten*, 420 U.S. 251, 256-60 (1975), the Supreme Court held that employees may refuse to submit to an interview by employer representatives, without a union representative being present, if the employee reasonably believes that the interview may result in discipline. In reaching this conclusion, however, the Court made it clear that the right arises “only in situation where the employee requests representation;” the employee’s right to request representation “is limited to situations where the employee reasonably believes the investigation will result in disciplinary action;” exercise of the right may not interfere with legitimate employer prerogatives; and, the employer may carry on its inquiry without interviewing the employee if it so chooses. *Id.* Once an employee makes a valid request for representation, an employer has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a representative or having no interview at all. *Id.*

Here, the evidence establishes that Wiedmeyer and Sanchez completely stopped asking Garner questions once Garner stated that he wanted union representation. They sought no further information and did not request or pressure him to complete a statement. In fact, Wiedmeyer exhausted every reasonable avenue at his disposal in his attempt to locate a steward. Knowing that there was none in the Bell Department, and also knowing that the departmental “list” to which Garner referred did not exist, he excused himself and contacted Employee Relations. Employee Relations’ senior most employees were out of the office, and the person he spoke to, Jessica Harbaugh, confirmed that Employee Relations did not have a list of stewards, and when he returned, the interview ended. Wiedmeyer did not deny Garner’s request

for a Union representative. Wiedmeyer attempted to obtain one, but could not, due in part to Garner's intentional refusal to tell Wiedmeyer about "Cherise" in the Employee Dining Room.

There is **no** *Weingarten* violation on these facts. *Weingarten* does not require Bellagio to locate Garner's shop steward, and Wiedmeyer's inability to obtain one does not establish a violation of the Act since by Garner's own admission, Wiedmeyer and Sanchez stopped the interview once he invoked his *Weingarten* right. See *Roadway Express*, 246 NLRB 1127, 1130 (1979) ("we believe that the burden of informing unit members of the designation of [shop stewards] is one more appropriately borne by the bargaining agent"); see also *Pacific Gas & Elec. Co.*, 253 NLRB 1143 (1981) (no obligation by employer to provide shop steward of choice). As the Board explained in *Coca-Cola Bottling Co.*,

[T]here is nothing in the Supreme Court's opinion in *Weingarten* which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons for which the employer is not responsible[.] ...

Our dissenting colleagues, nevertheless, characterize [the employer's] actions as a denial of the "help" to which the employee was entitled. In fact, [the employer] never denied [the employee's] request; it was simply unable to comply therewith. When [the employee] was informed of this fact, he did not, as he could have, request alternative representation. We see nothing in *Weingarten* which implies that it is the employer's obligation to suggest and/or secure alternative representation where the representative originally requested by the employee is unavailable. Therefore, in these circumstances, we disagree with our colleagues that at this point the burden shifted to [employer] either to stay the meeting or to offer [the employee] a meeting without the steward or none at all.

Accordingly, we shall adopt the Administrative Law Judge's recommendation that the complaint be dismissed in its entirety.

227 NLRB 1276, 1276-1277 (1977). Bellagio requests that the Board apply the analysis set forth in *Coca-Cola Bottling* and *Roadway Express* and dismiss this Complaint allegation.

B. The General Counsel failed to prove the allegations in paragraphs 5(i), (j) and (k), that Bellagio violated Sections 8(a)(1) and 8(a)(3) of the Act because it “suspended” Garner in retaliation for “refus[ing] to attend the [May 13th] meeting” and because Garner “assisted the Union and engaged in “concerted activities.”

The General Counsel’s contention that Bellagio violated Sections 8(a)(1) and 8(a)(3) of the Act when it placed Garner on SPI is analyzed under *Wright Line*. To establish unlawful discipline under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activity was a substantial or motivating factor in the employer's decision to take action against him. See *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's union support or activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Willamette Industries*, 341 NLRB 560, 563 (2004). If the employer satisfies that obligation, the burden shifts back to the General Counsel to establish pretext. *Id.*

Here, the General Counsel has not established a prima facie case. There is no evidence that Wiedmeyer’s decision to impose the SPI was based on Garner’s invocation of his *Weingarten* right, nor is there any proof of generalized animus other than Garner’s uncorroborated and self-serving testimony. The ALJ based his conclusion on his belief that Wiedmeyer was “angry.” The record does not support that belief. Indeed, if anything, the evidence establishes that Garner is an inherently adversarial employee who, when presented with a customer complaint, becomes defensive and agitated, and his actions on May 13th were consistent with his history.

There is also no evidence that Garner was subjected to an adverse action. SPI’s are not disciplinary or tracked in any way. Their purpose is to allow for investigation and to prevent an incident from escalating. As Moore explained:

SPI is a holding pattern. It stands for a suspension pending investigation, and it's when something has happened in the workplace where we either need to conduct an investigation or something has happened in the workplace. We need to have a resolution before we return the employee to work. It's a holding pattern. It's not discipline in and of itself. It's just a holding pattern.

631:2-8. Garner's treatment was consistent with this policy. The SPI was not tracked as discipline. It lasted less than 24 hours, and Garner he was compensated for all of his time. Its purpose was to prevent Garner from entering guest service and generating additional customer complaints. The break also allowed Garner time to obtain a steward and return for a due process meeting. This is consistent with, not contrary to, *Weingarten*.

The Board has repeatedly held that actions like Garner's SPI, which neither constitute formal progressive discipline, nor lay "a foundation for future disciplinary action against [the employee]," do not constitute an adverse action for purposes of establishing a violation of the Act.¹³ *Promedica Health Systems Inc.*, 343 NLRB 1351, 1351-1352 (2004) (quoting *Trover Clinic*, 280 NLRB 6, 16 (1986)). For example, in *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993), the Board found that an employer did not violate Section 8(a)(3) by issuing a "conference report" to an employee for wearing a union pin, because there was no evidence that the conference report was "even a preliminary step in the progressive disciplinary system." *Id.* at 403. The Board found no violation because "the General Counsel has failed to prove that the conference report is part of the Respondent's formal disciplinary procedure or that it is even a preliminary step in the progressive disciplinary system." *Id.*; *see also Jochims v. NLRB*, 480 F.3d 1161, 1170-1171 (D.C. Cir. 2007) (collecting authority in the supervisor context and explaining that even written warnings placed into personnel files may not constitute discipline).

¹³ There are Board decisions in which a "suspension pending investigation" is indisputably disciplinary and the last step in a disciplinary system before termination. That is not this case. As Moore explained in detail, Bellagio does not use SPI in that way, and it is not disciplinary under the applicable collective bargaining agreement.

Further, Garner must show by a preponderance of the evidence that his alleged protected activity motivated the employer's adverse action. *See, e.g., SFO Good-Nite Inn, LLC*, 352 NLRB No. 42, slip op. at 2 (2008). Even if one assumed that Garner could make out a prima facie case, the evidence proves that Bellagio would have placed him on SPI regardless of whether he requested union representation or not. The evidence, as discussed above, is overwhelming that Garner was agitated and in no condition to return to service. The only evidence to the contrary was Garner's testimony. His testimony was refuted by Wiedmeyer and Sanchez. It was inconsistent and demonstrably false on several material issues. And, even Garner concedes that he was so "upset" that he should be excused from omissions contained in his May 13th statement to Employee Relations. 141:16-18. There was no basis for crediting Garner over Wiedmeyer and Sanchez, particularly when the ALJ's basis for doing so was nothing more than Wiedmeyer and Sanchez' supposed failure to expressly describe Garner's agitated state in their May 13th statements.

Although the ALJ appears to believe that Wiedmeyer acted improperly because Wiedmeyer also wished to complete his investigation, that belief is not supported by Board law. 51:20-52:1. As made clear in *Weingarten*, once an employee requests representation, an employer may wait for the steward to arrive, or stop asking questions, end the interview and proceed with its investigation. *See, e.g., Pacific Gas & Electric Company*, 253 NLRB 1143, 1143 (1981). Regardless of how the General Counsel may wish to twist the facts, that is exactly what happened in this case. Once Garner requested representation, Wiedmeyer stopped asking questions, attempted to locate a steward, and finding that one was not available to him, discontinued the interview and placed Garner on SPI. The SPI lasted less than 24 hours. It ended the following day after the due process meeting. There is no basis in Board law for

finding that the SPI or Wiedmeyer's desire to conduct an investigation was improper, or that such a desire would lead Wiedmeyer to retaliate against an employee with whom he had been working for years.

The imposition of SPI in this case was consistent with Bellagio's imposition of SPI in other cases. Susan Moore testified that SPI's are part of Bellagio's standard process for handling workplace incidents. 646:9-651:6. SPI's are not tracked, but Moore testified that in her experience, roughly 5% of the SPI's issued at Bellagio are issued solely as "cooling off periods." *Id.* Given that Moore has been employed by Bellagio since 2001, and conducts several SPI's per week, even 5% is a large number. *Id.* The General Counsel did not controvert her testimony in any way. It must be credited, and the ALJ's arbitrary dismissal of the testimony cannot be justified.

As Moore explained, the use of SPI in this situation was consistent with Company standards. *Id.* "Bryan Garner was insisting that Brian Wiedmeyer get him a shop steward. The meeting became agitated and combative, and so the end result was that he placed him on SPI until we could have due process meeting with a shop steward there. Brian Wiedmeyer had called our office trying to secure a shop steward, but we don't have a list of shop stewards. The admin could not find one for him. Jessica didn't have a list for him, so he placed the employee on SPI so we could conduct a due process meeting the following day." 637:17-638:3.

Other than Garner's implausible testimony that he was not agitated in any way – Garner claimed his demeanor was no different than his demeanor at the hearing – the General Counsel produced no evidence to support a contention that the SPI was unjustified. Wiedmeyer and Sanchez' testimony that Garner stated he intended to return to work is not disputed, and

Wiedmeyer and Sanchez' belief that allowing Garner to return to work risked nothing but trouble for both Garner and the Company should be credited.

C. The General Counsel failed to prove the allegations in paragraph 5(l) that Bellagio violated Section 8(a)(1) of the Act by orally promulgating and enforcing an overly-broad and discriminatory rule “prohibiting its employees from discussing the terms and conditions of employment[.]”

According to the Complaint, Wiedmeyer supposedly orally promulgated an overly broad and discriminatory rule when he confronted Garner in the dispatch room on May 13th and instructed him to leave because he was on SPI. This claim should be dismissed. It is not supported by the facts or established Board law.

The Board recently explained in *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98, at 5-7 (Apr. 25, 2013), that it had not previously “articulated a specific standard defining when an oral statement by a supervisor constitutes a rule,” but it found the analysis in *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006), “instructive.” *Id.* In *St. Mary's*, a supervisor reprimanded an off-duty employee who was an active union supporter for telephoning another employee to discuss a labor-management issue while that employee was working at the hospital. *Id.* at 776. During a heated phone call, the supervisor told the off-duty employee, “You cannot call and you cannot talk and you cannot call the nurses while I am here and talk about the union.” *Id.* at 776-777. Noting that the supervisor was reprimanding one employee specifically, the Board found that the supervisor's comments “could not reasonably be interpreted as establishing that he intended to implement a new, more restrictive solicitation policy regarding employees in the hospital.” *Id.* (quoting *St. Mary's*, at 777). In *Flamingo*, the Board applied that analysis and concluded that a supervisor's reference to the need to use the chain of command, did not constitute a rule. *Id.* There was “no evidence that any of the Respondent's managers objected to a failure to follow” the supposed rule. *Id.*

In this case, there is a minor dispute as to the precise words that Wiedmeyer used when he confronted Garner in the dispatch room.¹⁴ According to Garner, Wiedmeyer said words to the effect of “you can’t be discussing that matter here” and then told him to leave. 122:9. Wiedmeyer’s testimony is different. He stated that he told Garner that “you need to leave,” 60:7-23, and that when Garner shot back “you can’t tell me who to talk to,” 122:11-12, Wiedmeyer reiterated that “in this situation,” Garner must go. 60:7-23. Wiedmeyer is the more credible witness, and his instruction is consistent with the SPI document. His testimony should be credited.

Even if it were not, however, there is *no dispute* that everyone in the room, including Garner, did not believe that Wiedmeyer’s statement amounted to a new rule of conduct. The test for rules of conduct is whether, under the totality of the circumstances, the rule “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd. mem.* 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999); *see also Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (in evaluating a challenged rule under the *Lafayette Park* test, the Board gives the rule a “reasonable reading,” refrains “from reading particular phrases in isolation,” and does “not presume improper interference”). In this case, Wiedmeyer’s statement was coupled with two qualifiers – “under the circumstances” – meaning that Garner was on SPI, and the fact that Garner needed to leave. It was also qualified by the circumstances. It was not a generalized pronouncement of policy. In fact, Garner, Meyer and Weinmen stated that they understood Wiedmeyer’s statement to be directed at Garner only, and was limited to the purpose of his SPI. Garner, Meyer and Weinmen

¹⁴ Max Sanchez testified that Wiedmeyer said “Bryan, you need to leave” and “Yes, you need to leave.” 103:12-17. Russ Meyer testified that Wiedmeyer said “you can’t talk about this. You’ve been suspended, you need to leave.” 198:4-7. Jason Weinmen could not recall exact words, but testified that Wiedmeyer told Garner “that he needed to go, that he couldn’t discuss this with any of the employees.” 208:20-21. Both Meyer and Weinmen are close with Garner. Weinmen walks out with him every day.

also testified that they have continued to discuss discipline on almost daily basis and without fear of reprisal since the May 13th incident.

The propriety of Wiedmeyer's statement is confirmed by comparing it to the unlawful orally promulgated rule in *Highland Yarn Mills*, 313 NLRB 193, 193-194 (1993). There, the employer's supervisor told two employees that "union business could not be conducted in a nonworking area" at any time, and "in fact made clear that such activity was not allowed anywhere in the plant – without a hint of justification for such a ban." Wiedmeyer's statement is not similar in any way. It did not apply to all employees, only Garner who had just been placed on SPI. Nor did Garner construe it as remaining in effect at any time thereafter. As he stated during the hearing, since his SPI, he has frequently discussed discipline in the workplace without any fear of reprisal. *Id.*

In sum, the ALJ could not have concluded that Wiedmeyer promulgated an overly broad rule as a matter of law. See *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98, at 5-7; *Praxair Distribution, Inc.*, 358 NLRB No. 7 (2012) (no rule found when it was based on a single comment by a supervisor).

D. The General Counsel failed to prove its allegation in paragraph 5(m) of the Complaint that Bellagio engaged in unlawful surveillance in violation of Section 8(a)(1).

In paragraph 5(m), the General Counsel contends that Bellagio engaged in unlawful "surveillance of employees engaged in union and concerted activities." "The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain

or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.” *Holsum de P.R., Inc.*, 344 NLRB 694, 708-709 (2005).

Here, Wiedmeyer saw Garner speaking to another employee in the dispatch room and then walked to the door to ensure that Garner was headed off property. As noted above, the dispatch room is a work area. It is one of the busiest work areas in the Bell Department. Wiedmeyer and other supervisors go there continuously throughout the day. It is well-established that when employees elect to conduct their organizational activity openly on company property, “observation of such activities by an employer is not unlawful.” *Sunshine Piping, Inc.*, 350 NLRB 1186, 1193-1194 (2007); *Nu-Line Industries, Inc.*, 302 NLRB 1, 2-3 (1991) (“an employer's mere observation of open, public, union activity on or near its property does not constitute unlawful surveillance.”); *Southwire Co.*, 277 NLRB 377, 378 (1985); *Oates Bros. Fruit & Produce*, 191 NLRB 736 (1971).

The idea behind finding “surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.” *Fred'k Wallace & Son, Inc.*, 331 N.L.R.B. 914 (2000) (citing *Flexsteel Industries*, 311 NLRB 257 (1993)). Nothing about this situation would suggest that Garner or any other employee could have held such a fear. At best, Wiedmeyer’s actions could give rise to a perception of surveillance, but that merely establishes that there are two possible interpretations of his behavior, and the Board has repeatedly held that when two interpretations of a supervisor’s alleged behavior exist, “the burden of establishing the unlawful creation of an impression of surveillance has *not* been met” *Northfield Urgent Care, LLC*, 358 NLRB No. 17, slip op. at 73-75 (emphasis added) (dismissing impression of surveillance claims

even though supervisor inquired about alleged protected activity); *Milum Textile Servs. Co.*, 357 NLRB No. 169, slip op. at 128-129 (Dec. 30, 2011) (dismissing impression of surveillance even though supervisor directly informed employee that she was being surveilled because employee's failure to realize it was a joke was unreasonable); *SKD Jonesville Division, LP*, 340 NLRB 101, 102 (2003) (where two likely interpretations of employer's conduct exist, no reason to infer one over the other).

**THE ALJ'S DECISION WAS CONTRARY TO THE LAW
AND THE RECORD AND SHOULD BE REVERSED**

Bellagio's position on each of the General Counsel's claims has been set forth above, and given that the Board reviews an ALJ's factual and legal conclusions *de novo*, this brief is devoted to the record rather than attacking the Decision. Nonetheless, it is important to note that the ALJ's reasoning for each of the conclusions of law was flimsy at best, and in the case of his conclusion that Bellagio violated Garner's *Weingarten* rights, nonexistent.

A. The ALJ's Conclusion That Bellagio Denied Garner's Request For A Weingarten Representative Should Be Reversed.¹⁵

The ALJ provided absolutely no explanation for his conclusion of law that Bellagio denied Garner *Weingarten* representation. As such, the ALJ's order and proposed notice regarding both issues cannot be adopted. *See Dynatron/Bondo Corp.*, 326 NLRB at 1170; *see also Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011). For the reasons set forth above, there is no reason to remand this matter to the ALJ. The evidence, including Garner's own admissions, establishes that Bellagio satisfied its obligations under *Weingarten*.

¹⁵ *See* Exceptions 1, 15 and 16.

B. The ALJ's Conclusion That Bellagio Placed Garner On SPI Because He Requested A Weingarten Representative Should Be Reversed.

The ALJ disregarded Bellagio's evidence that Garner was placed on SPI because of his agitation, and instead found that Wiedmeyer's decision to place Garner on SPI was retaliatory because Garner was a credible witness, the SPI was issued at the end of the shift and since Garner would have been able to go home, the "redundancy suggests invidious intent," and because he believed that Wiedmeyer may have become angry when Garner "derailed" his investigation. Decision 10:14-27. The ALJ's personal speculation and conjecture about these matters is insufficient to establish that Wiedmeyer and Sanchez' testimony that Garner was agitated "conceal[ed] an ulterior and unlawful reason for the actions." *Tomatek, Inc.*, 333 NLRB 1350, 1364 (2001) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

Whether an SPI can be used to establish a prima facie case, well as Garner's credibility, are discussed above. The other indications of pretext on which the ALJ relies are equally meritless. As to the ALJ's assertion that Wiedmeyer could have simply sent Garner home early and that placing him on SPI was "redundant," it is little more than counterfactual conjecture. There is no evidence that Garner was leaving work at the completion of the May 13th interview. To the contrary, there is no dispute that Garner said he was going to return to work. Wiedmeyer could not forcibly detain Garner in the office. His only choice was to take some kind of action, and placing Garner on SPI, rather than formally suspending him, was an appropriate choice. The converse, ending Garner home early without pay would have been far more severe. It would have resulted in lost work time, would have constituted an actual suspension under the CBA, and would have remained on Garner's discipline history. Indeed, if Wiedmeyer truly wished to

retaliate, he could have suspended Garner without pay. Placing him on SPI, had no impact whatsoever, other than allowing for Garner to cool down.

The ALJ also took issue with Bellagio's failure to produce specific instances of other SPI's. That point, however, was never disputed by the General Counsel, and basing a finding of pretext on Bellagio's failure to prove a negative improperly reverses the burden of proof. Under *Wright Line*, an employer is not required to dispel all elements of suspicion. It is the General Counsel's obligation to establish concrete proof of pretext. Given that the General Counsel could have called witnesses to challenge Moore's claim – indeed, the General Counsel neither called the Union, nor recalled the Charging Parties as rebuttal witnesses – Moore's testimony that Wiedmeyer's use of SPI was in accord with Bellagio procedure must be credited.

Finally, the ALJ's personal beliefs about "plausibility" do not satisfy the specific and substantial showing of pretext required by *Wright Line*. Nor are they supported by the record. Wiedmeyer, Sanchez and Berry all testified that they had always handled Garner's outbursts in this way. Giving him the opportunity to calm down and not issuing discipline. They had known Garner for more than a decade. There is no reason that his actions would have suddenly provoked Wiedmeyer into a retaliatory act, particularly when Wiedmeyer knew the law, and went so far as to offer Garner the opportunity to use a non-steward or any other representative of his choosing. This was discussed in Wiedmeyer's statement, GCX 3(b), and during the hearing in response to the ALJ's questioning: "JUDGE RINGLER: Now, suppose he said to you, 'I want my colleague Joe, another bellman, to be here for this meeting,' what would you have said and done? THE WITNESS: Well, I know it's not something that's recommended that we do unless they're a shop steward. But actually in the end that did happen as part of my statement, sir. And I

would have allowed that in this case to be able to, you know, move forward if that's what he wanted at his request.” 44:21-45:3.

The ALJ asserted that it was likely that Wiedmeyer would have become upset to the point of retaliation over Garner’s invocation of his *Weingarten* rights, while completely disregarding all of the evidence which showed that Garner had become upset and agitated on every prior occasion he was confronted about soliciting tips. In doing so, the ALJ’s analysis rested almost entirely on his assessment of Garner’s demeanor, ignoring the large inconsistencies in his statements and Garner’s past history of becoming agitated when confronted about soliciting a tip. As the Board has explained, “an administrative law judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word ‘demeanor.’” *Permaneer Corp.*, 214 NLRB 367, 368-69 (1974).

C. The ALJ’s Conclusion That Wiedmeyer Orally Promulgated An Overly Broad Rule Should Be Reversed.

The ALJ’s conclusion that Wiedmeyer’s instruction to Garner constituted an oral rule is obviously wrong. The Board set forth a framework for determining whether a supervisor’s statement constitutes a new “rule” for purposes of violating the Act in *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98, at 5-7 (Apr. 25, 2013) and *St. Mary’s Hospital of Blue Springs*, 346 NLRB 776 (2006). In those cases, the Board considered a number of factors to determine whether a statement was intended to establish a new, permanent conduct requirement for all employees. As discussed above, Wiedmeyer’s statement to Garner does not constitute an oral rule under this framework.

The ALJ ignored *Flamingo Las Vegas Operating Co.* and *St. Mary’s Hospital of Blue Springs*. He ignored the facts and circumstances of Wiedmeyer’s statement. He ignored the fact that **no one**, including Garner himself, believed that Wiedmeyer had forbidden discussion of

workplace discipline and investigations. He significantly overstated Meyer and Weinmen's testimony, asserting that they testified that Wiedmeyer had "banned" all discussion of investigations by Employee Relations, even though both men clearly stated that they **did not** believe that Wiedmeyer had announced a new rule, and that Wiedmeyer's statement was made in the context of ordering Garner to leave. And finally, he relied on a Board decision that is so obviously distinguishable from the present facts that it supports Bellagio's exceptions. Decision at 12:5. Indeed, the Board case he cited -- *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 69-74 (Aug. 26, 2011) -- concerned an employer whose Human Resources staff orally admonished employees to maintain confidentiality in *every* investigation. *Id.* The allegation in this case is that a single oral statement by Wiedmeyer -- and nothing more -- violated the Act. *Hyundai Am. Shipping Agency* does not support such a conclusion.

D. The ALJ's Conclusion That Wiedmeyer Engaged In Unlawful Surveillance Should Be Reversed.

The ALJ's conclusion that Wiedmeyer engaged in unlawful surveillance by (1) encountering Garner in the dispatch room, and (2) briefly standing in the door way of a work hallway to ensure that Garner left the property is utterly meritless. Certainly, his quotation of dicta from *Aladdin Gaming*, 345 NLRB at 586, does not comport with established Board law. Garner was in a busy work area when Wiedmeyer confronted him and told him to leave. Garner was walking down a busy work hallway, and Wiedmeyer was standing in the threshold of the access door to the dispatch room when Wiedmeyer briefly watched Garner to ensure that Garner was in fact leaving the facility rather than returning to work. As Garner conceded, Wiedmeyer and other supervisors were present in the dispatch room constantly.

There was nothing unusual or extraordinary about Wiedmeyer's actions and observation of employees engaged in open Section 7 activity on company property does not constitute

unlawful surveillance. The ALJ's assertion that Wiedmeyer "aggressively observed" Garner's conversation in the dispatch room – whatever that phrase is supposed to mean – as well as his attempt to connect the observation with what the ALJ found to be an unlawful SPI, does not change the law. In *Aladdin*, the Board found that an employer representative – the director of human resources – did not engage in surveillance when she openly confronted and listened to a group of employees discussing union organizing activity in an employee dining room. *Id.* This case, which involved brief, public interaction in a busy work area should not lead to a different result. The ALJ's conclusion of law should be reversed.

E. The ALJ's Recommended Order and Notice Cannot Be Enforced. They Are Unlawful And Violate Section 10(e) Of The Act Because They Are Not Sufficiently Tailored To The Circumstances Of This Case.

Finally, as set forth in Bellagio Exception 16, the ALJ's proposed remedial order and notice cannot be enforced because it is contrary to Board precedent and violates Section 10(e) of the Act. *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142-1143 (7th Cir. 1992); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (orders must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences" of the identified unfair labor practice).

There are two significant problems with the order and the notice. First, Section 1a of the order and the first "We Will Not" clause in the Notice are contrary to Board law because they appear to require Bellagio to provide employees with a chosen *Weingarten* representative regardless of context. Under *Coca-Cola*, 227 NLRB at 1276-1277, an employee is entitled to a specific representative only if that representative is available to participate in the interview without undue delay. Without this limitation, the order and notice are unlawfully broad. They are also not tailored to the facts of this case because Garner did not request a particular representative, nor did Bellagio deny him a particular representative. Garner lacked

representation because there were no shop stewards available and he purposefully failed to apprise Wiedmeyer of “Cherise,” the Union official in Manja who would have been able to provide a shop steward. Thus ordering Bellagio to comply with such requests is inappropriate.

Second, Section 1d of the order and the fourth “We Will Not” are contrary to Board law. Under appropriate circumstances, such as preventing a coverup or protecting witnesses from retaliation, Bellagio is entitled to require employees to maintain confidentiality. *See, e.g., Verso Paper*, Case No. 30-CA- 089350, NLRB Division of Advice (Jan. 29, 2013). The notice’s blanket prohibition against any such rule impermissibly constricts that right and is not tailored to the facts of this case.

CONCLUSION

For the reasons set forth above, the General Counsel failed to prove that Bellagio committed any of the unfair labor practices alleged in the Complaint. Bellagio’s exceptions should be sustained and the ALJ’s conclusions of law must be reversed, both because his factual determinations are not supported by the record and because his legal reasoning is contrary to Board precedent.

April 25, 2014

JACKSON LEWIS P.C.

By: /s/ Paul T. Trimmer
Paul T. Trimmer
3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Telephone: (702) 921-2460
Facsimile: (702) 921-2461
Attorneys for Employer

CERTIFICATE OF SERVICE

In addition to filing this **Brief In Support of Exceptions** in the above captioned matter via the NLRB's electronic filing system, we hereby certify that copies have been served this 25th day of April, 2014, by First Class Mail, upon:

Mr. Gary Shinnors
Office of Executive Secretary
National Labor Relations Board
1099 – 14th Street, N.W.
Washington, D.C. 20570-0001

Nathan Higley
Counsel for the General Counsel
via e-mail to Nathan.Higley@nlrb.gov

Mr. Gabor B. Garner
2680 Blairgowrie Drive
Henderson, NV 89044-0221

Ms. Najia Zaidi
10131 Canyon Hills Avenue
Las Vegas, NV 89148-7647

/s/ Paul T. Trimmer
An Employee of Jackson Lewis LLP