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

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

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I. SUMMARY OF ARGUMENT

Counsel for the General Counsel's opposition to the exceptions is meritless. His inability to respond to the principal arguments in Bellagio's Exceptions – including the ALJ's total failure to articulate an actual basis for his legal conclusion that Bellagio violated Garner's *Weingarten* rights – underscores the strength of Respondent's position and the erroneous nature of the ALJ's Decision. To the extent necessary, his arguments are answered below. Bellagio's Exceptions should be sustained and the ALJ should be reversed.

II. ARGUMENT

A. Credibility

Bellagio excepted to the ALJ's conclusion that Garner was a credible witness. In response, Counsel for the General Counsel claimed that Respondent "cites only favorable portions of its witnesses' testimony, ignores documentary evidence contradicting the testimony, and urges the Board to accept inferences rejected by the ALJ." Answering Brief at Section II.A. Apparently relying on the Board's deferential standard of review for most credibility decisions, Counsel for the General Counsel offers no other argument, cites to no testimony, and does not actually respond to Bellagio's arguments in any way.

It is true that ALJ credibility determinations are subject to deference in most cases. In this case, however, as made clear in Exceptions 8, 9, 10, 11, and 12, as well as pp. 18-21 of the Supporting Brief, the ALJ ignored the blatant inconsistencies, omissions, and implausibilities in Garner's testimony, and relied on Garner's "demeanor" for overlooking these issues. The ALJ ignored the fact that one of Garner's most crucial claims – that he was held against his will in Wiedmeyer's office – did not appear until he filed his unfair labor practice charge. The ALJ completely failed to consider or even mention the facts that Garner had previously become upset

in situations where he was confronted about soliciting a tip, as well as the fact that he *knew how to contact a Weingarten representative the entire time he was meeting with Wiedmeyer and Sanchez*, but failed to tell them how to do so or do so himself. Garner could have told Wiedmeyer and Sanchez to contact Cherise, the Union representative stationed in the Employee Dining Room. Garner's decision to withhold this information is consistent with Wiedemeyer and Sanchez' testimony that Garner was upset and trying to get a rise out of a supervisor. It is not consistent with Garner's contention that he remained calm, trying to assert his rights. Bellagio's exception to the ALJ's credibility determination should be sustained.

B. Bellagio's Exceptions To The ALJ's Finding That It Violated Garner's *Weingarten* Rights Should Be Sustained.

There is no dispute that the ALJ's conclusion of law that Bellagio violated Garner's *Weingarten* rights is bare. As noted in Exception 1, and pp. 21-23 and 32 of Bellagio's Brief, the ALJ made no findings of fact to support it, and did not provide any legal analysis regarding the matter.

Counsel for the General Counsel asserts that "the ALJ provided an independent analysis to support his findings" and "here, the ALJ gave due consideration to all essential facts with respect to Garner," but that is clearly not the case; and, not surprisingly, Counsel cannot cite any portion of the Decision to support his contention. Indeed, there are no factual findings that Bellagio denied Garner access to a steward. There are also no factual findings that Garner's investigatory interview continued after he invoked his *Weingarten* right, and Garner himself conceded on cross-examination that he was not questioned about the customer complaint after he said he wanted a steward.[1]

[1] In his Answering Brief, Counsel for the General Counsel takes issue with Bellagio's contention that this fact is "undisputed" and further asserts that "Respondent's Exceptions demonstrate a troubling disregard for accuracy." A. Brief at 2-3. According to Counsel for the General Counsel, that fact is in dispute because he

In an attempt to answer this fatal flaw, Counsel for the General Counsel tries to distinguish *Cassone Bakery, Inc.*, 345 NLRB No. 111 (2005) (ALJ did not articulate a basis for his decision) and *Dynatron/Bondo Corp*, 326 NLRB 1170 (1998). His efforts to do so should be rejected. Both cases stand for the proposition attributed to them: that an ALJ's decision should be reversed when he has not provided any legal analysis to support it.

In a final attempt to save the holding, Counsel admits that the "ALJ did not make findings of fact specific to the allegation" but maintains that other factual findings, such as the ALJ's conclusion that Bellagio suspended Garner for invoking his Weingarten right, is sufficient to establish a violation. A. Brief at 2. This is clearly wrong. The mere fact that Garner did not have a steward present does not establish a violation. To find a violation of *Weingarten*, the ALJ must have found that Bellagio both denied Garner access to a steward and then continued the investigatory interview. As set forth in both Bellagio's exceptions and supporting brief, that simply did not happen. All questioning stopped. Bellagio could not locate a steward. Garner failed to tell Wiedmeyer how to do so – contact Cherise – even though he was fully aware that she could help. When Garner asserted that he was returning to work in an agitated state, he was placed on SPI. Even if the suspension were retaliatory – which Bellagio has demonstrated was not the case – that fact would not show that Garner's *Weingarten* right was violated.

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disputed the assertion in his post-hearing brief. *Id. Given that Garner himself testified that he was asked no further questions, and all of the witness testimony is in agreement on that issue*, Counsel's contention is not evidence of a factual dispute *See* Exceptions Brief at p. 2; 185:19-186:5 (Garner admitting no further questions); 46:17 – 48:7 (Wiedmeyer); 93:1-4 (Sanchez). Counsel's assertion is also belied by Counsel's Cross-Exceptions. As noted in Respondent's Answering Brief to Counsel for the General Counsel's Cross-Exceptions, Counsel for the General Counsel has misstated the record in an attempt to advance a claim that the charging party in the case consolidated with this one, Najia Zaidi, engaged in protected activity on January 20, 2013. *See* Answering Brief at IV.C.1, pp. 15-16. As set forth in the Answering Brief, no reasonable reading of the testimony supports such a claim. Finally, as made clear in the cited testimony, both Garner and Zaidi testified in narratives on multiple occasions. Garner's use of memorized narratives should be counted against his credibility, but the ALJ cited only Zaidi for testifying in this manner. The mistaken reference to Garner, as opposed to Zaidi, was unintentional.

In sum, there is no basis in the ALJ's Decision for the violation; and, the record, including Garner's own testimony, does not support a finding that Bellagio violated Garner's *Weingarten* rights. Bellagio's first exception should be sustained.

C. Bellagio's Exceptions To The ALJ's Finding That It Violated The Act When It Placed Garner On SPI Should Be Sustained.

As set forth in Bellagio Exceptions 2, 3, 4, 7, 8, and 10, as well as pp. 24-28 and pp. 33-35, the ALJ's determination that Bellagio violated the Act by placing Garner on SPI should be reversed. In response to Bellagio's contention that placing an employee on SPI is insufficient to establish a prima facie case, Counsel for the General Counsel appears to have misapprehended the issue. He does not distinguish Bellagio's authority, which establishes that employer actions like SPI do not constitute adverse actions for purposes of establishing a violation of the Act. *See, e.g., Promedica Health Systems Inc*., 343 NLRB 1351, 1351-1352 (2004) (quoting *Trover Clinic*, 280 NLRB 6, 16 (1986)); *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993); *Jochims v. NLRB*, 480 F.3d 1161, 1170-1171 (D.C. Cir. 2007). Instead, without testimony or other evidence – from Garner or anyone else – he concentrates on an apparent subjective understanding of SPI. He speculates that it "is strange that Respondent claimed the need to SPI Garner when his shift was ten minutes from concluding. … The ALJ noted that Respondent might have easily allowed Garner to wait or clock out early."

As explained in Bellagio's brief, the Company *could not have* "allowed Garner to wait or clock out early." Garner said he wanted to go back to work, which would place him curbside, receiving guests as they check into the hotel. Because Garner was agitated, doing so placed customers at risk for bad service and would have put Garner in a situation where he was exposed to discipline for treating a guest in a rude manner. Moreover, Counsel's speculation, which is similar to the analysis used by the ALJ, demonstrates a profound lack of understanding of

industrial reality. *See Roadway Express,* 246 NLRB 1127, 1130 (1979) (explaining that *Weingarten* must be "tempered by a sense of industrial reality" that is consistent with an employer's real world need to conduct investigations). As Bellagio's witnesses testified without contravention, the Company's collective bargaining agreement with Garner's union would not have allowed it to send Garner home before the end of his shift without imposing a penalty. Nor could Bellagio hold an adult employee in an office against his will. Once Garner stated that he intended to go back to work, Bellagio had no choice. Placing Garner on the non-disciplinary SPI, which had no effect on his employment, ensured that Garner could cool down outside of work and return to the property for the benefit of a due process interview on the following day.

SPI stands for "suspended pending investigation." Suspension pending investigation means exactly that: an employee is removed from a situation in which he needs to cool off and allow for a full and fair investigation. Upon issuance of the SPI, as made clear in the SPI notice and the testimony, Garner was informed that he would be reinstated with back pay unless the investigation revealed a basis for discharge, which is exactly what happened. It does not, as Counsel claims, "pose[] the immediate threat of termination" or otherwise place an employee in jeopardy. It is the employee's underlying conduct that exposes him to discipline, not the SPI. As Susan Moore explained, the use of SPI in this case was appropriate and consistent with Bellagio's past use of SPI. The ALJ's failure to credit this testimony, which was not controverted by the General Counsel in any way, simply because Moore did not produce reams of corroboration, improperly placed the burden of proving a negative on Bellagio.

Counsel also claims that *Roadway Express* is distinguishable and does not support placing Garner on SPI. This is not true and Counsel's reading of *Roadway Express* is flawed because it leaves out a critical fact: in *Roadway Express*, the employer suspended an employee

after he refused to attend an investigatory interview and stated that he intended to return to work on the dock. 246 NLRB 1128-29. The Board explained that even if the employee could, under *Weingarten*, refuse to participate in the interview, he could not refuse to participate and return to work in contravention of the employer's instructions. *Id.* This case is no different. Garner refused to participate in the interview without a steward. Bellagio suspended the interview. It could not locate a steward. When Garner stated that he was going back to work, Bellagio had the right to take action, particularly since Garner was in an agitated state.

In short, even if the Board does not reverse the ALJ and credit Bellagio's evidence that Garner was agitated and subject to suspension on that basis, Bellagio's exceptions should still be sustained. Placing an employee on SPI is insufficient to establish a prima facie violation of the Act; and, under *Roadway Express*, Bellagio was privileged to place Garner on SPI once he refused to participate in the interview.

D. Bellagio's Exceptions To The ALJ's Finding That Wiedmeyer Orally Promulgated An Unlawful Rule Should Be Sustained.

Bellagio excepted to the ALJ's finding that it violated Section 8(a)(1) when Wiedmeyer instructed Garner to leave the Bell Dispatch area. As set forth in Exception 5 and Bellagio's brief at pp. 28-30 and 35-36, the ALJ both misstated the facts and relied on clearly distinguishable precedent when he found this violation. Indeed, Wiedmeyer testified that he did not tell Garner to stop talking about the discipline, period. Wiedmeyer instructed him to stop his conversation and leave because he had been placed on SPI. Neither Garner nor any of the other witnesses believed that Wiedmeyer had announced a rule that restricted them from talking about discipline. They have continued to discuss discipline freely without fear or trepidation, and in Garner's case, he continued to discuss the SPI as he left Bellagio on May 13th. Under *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98, at 5-7 (Apr. 25, 2013), the allegation should

have been dismissed. No reasonable employee, including every individual who testified, could conclude that Wiedmeyer implemented a new rule that banned discussion of discipline in the workplace, and Counsel's arguments do not warrant a contrary result. *See Praxair Distribution, Inc*., 358 NLRB No. 7 (2012) (no rule found when it was based on a single comment by a supervisor) and *Highland Yarn Mills*, 313 NLRB 193, 193-194 (1993).

Further, although Counsel for the General Counsel cites to *Lucky Cab Co.*, 360 NLRB No. 43, fn. 20 (2014), that case is distinguishable on the facts and the law. The facts are different because in *Lucky Cab*, unlike this case, there was no doubt that an employee had been specifically ordered to stop discussing discipline. It is distinguishable on the law because the allegation in *Lucky Cab* concerned an allegedly coercive statement, not an alleged orally promulgated rule. Here, there is no doubt that the General Counsel pleaded and litigated this allegation under the theory that Wiedmeyer's statement to Garner constituted an orally promulgated rule. Counsel for the General Counsel cannot now change his theory and assert that the statement is an independent violation of Section 8(a)(1). *Lamar Central Outdoor,* 343 NLRB 261, 265 (2004) (General Counsel may not change his theory of litigation without amending his complaint, because doing so "would violate fundamental principles of procedural due process, which require meaningful notice of a charge and a full and fair opportunity to litigate it.").

E. Surveillance.

Bellagio excepted to the ALJ's holding that Wiedmeyer, by walking into the Bell Dispatch area, engaged in surveillance in violation of Section 8(a)(1) of the Act. Exception 6 and Brief at pp. 30-32 and 36-37. That exception should be sustained. As established in the hearing, the Bell Dispatch area is a public work area (perhaps the busiest area in the entire Bell Department). It is frequented by supervisors scores of times each and every shift, and as the

Board has repeatedly held, observation of open, public activity does not constitute unlawful surveillance.

In his answering brief, Counsel for the General Counsel does not respond to these arguments. Instead, he claims that the "ALJ correctly found that Respondent created the *impression* of surveillance of Garner's Union activities." A. Brief at 7. Clearly, the ALJ *did not* find that Bellagio created the *impression* of surveillance with respect to Garner. It is just as clear that Counsel for the General Counsel *never* litigated such a theory. Those arguments do not require a response. And, while Counsel suggests that "Respondent made a deliberate effort to observe Garner's actions … then continued to monitor Garner," to sustain the ALJ's holding and the allegation in the General Counsel's complaint, the Board would have to reverse decades of precedent. It would have to find that an employer can engage in unlawful surveillance if a supervisor walks into a heavily used work area, already occupied by several individuals (and another supervisor), and observes one employee talking to another. That would be a *significant* departure from existing precedent. *See, e.g., Aladdin Gaming, LLC*, 345 NLRB 585, 585-586 (2005) (citing *Eddyleon Chocolate Co*., 301 NLRB 887, 888 (1991)); *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).

Simply put, the General Counsel's claim and the ALJ's holding are, under existing precedent, unsustainable. Bellagio's exceptions should be granted.

F. The Board Should Sustain Bellagio's Exceptions To The Remedy

Exceptions 15 and 16, and pages 37-38 of the Brief establish the defects in the ALJ's Remedial Order. It is, to be clear, overly broad in violation of Section 10(e) of the Act. Counsel for the General Counsel's response to Exception 15 is pure speculation. He claims that Bellagio presumably retains records of SPI in its employee files. As Susan Moore testified, however, this is not the case. As such, the Order is moot.

In response to Exception 16, Counsel for the General Counsel claims that Bellagio's citation to *Coca-Cola*, 227 NLRB at 1276-1277, is outdated and that under *Anheuser-Busch*, 337 NLRB 3 (2001), employees are entitled to the *Weingarten* representative of his or her choosing. Like the ALJ's Order, this is a misstatement of the law. It is true that Employees are entitled to a representative of his or her choosing, but that right is not unfettered. An employee may not insist on a particular representative if that representative is unavailable and retaining that representative would require the interview to be postponed. *See, e.g., El Paso Healthcare Sys*., 358 NLRB No. 54, at slip op. at 47 (June 15, 2012). This case did not involve an alleged denial of Garner's chosen representative. Stating the remedy in such broad terms is inappropriate, particularly when the ALJ made no actual factual findings regarding the *Weingarten* allegation.

Counsel for the General Counsel's response to the over breadth of the Notice is similarly unconvincing. He asserts that it is permissible to state notices in broad terms so that they can be easily understood. This is overly simplistic. In other situations where the Board analyzes rules, it applies the standard set forth in *Lafayette Park Hotel*, 326 NLRB 824 (1998). Using that standard, the Notice overreaches. Although Board precedent allows for Bellagio to restrict discussion of disciplinary matters in certain circumstances, the ALJ formulated the Notice as follows: "**WE WILL NOT** promulgate, maintain, and enforce an oral rule prohibiting you from

discussing with other persons any disciplinary matters under investigation by our Employee Relations department." This is overly broad. A reasonable person would believe that the phrase "disciplinary matters" would include any kind of disciplinary investigation, not merely an already issued SPI, which is what is at issue in this case. A reasonable person would also believe that the statement, which contains no room for exceptions, would prohibit the types of instructions permitted in *Verso Paper*, Case No. 30-CA- 089350, NLRB Division of Advice (Jan. 29, 2013). And finally, the imprecise nature of the Notice could improperly subject Bellagio to claims that the notice had been violated if it determined that some future investigation required confidentiality due to the prospect of a cover-up or some other legitimate reason.

III. 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.

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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 23rd day of May, 2014, by First Class Mail, upon:

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