UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NC-DSH, LLP d/b/a/ DESERT SPRINGS
HOSPITAL MEDICAL CENTER,

Respondent.

And

Case No. 28-CA-127971

THERESA VAN LEER, an Individual

RESPONDENT'S POST-HEARING BRIEF

COMES NOW NC-DSH, LLP d/b/a/ Desert Springs Hospital Medical Center, Respondent in the above-styled and numbered matter, and pursuant to § 102.42 of the Board's Rules and Regulations hereby respectfully submits the following Post-Hearing Brief to the Honorable Administrative Law Judge Ira Sandron in support of its position in this case.

I. STATEMENT OF THE CASE

The Complaint in this matter was issued on July 31, 2014. An Answer was timely filed on August 13, 2014. This matter came on for hearing before Administrative Law Judge Ira Sandron at the National Labor Relations Board, Region 28, Las Vegas, Nevada, on Tuesday, January 6, 2015, and Wednesday, January 7, 2015.

II. DISMISSAL OF PARAGRAPHS 5(a), (b), (c)(2), (c)(3), and (e)(2) OF THE COMPLAINT

Respondent moved at the hearing and resubmits here its argument to dismiss the above-referenced paragraphs of the Complaint. None of the above-referenced paragraphs of the Complaint were part of the original unfair labor practice charge, any amendment thereto, and were

not part of any investigation into the unfair labor practice charge. The first time that Respondent had notice of these charges was when the Complaint issued. In its Answer, Respondent moved for a dismissal on a number of these grounds, including a denial of procedural and substantive due process, excessive use of the authority granted to the National Labor Relations Board (NLRB or Board), and the Board's excessive use of power beyond that granted to the Board as a neutral investigatory agency.

General Counsel argues that the all-inclusive language in the charge which provides "by these and other acts," alleviates its requirement to place Respondent on notice of the allegations. However, this argument is without merit.

Respondent is entitled to know the alleged wrongdoings under investigation in order to properly defend itself. By including these matters in the Complaint, the Board has violated Respondent's rights based on the above and other grounds, and consequently those paragraphs of the Complaint should be dismissed without consideration of the merits of the allegations.

III. CREDIBILITY AND FACTS

A. Sam Kaufmann, Chief Executive Officer, Desert Springs Hospital and Valley Hospital

Sam Kaufmann, Chief Executive Officer of Desert Springs Hospital and Valley Hospital, testified regarding the allegations in Paragraph 5(a) of the Complaint. The General Counsel stated on the record that the allegations contained in Paragraph 5(a) and 5(b) of the Complaint related to smaller group or rounding meetings and not to larger group meetings (Tr. 26, ll. 19-21).[1] Specifically, General Counsel asked about a March 8, 2014, rounding meeting with Theresa Van Leer, Certified Nursing Assistant and three additional Certified Nursing Assistants (CNAs) (Tr.

[1] References to the transcript of the hearing in this matter are designed "Tr." followed by the appropriate page and line number(s).

27, ll. 1-5). Kaufmann testified that he did not remember a specific conversation on March 8, 2014, with Van Leer and three additional CNAs (Tr. 27, l. 6).

Kaufmann testified consistently that throughout his time as CEO of the Hospital he had engaged in rounding (Tr. 38, l. 21 – 39, l. 7). This rounding occurred on all three shifts. Kaufmann testified credibly and concisely about how these rounding meetings transpired. Kaufmann would begin on the fifth floor of Valley Hospital and would walk through the units until he covered every floor – ending on the first floor (Tr. 28, ll. 16-20). Kaufmann testified that he never inquired about working conditions and never offered to remedy any of the concerns volunteered to him (Tr. 30, ll. 1-13; Tr. 35, l. 1-8) Kaufmann initiated these rounding discussions by inquiring as to how employees were doing, not whether they had any concerns or complaints (Tr. 38, ll. 10-11).

Kaufmann testified that he had received the Company's labor relations training a number of times (Tr. 37, l. 22; Tr. 41, ll. 15-25; Tr. 43, ll. 1-3). This training was called ACT Training, and Kaufmann testified that he did not violate any of the guidelines of which he was aware regarding the ACT training (Tr. 43, ll. 9-13).

B. Elena McNutt, Chief Nursing Officer, Desert Springs Hospital

Elena McNutt is the Chief Nursing Officer at Desert Springs Hospital and testified concerning Paragraph 5(b) of the Complaint (Tr. 45, ll. 13-21). McNutt began her employment January 6, 2014 (Tr. 49, ll. 6-17). Upon becoming Chief Nursing Officer, McNutt went to the different floors to introduce herself, to try to meet staff, and to seek out any concerns they had that they wanted to share with her (Tr. 48, ll. 22 – 49, l. 5). Following January, McNutt did not inquire about whether employees had concerns or issues (Tr. 50, ll. 17-22; 48, ll. 14-17). McNutt credibly testified that when she was initially employed, some of the staff expressed concern about staffing

levels at the Hospital and that she attempted to remedy those concerns (Tr. 50, ll. 5-16). However, McNutt credibly denied doing that during the organizing campaign (Tr. 50, ll. 17-22).

General Counsel asked specifically whether McNutt recalled telling any individual employees that the issue of pay had been raised and that it would be addressed (Tr. 51, ll. 21-23). McNutt denied that she had told any individual employees that their pay would be addressed (Tr. 51, l. 24).

When asked whether she had attended any management meetings regarding a strategy for the Union, McNutt testified that she had attended ACT training so that she would understand basically what she could and could not ask or do (Tr. 53, ll. 1-14).

C. Yomi Fabiyi

Paragraphs 5(c),(e) and 6 relate to allegations about Yomi Fabiyi HR Administrator. Yomi Fabiyi has been employed since November of 2012 at Respondent's facility (Tr. 55, ll. 18-23). Fabiyi has day-to-day oversight for the HR Department, including employee discipline (Tr. 56, ll. 8-14). Fabiyi reports directly to Wayne Cassard, who also testified at the hearing (Tr. 56, l. 25 – 57, l. 1).

Fabiyi was involved in the disciplinary action against Van Leer as a result of her telephone call to CNA Terry Fulton (Tr. 60, ll. 8-14). Fabiyi became aware of an allegation of wrongdoing against Van Leer from Jeanne Schmid, Vice President Labor Relations for Universal Health Services, on March 20, 2014 (Tr. 60, ll. 13-15; Tr. 64, ll. 16-25; Joint Ex. No. 5).

Upon receipt of General Counsel's Exhibit 5, Fabiyi contacted his boss, Wayne Cassard (Tr. 65, ll. 10-13). After speaking with Cassard, Fabiyi met with Fulton and her supervisor, Murphy, on March 25, 2014. The meeting lasted approximately 45 minutes (Tr. 66, ll. 6-9). The meeting was held in Murphy's office on the 5th floor of the facility (Tr. 66, l. 5). In the meeting,

Fabiyi notified Fulton that he was aware of the complaint, understood that she was uncomfortable going to the HR office to talk about it and that is why he had come to her unit to discuss the matter (Tr. 67, ll. 16-23). Fabiyi testified that Fulton appeared to be very upset. Fabiyi testified that Fulton had received a telephone call from Van Leer and that Fulton became upset because Van Leer used vulgar and abusive language and Fulton felt threatened (Tr. 68, ll. 6-10). Fulton indicated that she felt very threatened and uncomfortable with the call (Tr. 68, ll. 14-17). Fulton relayed to Fabiyi the profanity used by Van Leer and in addition, Van Leer's statement "you guys are going to lose this for us" (Tr. 69, ll. 5-14). Fabiyi notified Fulton that policies were in place where such language could not be used. Fabiyi reviewed Schmid's statement (Tr. 71, ll. 1-4; GC Ex. 2).

On March 25, 2014, Fabiyi, Fulton and Murphy met in Murphy's office (Tr. 74, ll. 17-25). At this point, Fabiyi had Schmid's statement. Fabiyi's notes from the March 25, 2014, meeting were entered into evidence as General Counsel's Exhibit 4. Fabiyi contemporaneously made the notes which provide verbatim:

> "She asked, Are you at work? I said, yes. Girl, what the fuck is going on there? What do you mean no to the vote? Tell them motherfuckers you need to get it right. You all need to get it right. Relayed to coworkers and they informed Colleen. She didn't say she was going to beat my ass. I felt threatened, yes. We go out bowling, did say 'harm.' Got a text that Theresa just called me at another floor. She didn't say she will beat my ass. Very unprofessional. I felt threatened. I talked." Okay. "You know I'm not like that. Ain't there motherfuckin' business anyway. She told me my charge nurse came to me said it was you who went to HR. My coworkers say she shouldn't have done that. The next morning after the call, that is what I - - what are ya'll motherfuckers doing up there? She was sitting waiting outside. I was trying to," and I missed a word there, "these motherfuckers need to get their acts straight. She said, 'I thought you and I are cool." (Tr. 141 l. 17-25, Tr. 142 ll. 3-10).

Fabiyi's contemporaneously made notes constitute a business record and therefore is admissible.

Fabiyi also testified Fulton relayed to Fabiyi that Van Leer was waiting for her the next time she was being dropped off for work (Tr. 142 ll. 20-21). This is a critical distinction in Van Leer's testimony. Van Leer tries to create the impression that the two were in the parking lot together and walking to work together. However, the credible evidence is that Fulton was being dropped off. Van Leer had to have been waiting on Fulton at the facility, not in the parking lot in order to intercept her on her way to work (Tr. 142, ll. 17-143 l. 2).

Fabiyi also made contemporaneous notes of the March 28, 2014 meeting with Van Leer and Dugan. The notes are entered as General Counsel's Exhibit 5. The notes provide verbatim:

> "Okay. "Last Wednesday evening, met a - - met at work. They told me about something they heard about the Union. I called one of my coworkers, Lorriane; did not call Brooke (phonetic). Later called Terry. Yes, I was cursing, my friend. Not at work, on my private line. I was cursing. She said I'll call you back because I'm standing with Collen.' Got to work on Thursday, Ellie wasn't warned; Sam, the same thing. I asked a couple of people 'What is going on?' They said 'We heard that someone called threatening.' Dawn was twisting my words. Someone I had a problem with was saying curse words describing. I was not harassing anyone. I called Terry only. Why would I be calling them names? Not at work, cursing on their private line. I called a friend of mine and I'm cursing but not at work. People say they are going to make an example of you, like Naomi. I felt I was watched last week. Thursday and Friday, when I did nothing wrong. Terry and I have spoken several times. So what you were cursing. My words have been twisted. Rumors. They said 'Several people were called by me.' Several people said, 'Colleen was asking who is it that is using profanity on the phone?' 'I was not cursing at work. I didn't threaten her. We go bowling together. I'm cool with her, why would I threaten her? Words twisted by Dawn. I don't understand this. I know I didn't threaten anyone. Where is everyone getting this from? Friday evening towards the end, taking teleboxes down, discharging patients, et cetera, -- - - "E-T-C, took it out by one CNA, and I talked and we were speaking. She says 'bye,' and I said 'bye.' I heard Loran say, 'I don't know why Theresa was off the floor. She just called. Why are you off the floor? Why are they watching you?' Sam called Ellie, and she called the floor. The end of my shift, I punched out

> and said, 'Can I please talk to you? I was off 'cause I took the teleboxes down.' I also said, 'The way I've been looked at is not right.' I felt and sensed harassment when people were cold as ice toward me. Ellie handed me a paper rudely and set the rest on the table. I don't think that's right. I felt they were looking at me as guilty as charged. No, I didn't call anyone else or call anyone a snitch. Dawn is just mad at me. I need clarification. Since the campaign going on, the men were et cetera, call her when the shift is about to change." (Tr. 148 l. 19 - Tr. 150 l. 18).

Fabiyi testified in depth about HR policy 601 as the Employee Code of Conduct (Tr. 58 ll. 11-17, Tr. 152, ll. 2-4). Fabiyi testified that Van Leer was disciplined for the first rule in the policy which provides disruptive behavior, including but not limited to verbal or physical abuse/threats, intimidating, swearing, or coercing behavior directed toward a patient, visitor, contracted personnel or facility employee, or any behavior which disrupts or interferes with patient care and other staff members' work performance, or creates a non-productive work environment. (Tr. 152, ll.10-20 Joint Ex. 3). On April 8, 2014 Van Leer, Fabiyi and Dugan met in the HR office. (Tr.118, l. 10-12). Fabiyi estimated that the meeting lasted about half an hour. (Tr. 119, l. 2). The purpose of the meeting was to notify Van Leer that the investigation had been completed and there was a decision to give her corrective action. (Tr. 119, 5-9). The disciplinary action contained the signatures of Fabiyi and Dugan. (Tr. 119, ll. 15-24, GC Ex 7). Van Leer refused to sign the disciplinary action. (GC Ex. 7). Van Leer had not received any other disciplinary actions. (Tr. 121, ll. 7-9). Fabiyi consulted with Cassard about the language contained on GC Ex. 7 and about the level of discipline to issue. (Tr. 121, ll. 4-18). Fabiyi testified that he recommended the level three. (Tr. 123, l. 5-7).

General Counsel Exhibit 7 is clear that Van Leer was disciplined for displaying behavior that included profane and abusive language that was directed toward a hospital employee while the employee was at work and on duty. General Counsel Exhibit 7 also specifically provides

"While we respect your right to express your views related to union organizing, it is not appropriate and in violation of our policy to do so using profane and abusive language."

D. Jeanne Schmid, Vice President, Labor Relations, Universal Health Services

Jeanne Schmid is the Vice President of Labor Relations for Universal Health Services, the parent company of Desert Springs Hospital (Tr. 157, ll. 15-21). Schmid's testimony relates to Paragraph 6 of the Complaint. As Vice President of Labor Relations, Schmid is responsible for all things related to labor relations, including negotiations with the unions for represented staff, administration of contracts that have been negotiated, and is involved in any kind of union organizing activity (Tr. 160, ll. 1-9). Schmid was at Desert Springs due to the union organizing activity (Tr. 160, ll. 10-14).

On March 19, 2014, Schmid prepared Joint Exhibit No. 5 (Tr. 158, ll. 11-14). Schmid prepared Joint Exhibit No. 5 immediately following a meeting in Supervisor Colleen Murphy's office with Murphy, CNA Terry Fulton, and others (Tr. 159, ll. 10-14). Schmid testified that she was called to Murphy's office (Tr. 166, ll. 1-3). Upon her arrival at Murphy's office, Schmid observed employee Fulton (Tr. 166, ll. 4-9). Schmid testified that Fulton was shaking and was unable to speak upon Schmid's arrival (Tr. 166, ll. 10-13). As a result of Fulton's state, Schmid tried to reassure her, calm her down, and let her know everything would be okay (Tr. 167, ll. 9-11). Schmid testified that it took some time to calm Fulton down, but eventually Fulton was able to communicate and relay the events which are reported in Joint Exhibit No. 5 (Tr. 167, ll. 15 – 168, l. 5). Exhibit No. 5 speaks for itself and provides, in part, Fulton was visibly shaken in the meeting and Fulton informed the group Van Leer launched into a tirade of profanity and threats due to Terry's position on the union election.

Following the preparation of Joint Exhibit No. 5, Schmid forwarded Joint Exhibit No. 5 to Human Resources who conducted the investigation without further participation by Schmid (Tr. 164, ll. 1-6). Thereafter, Schmid was informed of the decision to issue a Final Written Warning to Van Leer (Tr. 164, ll. 17-19). Schmid did not play any role in the decision to suspend Van Leer or issue Van Leer a Final Written Warning (Tr. 164, ll. 10-16).

E. Charging Party Theresa Van Leer

Charging Party Theresa Van Leer testified that she was employed as a Certified Nursing Assistant (CNA) at Respondent's facility (Tr. 201, ll. 1-2). Charging Party's employment began on December 31, 2012 (Tr. 201, ll. 3-4). The only disciplinary action Charging Party received was the Final Written Warning at issue in this case for conduct occurring on March 19, 2014 (Tr. 201, l. 24 - 202, l. 2). Charging Party testified that in the fall and winter of 2013 she heard about the Union from a coworker and began to attend Union meetings (Tr. 202, ll. 1-25). Charging Party testified that she gave coworkers authorization cards. (Tr. 203, l. 23 – 204, l. 5). The Union election was held on Thursday, March 20, and Friday, March 21, 2014 (Tr. 204, ll. 6-8).

Complaint, Paragraph 5(a)

Van Leer testified CEO Kaufmann approached Van Leer and two other CNAs on March 8, 2014, and indicated that he could provide a hundred reasons why you should vote no for the Union and then proceeded to tell the employees the reasons why he felt they should vote no for the Union (Tr. 206, ll. 5-10). Charging Party's recollection is not specific with regard to this, however, Charging Party insists that Kaufmann asked whether employees had any concerns or issues that needed to be addressed (Tr. 206, ll. 11-18). Charging Party indicates that she informed Kaufmann that they were the lowest paid CNAs in the Valley (Tr. 206, l. 23 – 207, l. 14). Specifically, Charging Party says that she informed Kaufmann that the CNAs were the lowest paid

and she was talking about dollars, not cents, compared to other hospitals (Tr. 208, ll. 15-21). When asked by Judge Sandron if she remembered anything that either of the two said about pay, Charging Party testified that Kaufmann said he didn't think they were the lowest paid and that Charging Party said that she had done her research and they were definitely the lowest paid (Tr. 208, l. 22 – 209, l. 2). Charging Party testified that Kaufmann then wrote down Charging Party's name on his notepad (Tr. 209, ll. 3-8).

On cross examination Charging Party testified that she was comfortable discussing matters with Kaufmann, including union issues. The March 8, 2014, conversation is included. Charging Party confirmed that Kaufmann indicated that you can't count on union promises. Charging Party denied that Kaufmann explained anything about bargaining with the union (Tr. 268, ll. 7-11).

Complaint, Paragraph 5(b)

Charging Party also testified about an interaction with Ellie McNutt, Chief Nursing Officer (Tr. 210, ll. 9-12). Charging Party testified that on the first floor near Radiology, McNutt approached Charging Party and another employee, Seth Lowe, and stated, "I want to talk to you ladies about the Union if you had any concerns that needed to be addressed" (Tr. 210, l. 1 – 211, l. 7). Charging Party stated that she had raised the issue of pay with Sam and McNutt indicated that she was aware about the money issue (Tr. 211, ll. 9-19).

Charging Party's testimony with regard to the interactions with Kaufmann and McNutt are not credible. Taking the testimony of the three witnesses at issue in full, it is clear Kaufmann and McNutt knew exactly what they could and could not say regarding union organizing activity. A very basic tenet of this is that an employer cannot solicit and remedy grievances. What really happened in the conversations with Kaufmann and McNutt was that Charging Party indicated that

she wanted more money. Kaufmann and McNutt would have clearly known that they could not ask what employees wanted and promise to remedy those wants.

Complaint, Paragraphs 5(c)(d)(e) and 6

Charging Party also testified about a telephone call she made to another CNA, Terry Fulton, on March 19, 2014 (Tr. 212, ll. 3-8). Charging Party testified that she was not working when she telephoned Fulton (Tr. 212, ll. 9-10). Charging Party testified that she knew Fulton was a CNA who worked on Tower 5 (Tr. 212, ll. 11-12).

Charging Party was off duty and Fulton was on duty (Tr. 212, ll. 9-13). Charging Party and Fulton knew each other and had both gone with a group to bowl on one occasion (Tr. 212, ll. 16-25).

Charging Party testified that she had received a telephone call earlier from another employee on the same floor as Fulton regarding a rumor that employees on that floor were not going to vote for the Union. (Tr. 213, ll. 16-20). Therefore, Charging Party called Fulton. According to Van Leer, she said, "What the fuck is this I'm hearing that such and such said -- that I heard -- I told her that I had just heard a rumor that -- and, you know, yes, I was using profanity -- that I heard a rumor about the union. And I said, well, what the fuck is that I'm hearing that everybody is saying -- I got a call that everyone said, oh, everyone on Tower 5 should wait -- everyone on Tower 5 wants everyone to get together and wait a year to see what the hospital will do, and then unionize again. I said to her I'm so sick of hearing this bullshit. I'm so sick of this fucking shit. That's what I was saying to her. So I was -- not word for word verbatim is what I'm saying, you know, but this was in the line of what I was saying to her. You know, I'm so sick of hearing this motherfucking shit. I just want it all to be over. I was -- so one person told me we couldn't unionize for a couple of years. You said -- and I heard it was a year. I just want it to be

over. I'm so sick of this motherfucking shit. I was so frustrated. And these are the things I was saying to her out of frustration, your honor. I was cursing in my conversation. I wasn't cursing her out." (Tr. 213, l. 21 – 214, l. 16). Van Leer testified she and Fulton were not friends (Tr. 270 l. 14).

On cross examination, Charging Party testified that she worked Thursday, March 20, Friday, March 21, and Saturday, March 22. The next day she worked was Thursday, March 27 and half a day Friday, March 28. (Tr. 249, ll. 6-16.) Charging Party, lacking all credibility, repeatedly testified that she did not call Fulton because she was concerned about the union vote (Tr. 252 ll. 1-16). Charging Party insisted that she wasn't concerned about whether the union was going to win or not (Tr. 252, ll. 1-16). According to Charging Party, Fulton told her that she was at the desk with her supervisor (Tr. 214, l. 25- 215, l. 2). Charging Party testified that the purpose of her call was to find out if Fulton had heard the "rumor" (Tr. 216, ll. 19-23).

Charging Party admitted that she called Fulton on purpose and that she dialed Fulton's direct phone number (Tr. 253, ll. 19-25). Charging Party admitted that she was calling Fulton on her private cell phone number (Tr. 254, ll. 5-7). Again, lacking all credibility, upon being questioned by the Administrative Law Judge, Charging Party denied that the purpose of the call was to find out what was going on on Tower 5 with the union (Tr. 254, l. 10 – 255, l. 16). Charging Party even testified that she was not upset about the rumor that employees were talking about waiting a year to vote for the union. Charging Party admitted she called Fulton on Tower 5 because that's where the rumor was supposed to have started (Tr. 255, ll. 14-16). Charging Party did admit that she was trying to find out what employees on Tower 5 were talking about (Tr. 255, ll. 19-21). However, Charging Party denied that she tried to influence whether the rumor was true or to affect

how employees voted (Tr. 255, l. 22 – 256, l. 1). Charging Party went so far as to testify that she didn't try to convince anybody to vote for the union (Tr. 256, ll. 16-20).

When Charging Party was asked whether she was aware that Fulton was not supposed to accept private telephone calls on her cell phone while on duty, Charging Party testified that she was not aware of that. "That's her. That's not me." (Tr. 257, l. 24.) When Charging Party was asked whether she was supposed to take personal cell phone calls when on duty, she indicated, "If I'm working with a patient, no." (Tr. 258, l. 1.) Charging Party eventually reluctantly admitted that if she was not on break she was not supposed to be on her cell phone (Tr. 258, ll. 2-7).

Charging Party admitted she did not see Fulton the night after the call and she had no idea how Fulton reacted to receiving the telephone call (Tr. 258, ll. 20-25).

Charging Party testified that a memo was circulated the next morning explaining to employees that if they had received harassing phone calls about their union views that they could report it (Tr. 222, ll. 14-17). After reading the memo and speaking with employees on her unit, Charging Party called Fulton at home around 10:00 a.m. (Tr. 225, ll. 1-23). Charging Party testified that she called Fulton to discuss whether the report of harassing phone calls had come from Tower 5. According to Charging Party, Fulton immediately indicated that she didn't make any report about harassment or use of profanity. Charging Party indicated to Fulton that she said, "Oh, okay, dear, because I'm hearing different things, that somebody was harassed" (Tr. 225, ll. 17-18). Charging Party continued saying, "The memo said they were harassed about their views, and you know that wasn't the case" (Tr. 225, ll. 18-19). Again, Charging Party's testimony is not credible, and the purpose of the call was to let Fulton know Van Leer was not happy.

Charging Party insisted that she did not wait outside for Ms. Fulton to arrive the first day they were both at work, Friday, March 21, 2014 (Tr. 260, ll. 12-21). Charging Party admitted that

she saw Fulton on Friday morning as she entered work (Tr. 261, ll. 2-8). Charging Party testified that she saw her while walking into work. Charging Party admitted that she asked Fulton about the phone call and that Fulton allegedly said, "Girl, that wasn't me who said nothing about that phone call. . ." (Tr. 262, ll. 3-6). Upon examination by the Administrative Law Judge, Charging Party testified that she told Fulton that she received several phone calls from other people up there (meaning Tower 5) (Tr. 262, ll. 19-25).

What is abundantly clear is that Charging Party made a point of questioning Fulton about every aspect of the telephone call and what had transpired thereafter (Tr. 262, l. 20 – 264, l. 6). Charging Party made a point of talking to Fulton several times between that Thursday and March 25, 2014 (Tr. 264, ll. 7-12). Fabiyi met with Fulton on March 25, 2014, to review Schmid's memo (Tr. 66, ll. 1-6). By this time Van Leer had conveyed a clear message to Fulton to not get Van Leer in trouble.

Charging Party also testified that she had a conversation with her supervisor, Carol Dugan, in which she explained that she had called Fulton, used profanity on the phone, but that she did not harass or call Fulton names (Tr. 229, ll. 4-10). Van Leer admitted she volunteered the information to Dugan about the content of the telephone calls (Tr. 272 l.8-273 l.7). According to Charging Party, Dugan indicated that she was sure the matter would be investigated and if it was true it wouldn't be pretty, but that if nothing wrong had been done Charging Party had nothing to worry about (Tr. 229, ll. 11-17). The next day, Charging Party had another conversation with Dugan because she didn't like the way Sam and Ellie were looking at her and making her feel (Tr. 231, ll. 19-23). Charging Party did this because, as she testified, they had been very warm and loving during the campaign and on the morning of the election, they were cold as ice (Tr. 232, ll. 1-11).

Charging Party testified that there was a meeting with Carol Dugan and Human Resources Manager Yomi Fabiyi on March 28, 2014 (Tr. 233, ll. 9-17). According to Charging Party, Fabiyi indicated that he needed Charging Party's badge because she was being suspended during an investigation for calling employees and telling them that she was going to kick their ass if they didn't see her views about the union (Tr. 234, ll. 2-10).

Charging Party testified that she was asked by Fabiyi what the conversation with Fulton was about (Tr. 236, ll. 17-20). Charging Party told Fabiyi that it was private and none of his business but admitted that it was about the union (Tr. 236, ll. 19-24). Charging Party also testified that Fabiyi told her not to discuss anything that had transpired in the meeting and not to call anybody (Tr. 237, ll. 2-9). As Dugan and Charging Party returned to the unit, Dugan attempted to console Charging Party, who testified she was very upset (Tr. 238, ll. 17-25). Charging Party testified that on April 7, Fabiyi contacted her and arranged a meeting on April 8 at 6:30 in the evening (Tr. 240, ll. 2-14). Fabiyi presented Charging Party with the Level 3 disciplinary action in the meeting (Tr. 240, ll. 17-25). Charging Party admitted Fabiyi read the contents of General Counsel's Exhibit 7 to her, including the entirety of the incident language (Tr. 276, ll. 13-19). According to Charging Party, she recounted the entire conversation with Fulton and argued with Fabiyi about the Level 3 disciplinary action (Tr. 240, l. 17 – 242, l. 23). According to Charging Party, Fabiyi instructed her not to discuss the Level 3 (Tr. 243, ll. 10-13). Charging Party refused to sign the write-up (Tr. 240, ll. 6-11).

F. Wayne Cassard

Wayne Cassard is the top Human Resources official for the five acute care hospitals in Las Vegas, Nevada (Tr. 290, ll. 16-25). Cassard was first made aware of the telephone incident regarding Charging Party upon receipt of Joint Exhibit 5, the memo prepared by Schmid (Tr. 292,

ll. 8-22). Cassard instructed Fabiyi to meet with Fulton and review the Schmid statement with her and have her validate the information in the statement (Tr. 293, ll. 1-13). Cassard also received other information including Joint Exhibit 6, Murphy's statement about the incident (Tr. 293, ll. 20-25). Cassard explained the handwriting on General Counsel's Exhibit 2, which is an additional copy of Schmid's statement (Tr. 294, ll. 15-23). Cassard wrote on the left-hand margin the words "didn't happen," as well as the word "pressured by Theresa – felt threatened" (Tr. 295, ll. 5-11). Cassard made these marks on the document as Fabiyi was describing the meeting with Fulton (Tr. 295, ll. 15-25).

After reviewing the relevant information, Cassard discussed what actions to take with Fabiyi (Tr. 297, l. 18 – 298, l. 16). Cassard, having ultimate responsibility for deciding what discipline should be given, concluded that the Level 3 written warning was appropriate (Tr. 298, ll. 1-25). Cassard reviewed the language of the Level 3 and approved it (Tr. 299, l. 23 – 300, l. 7).

On cross examination, Cassard explained that due to Charging Party's clean work record, he felt that a Level 3 warning was a sufficient level of discipline (Tr. __ l.__).

G. Failure to Subpoena and/or Enforce the Subpoena of Employee Terry Fulton

General Counsel admitted that it attempted to issue a subpoena duces tecum (accidentally) and also a subpoena ad testificandum to Terry Fulton (GC Ex 11 and 13). General Counsel admitted that it was unable to establish delivery of the subpoenas. General Counsel made the decision not to seek enforcement of the subpoenas and not to have Fulton appear.

Fulton's failure to be subpoenaed and/or called as a witness by General Counsel creates a presumption that Fulton's testimony would have been harmful to General Counsel's position. Fulton is a necessary and critical witness to General Counsel's case. Fulton provided information immediately following the telephone call with Van Leer, was thereafter contacted the next morning

by Van Leer, and then in person the next day and several other days prior to the time that Fulton met with Fabiyi to discuss the events which transpired in the telephone call.

IV. ARGUMENT

A. Complaint, Paragraph 5(a).

The Board's current position with regard to the solicitation of employee grievances during an organizational campaign "raises an inference that the employer is promising to remedy the grievances." In Albertson's LLC, 359 NLRB No. 147 (2013), the Board reaffirmed that the legality of the employer's conduct does not turn on an employee's subjective reaction, but rather, or whether, under all the circumstances the employer's conduct had a reasonable tendency to interfere with, restrain, or coerce the employee in the exercise of rights guaranteed under the Act.

Paragraph 5(a) alleges that on March 8, 2014, Kaufmann solicited employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they rejected the union as their collective bargaining representative. There is no evidence that Kaufmann made any promises regarding increased benefits and improved terms and conditions of employment. Van Leer testified Kaufmann solicited employee complaints. Van Leer's testimony is not credible. Kaufmann testified that he had received significant training regarding what could and could not be said regarding the union. Further, Kaufmann spent hours, days, and weeks talking with employees about the union election. Van Leer admits the discussion with Kaufmann started with his saying he could provide 100 reasons to not support the union. Van Leer is either not correctly recalling any conversations she had with Kaufmann or she is misstating the content of the discussion. The results of the election were certified on March 31, 2014, the first business day after expiration of the objections period. (Joint Ex. 2). No other allegations of any violations by Kaufmann have ever been alleged and Van Leer is the only person to testify as

to any violations. Since there is no credible proof of solicitation of grievances, no violation of Section 8(a)(1) occurred.

B. Complaint, Paragraph 5b

Complaint, Paragraph 5b alleges that on or about March 15, 2014, Respondent, by Ellie McNutt in a first floor hallway at Respondent's facility, violated the Action soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they rejected the union as their collective bargaining representative. Like Kaufmann, McNutt had received significant training about what she could and could not say during the campaign. Also, like Kaufmann, this is the only allegation during the entirety of the campaign of wrongdoing by McNutt. There is no credible testimony that McNutt solicited employee complaints and grievances during the union campaign. Further, there is no evidence in the record whatsoever that McNutt made promises of improvements if the union was rejected.

C. Complaint, Paragraph 5(c)

Complaint, Paragraph 5(c) alleges that on March 28, 2014, Yomi Fabiyi interrogated Van Leer about her union activity; informed Van Leer that she had called other employees about the union creating an impression of surveillance; and threatened Van Leer with unspecified reprisals because of her union activity.

Interrogations of employees to determine union sympathy or affiliation is generally prohibited. NLRB v. West Coast Casket Co., 205 F.2d 902, 904. However, not all inquiries and/or interrogation is unlawful. Alleged unlawful interrogations are examined using the Rossmore House Hotel, 269 NLRB 1176 (1984), test. The Rossmore House test examines the following factors: (1) background of the questioning (in other words, whether the employer was hostile toward or discriminated against union activity); (2) the nature of the information sought; (3) the

identity of the questioner; (4) the place and method of the interrogation; (5) the truthfulness of the employee's reply; and (6) whether the interrogated employee was an open and active union supporter.

Respondent's position is that the Rossmore House test does not apply to the alleged interrogation. Fabiyi was investigating an incident initiated by Van Leer. Van Leer initiated the telephone call, admittedly used profane language, and admittedly was trying to discover what the rumors were regarding the union vote. Fabiyi simply inquired as to what transpired in the telephone conversation in order to determine whether disciplinary action should be issued. Fabiyi did not inquire as to union affiliation or sympathy. The election was over a week prior to March 28, 2014. It makes no sense to conclude Fabiyi was unlawfully interogating Van Leer.

Assuming arguendo the Rossmore House test applies, Respondent did not engage in unlawful interrogation. While the employer opposed the union's efforts to organize the facility, the employer was not hostile toward and did not discriminate against union activity. Joint Exhibit 2 indicates the results of the election were certified the first business day following expiration of the objections period. Therefore, it is undisputed there were no allegations of election interference or unfair labor practices which allegedly took place prior to the vote. In fact, the investigation on March 28, 2014, was a week after the election. With regard to the second factor, Fabiyi was simply inquiring as to what had transpired in the telephone call. There is no allegation and/or evidence that Fabiyi or any other of Respondent's supervisors attempted to obtain information about the union and its organizing activities. With regard to the third factor, Fabiyi, the top Human Resources Manager at the facility, was in charge of this serious investigation and was investigating the wrongdoing in the presence of Van Leer and her direct supervisor Dugan, with whom Van Leer obviously had a great relationship. In fact, on two occasions, Van Leer approached Duggan

over her concerns about the rumor that she had made threatening telephone calls. With regard to the fourth factor, the evidence is clear that the investigative meeting on March 28, 2014, took place in Fabiyi's office. With regard to the method of interrogation, Fabiyi simply asked Van Leer what had transpired on the telephone. With regard to the sixth factor, Van Leer testified that she attended meetings and that she supported the union. Based on Van Leer's other testimony regarding what transpired in the March 28, 2014, investigative meeting, she did not feel threatened or in any way fearful in the investigation. Van Leer simply did not believe what she did should result in disciplinary action. No unlawful interrogation occurred.

The Board has continued to hold that an employer creates an impression that its employees union activities are under surveillance when it tells them that it is aware of their union activities but fails to tell them the source of that information. *See*, Albertson's. In Ozburn Logistics, LLC, 359 NLRB No. 109 (2013), the Board stated that if an employer makes comments regarding employees' union activities, it must reveal the source of the information, or a violation of Section 8(a)(1) will be found. In the March 28, 2014, meeting with Dugan and Van Leer, Fabiyi simply asked about the facts of the telephone conversation with Fulton. First, this meeting took place after the union election. Second, it was clear Fabiyi was investigating the telephone call that was made by Van Leer. Obviously, there could be no creation of an impression of surveillance, and the only way an employer is aware of any union activity is when it is volunteered by another employee. Further, Van Leer was notified as to the source of the information. In addition, there is no allegation that any inquiry into union activity, other than the substance of the telephone call, had occurred. There cannot be interrogation in this circumstance because Fabiyi was simply asking what Van Leer said to Fulton. A profanity-laced tirade initiated by Van Leer merited

investigation. Therefore, it was perfectly reasonable, and not unlawful, to ask Van Leer what she said and what the telephone call was about.

There is no rational explanation for why Fabiyi would threaten Van Leer. The election was over, the results tabulated. The employees rejected representation. Van Leer didn't like being suspended. However, there is no credible evidence that Fabiyi threatened Van Leer.

D. Complaint, Paragraph 5(d)

Complaint, Paragraph 5(d) alleges that Van Leer's supervisor, Carol Dugan, on March 28, 2014, informed Van Leer not to discuss what was going on with regard to the disciplinary action. Van Leer's testimony regarding her interactions with Dugan relate solely to Dugan's efforts to console Van Leer due to her anger, frustration, and being upset about the disciplinary action and the investigation. According to the testimony, Dugan did not unlawfully restrict Van Leer from discussing anything related to her employment. Dugan simply advised, in a consoling way according to Van Leer's testimony, that she exit the facility while the suspension during the investigation was ongoing. Van Leer's testimony makes it clear that Dugan was not in any way trying to prohibit Van Leer from exercising any of her rights, but was trying to calm her down.

E. Complaint, Paragraph 5(e)

Complaint, Paragraph 5(e) alleges that on April 8, 2014, Fabiyi issued an overly-broad directive that Van Leer not discuss her discipline and threatened her with unspecified reprisals because of her union activity. This allegation is more fully discussed in Complaint Paragraph 6 below. Also, similar to the discussion in C. above, there is no rational explanation for why Fabiyi would issue such an instruction or threat.

Fabiyi's testimony is clear that he did not issue any prohibition on Van Leer's discussing her discipline. Further, it is clear Van Leer was not threatened regarding her union activities. Van Leer's testimony regarding this matter is not credible.

F. Complaint, Paragraph 6

Complaint, Paragraph 6 alleges that on March 28, 2014 through April 8, 2014, Van Leer was suspended and issued a Final Written Warning because Van Leer assisted the union and engaged in concerted activities and to discourage employees from engaging in these activities.

Van Leer was not engaged in protected conduct and was not disciplined for protected conduct. In some instances, employees may be given leeway for "impulsive behavior when engaging in concerted activity . . . ." Piper Realty Co., 313 NLRB 1289-90, (1994). However, Charging Party's behavior was not impulsive. In fact, it was clearly premeditated and intended to coerce co-employees. Therefore, the Atlantic Steel Co., 245 NLRB 814 (1979), analysis does not apply. In Atlantic Steel, the Board created a four-factor test when an employee engaging in concerted activity engages in impulsive behavior. The four-factor test essentially balances whether the employee's conduct becomes unprotected. Herein, Charging Party's behavior was neither impulsive nor protected, concerted activity.

For purposes of argument only, Desert Springs will provide an analysis of the facts in accordance with the Atlantic Steel factors. Under Atlantic Steel , the Board carefully balances four factors in determining whether the protection of the Act has been lost in a given situation: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. Atlantic Steel Co. at 816.

The first of the factors, the place of the discussion, weighs heavily in favor of a finding that Charging Party lost the protection of the Act. While Charging Party was not on duty, Ms. Fulton was on duty and in her normal work area. Charging Party's loud outburst, while on the telephone, obviously interfered with the workplace and upset Ms. Fulton to the point where she had difficulty calming down and explaining the content of the telephone conversation.

The second factor in the analysis, the subject matter of the discussion, arguably favors a finding that Charging Party did not lose the protection of the Act. Charging Party's profane threats and comments were aimed at Fulton and the fifth floor because a rumor about how the floor would vote against representation, applied to how employees would cast their vote. While Respondent does not concede that this factor weighs in favor of Charging Party's not losing the protection of the Act, Desert Springs believes Charging Party's premeditated telephone call related to how Fulton and others would vote. Charging Party insisted on cross examination and in questioning by the Judge that the purpose of the call was not to find out about the Union, that she did not try to influence how people voted, and that she wasn't upset about the rumor. Therefore, this factor is neutral.

The third factor, the nature of the outburst, weighs heavily in favor of a finding that Charging Party lost the protection of the Act. Charging Party's conduct was not impulsive at all. Charging Party's "outbursts" were premeditated, profane, threatening, and abusive.

The fourth factor, the presence of an unlawful provocation for the outburst, similarly weighs heavily in favor of a finding that Charging Party lost the protection of the Act. Again, Charging Party's conduct was not impulsive at all. Charging Party's profane "outbursts" were not a reaction to any unfair labor practice allegedly committed by Desert Springs. There were no

election objections filed. Van Leer admits the reason for the call was the rumor about how employees intended to vote, not that Desert Springs had committed unfair labor practices.

Therefore, even applying the Atlantic Steel analysis, the four factors weigh heavily in favor of a finding that Charging Party lost the protection of the Act. The Board has ruled similarly in numerous cases. *See*, Verizon Wireless, 349 NLRB 640 (2007); Felix Indus., Inc., 339 NLRB 195 (2003); and DaimlerChrysler Corp., 344 NLRB 1324 (2005).

Van Leer's conduct on March 19, 2014 was not protected by the Act. Further, there is no evidence Van Leer engaged in notable union activity which would be reason for retaliation against Van Leer. Desert Springs expressly recognizes Van Leer and other employees right to engage in union activity and in fact stated so in the Level 3 final written warning which is GC Ex. 7.

Van Leer's telephone call was clearly in violation of Policy 601 Rule 1. Van Leer's conduct clearly displayed disruptive behavior including profane and abusive language directed toward a hospital employee while the employee was at work and on duty. Van Leer's explanation that she and Fulton just talk like that is clearly false. Van Leer and Fulton are not that close and are not friends. Van Leer deserved, at a minimum, a Level 3 final written warning.

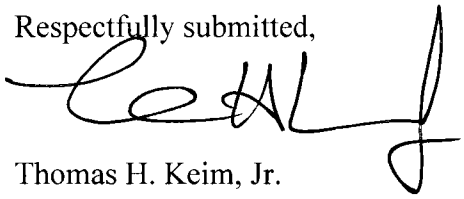
Van Leer's testimony and conduct demonstrate that Van Leer made a profane and abusive telephone call. Thereafter, the very next morning, tried to cover her tracks and intimidate Fulton into not participating in any investigation. Van Leer thoroughly interrogated Fulton at 10:00 a.m. the next morning by telephone, and thereafter at every opportunity as Van Leer and Fulton entered work. Van Leer's purpose in attempting to cover her tracks, was to avoid what she knew she deserved – disciplinary action. In her efforts to avoid disciplinary action she continued to intimidate Fulton, raise any number of unrelated issues and eventually make false allegations regarding various supervisors included in Paragraph 5 of the Complaint.

The Complaint specifically requests relief for the suspension. However, if Van Leer had received any level of discipline she would not have been eligible to receive compensation from the time she was suspended pending investigation. General Counsel is not arguing that a less level of discipline was appropriate. General Counsel is arguing that no discipline should have been issued at all. The overwhelming credible evidence indicates a contrary result. The fact is, Van Leer very easily could have had her employment terminated for this outrageous conduct. However, as Cassard testified, based on her otherwise clean work history, the decision was made that a Level 3 final written warning was an appropriate level of discipline. The fact Van Leer was not disciplined before or after this incident weighs heavily in favor of Desert Springs. Desert Springs is not after Van Leer for union activity. Van Leer engaged in a precipitating event, an abusive telephone call, and was disciplined for that conduct. No other discipline has been issued, because apparently, Van Leer has not engaged in any inappropriate conduct. The allegations in Paragraph 6 of the Complaint should be dismissed.

V. CONCLUSION

The Complaint in this matter should be dismissed in its entirety.

Respectfully submitted,



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