

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

VERITAS HEALTH SERVICES, INC.
d/b/a CHINO VALLEY MEDICAL
CENTER,

Respondent,

v.

UNITED NURSES ASSOCIATIONS OF
CALIFORNIA/UNION OF
HEALTHCARE PROFESSIONALS,
NUHHCE, AFSCME, AFL-CIO,

Charging Party.

Case Nos. 31-CA-29713, 31-CA-29714,
31-CA-29715; 31-CA-29716,
31-CA-29717, 31-CA-29738,
31-CA-29745, 31-CA-29749,
31-CA-29768, 31-CA-29769,
31-CA-29786, 31-CA-29936,
31-CA-29965, 31-CA-29966

**RESPONDENT CHINO VALLEY MEDICAL CENTER'S ANSWERING BRIEF TO
GENERAL COUNSEL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S
DECISION**

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I.
INTRODUCTION

General Counsel's exceptions 1-3 and 6 involve "housekeeping" matters where the ALJ's Decision omits particular findings or conclusions that follow from other findings or conclusions in the Decision. These housekeeping exceptions relate to findings and/or conclusions by the ALJ that are addressed in Respondent's exceptions and supporting brief. Additionally, General Counsel exception 4 involves the ALJ's findings and conclusions relating to alleged statements made during the course of employee meetings that took place in early May 2010, which findings and conclusions are also addressed in Respondent's exceptions and supporting brief. In order to avoid undue repetition, Respondent will not repeat such exceptions or arguments in this answering brief. However, Respondent's efforts to simplify the Board's review of the parties' exceptions in this regard is not intended to be, and should not be interpreted as, a waiver of any of Respondent's exceptions or supporting arguments. Respondent will instead focus on responding to the specific arguments raised by General Counsel in support of General Counsel exceptions 4 and 5.

II.
STATEMENT OF THE CASE AND ARGUMENT

A. General Counsel Exception No. 4-Alleged Threat To Discipline Employees For Voting For Union Representation

1. The Record

Paragraph 23(a) of the complaint alleges that certain statements in violation of Section 8(a)(1) were made by Respondent's agent Lex Reddy during meetings that occurred "[o]n or about May 3 and/or May 4." GCX 1(w), ¶ 23(a). Paragraph 23(b) of the complaint alleges that during **different** meetings held "[o]n or about May 6 or 7" Reddy "threatened to discipline employees since employees chose union representation." GCX 1(w), ¶ 23(b). At trial, General Counsel was unable to present any credible evidence that differentiated between the meetings allegedly held on "May 3 and/or 4" and the meetings allegedly held on "May 6 and/or 7." Moreover, the testimony of the witnesses who were presented by General Counsel in support of these allegations was very inconsistent. Union supporter Teer Lina testified that

Reddy only “explained that he is going to enforce the rules.” T 42, 69-70. Union supporter Tyrone Clavano testified that Reddy said that policies and procedures would be strictly enforced, including being late, that sick calls would be closely monitored, that employees would be disciplined even without a Union representative present, and that from now on it would be strictly policies and procedures with no more family atmosphere. T 79-81, 109.

Union supporter Marlene Becani testified during direct that Reddy spoke about “implementing rules against tardiness. He said we have to follow the rules.” T 183-185. On cross Becani testified that the topics discussed by Reddy were rules against tardiness, hiring new nurses, and vandalism of Gilliatt’s car; that these were the only topics she could remember; and that the only thing she could recall Reddy saying about tardiness was that employees have to follow the rules. T 203-206. Union supporter Vincent Hilvano testified at trial that Reddy stated, “Whoever or whatever your ideas are about this Union coming over to this Hospital and taking control of it is wrong,” that “they were still in the driver’s seat and negotiations between the Union and the Hospital is going to happen outside of the Hospital,” and that Reddy “spoke about enforcing the policies and that they had no choice but to enforce [the policies] because their backs were on the wall.” T 218-219.

Union supporter Ronald Magsino testified at trial that Reddy addressed the shortage of nurses and that the Hospital had hired nurses to fill in that shortage and also spoke about policies and procedures being strictly enforced and that violators would be dealt with accordingly. T 246-247. On cross Magsino testified that there were no other topics discussed by Reddy. T 306-310. Magsino testified that he did not think Hilvano was even at the meeting he attended. Id.

Union supporter Yesenia DeSantiago testified on direct that Reddy discussed “how nothing had changed, people were written up for being tardy, that the tardy policy had always been in place but had never really been enforced,” but that now “he said that now we are following the rules.” T 400-402. On cross-examination, DeSantiago testified that he did not recall Reddy discussing objections to the election, but said Reddy did show a picture of Gilliatt’s

car and said, "This is what happens when unions come in," but also that Reddy said he was not blaming them for Gilliatt's car being keyed. T 442-447. DeSantiago did not testify on cross that Reddy had said that the tardy policy had not been enforced in the past even though she was given the opportunity to do so. Id.

Union supporter Lisa Metheny testified that Reddy stated the Hospital was going to file charges against the nurses who are trying to form a union," and that "from now on that Chino Valley Medical Center was going to follow all policy and procedure to the fine detail and that if you're late, take too many breaks or you don't follow procedure, you may be counseled or reprimanded." T 572-573. Metheny also testified that Reddy said everything was going to be documented from "here on out." T 593.

Respondent's Chief Nursing Officer Linda Ruggio testified that at the meeting she attended Reddy said the status quo would remain and the Hospital would continue to enforce policies as they are written and nothing would change in relation to the enforcement or utilization of the policies based on the Union vote; and that the Hospital would honor and abide by the regulations in the NLRB handbook and encouraged employees to be familiar with those rights. T 900-904. Ruggio also testified that Reddy addressed the hiring of RNs and that the Company would not tolerate vandalism and that if individuals are identified who engaged in vandalism, then they would be dealt with appropriately. Id. Finally, Ruggio testified that Reddy stated that everyone knew there had been a campaign and vote and that the nurses had voted to have UNAC represent them. Id.

Human Resources Director Arti Dhuper testified that she attended all meetings where Reddy spoke to RNs and that Reddy stated at the meetings that there are policies and procedures in place and they would be followed just like in the past no matter what was going on at the hospital. T 992-995.

2. Discussion

General Counsel focuses on the testimony of Metheny in support of this exception, presumably because she alone testified that the meeting she attended was held on

May 6 (T 589). See, i.e., GC Brief, pp. 10-11. However, the ALJ did not find that Metheny made the statements attributed to her by General Counsel's brief. Compare ALJD 8:7-26 to GC Brief, pp. 10-11. Moreover, the testimony of Metheny on cross examination, during which she was asked to detail what was said during the meeting she attended, does not support the allegations of Paragraph 23(b). See T 589-594. Nor does the testimony of Lina, who identified Metheny as being present at the meeting she attended, support this allegation. See T 67-70. Accordingly, General Counsel did not establish by a preponderance of the evidence that Respondent violated the Act as alleged in Paragraph 23(b), particularly when assessed in light of the inconsistencies permeating the testimony of General Counsel's witnesses. See, i.e., T 42, 68-70, 79-81, 107-109, 183-185, 200-201, 203-205, 208-219, 222-223, 246-247, 306-310, 400-402, 442-447, 572-573, 589-593. Accordingly, General Counsel's exception 4 should be dismissed.

B. General Counsel Exception No. 5-Alleged Violation Of Section 8(a)(5) By Email Discussing Scheduling Procedures

1. The Record

Paragraph 12 alleges that on April 13 Respondent "notified" employees that they "could not make changes or exchanges of shifts once schedules are posted," which according to General Counsel was a unilateral change to employees' working conditions. In support of this allegation General Counsel relies on an email from Respondent's former director of nursing AnneMarie Robertson, sent to both bargaining unit RNs and other employees, discussing scheduling procedures. GCX 5; T 639. Robertson testified that her email was not intended to modify the Hospital's existing practice regarding "shift switching," which allows RNs to switch shifts once the schedule is posted only with the approval of their manager. T 611-614. Robertson's testimony in this regard was corroborated by both RN and management witnesses, who verified that the Hospital's practices and procedures for shift switching have remained constant since well before the April 2010 election. See, i.e., T 54-55, 195-197, 220, 310-311, 317, 628-629, 632-633, 695-699, 831-835; RX 64-65, 68.

In his Decision, the ALJ specifically references the testimony of Union supporter/General Counsel witness Lina “admit[ing] the practice has always been that after a schedule is posted, an employee needed a supervisor’s permission to alter the schedule.” ALJD 28:17-18. The ALJ also references the testimony of Union supporters/General Counsel witnesses Becani, Hilvano and Magsino, and of Robertson, then concludes that “the practice concerning shift changes after the schedule is posted remained the same both before and after the election.” *Id.*, 28:35-36. The ALJ also determined that “the announcement was roughly consistent with the existing practice.” *Id.*, 28:51.

2. Discussion

General Counsel contends that the procedures referenced in Robertson’s email were not “roughly consistent” with existing practice and that the announcement itself violated Section 8(a)(5) even though Respondent’s shift switching practices never changed. GC Brief, pp. 13-16. In support of its argument, General Counsel focuses on the first sentence of the email stating that “once a schedule is posted by the Nursing manager there will be no changes or exchanges.” *Id.*, p. 14. General Counsel’s contentions cannot be supported.

First, General Counsel improperly separates out the first sentence of the email, and ignores the remaining statements in the email which explain and provide context for that statement, in support of his exception. See, i.e., *Southern Frozen Foods, Inc.*, 202 NLRB 753, 755 (1973) [unfair labor practice finding reversed when based on isolated statements taken out of context provided by all of employer’s communications]; *Jacob Brenner Co.*, 160 NLRB 131, 137 (1966) [alleged unlawful statements must be read in context of entirety of employer’s communications]. The email, in its entirety, explains that after a schedule is posted any changes must be approved by management. GCX 5. The ALJ found that this has historically been the practice, and it does not appear that General Counsel disagrees with that finding. GC Brief, pp. 12-13. Accordingly, the ALJ’s determination that the procedures set forth in the email are “roughly consistent with the existing practice” is fully supported by the record; if anything, the ALJ’s “roughly” modifier is inconsistent with the record.

Second, and as correctly found by the ALJ, the facts presented by the record in this case are clearly distinguishable from the facts underlying the Board's decision in *ABC Automotive Products*, 307 NLRB 248 (1992), relied on by General Counsel. See GC Brief, pp. 14-15. As noted by the ALJ, in *ABC Automotive* the announced changes involved the elimination of the existing health and welfare benefit plan applicable to all unit employees, and that change would have been implemented had those unit employees returned to work following their unconditional offer to end their unfair labor practice strike. ALJD 28:47-50; see also *ABC Automotive*, at 249-250. Here Robertson's email did not represent a "change," and the record shows that employees did not reasonably interpret the email as changing the existing practice inasmuch as they continued to switch shifts following the date of the email in the same manner as they had prior to the email being sent. Finally, the "rule" from *ABC Automotive* relied on by General Counsel cannot be reconciled with the Board's cases finding that no Section 8(a)(5) violation can be shown without General Counsel establishing that there has been a change from an existing past practice that has had a material, substantial and significant impact on the terms and conditions of employment of unit employees. See, i.e., *Toyota of Berkley*, 306 NLRB 893 (1992); *UNC Nuclear Industries*, 268 NLRB 841 (1984).

For all of the foregoing reasons the ALJ's dismissal of the allegations of Paragraph 12 of the complaint should be affirmed.

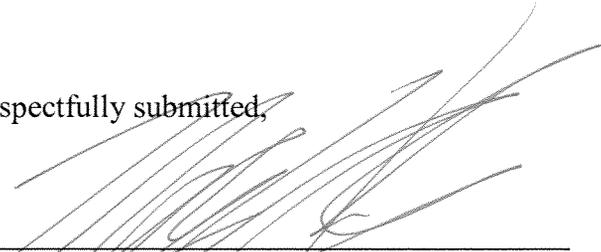
III. **CONCLUSION**

WHEREFORE, it is respectfully requested that General Counsel's exceptions 4 and 5 be dismissed for lack of merit, and that General Counsel's remaining exceptions relating to

the ALJ's unfair labor practice findings be dismissed for the reasons set forth in Respondent's exceptions and supporting brief.

Dated: January 25, 2012

Respectfully submitted,



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PROOF OF SERVICE BY E-MAIL

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On January 25, 2012, I served a true and correct copy of:

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ANSWERING BRIEF TO GENERAL COUNSEL'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S
DECISION

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Executed on January 25, 2012, at San Diego, California.



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