

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

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

Cases: 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

and

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

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Submitted by:
Joanna F. Silverman
Simone Pang
Counsel for the Acting General Counsel
National Labor Relations Board, Region 31
11150 West Olympic Blvd., Suite 700
Los Angeles, CA 90064-1825

Table of Contents

Table of Authorities	ii
I. PROCEDURAL HISTORY	2
II. INTRODUCTION.....	4
A. The ALJ’s Credibility Determinations Are Well Grounded.....	4
III. DISCUSSION	5
A. Respondent’s Exceptions Related to the Discharge of Ronald Magsino.....	5
B. Respondent’s Exceptions Related to Gonzalez’s Threat to Employee Teer Lina	26
C. Respondent’s Exceptions Related to Buesching’s Threat	27
D. Respondent’s Exceptions Related to Richards’ Threats	29
E. Respondent’s Exceptions Related to Lally’s Threats, Interrogations, and Giving Employees the Impression of Surveillance.....	30
F. Respondent’s Exceptions Related to Hower’s Threat.....	34
G. Respondent’s Exceptions Related to Casas’ Impression of Surveillance.....	35
H. Respondent’s Exceptions Related to Reddy’s Unlawful Statements.....	36
I. Respondent’s Exceptions Related to its Unlawful Service of Subpoenas on Employees and the Union.....	42
J. Respondent’s Exceptions Related to Attendance and Tardiness Policies.....	45
K. Respondent’s Exceptions Related to Education Reimbursement Policies	55
L. Respondent’s Exceptions Related to the Reading Remedy	61
M. Respondent’s Exceptions to the Recommended Order’s Breadth	62
N. Respondent’s Exceptions to the Hearing Before the ALJ	63
IV. CONCLUSION	71

Table of Authorities

Cases

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).....	45
Warner Co. v. NLRB, 365 F.2d 435 (3d Cir. 1966)	19

Regulations

45 C.F.R. § 164.501(6)(iii)	24
45 C.F.R. § 164.506(b)	24
45 C.F.R. § 164.506(c)(1).....	24
45 C.F.R. § 164.530(c)(2)(i)	26
65 Fed. Reg. 82491 (December 28, 2000)	24
65 Fed. Reg. 82598 (December 28, 2000)	25

Board Cases

ABC Indus. Laundry, 355 NLRB No. 17 (2010).....	33
Alcoa, Inc., 352 NLRB 1222 (2008).....	52
Altercare of Wadsworth Center for Rehabilitation and Nursing Care, Inc., 355 NLRB No. 96 (2010).....	54
American Life Insurance and Accident Co., 123 NLRB 529 (1959)	66
Ampersand Publishing, LLC, 357 NLRB No. 51 (2011)	62
Atlantic Scaffolding Co., 356 NLRB No. 113 (2011)	19
Avante at Wilson, Inc., 348 NLRB 1056 (2006)	19
Baddour, Inc., 303 NLRB 275 (1991)	28
BE & K, 351 NLRB 451 (2007)	45
Beverly Health & Rehabilitation Services, 339 NLRB 1243 (2003).....	61
Blockbuster Pavilion, 331 NLRB 1274 (2000).....	61
Blue Cross of Western New York, 298 NLRB 301 (1990)	52
Bruce Packing Company, Inc., 357 NLRB No. 93 (2011)	62
Carson Trailer, Inc., 352 NLRB 1274 (2008).....	63
Children's Farm Home, 324 NLRB 61 (1997).....	19
Ciba-Geigy Pharmaceutical Division, 264 NLRB 1013 (1982)	52
Cossentino Contracting Co., 351 NLRB 495 (2007).....	66
Cresleigh Management, 324 NLRB 774 (1997)	71
Delmas Conley d/b/a Conley Trucking, 349 NLRB 308 (2007)	45
Dickens, Inc., 355 NLRB No. 44 (2010)	66
Dorsey Trailers, Inc., 327 NLRB 835 (1999)	52
Dynamics Corp. of America, 286 NLRB 920 (1987).....	54
Earthgrains Co., 351 NLRB 733 (2007)	5
Easter Seals Conn., 345 NLRB 836 (2005)	41
Excel Case Ready, 334 NLRB 4 (2001)	61
Fed. Stainless Sink Div. of Unarco, 197 NLRB 489 (1972).....	5
Field Hotel Associates, 348 NLRB 1 (2006)	29
Fieldcrest Cannon, Inc., 318 NLRB 470 (1995).....	41, 61
Flexsteel Indus., 311 NLRB 257 (1993).....	33
Georgia Rug Mill, 131 NLRB 1304 (1961).....	5
Gold Standard Enter., 234 NLRB 618 (1978)	5

Gossen Company, 254 NLRB 339 (1981)..... 33

Grimmway Farms, 314 NLRB 73 (1994)..... 41

Harrison Steel Castings Co., 293 NLRB 1158 (1989)..... 30

Hickmott Foods, 242 NLRB 1357 (1979) 62

Homer D. Bronson Co., 349 NLRB 512 (2007)..... 5

Hyatt Regency Memphis, 296 NLRB 259 (1989) 52

Indianapolis Glove Co., 88 NLRB 986 (1950)..... 66

International Brotherhood Of Teamsters, Local 722, AFL-CIO (Kasper Trucking, Inc.), 314
NLRB 1016 (1994)..... 70

Ishikawa Gasket Am., 337 NLRB 175 (2001)..... 61

ITT Federal Services Corp., 335 NLRB 998 (2001)..... 27

Jefferson Chemical Co., 200 NLRB 992 (1972)..... 71

Jennie O Foods Inc., 301 NLRB 305 (1991) 55

John W. Hancock, Jr., Inc., 337 NLRB 1223 (2002)..... 31

Kinder-Care Learning Ctr., 299 NLRB 1171 (1990)..... 41

King David Center, 328 NLRB 1141 (1999)..... 33

LM Waste Service, Corp., 357 NLRB No. 194 (2011) 62

McAllister Towing & Transportation Co., 341 NLRB 394 (2004) 61

Mediplex of Danbury, 314 NLRB 470 (1994)..... 28

Midwest Psychological Center, Inc., 346 NLRB 1 (2005)..... 67

National Telephone Directory Corp., 319 NLRB 420 (1995) 44

New Concept Solutions, LLC, 349 NLRB 1136 (2007)..... 63

Noah's Bay Area Bagels, LLC, 331 NLRB 188 (2000) 27

Oakwood Healthcare, Inc., 348 NLRB 686 (2006) 19, 20

Our Way, Inc., 268 NLRB 394 (1993) 33

Pacific Beach Hotel, 356 NLRB No. 182 (2011) 60

Pacific Coast M.S. Indus. Co., Ltd., 355 NLRB No. 226 (2010) 18, 19

Peyton Packing Co., 129 NLRB 1358 (1961)..... 71

Quadrex Environmental Co., 308 NLRB 101 (1992)..... 19

Rossmore House, 269 NLRB 1176 (1984) 31

San Luis Trucking, Inc., 352 NLRB 211 (2008) 52, 54

Sears, Roebuck & Co., 304 NLRB 193 (1991)..... 19

Seda Specialty Packaging Corp., 324 NLRB 350 (1997)..... 32, 41

Shop-Rite Supermarket, 231 NLRB 500 (1977)..... 5

Southern California Gas Co., 346 NLRB 449 (2006)..... 60

Standard Dry Wall Products, 91 NLRB 544 (1950)..... 4

Sunshine Piping, Inc., 351 NLRB 1371 (2007) 63

T.R.W., Inc., 257 NLRB 442 (1981) 33

Taylor-Rose Mfg. Corp., 205 NLRB 262 (1973) 35

Three Sisters Sportswear, 312 NLRB 853 (1993) 61

Tocco, Inc., 323 NLRB 480 (1997) 60

Treanor Moving & Storage Co., 311 NLRB 371 (1993)..... 34, 35

United Artists Theatre, 277 NLRB 115 (1985)..... 41

Weather Tec Corp., 238 NLRB 1535 (1978)..... 40

Wilshire Plaza Hotel, 353 NLRB 304 (2008)..... 5

Winkle Bus Co., Inc., 347 NLRB 1203 (2006)..... 27

Womac Indus. Inc., 238 NLRB 43 (1978).....	52
Wright Electric, Inc., 327 NLRB 1194 (1999)	43, 44
Wright Line, 251 NLRB 1083 (1980).....	21, 53
Yale New Haven Hosp., 309 NLRB 363 (1992)	41

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel submits this Answering Brief in opposition to Respondent's Exceptions to the Decision of Administrative Law Judge William G. Kocol in the captioned matter. Counsel for the Acting General Counsel hereby respectfully requests that the National Labor Relations Board deny all but three of Respondent's exceptions.

I. PROCEDURAL HISTORY

This case was tried before the Honorable William G. Kocol on June 6 through June 10, 2011 and June 15, 2011, in Los Angeles, California, based on a Consolidated Complaint issued by the Regional Director for Region 31 on February 23, 2011 ("the Complaint"). (GC Ex 1(ww).)¹ The Complaint was based on unfair labor practice charges filed by United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO ("the Union").

The Complaint alleges that Veritas Health Services, Inc. d/b/a Chino Valley Medical Center ("Respondent," "Chino Valley," or "the Hospital") violated Section 8(a)(5) of the National Labor Relations Act ("the Act") by unilaterally changing terms and conditions of employment of its employees in the Unit represented by the Union at its Chino, California facility, without providing the Union with notice of and the opportunity to bargain to agreement or good-faith impasse over any proposed changes and by failing to furnish the Union with information requested by the Union on April 9, 2010. The Complaint alleges that Respondent violated Section 8(a)(3) of the Act by disciplining employees and by discharging an employee because they engaged in activity on behalf of the Union. Finally, the Complaint alleges that Respondent violated Section 8(a)(1) of the Act by threatening to more rigorously enforce policies because employees engaged in union activity; threatening to more closely monitor employees' attendance and tardiness because of their union activities; threatening employees

¹ References to exhibits are abbreviated as "GC Ex," for GC Exhibits and "REx" for Respondent Exhibits, followed by the page number of the exhibit where applicable. References to the transcript are abbreviated as "Tr." followed by the name of the witness whose testimony is being cited. When more than one page of a witness's testimony is cited, the witness's name follows the last of the citations to the transcript. References to the ALJ's decision are abbreviated as "ALJD," followed by the page number. References to Respondent's brief in support of its exceptions are abbreviated as "RBx," followed by the page number.

with adverse consequences because of their union activities; threatening employees that they would lose benefits because they voted for the Union; telling employees that they cannot talk to the media or other third-parties about their protected concerted activities and/or working conditions; interrogating employees about their union activities or support; serving employees and the Union with subpoenas requesting documents reflecting employees' union support and/or activities; and by creating the impression that Respondent was engaging in surveillance of employees' protected concerted and/or union activities.

On October 17, 2011, Administrative Law Judge (“ALJ” or “the Judge”) Kocol issued his Decision and Recommended Order (“ALJD”) finding that Respondent committed numerous violations of Section 8(a)(5), (3) and (1) of the Act. ALJ Kocol found that Respondent violated the Act by:

- Threatening employees that it would close the facility and terminate employees if they selected a union;
- Threatening employees with loss of benefits if they selected the Union as their collective-bargaining representative;
- Coercively interrogating employees about their union activities;
- Impliedly threatening employees with layoffs if they supported a union;
- Telling employees that they might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union;
- Giving employees the impression that their union activities are under surveillance;
- Threatening to discipline employees because they engaged in union activities;
- Informing employees that they could no longer take vacations longer than 2 weeks because the employees had selected the Union to represent them;
- Telling employees that the family atmosphere at Chino Valley is over and that henceforth Chino Valley would begin strictly enforcing its policies and procedures, including tardiness, because the employees voted for the Union;
- Broadly prohibiting employees from speaking to the media, including about the Union or about terms and conditions of employment;
- Serving subpoenas on employees and the Union that requested information about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding;
- More strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule because employees supported the Union;
- Disciplining employees who fail to attend mandatory meetings;

- Discharging Ronald Magsino for supporting the Union;
- Beginning to discipline employees who fail to attend mandatory meetings without first giving the Union an opportunity to bargain concerning the change;
- More strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule without first giving the Union an opportunity to bargain concerning the change;
- Terminating the practice of paying part-time employees for the time spent attending classes needed to maintain the certifications necessary to perform their work at Chino Valley without first allowing the Union an opportunity to bargain concerning that change; and by
- Failing to provide the Union with requested information that is presumptively relevant to the Union's performance of its representational duties.

Due to the widespread and egregious nature of Respondent's misconduct, the ALJ properly recommended a broad cease-and-desist order and that the notice to employees be read to employees by, or in the presence of, a responsible management official. (ALJD 145:5-36).²

II. INTRODUCTION

As the following discussion will demonstrate, ALJ Kocol's decision rests on solid credibility determinations, the overwhelming weight of the evidence, and well-established Board precedent and federal case law. In addition to setting out the bases upon which Judge Kocol rested his determinations, Counsel for the Acting General Counsel, in this Answering Brief, will point out the many instances in which Respondent either omits critical facts or misleads the reader by citing to evidence not in the record.

A. The ALJ's Credibility Determinations Are Well Grounded

Many of Respondent's exceptions are to the ALJ's credibility findings. The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence establishes that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). Here, the ALJ's credibility resolutions should not be overturned, as they are well supported by the record. ALJ Kocol discussed his credibility determinations thoroughly and with great specificity, detailing the reasons why he credited or discredited various witnesses who appeared before him. (ALJD 16, 18, 20, 23.) After observing demeanor, considering the overall logic of their testimony, and factoring in corroboration or lack

² ALJ Kocol dismissed the allegation of the Complaint that Respondent violated Section 8(a)(5) by unilaterally notifying employees that they could not make changes or exchange shifts once schedules are posted.

thereof, the ALJ consistently credited the testimony of General Counsel witnesses over those of Respondent.

Moreover, Respondent, in its brief, when arguing that its witnesses Ruggio, Gilliatt, and Dhuper should be credited over the current employees Lina, Clavano, Roncesvalles, Bacani, and Metheny ignores that current employees who testify against their current employer are considered particularly credible given that they are testifying against their own pecuniary interest and at great risk to their continuing employment. *See Wilshire Plaza Hotel*, 353 NLRB 304, 316 (2008), citing *Gold Standard Enter.*, 234 NLRB 618, 619 (1978); *Fed. Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972); and *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961).

In *Homer D. Bronson Co.*, 349 NLRB 512, 534 (2007), the Board upheld the judge’s credibility findings and observed that “[b]oth the Board and the courts have historically recognized that the testimony of such witnesses that is adverse to their employer is particularly reliable.” Moreover, the Board has found that testimony given by current employees adverse to their employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false.” *Earthgrains Co.*, 351 NLRB 733, 746 (2007), citing *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977).

As for former employees Magsino and DeSantiago, their testimony was consistent both on direct and cross examination and was corroborated by Ruggio’s notes of her investigation and testimony. The ALJ properly determined that, like the other employees witnesses called by Counsel for the Acting General Counsel, Magsino and DeSantiago testified credibly and consistently throughout the hearing. (ALJD 4, 6, 8, 16, 23.)

III. DISCUSSION

A. Respondent’s Exceptions Related to the Discharge of Ronald Magsino

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
Exceptions 5, 29-57, 76	Pages 16-23, 33, 38-78

The ALJ properly found that Respondent violated Section 8(a)(3) when it discharged employee Ronald Magsino (“Magsino”).³ The record evidence amply supports the ALJ’s findings underlying his conclusion that Respondent discharged Magsino because of his union

³ In Exception 5, Respondent asserts that the ALJ erred in finding that Magsino was terminated on May 10, 2010. Counsel for the Acting General Counsel agrees that the ALJ erred in finding that Magsino worked for Chino Valley until May 10, 2010. Rather, the record reflects that Respondent discharged Magsino on May 20, 2010. (GCEX 1(yy):1.)

activities. The following facts were properly relied upon by the ALJ in his decision. Magsino was a visible supporter of the Union prior to the election. (ALJD 10; GC Ex 2, GC Ex 3, GC Ex 46:19; Tr. 235-41/Magsino; Tr. 930/Ruggio.) Respondent, through Gilliatt issued final written warnings to employees Yesenia DeSantiago (“DeSantiago”) and Magsino on May 4, 2010 and May 5, 2010, respectively, for discharging a patient without reassessing the patient before discharge. (ALJD 10-12; GC Ex 18; Tr. 250-252, Tr. 330/Magsino, Tr. 404-405, Tr. 717/DeSantiago.)⁴ Both final written warnings included the following language, “Continued failure to comply with any hospital policy will result in immediate termination [w]ith cause.” (GC Ex 8, GC Ex 18.) The ALJ also properly determined that the final written warnings issued to Magsino and DeSantiago included the patient’s medical record number. (ALJD 11; GC Ex 8, GC Ex 18; Tr. 252/Magsino, Tr. 720/Gilliatt.) Gilliatt, when showing Magsino his final written warning, also showed Magsino the doctor’s dictation describing the patient’s care and Respondent’s policy and procedure for reassessment.⁵ (Tr. 252, Tr. 331, Tr. 334-335/Magsino, Tr. 713, Tr. 745-746/Gilliatt.) The doctor’s dictation that Gilliatt showed to Magsino during this meeting was not redacted and included the patient’s name, date of birth, and the medical record number. (Tr. 252-253, Tr. 281/Magsino, Tr. 745-746/Gilliatt.)

When Gilliatt showed Magsino his final written warning for unsatisfactory work performance, Magsino asked her what the warning was for and Gilliatt responded that the Department of Health had done an audit of the charts and they found that Magsino and DeSantiago had not reassessed the patient. (Tr. 253, Tr. 330-331, Tr. 335/Magsino.) Magsino was visibly upset. (Tr. 713/Gilliatt.) Magsino then asked Gilliatt if he could go out and review the warning, policy and procedure, and chart. (Tr. 253, Tr. 336-338, Tr. 340/Magsino, Tr. 716, Tr. 747/Gilliatt.) Gilliatt responded that it was ok and that he could go out, view the chart and print it. (Tr. 253-254, Tr. 282, Tr. 338-339/Magsino.) Gilliatt admitted to giving Magsino approval to review the record. (Tr. 716/Gilliatt.) Before Magsino left Gilliatt’s office, Gilliatt wrote the patient’s name and medical record on a piece of paper that she handed to Magsino. (Tr.

⁴ Sometime before May 5, 2010, Ruggio had contacted Gilliatt and told her that the State had come in and found that Magsino had not taken vital signs for a patient at discharge. (Tr. 712, Tr. 721/Gilliatt, Tr. 924/Ruggio.) Ruggio told Gilliatt to write up a final written warning and to give it to Magsino. (Tr. 924/Ruggio.)

⁵ The doctor’s dictation describes how the patient presented and what the doctor did. (Tr. 252/Magsino.)

341/Magsino, Tr. 713, Tr. 728/Gilliatt⁶.) Magsino left Gilliatt's office. (Tr. 254/Magsino.) Gilliatt was the first to mention printing the chart during this meeting. (Tr. 340/Magsino.)

After leaving Gilliatt's office, Magsino went to the nursing station and reviewed the chart. (Tr. 340/Magsino.) He printed the record and logged off of the computer system. (Tr. 344/Magsino.) He also threw the piece of paper Gilliatt had given to him with the patient's name and the medical record number in the HIPAA bin.⁷ (Tr. 341/Magsino.) Magsino, after printing the medical record, redacted the patient's name. (GC Ex 9(a) and GC Ex 9(b); Tr. 360/Magsino.)⁸ After Magsino redacted the patient's name, he found that you could still read the name, so he made a copy of the record and threw the first copy he had made into the HIPAA bin.⁹ (Tr. 360-361/Magsino.) As for the one copy Magsino had of the document, he brought it with him to Gilliatt's office. (Tr. 361-362/Magsino.)

About 10 to 15 minutes after leaving Gilliatt's office to review the medical record, Magsino returned to Gilliatt's office, bringing along his co-worker Ahmed Kassim. (Tr. 254, Tr. 345/Magsino.) Magsino brought the copy of the redacted medical record he had just printed and showed the record to Gilliatt. (Tr. 362/Magsino.) During this meeting, Magsino told Gilliatt that he had reviewed it and that, according to the doctor's dictation, the doctor had been aware of the patient's blood pressure and was ok with the patient being discharged. (Tr. 254, Tr. 347/Magsino.) Magsino also told Gilliatt that the Hospital's reassessment policy only said that the nurses have to review the patient's chief complaint and that he did so according to his nursing notes. (Tr. 254/Magsino.) Magsino asked Gilliatt why he was getting a final warning and she said that the Hospital was getting fined. (Tr. 254/Magsino.) Magsino asked Gilliatt if she thought he had unsatisfactory work performance to which Gilliatt responded that she did not make the write up and that management had asked her to give it to Magsino.¹⁰ (Tr. 254-255, Tr. 337/Magsino.)

⁶ Gilliatt contends that she only wrote down the patient's name on the piece of paper she gave to Magsino. (Tr. 728/Gilliatt.)

⁷ The HIPAA bin is the name for a locked box into which Chino Valley Medical Center staff members place information to be shredded. (Tr. 342/Magsino.)

⁸ The redactions made by Magsino are in black on GC Exhibits 9(a) and 9(b). (Tr. 360/Magsino.)

⁹ Respondent, in its exceptions and brief in support, omits the fact that Magsino took steps to redact and shred the medical record he accessed.

¹⁰ Gilliatt recalled that there was only one meeting in her office on May 5, 2010 and that her next conversation with Magsino took place in the nurses' station where she found Magsino disheveled and surrounded by policy books, core curriculum, and standards of care. (Tr. 713/Gilliatt.) Gilliatt told Magsino that he could not do this right then and that he was going to have to do this after work. (Tr. 714/Gilliatt.) Gilliatt also told Magsino, "Do your research and make sure what you're disputing." (Tr. 728/Gilliatt.)

After this meeting, Magsino put the medical record in his backpack. (Tr. 362/Magsino.) When Magsino got home that night after work, he removed the medical record from his backpack to review it. (Tr. 362/Magsino.) The next time the medical record came out of Magsino's backpack was when he made one copy to submit with his dispute letter to Respondent's Human Resources. (Tr. 363/Magsino.) Magsino could not recall if he accessed the medical record after May 5, 2010 but he thought he may have done so during a conversation with Dr. James Winn, the doctor who had cared for the patient. (Tr. 365-366/Magsino.)

On the following day, May 6, 2010, Ruggio, while in Gilliatt's office with Gilliatt and Magsino, provided Magsino with a copy of Respondent's dispute resolution policy. (GC Ex 147; Tr. 352-353/Magsino, Tr. 715/Gilliatt.) Subsequently, Gilliatt told Magsino to get letters of support from co-workers and told him to review the medical record and to submit his dispute. (Tr. 353/Magsino.) Gilliatt told him to review it carefully and to review it at home. (Tr. 353, Tr. 355/Magsino.)

On or about May 10, 2010, DeSantiago went to Gilliatt's office and asked if her final written warning had to be a final warning. (Tr. 407, Tr. 430/DeSantiago.)¹¹ Gilliatt told her that she had the right to dispute it and she gave DeSantiago a copy of Respondent's dispute policy. (Tr. 407, Tr. 430/DeSantiago.) DeSantiago told Gilliatt that she did not know who the patient was and Gilliatt responded that it had not been DeSantiago's patient. (Tr. 407, Tr. 430/DeSantiago.) DeSantiago asked if she had any access to the patient's chart so that she could get the facts. (Tr. 407, Tr. 431/DeSantiago, Tr. 718/Gilliatt.) Gilliatt responded yes, looked it up, and wrote the patient's name and medical record number on a sticky. (Tr. 407-408, Tr. 431/DeSantiago.) Gilliatt handed DeSantiago the sticky with the patient's name and medical record number and told DeSantiago to go ahead and look it up and said that DeSantiago had seven to ten days to dispute it. (Tr. 408, Tr. 431/DeSantiago, Tr. 718/Gilliatt, Tr. 728/Gilliatt.)¹² Gilliatt told DeSantiago to write a dispute and to turn it in to Human Resources.¹³ (Tr. 408/DeSantiago.) Gilliatt did not say anything to DeSantiago about the sticky she had given to DeSantiago with the patient's information.

Gilliatt did not recall much of the sequence of the events nor where conversations took place. (Tr. 715/Gilliatt.) Gilliatt denied telling Magsino that she had been told to give him the final written warning. (Tr. 718/Gilliatt.)

¹¹ Gilliatt recalled that this conversation took place on the day she gave DeSantiago her final written warning. (Tr. 718/Gilliatt.)

¹² Gilliatt contends that she only wrote the patient's name on the sticky. (Tr. 719/Gilliatt.)

¹³ According to Gilliatt, she gave DeSantiago permission to review the chart so she could have knowledge of the counseling. (Tr. 718/Gilliatt.)

After this meeting, DeSantiago opened the patient's chart on the computer and reviewed the triage, the patient's chief complaint, the notes, and the dictation. (Tr. 409, Tr. 432/DeSantiago.) DeSantiago then printed the triage, the notes, and the dictation. (Tr. 409/DeSantiago.) DeSantiago also wrote notes from her review of the medical record. (Tr. 432-433/DeSantiago.) Thereafter, DeSantiago placed the sticky and the medical record in the HIPAA bin. (Tr. 433/DeSantiago.) On or about May 11, 2010, DeSantiago submitted to Human Resources her letter disputing her May 4, 2010 final written warning. (GC Ex 51; Tr. 409-410/DeSantiago.)

On or about May 12, 2010, Magsino submitted a letter to Human Resources disputing the final written warning he had received on May 5, 2010. (GC Ex 9; Tr. 255/Magsino.) Along with his dispute letter, Magsino submitted a two-page doctor's dictation, one page entitled "patient notes" and 22 pages of letters of support.¹⁴ (GC Ex 9(a) through and including GC Ex 9(x).) The copy of the medical record Magsino submitted to Human Resources with his dispute letter did not contain the patient's name. (Tr. 268/Magsino.)

After Magsino submitted his dispute letter, Human Resources Director Arthi Dupher ("Dupher") provided Ruggio with the packet of documents Magsino had included with his dispute letter. (Tr. 836/Ruggio.) Ruggio, in turn, contacted Respondent's Chief Clinical Officer and Corporate Compliance Officer Suzanne Richards ("Richards") to get clarification and guidance on how to proceed. (Tr. 837/Ruggio, Tr. 771/Richards.) Richards had a report run to show access to the medical record Magsino had included with his dispute submission to Human Resources. (REx 46; Tr. 772/Richards.) The report revealed that Gilliatt, Magsino, and DeSantiago all accessed and printed the medical record at issue. (REx 46; Tr. 798/Richards.)

On May 14, 2010, at about 3 or 4 p.m., Magsino was called into Chief Nursing Officer Ruggio's office. (REx 48; Tr. 265, Tr. 369/Magsino.) Present were Ruggio and IT Head Jean Arriaga ("Arriaga").¹⁵ (REx 48; Tr. 266, Tr. 369/Magsino.) When Magsino arrived Ruggio said that she knew Magsino had rights and that she only had one question. (Tr. 266, Tr. 370/Magsino.) Magsino responded that it was ok. (Tr. 266/Magsino.) Ruggio told Magsino that he had viewed and printed a patient's chart on April 5, 2010. (Tr. 266, Tr. 370/Magsino.) Magsino responded

¹⁴ In Dr. James Winn's letter of support for Magsino, he identified the patient by unit number. (GC Ex 9(c).)

¹⁵ Respondent, in exception 35, excepts to the ALJ's finding that Yago was present during this meeting. A review of the record makes clear that this was a typographical error and the ALJ was referring to "Arriaga." Respondent offers no evidence or argument in support of this exception. Moreover, there is no evidence that this error prejudiced Respondent in any way.

that he was not sure if he had worked that day and asked if he could look at his schedule on his phone. (Tr. 266/Magsino.) Magsino told Ruggio that he did not have any idea why the record was printed on April 5, saying that the only thing he could think of was that he had left his computer open and somebody had printed it. (Tr. 266/Magsino.) Ruggio responded that it was a HIPAA violation. (Tr. 266/Magsino.)

Ruggio then told Magsino that he had printed the same patient's chart on May 5, 2010 and that that was a HIPAA violation as well. (Tr. 266, Tr. 370/Magsino.) Magsino responded that had been when he received his final written warning and informed Ruggio that he had asked Gilliatt if he could view it and that Gilliatt had given him permission to view it and print it. (REx 48; Tr. 267/Magsino, Tr. 842/Ruggio.) Ruggio continued on to inform Magsino that that was a HIPAA violation. (Tr. 267/Magsino.) Magsino told Ruggio that, when he was written up, Gilliatt had a copy of the medical record with the name, birth date and everything on it. (Tr. 267/Magsino.) Ruggio responded that she was going to have to talk to Gilliatt. (Tr. 267, Tr. 373/Magsino.) Arriaga told Magsino that he should have erased everything including the medical record number and the account number. (Tr. 374/Magsino.)

Then Ruggio asked Magsino about the record he had printed. (Tr. 267/Magsino.) Magsino responded that when he printed it he had removed the patient's name, birth date, date of service and only left the medical record and account number for reference. (REx 48; Tr. 267, Tr. 373/Magsino, Tr. 843/Ruggio.) Magsino told her that he had copied the document because when he redacted the name, the patient's name was still visible so he made a copy of it and then threw the original record in the HIPAA shredder. (REx 48; Tr. 267, Tr. 374-375/Magsino, Tr. 843/Ruggio.) Magsino said he had one copy of the record. (Tr. 267, Tr. 375/Magsino.) Ruggio told Magsino that that was a violation. (Tr. 267/Magsino.) Arriaga asked Magsino where he had been keeping the medical record and Magsino responded that he had kept it in his backpack in his car. (Tr. 844/Magsino.) Ruggio asked Magsino if he had hand-delivered or mailed his dispute to Human Resources. (Tr. 268, Tr. 376/Magsino.) Magsino responded that he hand-delivered it to one of the Human Resources personnel. (Tr. 268, Tr. 376/Magsino.) Ruggio responded that that was another HIPAA violation. (Tr. 268, Tr. 373, 376/Magsino.) Ruggio asked Magsino if he provided a copy of the record to anyone else and Magsino responded that he had not. (Tr. 374/Magsino, Tr. 843/Ruggio.) Ruggio asked Magsino for his copy of the medical record and Magsino left Ruggio's office to retrieve the record from his backpack in his locker. (REx 48; Tr.

268, Tr. 377-378/Magsino, Tr. 843-844/Ruggio.) The meeting ended with Ruggio saying that she had five days to do an investigation and would decide whether to report it. (Tr. 268, Tr. 377/Magsino.) According to Ruggio, Magsino was very cooperative during this meeting. (Tr. 923/Ruggio.)

On May 17, 2010, Ruggio met with Gilliatt. (REx 51; Tr. 860/Ruggio.) Ruggio asked Gilliatt what happened when she gave Magsino the counseling and Gilliatt responded that she offered him the name of the patient to look up because he was very upset and he wanted to do some research on the patient. (Tr. 860/Ruggio.) According to Ruggio's notes from her May 17 interview with Gilliatt, Gilliatt "did give Ronald the pt's name telling him to 'do your research & make sure you know what you are disputing.'" Gilliatt denied giving Magsino permission to print the record and take it home. (Tr. 860/Ruggio.)

According to Ruggio, she determined that Magsino's initial review of the record was not a breach because he was refreshing his memory, but that Magsino breached HIPAA by printing the chart, making a copy of the chart, removing it from the facility, and redistributing it to Human Resources. (Tr. 883-884/Ruggio.)

Also on May 17, 2010, DeSantiago was called into a meeting with Ruggio, Gilliatt, and HIPAA officer Adelma Urquieta ("Urquieta"). (REx 50; Tr. 411, Tr. 435/DeSantiago, Tr. 852/Ruggio.) Ruggio told DeSantiago that she had been written up because there had been no discharge vitals on the a patient's vital sign screen. (Tr. 412/DeSantiago.) Ruggio told DeSantiago that they had noticed that Magsino and DeSantiago had accessed the same chart and that DeSantiago had violated the patient's HIPAA rights. (Tr. 412, Tr. 436/DeSantiago.) DeSantiago responded that she had looked at the chart because she did not know for which patient she had been written up. (Tr. 412/DeSantiago, Tr. 854/DeSantiago.) DeSantiago said that Gilliatt had been the one to give her permission to go into the chart. (Tr. 412/DeSantiago.) Ruggio asked DeSantiago why she had printed the record. (Tr. 412, Tr. 436/DeSantiago.) DeSantiago said that she just wanted to get the exact times for her dispute and to take notes. (Tr. 412, Tr. 436/DeSantiago, Tr. 855/Ruggio.) Ruggio told DeSantiago that if Gilliatt had been the one that had printed the information for DeSantiago, it would have been okay. (Tr. 412, Tr. 437/DeSantiago.) Gilliatt told Ruggio that she was the one who told DeSantiago to get her information. (Tr. 412/DeSantiago.)

Ruggio asked DeSantiago what she did with the information and DeSantiago responded that she read it, printed it, wrote down what she needed and put the papers in the shred box. (Tr. 412/DeSantiago.) Ruggio asked, "How do I know that you didn't take and sell it." (Tr. 412-413/DeSantiago.) As reflected in Ruggio's notes of this meeting, DeSantiago told Ruggio and Urquieta that she thought that as long as she had been a nurse caring for the patient, it was her understanding that it was ok for her to access the record. (REx 50; Tr. 855/Ruggio; Tr. 923/Ruggio.) Urquieta told DeSantiago that she had no right to go into the patient's record if the patient was no longer at the Hospital. (Tr. 439/DeSantiago.) Ruggio told DeSantiago that they needed to call DHS to see if there was a breach and that, depending on what they said, they might report it to the BRN (Board of Registered Nurses). (REx 50; Tr. 413, Tr. 437/DeSantiago, Tr. 856/Ruggio.) Ruggio said that she would get back to DeSantiago in the next couple of days. (Tr. 414/DeSantiago.)

At about 3 p.m. on May 20, 2010, Magsino was called into the Human Resources office where he met with Ruggio and Dupher. (Tr. 277, Tr. 380/Magsino.) Also present were Teer Lina and an employee from Human Resources. (Tr. 380-381/Magsino.) Ruggio told Magsino that they had done the investigation and had called the patient to let the patient know that there had been a breach in the medical record and that they had called DHS. (Tr. 279, Tr. 381/Magsino.) Ruggio told Magsino that he had four counts of HIPAA violations and then enumerated five counts of HIPAA violations. (Tr. 279, Tr. 381-382/Magsino.) Ruggio told Magsino that his first count was viewing the chart on May 5, 2010,¹⁶ the second one was printing it, the third one was making copies of it, and the fourth one was when he put a copy of it in his backpack. (Tr. 279, Tr. 383/Magsino.) Ruggio then said that it was also a violation when he included the dictation with his dispute letter that he handed to Human Resources. (Tr. 279, Tr. 383/Magsino.) Also during the meeting, Dupher handed Magsino a letter notifying him that his final written warning would not be overturned. (GC Ex 11; Tr. 277-278, Tr. 384/Magsino.) Dupher told Magsino that they would have to write Magsino up for the HIPAA violation and that, with that, he could no longer work for Chino Valley Medical Center. (Tr. 276-277/Magsino.) Magsino asked if he should expect a call from DHS and Ruggio responded that he should not expect a call because they process things slowly. (Tr. 279-280, Tr. 383/Magsino.)

¹⁶ According to Magsino, Ruggio never told him that Respondent had excused his May 5 review of the medical record. (Tr. 382/Magsino.)

On May 20, 2010, Ruggio sent a letter to the patient informing him/her of Magsino's alleged HIPAA breach. (GC Ex 33; Tr. 920-921/Ruggio.) In this letter, Ruggio informed the patient that his/her personal information was never compromised. (GC Ex 33; Tr. 921/Ruggio.) There is no dispute that employees Magsino and DeSantiago both accessed and printed the same patient chart. (Tr. 791/Richards.) Respondent did not send the patient a letter notifying him/her of DeSantiago's alleged HIPAA breach. (Tr. 921/Ruggio.)

On or about May 24, 2010, Gilliatt gave DeSantiago a written warning for accessing a patient's record without authorization. (GC Ex 29; Tr. 414, Tr. 440/DeSantiago.) When Gilliatt gave DeSantiago this written warning, DeSantiago asked if this meant that she was going to be fired. (Tr. 415-416/DeSantiago.) Respondent had already issued DeSantiago a final written warning on May 4, 2010. (GC Ex 18.) Gilliatt responded no and said that DeSantiago was being written up for two different things. (Tr. 416/DeSantiago.) Gilliatt told DeSantiago that if she was being written up for the same thing as the final written warning, then DeSantiago would have been terminated. (Tr. 416/DeSantiago.) DeSantiago continued working for Respondent until May 2011, when she resigned. (Tr. 398/DeSantiago.)

Ruggio determined, with respect to DeSantiago, that, as with Magsino, DeSantiago's initial viewing of the chart was to refresh her memory and was not a breach, but that DeSantiago's printing of the chart was a breach. (Tr. 884/Ruggio.) According to Ruggio, there was no evidence to show that DeSantiago did anything further with the medical record other than taking notes off of what she printed. (Tr. 884/Ruggio.) After concluding her investigation, Ruggio contacted Richards to notify her of the outcome. (Tr. 885/Ruggio.) Richards recalled speaking with Ruggio regarding Magsino's discharge, but did not recall discussing DeSantiago with Ruggio. (Tr. 796/Richards.)

There is no evidence that Gilliatt asked Magsino or said anything to him about the medical record Magsino had printed and redacted that he brought with him at his meeting with Gilliatt after receiving his final written warning. Ruggio admitted that she never saw DeSantiago's notes nor did she ask DeSantiago what she did with the notes she took from her review of the medical record. (Tr. 924/Ruggio.) Respondent, in its brief in support of its exceptions, ignores the fact that DeSantiago took notes off of the medical record she accessed and that Respondent never sought to review those notes to determine if they contained protected medical information.

The California Department of Public Health (“CDPH”) provided a copy of its investigative report of Magsino and DeSantiago’s alleged HIPAA violations. (GC Ex 84.) Respondent asserts that these “notes actually support the determination that Magsino’s privacy violations violated HIPAA.” (RBx 73.) The notes do no such thing. Rather they reflect that the investigator found that the allegation of “breach of pt information” was “unsubstantiated.” (GC Ex 84:4.) In the Surveyor Notes Worksheet, the surveyor found that “no breach actually occurred, no information was shared. It was for personal use in defending themselves.” (GC Ex 84:5.)

Respondent excepts to the ALJ’s finding that “[b]y the time of trial, Ruggio testified that Gilliatt flatly denied she ever permitted Magsino to print the medical record,” as not being supported by the evidence at hearing. (RBx 59.) In fact, the ALJ’s finding is supported by the record. At the hearing Ruggio testified that Gilliatt did not give Magsino permission to print the record and take it home. Counsel for the Acting General Counsel fails to see how the ALJ misstated the record evidence.

1. Respondent’s Policies

Respondent also excepts to the ALJ’s findings with respect to Respondent’s alleged policies related to HIPAA. The ALJ’s findings in this regard are well-supported by the record. Respondent’s witness Richards testified that Respondent has a risk management policy which sets out that

if you need to access a medical record once that record is closed you actually have to sit with the Risk Manager or you have to sit with the Manager while you review that record, and at no time can you make a personal copy of somebody’s confidential information.

(Tr. 802, Tr. 805/Richards.) The ALJ properly recognized and relied on the fact that Respondent never produced a copy of this policy. (ALJD 18:26-40.) Richards also testified that employees are supposed to follow Respondent’s policy that

states they’re supposed to request the medical record so that we know who’s got what and we can keep the medical records secure . . . The appropriate way would have been to request to look at the medical record and actually sit with the manager to review.

(Tr. 805/Richards.) Again Respondent failed to present any policies outlining this procedure.

Upon questioning by Judge Kocol, Richards testified that when a nurse needs to defend himself regarding a quality assurance issue the nurse,

makes an appointment with the manager, and at that time they review the medical record. They can point out what's not there, what is there. If they don't want to be with the manager, then they would get the Risk Manager or another manager to actually go into the medical records department where all the records are secure and they can go through the medical and look through it.

(Tr. 817/Richards.) When asked by Judge Kocol what a nurse should do if he wants to contest his discipline through the internal grievance procedure, Richards testified

There is no need to write a letter. What they could have done was brought their write up to the Human Resources Department. The Human Resources Department would have facilitated a meeting with the manager. At that point, the manager and the employee could have gone into the record, could have shown what her evidence, his evidence is, and then decided, yes, we made a mistake, or we couldn't find it, this is still going to stand.

(Tr. 818/Richards.) Again, Respondent did not produce any evidence to support Richards' vague and unspecific testimony on these alleged policies and procedures.

The following discussion describes Respondent's policies in evidence concerning privacy. Respondent submitted into evidence an "information security agreement" signed by Magsino by which Magsino agreed not to disclose any of a patient's record except to a recipient designated by the patient or to a recipient authorized by the Hospital who has a need-to-know in order to provide continuing care for the patient or to discharge one's employment or other service obligation to the Hospital. (REx 52.)

Respondent also produced its "Meditech Appropriate Access Policy." (REx 55.) This policy describes its purpose as follows: "to define timely and appropriate access to patient information related to intentional or unintentional breach of patient confidentiality in the Meditech System." (REx 55.) The policy also instructs that "[u]sers must only access/view information that they have a legitimate 'need to know,' regardless of the extent of access provided." (REx 55.)

Another policy, Respondent's "Enforcement and Discipline Policy," describes "the requirements for discipline when breaches of confidentiality are identified and the suggested methodology for determining the severity of the breach." (GC Ex 36.) Attachment A to the Enforcement and Discipline Policy describes three levels of violations: Level I is defined to be an accidental and/or due to lack of proper education violation, Level II is defined to be a purposeful break in the terms of the Confidentiality Agreement, Security Agreement, or an unacceptable number of previous violations, and Level III is defined to be a purposeful break in

the terms of the Confidentiality Agreement, Security Agreement, or an unacceptable number of previous violations and accompanying verbal disclosure of patient information regarding treatment and status. (GC Ex 36:5.) Under Level I, the recommended action includes retraining and reevaluation, discussion of policy and procedure, and oral warning or reprimand; under Level II, the recommended action includes the additional written warning and acknowledgement of consequences of subsequent infractions; under Level III, the recommended action includes termination of employment. (GC Ex 36.) According to Ruggio she considered Magsino's conduct to fall under Level III of the Enforcement and Discipline policy. (Tr. 872/Ruggio.)

Respondent also offered into evidence various sections of the *California Healthcare Patient Privacy Manual*. (REx 57 through and including REx 62.) The manual sets out general principles regarding HIPAA compliance by healthcare providers including, for example, a "breach to do list" and a "breach decision tree." (REx 61.) The manual also notes that,

Even where an intended use is lawful and appropriate, a mistake that leads to a disclosure of information outside the facility presents issues that a disclosure within the facility does not. For example, a mistake that results in sending patient information to the wrong department in the hospital (or in sending the wrong patient information to a department within the hospital) would not seem to be an event that would need to be reported. On the other hand, a mistake that results in faxing or mailing a patient record to the wrong number or address outside the hospital (or faxing or mailing the wrong patient record to the correct number or address outside the hospital) must be reported to CDPH and the patient.

(REx 61:4.)

It is instructive that Respondent's discussion of HIPAA and its policies related to HIPAA include few citations to the record or to law. (RBx 70-72.) Moreover, a review of Respondent's citations to the record reflects that the evidence does not support the propositions for which it is cited. For example, Respondent writes, "it is noteworthy that the Hospital does not even permit HR employees to have access to patient records even though the normal scope of their duties involves handling employee grievances, and they are therefore not subject to the Hospital's policies relating to privacy of patient records. See, i.e., T 802, 817-818; RX 54-55 (AP 22-26)." (RBx 70.) A review of the cited pages of the transcript and the Respondent's exhibits fail to support this proposition. Respondent also misleads the reader by quoting language that is not found in the record. For example Respondent writes, "the copy of the patient record submitted to HR by Magsino did 'tell you everything about [the patient's medical history and treatment]' even

though it did not have the patient's name on it. See GCX 9(a)(AP 2-3)." (RBx 57.) A review of GC Ex 9(a) fails to reveal the language quoted by Respondent.

2. Respondent's Disparate Treatment of Magsino

The ALJ properly determined that Respondent treated Magsino disparately when it discharged him on May 20, 2010. (ALJD 21:33-22:23.) As described herein, the record amply supports the ALJ's finding of disparate treatment. On January 5, 2010, Respondent sent a letter notifying the California Department of Public Health ("CDPH") that a patient's test order sheet had been given to another patient at discharge. (GC Ex 39.) There is no evidence that Respondent issued any discipline, including verbal or written warnings, to the employee involved in this incident.

On August 5, 2010, Ruggio sent a letter to the CDPH informing the CDPH that an in-patient face sheet containing the patient's name, date of birth, social security number, address, insurance information and reason for the Hospital visit had been faxed to a citizen's home rather than the accepting hospital. (GC Ex 40; Tr. 927/Ruggio.) The employee involved was Lie Mei Souw. (Tr. 927/Ruggio.) Employee Souw only received a verbal warning for this incident. (GC Ex 136; Tr. 927/Ruggio.)

On September 21, 2010, Ruggio sent a letter to the CDPH informing the CDPH that Chino Valley Medical Center had faxed an in-patient case management review that included the patient information regarding diagnosis and reason for hospital admission to an incorrect healthcare company. (GC Ex 137; Tr. 927/Ruggio.) This information included the patient's name. (Tr. 927-928/Ruggio.) The employee involved was AnneMarie Robertson. (Tr. 928/Ruggio.) Respondent only issued Robertson a verbal warning. (GC Ex. 140; Tr. 928/Ruggio.)

On January 12, 2011, Ruggio sent a letter to the CDPH informing the CDPH that, on January 4th, 2011, an employee at Chino Valley Medical Center faxed a hospital face sheet, which included the patient's name, address, social security number, phone number, age, date of birth, next of kin name, address and phone number and insurance information and the medical reason for the Hospital admission to the wrong number.

(GC Ex 86; Tr. 925/Ruggio.) The employee involved was Francine Coleman. (Tr. 925/Ruggio.) Ruggio became aware of this incident on January 12, 2011. (Tr. 925/Ruggio.) Subsequently, on January 27, 2011, Coleman removed patient information from her work area and left a financial chart in a bathroom where it was found by a customer. (GC Ex 139; Tr. 926/Ruggio.) On or

about February 2, 2011, Respondent issued Coleman a verbal warning for both the January 4 and the January 27, 2011 incidents. (GC Ex. 139; Tr. 925-926/Ruggio.)

Lastly, on March 22, 2011, Respondent only issued employee Debra Benavidez a written warning when she faxed a patient's information from the laboratory to the wrong number.

Richards testified that patient information is compromised when somebody looks at the record and that there is a distinction between an unauthorized and an unintentional breach. (Tr. 807, Tr. 810/Richards.) With respect to the incidents involving Coleman, Souw, Robertson, and Benavidez, patient information was disclosed to non-hospital personnel. (Tr. 928/Ruggio.) According to Ruggio, one could not identify the patient by having the medical record number alone. Rather, one would need to know how to use Respondent's computer system to access the medical record. (Tr. 838/Ruggio.)

Respondent, in its exceptions, disputes the ALJ's proper findings of disparate treatment, specifically challenging the ALJ's finding that Respondent's treatment of DeSantiago as strong evidence of Respondent's disparate treatment of Magsino. Respondent asserts that DeSantiago's "violations were placed under Level II of the Enforcement Policy, and she received a final written warning." (RBx 23.) This misrepresents the record. Employees Magsino and DeSantiago both accessed and printed the same patient chart yet Magsino was fired for his conduct and DeSantiago was merely issued a written warning, not a final written warning as suggested by Respondent in its Brief, a written warning despite the fact that Respondent had previously issued DeSantiago a final written warning. (GC Ex 29.) Further evidence of disparate treatment comes from Respondent's failure to notify the patient involved of DeSantiago's conduct while notifying the patient with respect to Magsino's conduct. Lastly, there is no evidence that Respondent considered DeSantiago to be an active union supporter in contrast to its perception of Magsino as one of the most active union supporters at the facility.

3. Respondent's Assertion that Magsino Was a Supervisor

The ALJ properly dismissed Respondent's contention that Magsino was a supervisor within the meaning of the Act. (ALJD 22.) Respondent asserted at the hearing that Magsino was a supervisor within the meaning of the Act at the time he was discharged yet failed to present evidence establishing Magsino's supervisory status. The burden of proving supervisory status rests on the party asserting that such status exists and a lack of evidence will be construed against the party asserting supervisory status. *Pacific Coast M.S. Indus. Co., Ltd.*, 355 NLRB No. 226,

fn. 15 (2010), citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). Moreover, a party must present evidence that the employee actually possesses any of the powers enumerated in Section 2(11) of the Act. *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 30 (2011). It is not sufficient to present purely conclusory evidence to establish supervisory status. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

Respondent, in its Brief, implies that Magsino, as a relief charge nurse, was one of the individuals stipulated to be a statutory supervisor in the proceedings related to the Union's 2010 representation petition. (RBx 40.) However, the record reflects that, on March 5, 2010, Respondent and the Union entered into a stipulation in the representation case that six named individuals who worked as charge nurses during part of their work time for the Employer were not eligible to vote in the representation election in Case 31-RC-8795. (GC Ex 55:5.) The Judge properly found that Magsino, as relief charge nurse, was not one of the employees stipulated to be ineligible to vote in the election. (ALJD 22:25-29.)

There is no evidence that Magsino was involved in hiring, transferring, suspending, layoff, recall, promoting, discharging, rewarding employees, disciplining other employees, or adjusting employees' grievances. Nor did Magsino engage in responsible direction of other employees as Respondent offered no evidence that Magsino would be held accountable for the performance of employees he oversaw as relief charge nurse. Even assuming *arguendo* that Magsino assigned employees, there is no evidence that he used independent judgment in making any assignments. Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Children's Farm Home*, 324 NLRB 61, 65 (1997), citing *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). In particular, "The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act." *Children's Farm Home*, 324 NLRB at 65, citing *Warner Co. v. NLRB*, 365 F.2d 435, 437 (3d Cir. 1966).

The ALJ's finding that the evidence introduced by Respondent regarding Magsino's supervisory status fell short of establishing supervisory status is amply supported by the record. (ALJD 22:40-43.) Respondent's evidence from Magsino regarding his supervisory status was limited to Magsino's testimony that he served as a relief charge nurse in April and May 2010. (Tr. 393/Magsino.) Respondent adduced no evidence regarding the specific duties and/or

responsibilities of relief charge nurses. In fact, according to Respondent's witness Gilliatt, as director of the Emergency Department, it is her responsibility to "balance the schedule," meaning that she makes sure there are six employees on every day shift and six employees on every night shift. (Tr. 698/Gilliatt.) Gilliatt testified on direct examination that all of the nurses in the Emergency Department have the same qualifications and that she does not consider whether a shift is overloaded with new grads nor does she consider whether some nurses are better than others. (Tr. 698/Gilliatt.) On re-direct examination, Gilliatt testified that charge nurses assess the skill sets and experience of the RNs as well as the acuity of the patients in assigning RNs in the Emergency Department. (Tr. 757-758/Gilliatt.) Charge nurses sign a charge nurse job description. (Tr. 761/Gilliatt.) Respondent did not offer into evidence a charge nurse job description signed by Magsino.

Gilliatt's testimony on the issue of Magsino's supervisory authority is not credible. Initially she testified, unequivocally, that all of the nurses in the Emergency Department have the same qualifications and that she does not consider their experience when assigning employees to shifts. Yet on re-direct examination she testified that charge nurses consider nurses' experience and skills in making assignments. Gilliatt's flip-flopping renders her testimony on this subject unreliable and falls far short from establishing, with sufficiently specific evidence, that Magsino, as relief charge nurse, exercised supervisory authority to strip him of his protection of the Act.

In the absence of evidence that Magsino exercised any supervisory indicia, it is unnecessary to reach the issue of whether Magsino served as relief charge nurse regularly enough to be considered a supervisor within the meaning of the Act. However, even assuming *arguendo* that Respondent established, by a preponderance of the evidence, that Magsino was a 2(11) supervisor when acting as a relief charge nurse, Respondent failed to establish that Magsino worked as a relief charge nurse with sufficient regularity and predictability to be found to be a 2(11) supervisor.

In determining whether a rotating charge nurse is a supervisor within the meaning of the Act, the Board considers the regularity with which a nurse serves as a charge nurse, examining whether there is an established pattern or predictable schedule for when and how often the employees take turns as charge nurses. *Oakwood Healthcare, Inc.*, 348 NLRB at 698-699 (2006).

Shortly before the April NLRB-conducted election, Gilliatt was promoted to Emergency Department director from her position as a relief charge nurse. (Tr. 678, Tr. 737/Gilliatt.) Also, on about March 31, 2010, relief charge nurse Leslie Terezas left Chino Valley. (Tr. 739/Gilliatt.) Starting in March 2010 and continuing for the remainder of Magsino's time at Chino Valley, the Emergency Department experienced changes in its staff. (Tr. 739/Gilliatt.) As a result of these changes in staffing, Magsino served more frequently as a relief charge nurse during the last six weeks of his time at Chino Valley Medical Center. (Tr. 393/Magsino.) Respondent failed to adduce evidence of how frequently Magsino served as relief charge nurse before April and May 2010.

A period of six weeks during a time of changes in staffing among charge nurses is not sufficient to make a determination that Magsino served as a relief charge nurse with enough frequency and predictability to render him a supervisor under the Act. Moreover, the evidence is clear that Respondent was adamantly opposed to the unionization of its employees. Any increase in charge nurse shifts assigned to Magsino after the Union won the election, an election in which Respondent did not contend Magsino was a supervisor, may have been an attempt by Respondent to make Magsino a supervisor such that he would lose the protection of the Act.

In light of Respondent's failure to establish that Magsino exercised any supervisory indicia, the ALJ properly concluded that Magsino is not a Section 2(11) supervisor and would not lose the protection of the Act.

4. Analysis of the Section 8(a)(3) Discharge of Magsino

Under *Wright Line*, 251 NLRB 1083 (1980), the General Counsel must make a prima facie showing sufficient evidence to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon this showing, the employer carries the burden to show it would have taken the same action in the absence of the protected conduct. In this case, it is clear that Magsino was engaged in union activity with Respondent's knowledge as evidenced by his conversation with Lally about his picture appearing in the pro-union flyer, his direct supervisor Gilliatt's admission, under oath, that Magsino was one of two union leaders in the Emergency Department, and the decision-maker, Ruggio's, awareness that Magsino was one of the strong union supporters at the Hospital. The evidence establishes that Respondent took adverse employment action against Magsino by issuing him discipline for tardiness and ultimately discharging him for alleged HIPAA violations. The timing of the adverse employment

action against Magsino and Respondent's disparate treatment of Magsino reveal that Magsino's union activities were a motivating factor in Respondent's decision to discharge Magsino.

Respondent issued verbal warnings to at least three of its employees whose conduct resulted in the distribution of patient information, including patients' names, dates of birth, and social security numbers to non-hospital personnel. In each of those instances, confidential patient information was shared with the public, in contrast to Magsino's incident in which, even by Ruggio's testimony, the patient could not be identified from the documents at issue.

Furthermore, the ALJ properly discredited the testimony by Respondent's witnesses that Magsino should have followed a particular procedure before accessing the patient record in his preparation of his dispute of his final written warning. Respondent failed to present any evidence of those purported procedures. Moreover, Magsino's credible testimony establishes that his supervisor, Emergency Department Director Gilliatt, gave him explicit permission to print the record and to review it at home. Gilliatt's testimony regarding whether she gave Magsino permission is not credible whereas Magsino, from the time of his interviews with Ruggio in May 2010 to his testimony at the hearing, has consistently reported that Gilliatt gave him permission to access, review, and print the medical record. Respondent's decision to discharge Magsino for conduct for which he was granted permission is further evidence that Magsino's discharge was pretextual. In addition, Respondent's exceptions to the ALJ's failure to consider the report of its proffered expert witness should be denied on the basis that the report was drafted by the proffered expert and Respondent Counsel Scott. (Tr. 1042-1043/Navarro.)¹⁷

In addition, the evidence makes clear that Respondent has not and does not take patient privacy as seriously as it purports. Respondent either took no action or merely issued employees verbal warnings where they had disclosed unredacted patient information to members of the public. For example, Respondent issued employee Francine Coleman one verbal warning after she not only faxed patient information to a member of the public but also removed private patient information from her work area and left this information in a public restroom where it was found by a member of the public.

¹⁷ Respondent refers to its proffered expert's report as GCX 92. (RBx 70.) The exhibit is in evidence as REx 92.

Respondent discharged Magsino where he was given permission to access, print, and review a patient chart and where he redacted the patient name from those documents.¹⁸ In contrast, Respondent issued a written warning to DeSantiago whose conduct virtually mirrors Magsino's even though DeSantiago, like Magsino, already had been issued a final written warning. While Respondent attempts to distinguish Magsino's and DeSantiago's conduct, the final written warning issued by Respondent to DeSantiago on May 4, 2010 clearly sets out that "continued failure to comply with any hospital policy will result in immediate termination [w]ith cause." (GC Ex 18.) Rather than discharge DeSantiago, Gilliatt gave DeSantiago a written warning, not even a final written warning, and told her, inconsistent with the language of the May 4, 2010, final written warning, that she would have been fired if she had violated the same policy for which she had been disciplined on May 4. Moreover, Respondent never asked to see DeSantiago's notes that she admitted taking from her review of the medical record which may have included information that would identify the patient. Respondent's failure to fully investigate the facts surrounding DeSantiago's conduct is further evidence of its unlawful motives for discharging Magsino. Also, Respondent, throughout its brief, argues that it did not consider Magsino's accessing of the medical record as a violation; however, the credible evidence adduced at the hearing reflected that Respondent never told Magsino that he was not being disciplined for accessing the medical record, rather, he was told the opposite, that one of the counts against him was his accessing of the medical record.

Additionally, Respondent's outrage regarding Magsino's failure to redact the patient medical record number from the dispute letter he submitted to Human Resources is misplaced where Respondent included the same information in the warnings it issued to Magsino and DeSantiago. Respondent's failure to redact the very same information it protests in Magsino's dispute letter demonstrates Respondent's pretextual conduct. Further, Respondent evidenced its complete disregard for patient confidentiality when its manager, Gilliatt, handed Magsino and DeSantiago slips of paper with the patient's name and medical record without any instruction on what to do with the slips of paper after they had accessed the medical chart.¹⁹

¹⁸ Respondent's own witness testified that the patient's identity would not be discernable from the face of the documents Magsino submitted to Human Resources. (Tr. 838/Ruggio.)

¹⁹ The evidence reveals that, in addition to redacting identifying information from the medical record, Magsino, of his own accord, placed in the HIPAA bin the slip of paper Gilliatt had handed to him with the patient's name and medical record number.

Moreover, Respondent's application of its "Enforcement and Discipline Policy" against Magsino is additional evidence of the pretextual nature of his discharge. Respondent considered Magsino's conduct to fall within Level III which involves a purposeful break in the terms of the Confidentiality Agreement, Security Agreement, or an unacceptable number of previous violations accompanying verbal disclosure of patient information regarding treatment and status. There is no evidence that Magsino had "an unacceptable number of previous violations" nor that he verbally disclosed patient information. In contrast, Respondent did not consider DeSantiago's conduct to be a Level III violation but treated it as, at most, a Level II infraction, issuing her a written warning in spite of the final written warning already in her personnel file. Rather than following its own procedures, Respondent fired Magsino as part of its course of conduct to discourage employees from engaging in activities protected by the Act and to erode employee support for the Union.

In spite of Respondent's arguments to the contrary, HIPAA regulations specifically recognize that "a covered entity may use or disclose protected health information for its own . . . health care operations." *See* 45 C.F.R. § 164.506(c)(1). Health care operations are defined to cover "general administrative activities of the entity, including, but not limited to . . . resolution of internal grievances." *See* 45 C.F.R. § 164.501(6)(iii). This type of use or disclosure may occur without the consent of the patient. *See* 45 C.F.R. § 164.506(b). Thus, these regulations do not limit this use exception to grievances brought by a labor organization, but apply to any "internal" grievance. Respondent should not be permitted to use HIPAA as a defense to discharge Magsino where he accessed a patient's chart to defend himself using Respondent's internal grievance resolution process. In fact, the agency charged with investigating these matters, the California Department of Public Health, determined that no breach had occurred given that Magsino was doing research to defend himself.

According to the Preamble to the Final Privacy Rule, 65 Fed. Reg. 82491 (December 28, 2000) (to be codified at 45 C.F.R. Parts 160 and 164),

We also add to health care operations disclosure of protected health information for resolution of internal grievances. These uses and disclosures include disclosure to an employee and/or employee representative, for example when the employee needs protected health information to demonstrate that the employer's allegations of improper conduct are untrue. We note that such employees and employee representatives are not providing services to or for the covered entity, and, therefore, no business associate contract is required. Also included are

resolution of disputes from patients or enrollees regarding the quality of care and similar matters.

Thus, under the rules and regulations issued by the Department of Health and Human Services (“DHHS”), the federal agency charged with enforcing HIPAA, use of protected health information by an employee to show an employer’s allegations of improper conduct are untrue is permissible. Magsino’s access and use of the patient record was lawful under HIPAA in that he needed protected health information to demonstrate that Respondent’s allegations of his improper conduct were untrue.

Moreover, DHHS, in its preamble notes that the final privacy rule,

does not prohibit disclosures that covered entities must make pursuant to other laws. To the extent a covered entity is required by law to disclose protected health information to collective bargaining representatives under the NLRA, it may do so without an authorization. Also, the definition of health care operations at §164.501 permits disclosures to employee representatives for purposes of grievance resolution.

65 Fed. Reg. 82598 (December 28, 2000) (to be codified at 45 C.F.R. Parts 160 and 164). Given DHHS’s interpretation of HIPAA as allowing disclosure of protected information to employee representatives for the purpose of grievance resolution, *a fortiori* HIPAA would permit the disclosure of protected information to the Human Resources wing of a protected entity for the purpose of grievance resolution. Moreover, even the *California Healthcare Patient Privacy Manual* (“the Manual”), referenced by Respondent reflects that disclosures to departments within a hospital are treated differently than those to outside parties. Thus, Respondent has failed to show that its Human Resources department is not part of the covered entity within the meaning of HIPAA. While Ruggio testified that Magsino had violated one of Respondent’s policies by sharing the medical record with Human Resources because Human Resources did not have a “need to know,” Human Resources clearly did have a need to know Magsino’s version of the events given that Human Resources was being called upon to make a determination regarding Magsino’s disputed final written warning. (REx 55.)

Consistent with its purpose to protect health information, HIPAA does not distinguish between intentional and unintentional breaches. In fact, under HIPAA, “a covered entity must reasonably safeguard protected health information from any intentional or unintentional use or

disclosure that is in violation of the standards, implementation specifications or other requirements of this subpart.” *See* 45 C.F.R. § 164.530(c)(2)(i).²⁰

While Respondent argues fervently that Magsino’s conduct was intentional and that the other employees who mishandled patient information by faxing to the wrong number or leaving a medical record in the public restroom was not, Respondent’s own policies do not make a distinction between intentional or unintentional breaches. In fact, one of Respondent’s policies specifies that it applies where patient information has been accessed “related to intentional or unintentional breach of patient confidentiality in the Meditech System.” (REx 55.) Thus, any assertions by Respondent that intentional and unintentional breaches are treated differently under HIPAA and its policies are unsupported by evidence and law. Based on a thorough and careful review of the record evidence, including strong evidence of disparate treatment, timing, and anti-Union animus, the ALJ correctly determined that Respondent violated Section 8(a)(3) by discharging Magsino.

B. Respondent’s Exceptions Related to Gonzalez’s Threat to Employee Teer Lina

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
3-4, 15	5-6, 27-28, 78-79

The ALJ properly found that Respondent violated Section 8(a)(1) by threatening employees with the loss of benefits if they selected the Union as their collective-bargaining representative. The record evidence supports the ALJ’s finding. About three weeks before the Union election, employee Teer Lina (“Lina”) was called to meet with former ER Manager Carlos Gonzalez (“Gonzalez”) in his office. (Tr. 36, Tr. 38, Tr. 62/Lina.) No one else was present during the meeting. (Tr. 38, Tr. 62/Lina.) Gonzalez handed Lina a flyer. (GC Ex 56; Tr. 38, Tr. 61, Tr. 63/Lina.) The flyer was entitled, “Protect Your Flexibility! What Might Happen if a Union Contract Locks in Working Rules that Don’t Fit Individual Needs,” and the bottom of the flyer stated, “VOTE NO ON APRIL 1 & 2!” (GC Ex 56.) Among the items listed on the flyer Gonzalez shared with Lina was “have you ever . . . been able to extend your vacation due to an important personal situation?” (GC Ex 56.) Gonzalez said that the relationship between management and employees would change if the Union got elected. (Tr. 38, Tr. 63-64/Lina.)

²⁰ Other than this section, HIPAA’s only other references to intentional disclosure of private information are found in § 160.408 Factors considered in determining the amount of a civil money penalty and § 160.410 Affirmative defenses.

Gonzalez then looked at Lina and said, “You know how you’re taking vacation the whole month overseas?” (Tr. 38, 64/Lina.) Lina did not respond. (Tr. 38, 64/Lina.)

Here, the ALJ properly found that Gonzalez’s statement to Lina was an unlawful threat, implying that she might not be able to take month-long vacations if employees voted for the Union. *See, e.g., Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 188 (2000) (employer’s comments that employees would be deprived of existing benefits if they selected the union to represent them constituted an unlawful threat).

The ALJ properly considered the totality of the circumstances. Contrary to Respondent’s argument that the ALJ failed to consider all campaign communications by Respondent, the ALJ expressly considered that the “Protect Your Flexibility” flyer/leaflet “said how the relationship between management and the employee would change when the [U]nion was elected,” and “described how current flexibility could be lost if the Union was selected.” (ALJD 4:20-22, 4:26-27.) Furthermore, Respondent’s assertion that there can be no 8(a)(1) violation absent a statement *expressly* predicting an adverse consequence of unionization is not supported by the case it cited, *Winkle Bus Co., Inc.*, 347 NLRB 1203, n.15 (2006) (general statement, “in your case the Union is not good for you,” not a threat). The case is also not analogous to this case. The Board’s well-established test for interference, restraint, and coercion under Section 8(a)(1) depends on whether the employer engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act. *ITT Federal Services Corp.*, 335 NLRB 998, 1002-1003 (2001) (employer violated Section 8(a)(1) by making a threat of unspecified reprisals for engaging in union activity). Here, the ALJ considered the totality of circumstances—the campaign communications by Respondent and the heightened coerciveness because Lina was summoned to Gonzalez’s office for a one-on-one conversation weeks before the Union election—and properly determined that Gonzalez’s statement reasonably tended to interfere with Lina’s free exercise of her rights under the Act in violation of Section 8(a)(1).

C. Respondent’s Exceptions Related to Buesching’s Threat

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
1-3	4-5, 27, 78-81

The ALJ properly found that Respondent violated Section 8(a)(1) by threatening to close its facility and terminate employees if they selected the Union. The record evidence supports the ALJ’s finding. On March 8, 2010, less than a month before the Union election, Manager Carol

Griffin (“Griffin”) introduced employee Lisa Metheny (“Metheny”) to someone who called herself “Red Robin” (“Robin”) in the nurses’ station at Chino Valley. (Tr. 569-570, Tr. 581/Metheny.) Later that same day, Metheny saw Robin talking to Cynthia Gabo (“Gabo”), Metheny’s charge nurse, and Jenny Massouy (“Massouy”), a registered nurse, in the nurses’ station. (Tr. 570, Tr. 583-584/Metheny.) Robin told Gabo and Massouy that during negotiations, the lawyers could be going head-to-head and there could be a strike. (Tr. 570/Metheny.) Robin said that they could bring in nurses from other facilities to replace the nurses at Chino Valley and they could possibly keep some of the nurses. (Tr. 570, Tr. 584/Metheny.) Then Robin said the hospital could be closed down and they could fire all the nurses and bring back the ones they want or bring in some nurses from other facilities. (Tr. 570-571, Tr. 584/Metheny.) Respondent stipulated that Buesching was also known as Red Robin and that she was an agent of Respondent within the meaning of Section 2(13) of the Act in March 2010. (Tr. 505.)

Here, the statements made by Buesching to nurses about strikes constitute unlawful threats. Specifically, Buesching predicted that, in a strike, Respondent could close down the hospital, unaccompanied by any objective factual basis for the prediction and coupled with an unlawful threat that Respondent could fire all the nurses or replace them. Her statements “may be fairly understood as a threat of reprisal against employees” and are unlawful. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); *see also Baddour, Inc.*, 303 NLRB 275, 275 (1991) (telling employees, without explanation, that they will lose their jobs as a consequence of a strike or permanent replacement found unlawful).

Respondent’s only arguments in support of its exceptions regarding Buesching’s threat relate to credibility. As explained above in Section II.A., the ALJ’s credibility resolutions are well supported by the record. Buesching’s testimony should be discredited because her testimony is contradictory and self-serving. Her testimony that she does not go by the nickname Red Robin not only contradicts Respondent’s admission that Buesching was also known as Red Robin but also Buesching’s own testimony that her e-mail address was Red Robin. (Tr. 505, Tr. 1044, 1049/Buesching.) Moreover, Buesching’s testimony, that she “would never say” that if there was a strike, the employer could choose to terminate some employees and keep other employees because “[t]hat would be threatening,” is completely self-serving and not credible. (Tr. 1047/Buesching.)

The detailed testimony of Metheny, an employee testifying against her pecuniary interests, should be given heightened credibility over the self-serving testimony of Buesching, an admitted agent of Respondent. Respondent cited no evidence in the record to support its assertion that Metheny was a Union officer and a recipient of salary from the Union during the relevant time period. Metheny, reasonably and to the best of her recollection, testified that she was reimbursed for a trip to Las Vegas for a Union convention. (Tr. 578-579/Metheny.) And contrary to Respondent’s contention, Metheny’s testimony was consistent on both cross and direct—she testified that Buesching said that nurses could be “replaced” and “fired” during a strike. (Tr. 570-571, Tr. 584/Metheny.) As the ALJ noted, Metheny’s testimony was also consistent with the affidavit she gave to the Board during the investigation of the charge, and her demeanor, unlike Buesching’s, was convincing. (ALJD 4:1-6.) The ALJ’s credibility findings are well founded and should not be overturned.

D. Respondent’s Exceptions Related to Richards’ Threats

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
3, 6	6, 28, 78-79, 81

The ALJ properly found that Respondent violated Section 8(a)(1) by threatening employees with a reduction of benefits if employees selected the Union. The record evidence supports the ALJ’s finding. In mid-March 2010, a couple of weeks before the Union election, Respondent held a meeting for employees in the second floor conference room at Chino Valley. (Tr. 244-245/Magsino.) Magsino attended the meeting with fewer than ten other staff nurses. (Tr. 244-245, Tr. 303/Magsino.) Chief Nursing Officer Ruggio and Chief Clinical Officer Richards were present for management. (Tr. 244, Tr. 302/Magsino.) Richards showed the nurses slides about the Union, which communicated to employees that everything would be up for negotiation in collective bargaining and that the employees could end up with more or less. (Tr. 245, Tr. 303-304/Magsino.) Richards told the nurses about having to pay dues as a Union member and that when the Union got voted in, they “would lose the family atmosphere and flexibility of scheduling” at Chino Valley. (Tr. 245, Tr. 304-305/Magsino.) Richards, who testified at the hearing, did not deny making this statement.

Here, Richards’ statement, unaccompanied by any lawful explanation based on objective facts as to why employees would lose the family atmosphere or flexibility of scheduling, is a violation of Section 8(a)(1). *Field Hotel Associates*, 348 NLRB 1, 5, fn. 17 (2006) (finding

respondent’s threat of the loss of the “family atmosphere” in facility if employees select union to be unlawful).

Respondent’s argument that Richards stated that employees “might” lose the family atmosphere and flexibility of scheduling is inapposite. First, Magsino’s testimony on direct should be relied upon because his testimony that Richards stated employees “would” lose the family atmosphere and flexibility of scheduling was in response to an open-ended question about what Richards said, while his testimony that Richards stated employees “might” lose the family atmosphere and flexibility of scheduling was in response to Respondent Counsel’s leading question. (Tr. 245, 305/Magsino.) Second, even if Richards said “might” rather than “would,” when assessing whether statements by an employer constitute unlawful threats, as Respondent argues, those statements *must* be reviewed in the context provided by other statements made by the employer. Here, Richards’ statement should not be evaluated in isolation, but in the context of Respondent’s other threats and interrogations and Respondent following through on its threats. *See Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 fn. 4 (1989) (a background of union animus represents significant context for evaluating the lawfulness of an employer’s statements). Evaluating Richards’ statement in the context of Respondent’s threats, interrogations, and other anti-Union actions, the ALJ properly found that Respondent violated Section 8(a)(1) by threatening employees with the loss of family atmosphere and flexibility of scheduling.

E. Respondent’s Exceptions Related to Lally’s Threats, Interrogations, and Giving Employees the Impression of Surveillance

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
3, 7-13 ²¹	6-7, 11-12, 28, 31, 78-79, 81-84

Threat and Interrogation by Lally to Roncesvalles

The ALJ properly found that Respondent violated Section 8(a)(1) by coercively interrogating employees about their union activities and by impliedly threatening employees with layoffs if they supported a union. The record evidence supports the ALJ’s finding. On March 31, 2010, Charge Nurse John DeValle (“DeValle”) told employee Rosalyn Roncesvalles

²¹ With respect to exception 8, the Acting General Counsel does not dispute that the ALJ erred in concluding that Gilliatt was present during the March 31 meeting between Lally and Roncesvalles. However, the Respondent has failed to set out how it has been prejudiced by this error.

(“Roncesvalles”) to go to the conference room because James Lally (“Lally”), Respondent’s Chief Medical Officer, wanted to speak with her. (Tr. 126/Roncesvalles.) Roncesvalles went to the conference room to meet with Lally. (Tr. 126/Roncesvalles.) Also in the conference room were Ruggio and two other women, seated approximately six-to-eight feet away from Lally. (Tr. 126-127/Roncesvalles.) Roncesvalles sat across from Lally who showed her a copy of a flyer in which employees were holding a piece of paper that read, “I’M VOTING YES!” (GC Ex 3:2; Tr. 129/Roncesvalles.)²² Lally asked Roncesvalles if she knew about the flyer. (Tr. 127, Tr. 164/Roncesvalles.) Roncesvalles did not respond. (Tr. 127, Tr. 164/Roncesvalles.) Lally looked at the flyer and said, “Where are you at? Let me look at you. Oh, there you are. You look nice in this picture.” (Tr. 127, Tr. 164/Roncesvalles.) Lally asked Roncesvalles how long she had been working at Chino Valley. (Tr. 129, Tr. 164/Roncesvalles.) She said around five years. (Tr. 129, Tr. 164/Roncesvalles.) He asked whether in the last five years she had been working there, Respondent had laid off anybody. (Tr. 129, Tr. 164/Roncesvalles.) Roncesvalles said no. (Tr. 129, Tr. 164/Roncesvalles.) Lally said they had been through a lot of crises and Respondent had not laid off any people. (Tr. 129, Tr. 164/Roncesvalles.) Roncesvalles responded, “Yes.” (Tr. 129, Tr. 164/Roncesvalles.) Lally said he knew what was going on in Chino Valley, he didn’t like the Union, and he wanted Roncesvalles to vote “no” for him because they had a good working relationship even without the Union. (Tr. 130, Tr. 164/Roncesvalles.) Before this meeting on March 31, 2010, Roncesvalles had never met with Lally one-on-one. (Tr. 130/Roncesvalles.)

Here, Lally’s interrogation of Roncesvalles reasonably tends to restrain or interfere with employees’ rights guaranteed under the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984). Lally’s statement about layoffs in conjunction with his request that Roncesvalles vote against the Union creates the implication that the two are linked, and that Respondent would layoff employees if they did not vote against the Union. The totality of the circumstances—a high-ranking official from Chino Valley questioning an employee, one-on-one for the first time one day before the Union election, about a Union flyer—fully supports the ALJ’s finding that Lally threatened Roncesvalles with layoffs if she supported the Union and that his questioning of her was coercive. *Cf. John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1223-1224 (2002) (no violation

²² Counsel for the Acting General Counsel does not dispute Respondent’s Exception 8 that the ALJ erred in finding that Gilliatt was present for this meeting. Rather, the evidence reveals that Ruggio was present in the room where the interrogation and threat took place. (Tr. 126-127/Roncesvalles.)

of the Act where the questioner was a low-level supervisor, questioning arose casually as a part of an ordinary conversation, and the questioning would not have revealed union sentiments).

Respondent's arguments are immaterial. Even assuming that Respondent's arguments are true—(1) the signs held by employees when their photos were taken were blank, (2) Roncesvalles' picture was displayed on the flyer with her permission, (3) Lally did not ask Roncesvalles other things about the flyer and her union activity, and (4) Roncesvalles did not face Lally and Gilliat alone—the totality of the circumstances still support the ALJ's finding of 8(a)(1) violations. Moreover, Respondent's argument that Lally's questioning of Roncesvalles was a lawful attempt to explain why unionization was wrong for Respondent and to reiterate Respondent's campaign message is simply not supported by the record evidence, which shows an unlawful threat and coercive interrogation in the midst of Respondent's other unlawful threats and interrogations and anti-union actions. Finally, the ALJ properly inferred from Respondent's unexplained failure to call Lally as a witness that his testimony would not have been helpful to Respondent. *See Seda Specialty Packaging Corp.*, 324 NLRB 350, 351 (1997).

Threat and Impression of Surveillance by Lally to Magsino

Contrary to Respondent's exception, the ALJ did not conclude that Respondent improperly monitored Union activity. Rather, the ALJ properly found that Respondent violated Section 8(a)(1) by giving Magsino the impression that his union activity was under surveillance and threatening to discipline him because he engaged in union activities. (ALJD 6:29-7:2.)

The record evidence supports the ALJ's findings. On or around April 5, 2010, Lally approached Magsino to speak with him. (Tr. 242, Tr. 301/Magsino.) They spoke in the ambulance bay at Chino Valley with no one else present. (Tr. 242, Tr. 244, Tr. 301/Magsino.) Lally told Magsino that he was going to give Magsino a warning. (Tr. 242, Tr. 301/Magsino.) Lally said Magsino had been really good about the whole Union thing, but he was going to give him a warning for violating the solicitation policy because they saw Magsino on camera talking to a group of nurses during work hours and they thought he was organizing something. (Tr. 242-243/Magsino.) Lally said he knew it was crap that they were making him do it. (Tr. 243/Magsino.) He said that the policy had been in place for a while. (Tr. 243/Magsino.) Lally told Magsino he could expect the letter regarding his warning before the end of the day. (Tr. 243/Magsino.) Magsino asked what Respondent was going to do with him, whether Respondent was going to write him up or suspend him. (Tr. 243/Magsino.) Lally replied, "No, it's ground

[sic] for termination.” (Tr. 243/Magsino.) Lally did not deny making these statements. The ALJ properly found Magsino’s testimony to be credible, and the ALJ properly drew an adverse inference from Lally’s failure to testify. (ALJD 6:44-45.) As explained above in Section II.A., the ALJ’s credibility resolutions are well supported by the record.

Here, Lally’s statement that they saw Magsino on camera talking to a group of nurses and that they thought he was organizing something created an unlawful impression of surveillance. The fact that Lally never identified who “they” were is immaterial because Magsino could reasonably infer that “they” referred to Chino Valley management. As such, Magsino would have reasonably assumed from Lally’s statement that Respondent was closely monitoring the degree and extent of his union organizing activities, creating an impression of surveillance in violation of Section 8(a)(1) of the Act. *Flexsteel Indus.*, 311 NLRB 257, 257 (1993).

Furthermore, Lally’s statement that Magsino’s actions were “ground [sic] for termination” is an explicit threat that Magsino could be terminated because Respondent thought he was engaging in union organizing activity. The fact that Magsino never received any discipline or termination for solicitation is irrelevant to finding an unlawful threat. *See, e.g., ABC Indus. Laundry*, 355 NLRB No. 17, slip op. at 14 (2010) (employer violated Section 8(a)(1) when it threatened to fire an employee because of her suspected involvement with a union). Lally’s threat to Magsino is plainly coercive, discourages employees from engaging in union activities, and violates Section 8(a)(1) of the Act.

The cases cited by Respondent do not support findings contrary to the ALJ’s. *Our Way, Inc.*, 268 NLRB 394 (1993), and *T.R.W., Inc.*, 257 NLRB 442 (1981), discuss Board law that an employer’s rules prohibiting solicitation during “working time” are presumptively valid, but they do not address the issues at hand, creating an impression of surveillance and a threat of termination. Neither *King David Center*, 328 NLRB 1141, 1142 (1999), nor *Gossen Company*, 254 NLRB 339, 353 (1981), are analogous to this case; those cases discuss situations where an employer representative happen to be in the vicinity of union activities of their subordinate employees. The remaining cases are inapposite, as Respondent cites nothing in record evidence to support its arguments that the ambulance bay is an open area monitored by security cameras for security purposes and that Magsino was engaged in solicitation during work hours in the ambulance bay. Unlike Respondent’s arguments, the ALJ’s findings are sound and fully supported by the record.

F. Respondent’s Exceptions Related to Hower’s Threat

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
3, 14, 16-17	12-13, 32, 78-79, 84-85

Contrary to Respondent’s exception, the ALJ did not conclude that Respondent violated Section 8(a)(1) of the Act by changing its vacation policy. Rather, the ALJ properly found that Respondent violated Section 8(a)(1) by informing employees that they could no longer take vacations longer than two weeks because the employees had selected the Union to represent them. (ALJD 7:33-35.)

The record evidence supports the ALJ’s finding. Shortly after the Union election, in late April 2010, Terri Hower (“Hower”), a charge nurse, approached employee Tyrone Clavano (“Clavano”) and some other nurses in Room 246 in Chino Valley’s Telemetry Department. (Tr. 83, Tr. 103-104/Clavano.) Hower told the nurses that “two weeks vacation at one time would no longer be allowed.” (Tr. 82-83, Tr. 86, Tr. 104-106/Clavano.) Clavano and the other nurses did not respond. (Tr. 83, Tr. 105/Clavano.) Prior to this conversation, employees were allowed to take vacations longer than two weeks. (Tr. 83/Clavano.) The ALJ properly found that Hower did not deny making the alleged statements but instead testified that she could not recall making them. (ALJD 7:13-14.) In response to Respondent Counsel’s question, “Do you recall ever making any kind of statement to Mr. Clavano that employees would only be able to take two-week vacations, or words to that effect?” Hower answered, “No.” (Tr. 608/Hower.)

The ALJ also properly found that Hower announced a change in the vacation policy to several nurses based on Clavano’s credible testimony, and that the announcement violated the Act. As explained above in Section II.A., the ALJ’s credibility resolutions are well supported by the record. Even without evidence that Respondent ever changed its vacation policy, or considered doing so, or that Hower had authority to change the policy, the ALJ’s findings are sound. The timing of Hower’s statement, shortly after the election, in the context of Respondent’s many other unfair labor practices, including its prior threat that employees would no longer be able to take month-long vacations if they selected the Union, support the inference that Hower’s statement was tied to the employees voting for the Union. It is immaterial whether or not Hower’s statement is characterized as an “announcement.” Respondent violated Section 8(a)(1) by informing employees that they could no longer take vacations longer than two weeks because the employees voted for the Union. *See Treanor Moving & Storage Co.*, 311 NLRB 371,

371-372 (1993) (employer’s statement to employee that, “We used to let you guys get away with this kind of stuff. But now you are union and you guys are playing your game and the company is going to have to play by their game,” constituted an announcement of a policy crackdown in retaliation for employees having voted for a union in violation of Section 8(a)(1)).

G. Respondent’s Exceptions Related to Casas’ Impression of Surveillance

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
18-19	12, 31-32, 85

The ALJ properly found that Respondent violated Section 8(a)(1) by giving employees the impression that their union activities were under surveillance. The record evidence supports the ALJ’s finding. Sometime in May 2010, Clavano was having a casual conversation with two or three other registered nurses in the ICU at Chino Valley when Dolly Casas (“Casas”), a charge nurse, approached them. (Tr. 84, Tr. 111-112/Clavano.) Casas walked over to the group and said, “What are you talking about because we’re supposed to know what you’re talking about?” (Tr. 84, Tr. 113/Clavano.) Clavano did not respond. (Tr. 85/Clavano.) Casas testified that she did not recall making the above statement, and, as the ALJ noted in finding Casas not credible as a witness, Casas did not remember much of anything else she was questioned about. (Tr. 764-767/Casas; ALJD 7:42-44.) As explained above in Section II.A., the ALJ’s credibility resolutions are well supported by the record. Casas’ testimony is particularly unreliable. For example, Casa was called as a witness by Respondent in May 2010 in the hearing on the post-election objections (Case No. 31-RC-8795) and was questioned about the Union campaign and election, yet she testified in June 2011 that she did not remember that a campaign or election had ever occurred. (GC Ex 93; Tr. 766-767/Casas.)

The ALJ properly concluded that the nurses would reasonably have made the connection between Casas’ statement and their union activities. Although Casas’ statement was not explicitly linked to union activity, the statement was made close to the Union election and in the context of Respondent’s many other unfair labor practices, including a prior incident of unlawfully giving employee Magsino the impression that his union activity was under surveillance. Casas’ statement would have led the nurses to reasonably assume that their union activities had been placed under surveillance through Casas eavesdropping on their conversations. *Taylor-Rose Mfg. Corp.*, 205 NLRB 262, 262 (1973) (employer’s unsuccessful attempt at eavesdropping on the conversations of employees with a union representative was

unlawful).

H. Respondent's Exceptions Related to Reddy's Unlawful Statements

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT'S BRIEF
Exceptions 20-25 ²³ , 75	Pages 13-16, 32-33, 85-87

Respondent excepts to the ALJ's findings that Respondent violated Section 8(a)(1) at meetings held by Respondent's CEO, Lex Reddy. (ALJD 8-9.) The ALJ's findings are amply supported by the record evidence. Respondent argues that only three of seven witnesses testified that Reddy stated that he was going to start "strictly" enforcing rules and policies. (RBx 85.) By Respondent's own admission, the three witnesses corroborated one another. The ALJ relied on this corroborated testimony and the credible testimony of other of the General Counsel's witnesses to find that Respondent violated 8(a)(1) at these meetings. The ALJ also properly discredited Respondent's witnesses' testimony on these meetings as described below.

During the first week of May 2010, Respondent held multiple mandatory meetings for RNs from various departments at the Hospital. (Tr. 41-2/Lina, Tr. 79/Clavano, Tr. 992-993/Dupher.) Hospital Manager Lex Reddy spoke to the employees at these meetings. (Tr. 42/Lina, Tr. 79-80/Clavano.) Managers including Linda Ruggio, Cheryl Gilliatt, Angelica Silva, Sandra Moreno, and James Lally were in attendance at these meetings. (Tr. 41/Lina, Tr. 67-68/Lina, Tr. 79/Clavano, Tr. 993/Dupher.) Human Resources Director Arti Dupher was present at all of the mandatory meetings conducted by Reddy in May 2010. (Tr. 992-993/Dupher.) There is no evidence that Reddy had held mandatory meetings for Unit employees before May 2010. (Tr. 1011/Dupher.)

On May 3, 2010, at about 8 a.m., 40 to 50 Unit employees attended a meeting in the first floor conference room. Present for management were Ruggio, Gilliatt, Silva, Reddy, and Lally. (Tr. 79, Tr. 107/Clavano, Tr. 108/Gilliatt.) Reddy spoke for most of the meeting. (Tr. 80/Clavano.) Reddy said that the elections were over and that they needed to move on. (Tr. 80/Clavano.) Reddy told employees that "from now on policies and procedures would be strictly enforced, including being late" and that sick calls would be monitored closely. (Tr. 80/Clavano.) Reddy said that tardiness would be closely monitored. (Tr. 81/Clavano.) Reddy spoke about

²³ With respect to Exception 20, Respondent asserts that the ALJ erred in finding that Reddy is the chief executive officer of Respondent. In addition to offering no argument as to how this finding prejudiced Respondent, Respondent reiterates, in its Brief, that Reddy is an admitted agent. (RBx 13.) Therefore, that the ALJ may have used the wrong title in referencing Reddy in no way prejudices Respondent.

Weingarten rights, saying that if someone needed to be disciplined they would discipline employees without the Union representative present. (Tr. 80, Tr. 109/Clavano.)

Reddy informed employees that Respondent was contesting the results of the election. (Tr. 80, Tr. 109/Clavano.) He also showed the employees a picture of a car that had been scratched, telling employees that it had been done by the Union and that the Union had illegally used the charge nurses to intimidate the nurses to vote for the Union. (Tr. 80/Clavano, Tr. 109/Clavano.) Reddy also told employees that from then on there would be no more family atmosphere. (Tr. 81, Tr. 109/Clavano.) At this meeting, Reddy also spoke about hiring new nurses and told employees that they needed to go through channels rather than go speak to the media. (Tr. 81/Clavano.) The meeting ended with Reddy saying that he was still in charge. (Tr. 82/Clavano.)

About 10 nurses including Bacani, Magsino, and DeSantiago attended a meeting on or about May 3, 2010 at about 8 p.m. in the main conference room of the Hospital. (Tr. 183-184, Tr. 200/Bacani, Tr. 246/Magsino.) Present for management were Reddy and Dupher. (Tr. 183/Bacani, Tr. 246, Tr. 306/Magsino, Tr. 400, Tr. 443/DeSantiago.) Reddy spoke throughout the meeting. (Tr. 246/Magsino, Tr. 400/DeSantiago.) Reddy spoke about the election and talked about how nothing had changed. (Tr. 401, Tr. 446-447/DeSantiago.) Reddy said that the policies and procedures were being strictly enforced and that the violators would be dealt with accordingly. (Tr. 247, Tr. 307-308/Magsino.) Reddy talked about employees being written up for being tardy and said that the tardy policy has always been in place. (Tr. 401, Tr. 444-445/DeSantiago.) Reddy informed the employees that it never was really enforced, but that now they were following the rules. (Tr. 401, Tr. 445/DeSantiago.) Reddy spoke about implementing rules against tardiness and told employees that they had to follow the rules. (Tr. 184, Tr. 205/Bacani.) Reddy informed the employees that if they had problems with their managers that they should go directly to them or to Administration and not to go to the media. (Tr. 247, Tr. 308-309/Magsino, Tr. 401, Tr. 444/DeSantiago.) Reddy said that he did not want his name or Chino Valley's name in the papers. (Tr. 401/DeSantiago.)

Reddy showed the employees a picture of Gilliatt's car and said that he would deal with the people responsible. (Tr. 184, Tr. 205-206/Bacani, Tr. 308-309/Magsino, Tr. 447/DeSantiago.) While showing the employees a picture of Gilliatt's car, Reddy said "This is what happens when unions come in." (Tr. 447/DeSantiago.) Reddy talked about hiring new

nurses to address a shortage and told the employees to be nice to the newly-hired nurses. (Tr. 184, Tr. 205-206/Bacani, Tr. 247, Tr. 308-309/Magsino.)

At a meeting held between 8 and 10 a.m. on or about May 6, 2010 in the first floor conference room, Reddy spoke to about 30 to 40 registered nurses from various departments at the Hospital. (Tr. 41-42/Lina, Tr. 571-572, Tr. 589/Metheny.) Present for management were Angelica Silva, Sandra Moreno, Linda Ruggio, James Lally, and Lex Reddy. (Tr. 572, Tr. 589-590/Metheny.) Reddy started the meeting by introducing the managers to the employees and said that RNs have their rights and management has its rights too. (Tr. 590/Metheny.) Reddy talked about Weingarten rights and said that he was not going to wait for someone from the outside to come in and witness a nurse being counseled. (Tr. 591, Tr. 593/Metheny.) Reddy said that the Hospital was going to file charges against the nurses that were trying to form a union. (Tr. 572/Metheny.) Reddy told employees present that he was going to enforce the rules. (Tr. 42, Tr. 69/Lina.) Reddy said that "from now on" Chino Valley Medical Center was going to follow all policy and procedure to the fine detail and said that if employees were late, took too many breaks or did not follow procedure, they may be counseled or reprimanded. (Tr. 572, Tr. 593/Metheny.) He also talked about vandalism to Gilliatt's vehicle, saying that this would not be tolerated and that it happened during the union process. (Tr. 42, Tr. 70/Lina, Tr. 572-573, Tr. 592, Tr. 594/Metheny.) Reddy told the employees that they had five lawyers on hand and that everything would be documented. (Tr. 573, Tr. 592-593/Metheny.) Reddy also spoke about hiring new nurses. (Tr. 592, Tr. 594/Metheny.)

Sometime after the Union election in April 2010, about 15 to 20 nurses from various departments at the Hospital attended a meeting between 7:30 and 9 a.m. in the first floor conference room. (Tr. 217-218/Hilvano.) At this meeting, Reddy said that he had heard something about the Union taking over the Hospital and said that whatever employees' ideas were about the Union coming "over to the Hospital and taking control of it -- it's wrong -- that they were still in the driver's seat and any negotiations between the Union and the Hospital is going to happen outside of the Hospital." (Tr. 218/Hilvano.) Reddy spoke about enforcing the policies and said that they had no choice but to enforce it because their backs were on the wall. (Tr. 218/Hilvano.)

Ruggio recalled attending one meeting at which Reddy spoke in early May of 2010. (Tr. 900-901/Ruggio.) Present also were Lally and Dupher. (Tr. 901/Ruggio.) Reddy spoke about the

recent Union vote and said that they would continue to enforce their policies as they are written. (Tr. 902, Tr. 904/Ruggio.) Reddy spoke about hiring about 40 new nurses out of 60 that they had interviewed (Tr. 903/Ruggio.) Ruggio recalled Reddy saying that,

he would appreciate the general staff not to discuss hospital matters with the media, because we do have policies in relation to discussing hospital matters with the media and there are only certain people within the facility or within the corporation who really have authorization to give information or speak with the media.

(Tr. 903/Ruggio.) Reddy also talked about the vandalism to a vehicle and said that it would not be tolerated. (Tr. 904/Ruggio.)

Dupher recalled that, at the May 2010 meetings, Reddy spoke about policies and said that employees needed to still follow policy and procedure. (Tr. 994/Dhuper.) Reddy also talked about vandalism to Gilliatt's car. (Tr. 994, Tr. 1013/Dhuper.) In response to Respondent Counsel's question, "Do you recall Reddy saying anything to employees to the effect that you are not to go to the media or outside parties with respect to any issues you might have," Dhuper responded, "I don't recall any of that said. The only thing he said was if there was [sic] concerns, they need to go to administration." (Tr. 994-995/Dhuper.)

When asked on cross-examination if Reddy spoke about policies and procedures, Dhuper made a point to say that Reddy said "employees needed to follow policies and procedures like they did *in the past*." (emphasis added) (Tr. 1013/Dhuper.) When asked on cross-examination why Reddy held the meetings in May of 2010, Dhuper initially testified that she did not know why he decided to come. (Tr. 1011/Dhuper.) She then testified that Reddy came to:

meet with the staff members, address any questions they might have, as there were some concerns that were raised . . . why some decisions were made and things like that on policies and procedures. So he just came to ask if anybody had any questions.

(Tr. 1011/Dhuper.) When asked by Counsel for the Acting General Counsel what she meant by "why some decisions were made," Dhuper responded that they had moved to a self-insured plan from a fully insured plan and that some people wanted to know how the self-insured plan worked in terms of benefits. (Tr. 1011-1012/Dhuper.) Dhuper then admitted upon further questioning that Reddy did not talk about the self-insured plan at the May meetings. (Tr. 1012/Dhuper.) Finally, when questioned about if she knew why Reddy held these meetings in May 2010, Dhuper testified that she did not know. (Tr. 1014/Dhuper.) Upon questioning by Judge Kocol,

Dhuper denied recalling any discussion by Reddy about the election but admitted that Reddy made “a statement about the situation we have going on with the union at this point.” (Tr. 1013-1014/Dhuper.)

In fact, Reddy’s statements that employees should not go to the media or newspapers are consistent with a provision of Respondent’s employee handbook.²⁴ (REx 88.) Under “Confidentiality,” Respondent instructs employees as follows,

The Facility draws a lot of attention from the media. Only the designated spokespersons may make statements to the members of the media on behalf of the Facility, its patients, or its employees. If you are approached by members of the media, refer them to Administration for assistance.

(REx 88:6.)²⁵

The evidence reveals that Reddy held these meetings with Unit employees to notify employees that Respondent would be clamping down on them by enforcing previously-unenforced rules and to communicate that Respondent was disputing the employees vote for the Union.

The ALJ properly relied on the testimony of the witnesses called by General Counsel. Dhuper was evasive on cross-examination and contradicted her own testimony. For example, Dhuper testified, on cross-examination, that Reddy held the May meetings to answer employee questions about Respondent’s new insurance plan but then admitted that Reddy did not discuss the insurance plan at the May 2010 meetings. Dhuper’s evasive and changing testimony should not be credited. *See Weather Tec Corp.*, 238 NLRB 1535, 1555 (1978), *enfd.* 626 F.2d 868 (9th Cir. 1980) (Board upheld ALJ who discredited witness because of evasive, vague, confusing, and inconsistent testimony).

Further, in order to credit Dhuper, the testimony of numerous current and former employee witnesses would have to be discredited. For example, Dhuper testified Lex Reddy said nothing about employees going to the media or the newspaper or about starting to enforce rules.

²⁴ Respondent asserts that “the fact that Ruggio and Dhuper readily admitted to the statements made by Reddy regarding not speaking to the media enhances their credibility inasmuch as they did so even though such statements by Reddy at least arguably violate Section 8(a)(1)” (RBx 86.) While Ruggio did admit that Reddy instructed employees not to speak to the media, Respondent failed to cite to evidence reflecting that Dhuper “readily admitted” to the statements made by Reddy. (Tr. 903/Ruggio.) Rather, it appears that Dhuper was asked by Respondent Counsel whether she recalled “Reddy saying anything to employees to the effect that you are not to go to the media or outside parties with respect to any issues you might have,” to which she responded “I don’t recall any of that said. The only thing he said was if there was [sic] concerns, they need to go to administration.” (Tr. 994-995/Dhuper.)

²⁵ This section can be found at the sixth page of Respondent Exhibit 88 which is marked at the bottom as “7.”

This testimony is in sharp contrast to the testimony of six current and former employees who recalled Reddy informing them that he was going to begin enforcing rules and disciplining employees and also Ruggio's testimony that Reddy told employees that they should not go to the media or newspapers if they have issues at the Hospital. The ALJ also properly drew an adverse inference from Respondent's unexplained failure to call Reddy in its case. *Seda Specialty Packaging Corp.*, 324 NLRB at 351; *Grimmway Farms*, 314 NLRB 73, 76 fn. 2 (1994). It is entirely reasonable to infer that questioning Reddy on this allegation would only have damaged Respondent's case.

The Board has held that an employer violates Section 8(a)(1) of the Act by telling employees that working conditions would be made stricter if the union organized the employer. *Fieldcrest Cannon*, 318 NLRB 470, 495 (1995), citing *United Artists Theatre*, 277 NLRB 115 (1985). While Reddy did not explicitly blame the strict enforcement on the Union, Reddy spoke of the Union throughout the meeting and the timing of the statements, within a month of the Union election, leads to an inference that his threats to enforce policies more strictly were a result of the employees voting for the Union. See *Yale New Haven Hosp.*, 309 NLRB 363, 370 (1992). Reddy's statements to employees about enforcing policies on tardiness and losing family atmosphere at the same meeting where he discussed the election and Respondent's filing objections to the election results sends a strong message to employees that the new enforcement and/or more strict enforcement of policies was a result of the employees' Union vote.

Reddy's admonitions to employees to go to management and the administration with problems rather than to the media or newspapers violates Section 8(a)(1) of the Act. Reddy's statements that employees should not go to the media or newspapers violate Section 8(a)(1) by interfering with employees' Section 7 right to discuss terms and conditions of employment. *Easter Seals Conn.*, 345 NLRB 836, 839 (2005); *Kinder-Care Learning Ctr.*, 299 NLRB 1171, 1171 (1990).

Moreover, Reddy's statements to employees at the May 2010 meetings must be viewed in context of Respondent's other conduct ongoing at that time. On April 12, 2010, Lally sent a message to employees that "it is very important that staff comply with our written policies and procedures especially those related to attendance and tardiness. I am asking my directors to monitor and address appropriately any shortcomings in these areas." (GC Ex 4.) Lally's memorandum came within 10 days of the Union election and just two weeks before Reddy

informed employees that Respondent would be enforcing and following policies and procedures. Lally's message along with Reddy's statements at his May meetings lead to an inference that Respondent was tightening policy enforcement to punish employees for selecting the Union in the NLRB-conducted election. Moreover, at the same time Reddy was promising employees stricter enforcement and discipline, Respondent was following through on its threats by disciplining employees for tardiness and attendance infractions where it had never done so before. Based on the above evidence and case law, the ALJ properly found that Reddy's threats regarding enforcement, more rigorous enforcement, discipline, and instructions that employees not speak to the media in May 2010 violated Section 8(a)(1) of the Act.

I. Respondent's Exceptions Related to its Unlawful Service of Subpoenas on Employees and the Union

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT'S BRIEF
26-28	24-25, 33-34, 87-88

The ALJ properly found that Respondent violated Section 8(a)(1) by serving subpoenas on employees and the Union that requested information about employees' union activities, which was not related to any issue in the legal proceeding. The record evidence supports the ALJ's finding.

In May 2010, in connection with its post-election objections, Respondent served subpoenas *duces tecum* to current and former employees as well as the Custodian of Records for the Union and Union Counsel Lisa Demidovich ("Demidovich"). (GC Ex 10, GC Ex 19, GC Ex 20, GC Ex 21, GC Ex 53.) The employees who received subpoenas from Respondent included Lina, Magsino, and Clavano. (GC Ex 10, GC Ex 19, GC Ex 53; Tr. 43/Lina, Tr. 77-79/Clavano, Tr. 273-276/Magsino.) Respondent's subpoenas requested, *inter alia*, the following information:

Any and all documents relating to any communication during the relevant time period between [the employee] and any representative of the Union;

All authorization and/or membership cards signed by any Charge Nurse during the relevant time period, including any authorization and/or membership cards [the employee] signed, if [the employee was] employed Respondent as a Charge Nurse during said period;

All authorization and/or membership cards signed by any RN during the relevant period; and

All documents relating to the distribution and/or solicitation of Union authorization and/or membership cards during the relevant time period.

(GC Ex 10:2, 4, GC Ex 19:2, 4, GC Ex 20:4, GC Ex 21:4, GC Ex 53:2, 4.) In the subpoenas, “Charge Nurse” was defined as “any person employed by [Respondent] who worked as a Charge Nurse at any time between July 1, 2009 and April 9, 2010, including but not limited to all persons identified as Attachment A-2.” (GC Ex 10:2, GC Ex 19:2, GC Ex 20:2, GC Ex 21:2, GC Ex 53:2.) For some of the requests contained in the subpoenas, Respondent provided a note that stated the following:

[Respondent] is willing to allow the documents to be produced to the hearing officer for an *in camera* inspection, whereupon only non-privileged documents that are relevant to [Respondent’s] objections are provided to [Respondent].

(GC Ex 10:2-5, GC Ex 19:2-5, GC Ex 20:3-4, GC Ex 21:3-4, GC Ex 53:2-5.)

At the post-election objections hearing in Case No. 31-RC-8795, Administrative Law Judge Lana Parke (“Parke”) granted the Union’s petition to revoke as to various requests in Respondent’s subpoenas issued to the Union and Demidovich. (REx 105:18, 20-22, 24-25, 29, 31, 33, 36.) At the hearing, Respondent limited some of the requests in the subpoenas referring to Charge Nurses to Charge Nurses who were stipulated by the Union and Respondent to be supervisors within the meaning of the Act. (REx 105:13-14, 20-22.)

Respondent’s exceptions are not supported by the record evidence or Board law. First, the information requested by Respondent in its subpoenas is unlawful and would not have been relevant to support Respondent’s objections at the post-election hearing. Subpoenaing authorization and/or membership cards signed by RNs is clearly prohibited by Board law because that information would have revealed the identity of employees engaged in organizing. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999) (holding that an employer violated Section 8(a)(1) when it sought discovery of employee authorization cards, reasoning that the “Board zealously seeks to protect to the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing”). Respondent’s request for authorization and/or membership cards signed by any Charge Nurse is also unlawful because Respondent’s definition of “Charge Nurse” in the subpoenas is broad enough to include employees who were not supervisors under the Act. Respondent’s other requests, for documents relating to communications between employees and Union

representatives and for documents relating to the distribution and/or solicitation of Union authorization and/or membership cards, similarly may have revealed the identity of employees engaged in union activities. Respondent's request for this information in its subpoenas strips employees of their Section 7 right to keep their union activities confidential.

The fact that Judge Parke deemed certain information sought by the subpoenas relevant *after* Respondent agreed to limit its requests did not render the requests lawful when they were issued. In fact, Respondent's issuance of subpoenas on non-supervisory employees is indicative of its illegal objective to intimidate and harass employees. Even assuming *arguendo* that the documents requested were somehow relevant and Respondent did not have an illegal objective, the employees' confidentiality interests outweigh Respondent's interest in obtaining the information. The Board has emphasized the importance of employees maintaining confidentiality with regard to their authorization cards and other union activities, primarily because employees may be chilled from engaging in such activities if employers knew their identities. *See, e.g., National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (holding that "the confidentiality interests of employees who have signed authorization cards and attended union meetings are paramount to [an employer's] need to obtain the identities of such employees for cross-examination and credibility impeachment purposes"). In light of the fact that Respondent issued its subpoenas to employees before the Union was certified, the employees' confidentiality interests were particularly substantial because Respondent's conduct would reasonably have tended to deter the employees' from continuing to engage in protected union activities.

Second, Respondent's offer to allow an *in camera* inspection does not immunize Respondent from liability. As the ALJ properly reasoned, "[t]he harm is in the interrogation and the possibility that the employees might feel compelled to produce evidence of union activities by them and other employees." (ALJD 10:3-4.) Because Respondent was not entitled to any of the authorization cards signed by employees or other documents revealing employees' union activities, Respondent's offer of an *in camera* inspection is illusory. In fact, the Board has found that an employer weakens its claimed justification in seeking information regarding union activities by suggesting that there are less intrusive ways of obtaining the information. *Wright Electric, Inc.*, 327 NLRB at 1195.

Finally, the Petition Clause of the First Amendment does not insulate Respondent's subpoena requests from violating Section 8(a)(1). The instant case is factually and procedurally

distinguishable from *BE & K*, 351 NLRB 451 (2007), which Respondent cites in support of its argument. In that case, the Board sought to enjoin a lawsuit filed by the employer on the basis that the lawsuit itself was an unfair labor practice. In this case, the Board is not attempting to enjoin Respondent’s petitioning of the government through a lawsuit filed by Respondent. Rather, the Board is prosecuting Respondent in its own forum and it was in that forum that Respondent used the Board’s processes, Board subpoenas, to violate employees’ Section 7 rights. The Petition Clause does not give Respondent the right to violate the Act by issuing coercive subpoenas to employees demanding the production of authorization cards and other documents that may reveal employees’ protected union activities. Respondent’s conduct clearly implicates what the Supreme Court considered to be a risk of “interference” with the Board’s proceedings, that Respondent will coerce or intimidate employees. *Delmas Conley d/b/a Conley Trucking*, 349 NLRB 308, 311 (2007), citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). As Respondent cannot be privileged to use the Board’s processes to intimidate employees and violate the Act, the ALJ properly found that Respondent violated Section 8(a)(1) by serving its subpoenas on the employees and the Union.

J. Respondent’s Exceptions Related to Attendance and Tardiness Policies

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
Exceptions 58-64, 66-71, 76, 77	Pages 7-9, 28-30, 89-95

1. Mandatory Meeting Discipline Facts

The ALJ relied on the ample testimony and documentary evidence to find that Respondent began enforcing attendance policies and disciplining employees only after they voted for the Union in violation of Section 8(a)(3) and 8(a)(5). (ALJD 25-26.). The following is a recitation of the facts which establish this violation of the Act by Respondent. There are approximately six to eight mandatory meetings, every two to three months, in the Emergency Department. (Tr. 40-1/Lina, Tr. 145/Roncesvalles.) On April 15, 2010, Emergency Department Director Cheryl Gilliatt (“Gilliatt”) gave employee Teer Lina (“Lina”) a verbal warning for missing a mandatory staff meeting. (GC Ex 13; Tr. 39-40/Lina.) Lina told Gilliatt that she had an agreement with the previous manager, Carlos Gonzalez, that she could be off on Tuesdays and Wednesdays. (Tr. 66/Lina.) Before receiving this warning, Lina had missed mandatory meetings during her employment at Chino Valley and, in fact, had only attended one mandatory meeting over the past four years. (Tr. 40/Lina.) Before April 15, 2010, Lina had not received any verbal

or written warnings for missing mandatory meetings. (Tr. 41/Lina.) Lina's April 15, 2010 verbal warning was the first verbal warning she received during her employment at Chino Valley. (Tr. 65/Lina.)

Upon receiving notification that Gilliatt was holding a mandatory meeting on April 8, 2010, employee Rosalyn Roncesvalles ("Roncesvalles") contacted Gilliatt to tell her that she would not be able to attend because she was working at her other job. (Tr. 157/Roncesvalles.) Roncesvalles told Gilliatt that if the meeting falls on the days that she is working she would not be able to attend the mandatory staff meeting. (Tr. 157, Tr. 160/Roncesvalles.) Gilliatt responded "okay." (Tr. 157, Tr. 160/Roncesvalles.)

As with Lina, in mid-April 2010, Gilliatt gave Roncesvalles a verbal warning for missing a mandatory meeting in April 2010. (GC Ex 25; Tr. 143-145/Roncesvalles.) Gilliatt approached Roncesvalles and her co-worker Pat Nila ("Nila") while they were in the first nurses' station in the Emergency Department and gave Roncesvalles her verbal warning. (Tr. 144-145, Tr. 161/Roncesvalles.) Roncesvalles told Gilliatt that she had been working her full-time job and reminded Gilliatt that she had told Gilliatt she would not be able to attend the meeting. (Tr. 161/Roncesvalles.) Gilliatt responded ok and told Roncesvalles to write her comments on the warning. (Tr. 161-162/Roncesvalles.) Before April 2010, Roncesvalles had missed mandatory meetings but had never received any verbal or written warnings for failing to attend those meetings. (Tr. 145-146/Roncesvalles.)

Like Lina and Roncesvalles, Marlene Bacani, throughout her employment at Chino Valley Medical Center, had missed mandatory meetings without asking her supervisor for advance permission to miss the meetings and had not received any verbal or written warnings. (Tr. 182, 188/Bacani.)

In addition to issuing the verbal warnings described above to employees Lina and Roncesvalles, Respondent also issued verbal warnings to 16 other Unit employees, from various of Respondent's departments, for failing to attend mandatory meetings after the Union election.²⁶

²⁶ The following list reflects the Exhibit numbers of the discipline issued to employees for failing to attend mandatory meetings after the Union election as well as the departments in which the disciplined employees worked at the time of the discipline: GC Ex 57 (Med-Surg), GC Ex 60 (Emergency), GC Ex 63 (Tele), GC Ex 66 (Tele), GC Ex 67 (Emergency), GC Ex 68 (ICU), GC Ex 69 (Emergency), GC Ex 70 (Emergency), GC Ex 71 (Unknown), GC Ex 73 (Tele), GC Ex 74 (ICU), GC Ex 74 (ICU), GC Ex 75 (ICU), GC Ex 76 (ICU), GC Ex 77 (ICU), GC Ex 78 (ICU), GC Ex 79 (ICU), GC Ex 80 (ICU), GC Ex 81 (ICU), GC Ex 82 (ICU), GC Ex 83 (Emergency).

Respondent, pursuant to subpoena, produced a chart evidencing counselings issued to employees concerning attendance, tardiness, and mandatory meetings for the period of October 1, 2009 through June 1, 2011. (GC Ex 90; Tr. 493-494/Robak, Tr. 510/Robak.) This chart reveals that, from October 1, 2009 to April 9, 2010, Respondent had not issued any discipline, including verbal or written warnings, to Unit employees for failing to attend mandatory meetings. (GC Ex 90.) Respondent also offered into evidence a chart reflecting counseling issued to employees from January 1, 2009 through September 30, 2009. (REx 77; Tr. 981-982/Dhuper.) This chart reflects that no Unit employees were disciplined for failing to attend mandatory meetings during the time period of January 1, 2009 to September 30, 2009. (REx 77.)

According to Gilliatt, in 2009, there were pre-scheduled mandatory quarterly meetings in the Emergency Department. (Tr. 687/Gilliatt.) Those mandatory meetings were often attended by less than 25% of the staff. (Tr. 687/Gilliatt.) Gilliatt testified that she began disciplining employees for failing to attend mandatory meetings in April 2010 because she “didn’t want to start a habit of them not attending mandatory meetings.” (Tr. 688/Gilliatt.) Gilliatt testified that no one directed her to counsel employees. (Tr. 688/Gilliatt.)

On cross-examination, Gilliatt was asked a series of questions about her meetings with employees when she gave them their warnings for failing to attend the April 2010 mandatory meeting. Gilliatt testified that the employees wrote comments on the warnings she issued to them in her presence and the employees would hand her back a copy of the warning with their comments. (Tr. 741, Tr. 743/Gilliatt.) Gilliatt recalled giving employee Lina a warning but did not recall that Lina told her that Gonzalez had not disciplined her for missing a mandatory meeting before. (Tr. 740/Gilliatt.) Lina wrote on her warning “I was working @ my other [sic] which approved by Carlos Gonzalez previous manager.” (GC Ex 13; Tr. 741/Gilliatt.) Gilliatt could not recall if employee Yesenia DeSantiago told her that she did not have a babysitter on Wednesdays and Thursdays when Gilliatt issued DeSantiago her warning. (Tr. 741/Gilliatt.) The employee comment section on DeSantiago’s warning reads, “No babysitter on Weds and Thursdays.” (GC Ex 67.) Gilliatt did not recall whether employee Mohamed Hussin told her that he had been on vacation when Gilliatt gave him his verbal counseling for missing the April 8th mandatory meeting. (Tr. 742-743/Gilliatt.) The employee comment on Hussin’s warning reads, “I was on my vacation.” (GC Ex 60.) As for employee Pat Nila, Gilliatt did not recall if he informed her that he missed the meeting because he had been driving home from his full-time

job. (Tr. 743/Gilliatt.) The employee comment section on Nila's warning for missing the April 8 meeting reads, "I was working at my full time job and got off at 0730. Can't attend meeting when I'm driving home." (GC Ex 69.) Gilliatt did recall that employee Emold Fray told her, upon receiving the warning for missing the meeting, that she couldn't attend the April meeting because she was in class that morning (Tr. 744/Gilliatt.) Fray's employee comment on the warning reads, "I was in class @ 0930AM." (GC Ex 70.)

Respondent did not give the Union notice or an opportunity to bargain over any changes to its attendance policies. (Tr. 229, Tr. 231-232/Sackman.)

2. Tardiness Discipline Facts

The record amply supports the ALJ's finding that Respondent violated Section 8(a)(3) and 8(a)(5) with respect to its enforcement of its tardiness policy. Before May 2010, employees understood that as long as they clocked in within seven minutes of their start time they would not be considered late or disciplined for tardiness. (Tr. 42-43/Lina, Tr. 151/Roncesvalles, Tr. 187/Bacani, Tr. 215/Hilvano, Tr. 250, Tr. 312/Magsino, Tr. 407, Tr. 426-427, Tr. 428-429/DeSantiago.) Charge Nurses including Wendy Davis, John DeValle, Leslie Terezas, and Laurel Smith informed employees of this policy. (Tr. 151/Roncesvalles, Tr. 216/Hilvano.) The evidence adduced at trial revealed that, starting within a month after the Union election, Respondent disciplined at least 25 Unit employees for clocking in within one to seven minutes after their start times. Respondent's written policy on tardiness provides that, "Tardiness is excessive when an employee is late (2) or more times in a one month period. Repeated tardiness may lead to disciplinary action up to and including termination." (REx 45.)

On May 4, 2010, Gilliatt gave employee Yesenia DeSantiago ("DeSantiago") a verbal warning for tardiness. (GC Ex 17; Tr. 403-404/DeSantiago.) Gilliatt told DeSantiago that she was not the only one being written up and that other staff members were being written up. (Tr. 403/DeSantiago.) Before May 4, 2010, DeSantiago had not received any verbal or written warnings for tardiness and had clocked in to her shift between one and seven minutes after her start time at least once a week. (Tr. 406-407/DeSantiago.)

At about noon on May 5, 2010, Gilliatt gave employee Marlene Bacani ("Bacani") a verbal warning for tardiness. (GC Ex 26; Tr. 186/Bacani.) Bacani has worked at Chino Valley since October 2006. Before May 2010, Bacani had not been disciplined for tardiness during her

employment at Chino Valley and had clocked in after her start time of her shift. (Tr. 187/Bacani.)

Also on May 5, 2010, at about 7:30 p.m., Vincent Hilvano (“Hilvano”) received a verbal warning for tardiness. (GC Ex 15; Tr. 214/Hilvano.) On December 20, 2009, Hilvano had received a written warning for tardiness. (GC Ex 16; Tr. 216/Hilvano.) In this warning, under “further action to be taken,” supervisor Gonzalez wrote, “next will be a final written warning followed by a termination notice.” (GC Ex 16.) As for the improvement period, the warning indicated “no tardiness for next 3 months.” (GC Ex 16.) The evidence reveals that Hilvano was tardy frequently during the three months following his December 2009 warning and had clocked in between one and seven minutes after his start time but he received no discipline until May 5, 2010, after the Union election. (GC Ex 129; Tr. 215/Hilvano.) Moreover, the warning he received in May 2010 was not a final written warning as had been promised by Hilvano’s December 2009 written warning. (GC Ex 15, GC Ex 16.)

On May 5, 2010, Gilliatt called employee Ronald Magsino (“Magsino”) into her office and gave him a verbal warning for tardiness. (GC Ex 7; Tr. 248/Magsino.) Gilliatt told Magsino that she had done an audit for the month of April and found him to be tardy. (Tr. 248/Magsino.) Gilliatt said that other employees were going to be written up for tardiness as well. (Tr. 248-249/Magsino.) Before this May 5, 2010 verbal warning, Magsino had not received any verbal or written warnings for tardiness although he had clocked in late to his shift. (Tr. 249/Magsino.)

On May 12, 2010, between 4-5 in the afternoon, Gilliatt called employee Roncesvalles into her office and gave her a verbal warning for tardiness. (GC Ex 23; Tr. 147-148/Roncesvalles.) Gilliatt told Roncesvalles that it was not only her and that this warning was being given to everyone who was late. (Tr. 148/Roncesvalles.) At the time of the hearing, Roncesvalles had worked for Respondent for five and a half years. (Tr. 122/Roncesvalles.) Before receiving this verbal warning in May 2010, Roncesvalles had never received any verbal or written warnings for tardiness and had clocked in after her start time, but within seven minutes of her start time. (GC Ex 130; Tr. 149, Tr. 151/Roncesvalles.)

On May 11, 2010, Linda Ruggio sent employees an email in which she informed employees that:

Tardy is defined by being late for your designated shift; if you are to start your work shift at 0700 and you clock in at 0701, you are considered tardy. Regarding the 1112-minute (formerly the 7-minute) grace period; This grace period is a JE

Dev policy that is strictly for time-keeping purposes and has absolutely no bearing on the issue of Tardiness.

(REx 1.) Ruggio sent out this memorandum,

to clarify for all the staff in regards to their perception that this seven minute grace period really did not have anything to do with a grace period allowing people to be tardy for their shift, but rather it is a timekeeping policy for wage rules and paycheck [sic].

(Tr. 829/Ruggio.) Ruggio testified that she issued the May 11 memorandum because she “just wanted to clarify for them that this really doesn’t give anybody leeway to be tardy.” (Tr. 829-830/Ruggio.)

Respondent issued discipline to 23 Unit employees for clocking in between one and seven minutes after their start time after the April 2010 election.²⁷ In warnings Respondent issued to employees for tardiness, Respondent noted that, if the employee failed to maintain satisfactory attendance, “counseling and/or disciplinary action, up to and including suspension and termination may occur.” (GC Ex 7, 17, 23, 26, 66, 68, 71, 73-81, 110, and 115.)

The following chart reflects that employees, including those who received discipline for tardiness after the Union election, regularly clocked in between one and seven minutes after their start times for several months before the Union election. There is no evidence that these employees received discipline for any of the instances of tardiness before April 2010.

²⁷ The following list reflects the Exhibit number of discipline issued to the employee for clocking in between one and seven minutes after their start time after the Union election and the department in which the employee worked at the time of the discipline: GC Ex 104 (Med/Surg-Telemetry), GC Ex 103 (Telemetry), GC Ex 26 (Emergency), GC Ex 100 (ICU), GC Ex 128 (Emergency), GC Ex 146 (ICU), GC Ex 117 (Med/Surg-Telemetry), GC Ex 121 (Emergency), GC Ex 126 (Telemetry), GC Ex 17 (Emergency), GC Ex 111 (Emergency), GC Ex 109 (Emergency), GC Ex 142 (Emergency), GC Ex 120 (Emergency), GC Ex 119 (Emergency), GC Ex 15 (Emergency), GC Ex 123 (Med/Surg-Telemetry), GC Ex 7 (Emergency), GC Ex 112 (ICU), GC Ex 110 (ICU), GC Ex 68 (ICU), GC Ex 124 (Med/Surg), GC Ex 105 (Emergency), GC Ex 23 (Emergency), GC Ex 102 (Emergency), GC Ex 101 (Emergency), GC Ex 106 (Med/Surg), GC Ex 107 (Med/Surg-Telemetry), GC Ex 116 (Emergency), GC 115 (Emergency), and GC Ex 141 (Emergency).

Chart Reflecting the Number of Occasions per Month Unit Employees Clocked in Between 1 and 7 Minutes After Their Start Times

	June 2009	July 2009	August 2009	September 2009	October 2009	November 2009	December 2009	January 2010	February 2010	March 2010	April 2010
	PP200913-200915	PP200915-200917	PP200917-200919	PP200919-200921	PP200921-200923	PP200924-200926	PP200928-201001	PP201011-201003	PP201003-201005	PP201005-201007	PP201007-201009
Ablog	6	6	5	N/A	N/A	N/A	N/A	N/A	N/A	9	5
Agbonkpofe	3	6	5	4	6	2	7	8	9	3	4
Barani	3	1	9	11	8	8	10	8	9	4	5
Bader	2	4	6	8	12	9	9	7	8	11	1
Bhido	6	11	8	4	8	5	7	3	5	12	7
Clyburn	N/A	N/A	N/A	N/A	N/A	N/A	4	6	6	3	1
Cruzat	N/A	3	2	4	7	3	5	9	6	4	9
DeSantiago	N/A	N/A	1	6	5	2	6	3	6	6	7
Guardado	1	0	3	0	1	4	4	4	3	2	3
Hilvano	5	6	5	5	4	7	3	0	2	12	3
Kim	N/A	1	2								
Magsino	1	3	6	4	2	5	4	9	9	13	3
Mendoza	7	4	2	7	5	8	6	6	6	8	7
Nadua	N/A	N/A	N/A	3	2	5	6	2	4	5	4
Orona	9	7	7	11	6	11	9	9	6	6	2
Roncesvalles	0	0	2	1	0	2	1	N/A	0	0	2
Sahagun	9	10	6	8	7	7	3	1	4	5	4
Sanders	0	1	1	3	1	2	1	2	2	3	2
Songco	10	5	7	14	10	7	6	5	6	11	6

N/A reflects no timecards are in evidence for the Pay Period.
Pay Period is abbreviated by "PP."

Respondent did not give the Union notice or an opportunity to bargain over any changes to its tardiness policies. (Tr. 229, Tr. 231/Sackman.)

3. 8(a)(5) Analysis of Respondent's Changes to its Attendance and Tardiness Policies

Section 8(a)(5) requires that an employer provide its employees' representative with notice and an opportunity to bargain before instituting changes to mandatory subjects of bargaining where that change is "material, substantial, and significant." *Alcoa, Inc.*, 352 NLRB 1222, 1223 (2008) citing *Dorsey Trailers, Inc.*, 327 NLRB 835, 852 fn. 26 (1999); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1016 (1982). The Board has long held that tardiness and attendance policies are mandatory subjects of bargaining. *Alcoa, Inc.*, 352 at 1223; *Blue Cross of Western New York*, 298 NLRB 301, 308 (1990).

An employer's change in the enforcement of attendance and disciplinary rules represents a change in the employees' terms and conditions of employment. *San Luis Trucking, Inc.*, 352 NLRB 211, 229 (2008), citing *Womac Indus. Inc.*, 238 NLRB 43, 43 (1978). As such, an employer must bargain with the employees' representative before instituting such a change. *San Luis Trucking*, 352 NLRB at 229, citing *Hyatt Regency Memphis*, 296 NLRB 259, 263-264 (1989), enfd. mem. 944 F.2d 904 (6th Cir. 1991).

In the instant matter, Respondent, after the Union election, announced that it would be monitoring tardiness and attendance and began to discipline employees for failing to attend mandatory meetings and for tardiness when employees arrived between one and seven minutes late to work when before the election employees Respondent had not disciplined employees for on these grounds. The evidence clearly reveals that, before the Union election, Respondent had a past practice of allowing employees a seven minute grace period before they would be considered tardy. Ruggio's testimony that she issued her May 11 memorandum to explain to employees that there was not a grace period is further evidence of Respondent's departure from past practice. There would have been no reason to educate employees about this no-grace period policy had there not been an understanding among employees that a grace period existed. The evidence also establishes that employees regularly failed to attend mandatory meetings without being disciplined, but that after the Union election, Respondent began to discipline employees for failing to attend these meetings. Chino Valley did not bargain with the Union before instituting changed and stricter enforcement of its rules regarding the attendance and tardiness rules. Accordingly, Respondent violated Section 8(a)(1) and (5) of the Act.

Respondent's argument that no violation can be found because the Union did not request bargaining over these unilateral changes is disingenuous at best. (RBx 90-92.) On April 9, 2010, the Union sent Respondent a letter, which included the following, "we insist that, henceforth, you honor your legal responsibility to make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit without affording an opportunity to this Union to bargain over the decision and effects of any such change." (GC Ex 27:1.) On April 14, 2010, Respondent responded to the Union's April 9, 2010 letter refusing to provide the information requested by the Union in its April 9, 2010 letter and refusing to bargain with the Union. (GC Ex 28.)

Moreover, Respondent's arguments that the enforcement of Respondent's policies was merely a result of the new Emergency Department Director Gilliatt stepping in is also belied by the record. In fact, as illustrated *supra* at fn. 26 and fn. 27, Respondent began disciplining employees in various of Respondent's departments for failing to attend mandatory meetings and for tardiness after the Union election. Clearly, the enforcement of Respondent's policies in response to the Union election was not limited to Gilliatt's Emergency Department.

4. 8(a)(3) Analysis of Respondent's Discipline Pursuant to its Unilateral Changes to its Attendance and Tardiness Policies

Under *Wright Line*, 251 NLRB 1083 (1980), an employer violates Section 8(a)(3) of the Act by taking adverse employment action against its employees because of their union activities. In the instant case, Respondent did not have a past practice of disciplining employees for failing to attend mandatory meetings or for clocking in within one and seven minutes after their start times. The Union election took place on April 1 and 2, 2010. On April 12, 2010, Lally notified employees that he was instructing his managers and supervisors to monitor attendance and tardiness. Beginning within a week after the election, Respondent began disciplining employees for missing mandatory meetings where before they had not disciplined employees. Then, within a month after the election, Respondent began disciplining Unit employees for tardiness during the month of the Union election. Given Respondent's past practice and the timing of the discipline, it is clear that Respondent was punishing employees for their union vote. Moreover, Reddy's statements at the May 2010 meetings regarding enforcement of tardiness rules is further evidence that Respondent was disciplining employees in retaliation for their union vote.²⁸

²⁸ See *infra* at 36-42.

The ALJ properly dismissed Respondent's argument that the verbal counselings it issued to employees do not constitute discipline as the case law does not support such a proposition. (ALJD 24-25.) "[V]erbal counselings or warnings constitute disciplinary action sufficient to support a violation of Section 8(a)(3) where they are a part of a disciplinary process in that they lay 'a foundation for future disciplinary action against [the employee].'" *Altercare of Wadsworth Center for Rehabilitation and Nursing Care, Inc.*, 355 NLRB No. 96, slip op. at 1 (2010). The verbal warnings Respondent issued to employees in the instant matter clearly lay a foundation for future disciplinary action against the employees. Given that the warnings Respondent issued to employees for tardiness included language that additional disciplinary action might be taken against them if they failed to maintain satisfactory attendance, it is clear from the warnings that they are a part of a disciplinary process and could be used against employees in the future.

Moreover, the evidence belies any argument Respondent makes that employees were disciplined starting in April 2010 for failing to attend mandatory meetings and for tardiness because Gilliatt became manager in the Emergency Department. Rather, the evidence reflects that employees in the Telemetry, Med-Surg, and ICU departments also began to be disciplined for failing to attend mandatory meetings and for tardiness after the Union election. (GC Ex 90.) Gilliatt's testimony that she was not instructed to monitor timecards is not credible given that Lally informed the staff, in writing, that he had asked his directors to monitor and address any shortcomings in the areas of attendance and tardiness. (GC Ex 4.)

Gilliatt's self-serving testimony that she started disciplining employees for missing mandatory meetings because she did not want to start a habit of employees not attending mandatory meetings is not credible. The ALJ noted Gilliatt's admission that often less than 25% of the Emergency Department staff attended mandatory meetings. (ALJD 25; Tr. 687-688/Gilliatt.) The ALJ properly concluded, based on the record evidence, that the "only difference was before the election, employees were not disciplined and after the election the employees were disciplined." (ALJD 25.)

An employer violates Section 8(a)(1) and (3) of the Act when it increases discipline of its employees or more strictly enforces its work rules in response to union activities. *San Luis Trucking, Inc.*, 352 NLRB at 229, citing *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), *enfd.* 928 F.2d 609 (2d Cir. 1991).

If the General Counsel demonstrates that the pattern of discipline after the commencement of union activity deviated from the pattern prior to the start of union activity, a prima facie case of discriminatory motive is established requiring the Respondent to show that its increased discipline was motivated by considerations unrelated to its employees' union activities.

Jennie O Foods Inc., 301 NLRB 305, 311 (1991). Based on the timing of the conduct, Respondent's significant departure from its past practice, and in the context of Respondent's anti-union campaign materials and Lex Reddy's May 2010 statements to employees, Respondent violated Section 8(a)(3) of the Act when it began to discipline employees for failing to attend mandatory meetings and for tardiness after the Union election.

K. Respondent's Exceptions Related to Education Reimbursement Policies

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT'S BRIEF
Exceptions 72-74, 77	Pages 9-11, 30-31, 95-96

Contrary to Respondent's exceptions, the record amply supports the ALJ's determination that Respondent violated Section 8(a)(5) when it unilaterally ceased paying per diem employees for time spent attending certification courses required to work for Respondent. (ALJD 26-27.) The following facts were properly considered by the ALJ in finding this violation. Registered nurses are required to maintain professional certifications which they keep current by attending classes. (Tr. 130/Roncesvalles.) Sometime in March 2010, Deborah Zeritki, the lead EMT who acts as Emergency Department Director Gilliatt's assistant director, contacted employee Rosalyn Roncesvalles ("Roncesvalles") to remind her that her PALS license would be expiring on March 31, 2010.²⁹ (Tr. 140, Tr. 174/Roncesvalles, Tr. 709/Gilliatt.) Roncesvalles attended an 8-hour training provided by an agency called "Flex Ed" to renew her PALS certification on March 31, 2010, the day before the Union election. (Tr. 131/Roncesvalles, Tr. 173/Roncesvalles.) If Roncesvalles were not to renew her PALS certification she would not be permitted to work at Chino Valley. (Tr. 131/Roncesvalles.) To be paid for time attending trainings, it was Roncesvalles' practice to record her hours spent attending classes and trainings on her time card

²⁹ After Gilliatt testified that Deborah Zeritki acted as her assistant director, Respondent Counsel posed the following question to the witness, "Ms. Gilliatt, again, what is Deborah's position?" (Tr. 710.) In response to this question Gilliatt responded, "She's lead EMT, emergency medical technician." (Tr. 710/Gilliatt.) Respondent Counsel then asked Gilliatt, "Does she have a director or assistant director, or anything like that title?" (Tr. 710.) Gilliatt responded, "No." (Tr. 710/Gilliatt.) Respondent Counsel followed up by asking, "Okay. But she acts in some ways as your assistant, correct?" and Gilliatt responded that she "delegate[s] supplies and certain tasks to [Zeritki]." (Tr. 710/Gilliatt.)

adjustment sheet, which is kept in a binder at the nurses' station in the Emergency Department. (Tr. 132/Roncesvalles, Tr. 703/Gilliatt.) Roncesvalles' PALS training is reflected on her time card adjustment sheet. (GC Ex 22; Tr. 136/Roncesvalles.) The lines crossing out the writing on Roncesvalles' time card adjustment sheet reflect that she was paid for those trainings she attended. (GC Ex 22; Tr. 133/Roncesvalles.)

Because Roncesvalles had not yet received payment for attending the PALS training, she looked at her time adjustment sheet and found that Gilliatt had written the words "full-time employees only." (GC Ex 22; Tr. 135, Tr. 137, Tr. 174-175/Roncesvalles.) After noticing Gilliatt's notation, Roncesvalles called Gilliatt by phone. (Tr. 136-137, Tr. 175/Roncesvalles.) Roncesvalles greeted Gilliatt and said that she wanted to clarify her PALS class. (Tr. 137, Tr. 175/Roncesvalles.) Roncesvalles told Gilliatt then she had seen that Gilliatt had written "full time employees only" on the time adjustment sheet. (Tr. 137/Roncesvalles.) Gilliatt responded it was because Roncesvalles was per diem and payment was only for full-time employees. (Tr. 137/Roncesvalles.) Roncesvalles responded that she had been paid as a per diem employee and that the previous manager, Carlos Gonzalez, had paid the per diem nurses when they attended classes. (Tr. 137, Tr. 175/Roncesvalles.) Gilliatt responded that she would check with Human Resources. (Tr. 137, Tr. 175/Roncesvalles.)

Sometime in mid-April 2010, Roncesvalles asked her charge nurse John DeValle ("DeValle") to assist her in finding Respondent's policy on paying employees for attending classes. (Tr. 138-139, Tr. 174/Roncesvalles.) DeValle helped Roncesvalles look for the policy on Respondent's computer system and printed the policy for Roncesvalles. (GC Ex 24; Tr. 138-139, Tr. 176-177/Roncesvalles.) The policy DeValle assisted Roncesvalles in accessing and printing in mid-April 2010 describes Respondent's procedure for attendance to seminars, mandated classes, conferences, workshops or other sessions that are partially or fully paid by Chino Valley Medical Center. (GC Ex 24.) The scope of the policy is "all employees." (GC Ex 24.) The policy sets out that "employees who attend a class mandated by their position at the Hospital will be compensated for hours spent at the mandated class provided that the employee has received approval from his or her immediate supervisor prior to attending the mandated class."³⁰ (GC Ex

³⁰ While Respondent produced a policy through its Human Resources Director on continuing education/approval applicable to management employees, Respondent did not establish that the policy found by Roncesvalles and her charge nurse DeValle on Respondent's online library of policies is not a policy of Respondent's. (REx 76.) Moreover, to the extent that Respondent argues that Roncesvalles did not acquire the necessary supervisory approval

24.) Respondent's policy as reflected in GC Exhibit 24 does not make any distinctions between per diem, full-time, or part-time employees. (GC Ex 24.) Also, in a flyer distributed by Respondent before the Union election, Respondent announced benefits employees received without a union. Among those benefits was "Flex Ed, paid while you are learning." (GC Ex 6.)³¹

On April 14, 2010, Roncesvalles sent an email to Gilliatt following up on why she had not been paid for attending her PALS class. (GC Ex 12; Tr. 140-141/Roncesvalles.) Gilliatt did not respond to Roncesvalles' email. (Tr. 141, Tr. 176/Roncesvalles.) Respondent did not pay Roncesvalles for the time she spent attending the 8-hour PALS class on March 31, 2010.³² (Tr. 141-142/Roncesvalles.)

On May 12, 2010, Roncesvalles met with Gilliatt. (Tr. 148/Roncesvalles.) At this meeting, Gilliatt gave Roncesvalles a verbal warning for tardiness and they also discussed Roncesvalles' PALS training. (Tr. 148/Roncesvalles.) Roncesvalles told Gilliatt that she had not been paid yet and Gilliatt responded that it was only for full-time nurses. (Tr. 148/Roncesvalles.) Gilliatt told Roncesvalles "there's a lot of changes now Rosalyn." (Tr. 149, Tr. 180/Roncesvalles.)

Prior to the Union election, Chino Valley had paid Roncesvalles for trainings she had attended both as a full-time nurse and as a per diem nurse. (Tr. 142/Roncesvalles.) Between January 2009 and March 2010 when Roncesvalles was a per diem employee, Respondent paid Roncesvalles for classes she attended to maintain her BLS, ACLS, and MICN certifications.³³ (REx 3; Tr. 142, Tr. 167-168, Tr. 172/Roncesvalles.) In order to be paid for those trainings, Roncesvalles followed the same procedure she followed for seeking payment for her March 31, 2010 class. (Tr. 142-143, Tr. 168/Roncesvalles.) Respondent did not give the Union notice or an

to receive reimbursement for attending the PALS training, the record makes clear that Roncesvalles received the approval from Zeritki, Gilliatt's assistant director.

³¹ In its exceptions, Respondent ignores the language pertaining to Flex-Ed in its own campaign flyer. Rather, Respondent merely cites to the language in the flyer related to paid BLS/ACLS certifications which appear to be limited to full-time employees. At issue in this case was Respondent's unilateral change to its practice of reimbursing per diem employees for Flex Ed training in connection with a PALS certification, not for BLS/ACLS certifications.

³² The first day of the payroll period is a Sunday and the last day of a payroll period is a Saturday. (Tr. 1005/Dhuper.) Given that March 31, 2010, was a Wednesday, it would have fallen within the pay period ending on Saturday, April 3, 2010, the day after the Union election.

³³ While the line dated 5/26/09 on Respondent Exhibit 3 is not crossed out, Roncesvalles was paid for attending her ACLS renewal. (Tr. 172/Roncesvalles.) Respondent presented one per diem employee, Tamara Bateman, who testified that she had never been paid for attending trainings. (Tr. 633/Bateman.) There is no evidence in the record that Bateman ever sought to be paid for her time spent attending trainings.

opportunity to bargain over any changes it made to its policies on compensation to employees for attending trainings. (Tr. 232/Sackman.)

Respondent's evidence as described below does not rebut the evidence that Respondent had a past practice of paying per diem employees for time spent attending certifications and departed from the practice after the Union election without giving the Union notice or an opportunity to bargain. Respondent witness Gilliatt's testimony on this allegation is not credible. According to Gilliatt, as soon as she became Emergency Department Director, Roncesvalles asked Gilliatt if she would be paid for her PALS class. (Tr. 703/Gilliatt.) Gilliatt testified that she told Roncesvalles that reimbursement for hours attending those classes was for full-time staff and not per diem staff. (Tr. 703/Gilliatt.) Roncesvalles told Gilliatt that Gonzalez used to pay her for the classes and Gilliatt responded that she did not know that happened before but "I know now – I mean my understanding is . . . according to what Human Resources's [sic] policies were." (Tr. 704/Gilliatt.) In response to Respondent Counsel's question "Do you recall anything else that was said during that discussion," Gilliatt testified, "[Roncesvalles] was argumentative with me." (Tr. 705/Gilliatt.) Gilliatt testified that, after she had this conversation with Roncesvalles, Gilliatt found that Roncesvalles had recorded her PALS class on the time adjustment sheet at which time Gilliatt wrote "fulltime employees only." (Tr. 703-705/Gilliatt.)

Respondent Counsel asked Gilliatt, "And then thereafter, did Ms. Roncesvalles ever communicate with you again concerning being paid or not being paid for that time?" (Tr. 706.) Gilliatt responded, "about PALS, no." (Tr. 706/Gilliatt.) Respondent Counsel then asked, "So after you said, 'for fulltime employees only,' did she come to you at any point in time and say, 'Hey, aren't you going to pay me.?" (Tr. 706.) Counsel for the Acting General Counsel objected that the question had been asked and answered. (Tr. 706.) Despite the objection, which was sustained, the witness answered the question, "yes, she did." (Tr. 706/Gilliatt.) Upon this response, Judge Kocol stated, "You're changing -- you're now saying she did come to you? You earlier said she didn't. Let's ask the question again." (Tr. 707.) Judge Kocol then asked the witness, "After you'd entered in, 'for fulltime staff only,' words to that effect, did Ms. Roncesvalles raise the matter with you again?" (Tr. 707.) Gilliatt replied, "Just two weeks ago, she asked me again about another certification." (Tr. 707/Gilliatt.) Subsequently, Respondent Counsel asked Gilliatt, "But did she -- after you wrote, 'for fulltime employees only,' with respect to the PALS renewal, did she raise that issue with you again?" (Tr. 707.) Gilliatt

responded “I can’t recall.” (Tr. 707/Gilliatt.) Respondent Counsel then asked Gilliatt again, “Do you recall any other discussions between you and Ms. Roncesvalles concerning the PALS renewal?” (Tr. 707/Gilliatt.) After a long pause, Gilliatt responded, “I believe she asked me after she got a paycheck why didn’t she get paid for her PALS.” (Tr. 707/Gilliatt.) Gilliatt testified that she responded “per diem staff do not get paid for their certifications. (Tr. 708/Gilliatt.) Gilliatt denied telling Roncesvalles that there are a lot of changes but testified that those were Roncesvalles’ words. (Tr. 708/Gilliatt.)

Moreover, Gilliatt testified on direct examination that she discussed the issue of Roncesvalles getting paid for PALS training with Human Resources representative Beverly. (Tr. 708, 727/Gilliatt.) However, on cross-examination, when asked by Counsel for the Acting General Counsel whether she discussed Rosalyn’s PALS certification with Beverly in Human Resources, Gilliatt changed her testimony and denied any such conversations with Human Resources about Roncesvalles’ payment for attending the PALS training. (Tr. 727/Gilliatt.)

Furthermore, Gilliatt’s testimony, as set out *supra* at footnote 29, regarding Deborah Zeritki was self-serving and inconsistent. Clearly, Respondent Counsel was surprised by Gilliatt’s testimony that Zeritki acted as Gilliatt’s “assistant director.” In an effort to avoid imbuing any supervisory authority on Zeritki, Respondent Counsel asked Gilliatt a series of questions to strip Zeritki of any supervisory authority despite Gilliatt’s initial response that Zeritki was her assistant director. The record makes clear, despite Respondent Counsel’s attempts to dilute Gilliatt’s testimony, that Gilliatt considers Zeritki to be her assistant director and that, at a minimum, she delegates certain tasks to Zeritki, among which is her role to remind staff if their certifications are to expire within the next month. (Tr. 710/Gilliatt.)

The ALJ’s finding that Gilliatt’s testimony with respect to pay for certification classes was not credible is amply supported by the record. Gilliatt’s version of the events surrounding Roncesvalles’ PALS certification does not make sense. According to Gilliatt, Roncesvalles, an employee who had always been paid for attending certifications, approached Gilliatt immediately upon her becoming director to find out if she would be paid for attending a certification class. Roncesvalles had no reason to inquire into whether she would be paid for attending the PALS training given that she had been paid for attending the trainings in the past. Moreover, Gilliatt’s flip-flopping on the issue of whether she talked to Human Resources about Respondent’s policy on reimbursement for trainings evidences Gilliatt’s lack of credibility. Roncesvalles’ version of

the events, that Gilliatt said she would check with Human Resources after Roncesvalles informed Gilliatt that she had been paid for attending trainings as a per diem employee, is credible. Gilliatt's version that she asked Human Resources about this specific policy immediately upon her becoming director without any reference to Roncesvalles' request for reimbursement is nonsensical. Gilliatt's non-specific, vague testimony and overall failure to recall facts and details as well as changing her testimony, renders Gilliatt's testimony unreliable, particularly when it is compared to Roncesvalles' testimony which was detailed and consistent during both direct and cross-examination.

Moreover, Respondent presented no evidence to rebut Roncesvalles' testimony that she had been paid by Respondent in the past for attending trainings. Finally, that one per diem employee testified that she had not been paid by Respondent for attending trainings does not establish that Respondent did not have a past practice of paying per diem employees for attending trainings, especially in light of the lack of evidence that that employee ever took any steps to receive payment for attending those courses. Furthermore, even Respondent's anti-union campaign materials announced "Flex Ed, paid while you are learning" as a benefit enjoyed by employees. (GC Ex 6.) Respondent did not make a distinction between per diem, full-time, or part-time employees in this flyer nor did it do so in the policy found by Charge Nurse DeValle and Roncesvalles on Respondent's online library of policies. Thus, Respondent's own campaign materials contain an admission that they paid employees, regardless of their employment status, for time spent attending Flex Ed courses before the Union election.

An employer violates Section 8(a)(5) where it makes a unilateral change to a matter which is a mandatory subject of bargaining. Clearly, wages are a mandatory subject of bargaining and given Respondent's past practice of paying wages to employees for time spent attending certification trainings, Respondent's cessation of such payment to employees constitutes a unilateral change. *Pacific Beach Hotel*, 356 NLRB No. 182, slip op. at 58 (2011). The Board has also held that employers violate Section 8(a)(5) where they make unilateral changes to training and education assistance policies. *See Southern California Gas Co.*, 346 NLRB 449, 449 (2006); *Tocco, Inc.*, 323 NLRB 480, 480 (1997). In this case, Respondent, within days of the Union election, departed from its past practice of paying per diem employees for attending certification classes without giving the Union notice or an opportunity to bargain. Such conduct violates Section 8(a)(5) of the Act.

L. Respondent's Exceptions Related to the Reading Remedy

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT'S BRIEF
Exceptions 79 and 80	Pages 35, 96-97

The ALJ properly determined that, based on the Respondent's conduct in this matter, it would be appropriate to require a high-ranking official to read the Notice, or be present when the Notice is read to employees by a Board Agent.³⁴ Such a remedy is appropriate where, as here, Respondent has repeatedly infringed upon employees' Section 7 rights. As the Board has previously observed, "the public reading of the notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) (internal quotations omitted). The remedy is in line with various Board decisions. *See, e.g., Excel Case Ready*, 334 NLRB 4 (2001); *Blockbuster Pavilion*, 331 NLRB 1274 (2000); *Fieldcrest Cannon, Inc.*, 318 NLRB at 473; *Three Sisters Sportswear*, 312 NLRB 853, 853 (1993). The cases cited by Respondent in its brief are inapposite. A reading of *Beverly Health & Rehabilitation Services*, 339 NLRB 1243 (2003), does not stand for the proposition that the Board "will not impose an extraordinary remedy unless the General Counsel demonstrates that the respondent has been found to have committed serial unfair labor practices over many years in many different cases and in many different locations." Rather, the Board declined to order a corporate-wide remedy in this case because Respondent "committed three types of unfair labor practices at one facility with a state manager being the perpetrator in two instances." *Id.* at 1243-1244. There is no reference to a notice reading. Moreover, the respondent in *Beverly Health & Rehabilitation Services* was found to have violated Section 8(a)(1) by interrogating employees, threatening employees, and soliciting grievances from employees, a far cry from the number and magnitude of unfair labor practices committed by Respondent in the instant matter. Respondent cites to *Ishikawa Gasket Am.*, 337 NLRB 175 (2001). In that case, the Board did not order a notice reading on the basis that the General Counsel did not argue it to be an egregious case. *Id.* at 176. In contrast, Counsel for the Acting General Counsel has argued that this is an egregious case and, continues to seek effective remedies to undo Respondent's widespread unlawful conduct, including a notice reading as

³⁴ In fact, while the ALJ properly determined that a reading order was appropriate in this case, he failed to include the notice reading remedy in his Order. Counsel for the Acting General Counsel excepted to this failure to include the notice reading in his Order in her Exception 2.

properly recommended by the ALJ.³⁵ A remedy is necessary to dissipate the coercive effects of the unlawful discharge and other unfair labor practices. A traditional posting will be insufficient to remedy these pervasive unfair labor practices committed during the organizing campaign and shortly after the Union won the election.

M. Respondent’s Exceptions to the Recommended Order’s Breadth

RESPONDENT’S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT’S BRIEF
Exceptions 78 and 83	Pages 35 and 97

Respondent excepts to the issuance of a broad cease and desist remedy in this matter. It asserts that it was not appropriate for the ALJ to issue a broad order where it was not sought by the General Counsel. In the consolidated complaint in this case, the Acting General Counsel specified that he was seeking a notice reading and for the notice to be electronically distributed to employees and also sought “other relief as may be appropriate to remedy the unfair labor practices alleged.” (GC Ex 1(ww):1.) Thus, the General Counsel’s request for relief encompasses the broad order as recommended by the ALJ. Moreover, contrary to Respondent’s assertions, a broad order is appropriate in the instant matter given that Respondent has “engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Bruce Packing Company, Inc.*, 357 NLRB No. 93, slip op. at 7, fn. 4 (2011), citing *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).

With respect to Respondent’s exception to the ALJ’s failure to differentiate between RNs and non-unit employees in his recommended order, Respondent does not cite to any case support for the proposition that the ALJ’s recommended order is inconsistent with Board law. Rather, the ALJ’s recommended order is entirely consistent with orders issued by the Board. *See, e.g., LM Waste Service, Corp.*, 357 NLRB No. 194, slip op. at 2-3 (2011); *Ampersand Publishing, LLC*, 357 NLRB No. 51, slip op. at 13 (2011). In light of the above and particularly in the absence of case support, Exception 83 should be denied.

³⁵ Respondent’s argument that “the ALJ’s discussion of this portion of his remedy was simply ‘cut and pasted’ from the Board’s opinion in *Texas Super Foods* . . . demonstrates a lack of the type of considered analysis required by the Act and the overreaching nature of the ALJ’s decision as a whole” should be disregarded given Respondent’s failure to file an exception to this portion of the ALJD. (RBx 35, 97.)

N. Respondent's Exceptions to the Hearing Before the ALJ

RESPONDENT'S EXCEPTIONS	WHERE DISCUSSED IN RESPONDENT'S BRIEF
Exceptions 65, 81, 82	Pages 25, 34, 98-99

In Exception 65, Respondent asserts that the ALJ improperly referenced matters for compliance stage and provided instruction to the General Counsel on how to address/proceed on compliance. This exception fails to comply with the requirements of Section 102.46(b) of the Board's Rules and Regulations by failing to state, either in its exceptions or its brief, on what grounds the purportedly erroneous findings or conclusions should be overturned. *Sunshine Piping, Inc.*, 351 NLRB 1371, n.1 (2007) (Board disregarded "bare exceptions" that were unsupported by argument); *New Concept Solutions, LLC*, 349 NLRB 1136, n.2 (2007) (Board disregarded bare unsupported exceptions to judge's findings of violations). In *Carson Trailer, Inc.*, 352 NLRB 1274, 1274 (2008), the respondent filed exceptions to the judge's recommended decision and order arguing that the "evidence [did] not support" the judge's determination that the respondent had unlawfully laid off two union supporters. In contesting the remedy, respondent argued that there was "insufficient evidence" to support the violations. The Board agreed with the General Counsel that respondent's exceptions did not meet the minimum requirements of Section 102.46(b) of the Board's Rules and Regulations, and disregarded the respondent's exceptions pursuant to Section 102.46(b)(2). *Id.* This exception should be denied on the basis that the Respondent provided no argument or basis on which the ALJ's findings should be overturned.

In Exception 81, Respondent contends that the ALJ erred in denying Respondent a full and fair hearing before an impartial trier of fact and then sets out a laundry list of the ways in which the ALJ allegedly denied Respondent a full and fair hearing. Here, Respondent asserts that Respondent was denied a full and fair hearing before an impartial trier of fact yet fails to provide supporting argument. Like Exception 65, Exception 81 is a bare exception and as it is devoid of legal argument, should be disregarded and denied in its entirety.

Counsel for the Acting General Counsel, while contending that Exception 81 is bare and should be denied on the basis that the Respondent failed to provide argument in support of the

exception as required by the Board's Rules, will now address many of Respondent's allegations as set out at pages 25-27 of Respondent's Brief.³⁶

- ALJ refuses to conduct proceedings relating to Respondent's SDT to CDPH on the record and falsely states that Respondent had already had its opportunity to respond to the petition to revoke filed by CDPH even though the time period for Respondent do so had not yet expired, then uses intemperate language while discussing subpoena issues on the record (see, i.e., T 13-15; RX 93-98)

- A review of the transcript section and the exhibits cited by Respondent fails to support Respondent's contention. Rather, the record reflects that Respondent counsel stated, to the ALJ, "You granted the petition to revoke, so if I said denied, I was certainly in error on that. Grant the petition to revoke in its entirety. At that point, I would ask to argue -- the administrative law judge indicated that the Respondent had already had its opportunity to respond to the petition to revoke. I indicated that the time deadline had not yet expired for that response, at which point the administrative law judge offered that he would review the response when filed and then would rule as appropriate after having done so." (Tr. 14:4-13/Scott.) Thus, the statement Respondent attributes to the ALJ was made on the record by Respondent counsel. As to Respondent's contention that the ALJ refused to conduct proceedings relating to Respondent's SDT to CDPH on the record, the record reflects that the ALJ set out his ruling on Respondent's SDT to CDPH on the record as well as the basis for his ruling. (Tr. 13-15.) After reviewing the portions of the transcript cited to by Respondent, Counsel for the Acting General Counsel is unable to glean what language used by the ALJ Respondent considers "intemperate."

Counsel for the Acting General Counsel has grouped together the following of Respondent's contentions as they all relate to Respondent's complaints regarding evidentiary rulings made by the ALJ on the record.

- ALJ modifies basis for rulings in furtherance of efforts to block Respondent from obtaining relevant information (see, i.e., T 15-16, 285-286 [privilege issues involving documents provided to Union counsel by Magsino, assessed by ALJ on whether documents would harm General Counsel's case rather than conducting proper privilege analysis], 469 [SDT to CDPH], 912 [ALJ states false justification for requiring Respondent to comply with

³⁶ Given the number of allegations of bias, unsupported by argument, Counsel for the Acting General Counsel responds to Respondent's most frivolous assertions of the ALJ's bias.

particular sections of Federal Rules of Civil Procedure)]; ALJ rejects testimony that is harmful to General Counsel's case (see, i.e., T 816, 790-791); ALJ refuses to permit Respondent to introduce and/or obtain relevant evidence, including by precluding cross examination of General Counsel's witnesses and refusals to enforce subpoenas (see, i.e., T 48-49, 67, 91, 114-115, 208 [Respondent barred from examining General Counsel witnesses under FRE 611(c)], 292, 313-314 [evidence re tardiness practices], 343-344, 346, 580-581, 627-628, 643-650, 680-681, 790-791, 816, 820, 894-895, 950-951, 989, 1041-1043, 1064 [petition to revoke granted without discussion], 1069-1071 and RX 112, 114-115 [subpoenas directed to CDPH as relevant to GCX 84], RX 63 [Report Form not allowed in as business record]; RX 18-21, 93-101, 107-116); ALJ permits General Counsel to submit incompetent and/or irrelevant evidence (see, i.e., T 159, 165-169, 454-456, 459, 461-470 [relating to GCX 84], 474, 496, 507-508, 512 [allows custodian of records to be examined regarding actual entries in records and practices relating thereto without laying proper foundation], 518-521, 752 [ALJ permits Union to exceed scope of direct examination of Respondent's witness even though General Counsel had previously rested his case], 848, 857-858, 863-865, 887-889).

- Without argument in support of these various citations, the Counsel for the Acting General Counsel is left to guess as to how Respondent believes the ALJ erred in his rulings. Herein, Counsel for the Acting General Counsel addresses various of Respondent's contentions she believes are illustrative of how Respondent mischaracterizes the record in a continuing effort to evade its obligations under the Act.
 - Pages 790-791 reflects that the ALJ properly sustained an objection made by the General Counsel.
 - Page 816 reflects that the ALJ properly sustained a hearsay objection made by the General Counsel.
 - At pages 48-49 of the Transcript, Counsel for the Acting General Counsel fails to understand how the record establishes that the ALJ refused the Respondent to introduce or obtain relevant evidence.
 - With respect to Respondent's contention that the ALJ refused to permit Respondent to introduce relevant evidence, the record reveals that the ALJ made proper evidentiary rulings such as excluding hearsay evidence. *See, e.g.* Tr. 887-889.
 - As for Respondent's allegation that the ALJ erred in granting the petition to revoke a subpoena directed at the California Department

of Public Health (“CDPH”) representative Lena Resurreccion, the record reflects that the ALJ properly determined that her testimony would be irrelevant given that Resurreccion did not participate in creating GC Ex 84, the record of CDPH’s investigation of the Magsino and DeSantiago incidents. (Tr. 1068-1070.)

- The Respondent’s attacks on the ALJ as a biased trier of fact reflects Respondent displeasure with the fact that the ALJ, consistent with Section 102.38 of the Board’s Rules, directed the trial “so that it may be confined to material issues and conducted with all expeditiousness consonant with due process.” *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950) (footnote omitted). “In the conducting of a [trial] the question of whether certain lines of inquiry or responses of witnesses should be curtailed rests within the sound discretion of the” judge. *American Life Insurance and Accident Co.*, 123 NLRB 529, 530 (1959). That the Respondent disagrees with the lines drawn by the ALJ with respect to areas of inquiry and relevance of proffered evidence does not transform the ALJ into a biased trier of fact. Rather, the record reflects that the ALJ thoughtfully considered Respondent’s proffered evidence and exercised his sound discretion as he is charged to do by the Board’s Rules.
- Rather than support Respondent’s bare exceptions, a review of the record reflects that the ALJ acted properly and within his discretion to regulate the course of the hearing under Section 102.35(a)(6) of the Board’s Rules and Regulations.³⁷ Moreover, a “party urging reversal of a judge’s evidentiary ruling must show that the judge’s error prejudiced the party’s substantive rights.” *Dickens, Inc.*, 355 NLRB No. 44 (2010), citing *Cossentino Contracting Co.*, 351 NLRB 495, 495 fn. 1 (2007). Assuming *arguendo* that the ALJ erred in his rulings, Respondent failed to show that any such errors prejudiced it in the presentation of its defense. On this basis, exception 81 should be denied in its entirety.

- ALJ otherwise assumes role of advocate on behalf of General Counsel (see, i.e., T 51, 63, 288, 292, 298, 302, 319, 342, 368, 371, 389, 423, 488-490, 539-540, 597-599, 616-617, 616-

³⁷ Counsel for the Acting General Counsel disagrees with Respondent’s characterization of the ALJ’s conduct during the hearing as set out in exception 81 and in Respondent’s brief at pages 25-27.

617, 622-623 [ALJ independently raises grounds for objecting to admission of document even after General Counsel had withdrawal objections], 790-791, 801-802, 838-842, 847, 950-951)

- With respect to these allegations, without argument in support of them, Counsel for the General Counsel is left to guess as to how Respondent believes the ALJ assumed the role of advocate on behalf of the General Counsel. Counsel for the Acting General Counsel fails to understand how these transcript citations reflect impermissible conduct by the ALJ. Rather, the record reflects that the ALJ was satisfying his duty under Section 102.35 of the Board's Rules to "to inquire fully into the facts and that the judge has the authority to call, examine, and cross-examine witnesses." While the "judge may not take over the role of prosecutor, which is the General Counsel's function in unfair labor practice proceedings," there is no evidence in this record that the ALJ did so. *See Midwest Psychological Center, Inc.*, 346 NLRB 1, 1 (2005). While the ALJ questioned witnesses, his questioning did not give the appearance of partiality or constitute an attempt to take over the General Counsel's prosecutorial role.
- ALJ refuses to grant request to strike nonresponsive testimony on the basis that witness "did not understand question" instead of inferring that witness was being evasive (see, i.e., T 165-166, 569)
 - Counsel for the Acting General Counsel fails to see how pages 165-166 of the Transcript reflect that the witness was being evasive, especially in light of the fact that when the question posed by Respondent was repeated by the ALJ, the witness immediately answered the question. That the witness did not understand Respondent's counsel does not require nor should it lead to an inference by the ALJ that the witness was being evasive.
 - At page 569, the record reflects that the Respondent asked the witness a question and the witness provided more information than the Respondent wished to elicit. That the witness provided Respondent with more information than it desired does not evidence evasiveness by the witness.
- ALJ allows Union to manipulate scheduling of hearing while denying Respondent's request to resume hearing on day following June 15 session to allow testimony by a witness not immediately available (see, i.e., T 32, 711, 1071)

- A review of the Transcript at page 32 reflects that Respondent Counsel asked the ALJ what time he starts the hearing in the morning and that Union Counsel then requested to start at 10 a.m. on Friday because of an appointment. Page 711 of the Transcript, reflects the following exchange:

MS. DEMIDOVICH: I previously advised you that I had an appointment and I asked to start on Friday at 10:00. I just wanted to inform everyone that I found out over lunch that my appointment was cancelled. So I no longer need that, for what it's worth.

JUDGE KOCOL: Mr. Scott?

MR. SCOTT: I had lined up my witnesses to be here at 10:00 tomorrow morning.

JUDGE KOCOL: Can you realign them?

MR. SCOTT: I will try, Your Honor.

JUDGE KOCOL: Alright. So we'll start tomorrow at 9:00. Let's see, where were we? We're back to you, Mr. Scott.

MR. SCOTT: Yes, Your Honor.

Counsel for the Acting General Counsel fails to see how this establishes that the ALJ permitted the Union to manipulate scheduling of hearing. With respect to Respondent's assertion that the ALJ denied Respondent's request to resume hearing on a day following the June 15 session to allow testimony by a witness not immediately available, the Respondent has not provided argument to show how it was prejudiced by the ALJ's ruling.

- ALJ expresses approval of General Counsel's case (see, i.e., T 497 [ALJ comments that General Counsel's questioning "hit pay dirt"])
 - A review of the transcript reflects the ALJ did not make the comment quoted by Respondent. Rather, while Counsel for the Acting General Counsel was questioning Respondent's custodian of records regarding documents produced pursuant to subpoena, Judge Kocol stated "Ms. Silverman, at some point we are going to hit pay dirt here." (Tr. 497.) Respondent's blatantly took this statement out of context in an effort to make it appear that the ALJ was biased in favor of the General Counsel. This exception should be denied on the basis that it does not accurately reflect the record and is unsupported by argument in Respondent's brief.
- ALJ interrupts Respondent's questioning of General Counsel's witness because responses show lack of credibility (see, i.e., T 52-53, 60)

- A review of the transcript cited by Respondent reflects that the ALJ “interrupted” Respondent’s cross-examination to overrule an objection made by Counsel for the Acting General Counsel and that the ALJ stated that he could not hear the witness’s answer. The Judge then proceeded to ask the witness clarifying questions to determine how employees are scheduled. (Tr. 52-53.) Later, the ALJ, upon noticing that the witness did not understand Respondent’s question told Respondent that he did not think the witness understood the question and re-asked the witness the question initially posed by Respondent counsel. (Tr. 60.)
- ALJ permits General Counsel and Union to reopen record after hearing had been closed for the day for house-keeping purposes, then allows General Counsel and/or Union to successfully request that onerous burden be placed on Respondent relating to expert report (see, i.e., T 525-526, 605, 640-641, 909-913)
 - Pages 525-526 and 605 of the Transcript do not reflect that the ALJ permitted the General Counsel and the Union to reopen the record after the hearing had been closed for the day, rather they reflect the offering of various documents into the record by Counsel for the Acting General Counsel and a request for a document subpoenaed by the General Counsel but not yet produced by Respondent that the Counsel for the Acting General Counsel intended to offer into the record before resting her case.
 - Pages 640-641 reflects a proffer, by Respondent Counsel, of anticipated testimony of an expert witness it planned to call and the General Counsel and Union’s positions on Respondent’s proffer.
 - Pages 909-913 reflects direct examination by Respondent of its witness Linda Ruggio and a request, pursuant to the Federal Rules of Civil Procedure, for a report regarding the expert witness Respondent indicated it would be calling at the next day of hearing.
- ALJ instructs General Counsel and/or Union on manner in which to prosecute case against Respondent (see, i.e., T 23-24 [date bargaining obligation allegedly attached], 251 [provides basis for introduction of evidence])
 - At pages 23-24 of the Transcript, the ALJ posed a question to the General Counsel regarding the date alleged in the complaint upon which the bargaining obligation attached. Subsequently, at pages 487-488 of the Transcript, Counsel for

the Acting General Counsel moved to amend the complaint as to the date the bargaining obligation attached. Respondent counsel did not object to the amendment.³⁸ Moreover, Respondent has cited to no authority standing for the proposition that it is inappropriate for the ALJ to ask questions about the complaint where he does not understand the allegations he is charged with the responsibility of deciding.

- Page 251 of the Transcript does not reflect that the ALJ provided a basis for introduction of evidence. Rather, it shows Counsel for the Acting General Counsel offering in a relevant document, Respondent's objection to the document, Counsel for the Acting General Counsel's argument regarding the relevance of the document and the ALJ asking a clarifying question to understand that relevance. This certainly does not reflect the ALJ providing a basis for the introduction of evidence.
- ALJ engages in *ex parte* communications with the General Counsel (see, i.e., RX 17; T 650-651)
 - The record does not reflect that the ALJ engaged in *ex parte* communications with the General Counsel. However, even assuming *arguendo* that the ALJ did engage in *ex parte* communications with a party, Respondent has not offered a scintilla of evidence or argument showing that it was prejudiced by the alleged conduct.
- ALJ exhibits hostility towards Respondent's counsel (see, i.e., T 338, 341 [ALJ rules that Respondent's clarifying question is argumentative], 498 [ALJ chastises Respondent's counsel for not complying with his "clear instructions" when instructions were not clear and ALJ refused to place them on the record], 756-757, 910-911)
 - The Board applies an exacting standard in determining whether an ALJ's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for hearing before a new ALJ. *International Brotherhood Of Teamsters, Local 722, AFL-CIO (Kasper Trucking, Inc.)*, 314 NLRB 1016, 1030 (1994). The standard "requires that the ALJ's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process." *Id.* A reading of the record fails to

³⁸ Respondent did argue that it was not waiving its argument that the complaint in this matter violated *Peyton Packing and Jefferson Chemical*. (Tr. 488-490.)

sustain Respondent's argument that the ALJ evidence such bias and partiality as to require rejection of his findings and conclusions.

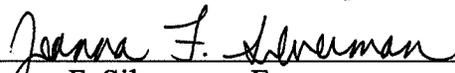
As evidenced by the foregoing discussion, rather than reflecting improper conduct or bias on the part of the ALJ, these baseless and inflammatory accusations merely reflect the weakness of Respondent's argument. Accordingly, exception 81 should be denied in its entirety.

Unlike exception 81, Respondent provides argument and case law in support of its exception 82. In exception 82, Respondent asserts that the ALJ erred in precluding the Acting General Counsel from litigating the instant matter because he did not consolidate this matter with Case No. 31-CA-30105 ("test of certification case"). The ALJ's finding is amply supported by case law. Under *Jefferson Chemical Co.*, 200 NLRB 992 (1972), *Peyton Packing Co.*, 129 NLRB 1358 (1961), and *Cresleigh Management*, 324 NLRB 774 (1997), the General Counsel is precluded from attempting to twice litigate the same act or conduct as a violation of different sections of the Act or to relitigate the same charges in different cases. Here, the Acting General Counsel is not attempting to twice litigate the same conduct as a violation of different sections of the Act or to relitigate the same charge in different cases. The instant matter is an unfair labor practice case involving various alleged violations of 8(a)(1), 8(a)(3), and 8(a)(5) including unilateral changes and a refusal to provide information while the test of certification case arose out of representation case 31-RC-8795. The ALJ properly found that the matters are distinct and the Acting General Counsel properly exercised his discretion in not consolidating the cases.

IV. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel submits that all of Respondent's exceptions, save Exceptions 5, 8, and 35, should be denied.

Dated at Los Angeles, California, this 25th day of January, 2012.


Joanna F. Silverman, Esq.
Simone Pang, Esq.
Counsel for the Acting General Counsel

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

Cases: 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 and 31-CA-29966

CERTIFICATE OF SERVICE

I hereby certify that I served the attached copy of the **ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties listed below on the 25th day of January, 2012.

VIA E-FILE

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
www.nlr.gov

VIA E-MAIL:

Lisa C. Demidovich, Esq.
United Nurses Assn of California/Union of
Healthcare Professionals, NUHHCE,
AFSCME, AFL-CIO
lisa@unac-ca.org

Theodore R. Scott
Little Mendelson, P.C.
tscott@littler.com



Mara Estudillo
Secretary to the Regional Attorney
NLRB, Region 31