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April 8, 2013

BY E-FILED, EMAIL, AND U.S. MAIL

The Honorable Gerald A. Wacknov
Administrative Law Judge
Division of Administrative Law Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, California 94103-1779

Re: Encino Hospital Medical Center
NLRB Case No. 31-CA-066945

Dear Judge Wacknov:

As you know, we represent Encino Hospital Medical Center ("Encino" or the "Company") in the above-referenced matter. We are writing in response to the National Labor Relations Board's ("NLRB" or the "Board") decision on March 19, 2013 to remand your decision in this matter for further consideration and a supplemental decision. Please find the Board's decision enclosed as an attachment.

The Board's decision calls for a supplemental decision which addresses the credibility of certain testimony as well as multiple factual issues in the underlying matter. Encino contends that remand is inappropriate, as the issues identified by the Board were fully litigated, briefed, and considered in the underlying proceedings. To that end, Encino will shortly file a Petition for Writ of Mandamus to halt the remand of the case with the Court of Appeals for the D.C. Circuit. Should the Circuit deny Encino's petition, we request that you permit the parties to submit briefing on the issues the Board has highlighted for consideration.

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Thank you for your courtesy in this regard.

Very truly yours,

JACKSON LEWIS LLP

Jonathan A. Siegel

JAS/MB/mrs
Enclosures

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4829-4772-9427, v. 1

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Encino Hospital Medical Center[1] *and* SEIU United Healthcare Workers–West. Case 31–CA–066945

March 19, 2013

ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On July 26, 2012, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Acting General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand this case to the judge for further findings, analysis, and conclusions consistent with this Order Remanding. The judge dismissed the complaint's allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Patricia Aguirre. In exceptions, the Acting General Counsel contends that the judge made factual findings and credibility determinations that are not consistent with the record, and that he did not provide sufficient legal analysis. Based on our review of the record, we find merit to aspects of the Acting General Counsel's exceptions and will remand this proceeding to the judge for further examination and a supplemental decision.

I. FACTUAL BACKGROUND

A brief review of the factual background of the case is helpful. On August 17, 2011,[2] the attorney general of the State of California held a hearing to decide whether the Respondent's parent company, Prime Healthcare Foundation, Inc. (Prime), should be permitted to buy another hospital. Employee Aguirre spoke at that hearing. She said that conditions of employment at the Respondent's hospital had deteriorated as a result of its acquisition by Prime, implying that the employees of the other hospital would suffer similarly if the purchase were approved. Ultimately, the attorney general decided not to approve the sale.[3]

Aguirre, who worked as a lab technician/phlebotomist, served as a union shop steward. Aguirre processed a grievance for employee Iris Arse; the grievance settled when Arse resigned in lieu of termination and the Respondent agreed not to contest her claim for unemployment benefits. Nonetheless, Arse's unemployment claim was denied, and Aguirre agreed to assist her at an appeal on September 27. The judge found that, on September 23, Aguirre lied to one of the Respondent's human resources employees in an attempt to elicit information about the Respondent's position towards Arse's appeal. The judge also found that Aguirre had previously received a 3-day suspension in October 2010 and warnings for various infractions in May 2011. The Respondent discharged Aguirre on October 11.

II. THE ACTING GENERAL COUNSEL'S *WRIGHT LINE* THEORY

Whether Aguirre's discharge was unlawful under the Acting General Counsel's principal theory of liability must be determined by application of the Board's decision in *Wright Line*.[4] Under *Wright Line*, the Acting General Counsel satisfies his initial burden by showing that (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer bore animus towards the employee's union activity. If the Acting General Counsel meets his initial burden, the employer may defend by proving that it would have taken the adverse action even absent the employee's union activity. See, e.g., *Vision of Elk River*, 359 NLRB No. 5, slip op. at 3–4 (2012). If, however, the Acting General Counsel shows that the reasons the employer provides for its action are pretextual—that is, false, or not in fact relied upon—the employer fails to carry its rebuttal burden by definition. Id. slip op. at 7.

Citing *Wright Line*, the judge found that the Respondent's discharge of Aguirre was lawful. He assumed arguendo that the Acting General Counsel carried his initial burden of demonstrating that Aguirre's union activity was a motivating factor in the Respondent's decision to discharge her. With that assumption, the judge found—without any explanation or supporting analysis—that the Respondent demonstrated that it would have discharged Aguirre regardless of any animosity it harbored against Aguirre or the Union for engaging in protected activity. The judge's application of *Wright Line* here did not fully address certain issues presented by the record evidence, particularly whether the Respondent knew about and bore animus towards Aguirre's statements at the attorney general's August 17 hearing and whether the Respondent

[1] The name of the Respondent was amended at the hearing from "Encino Hospital Medical Center–Prime" to "Encino Hospital Medical Center."

[2] All dates are in 2011, unless stated otherwise.

[3] The record does not establish the reason for the attorney general's decision.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

in fact relied upon Aguirre's alleged misconduct when it decided to discharge her. Accordingly, we will remand this matter to the judge for further consideration, as described below.

A. Aguirre's Protected Union Activity at the Attorney General's Hearing

Although the judge found that Aguirre spoke on behalf of the Union's political department before the California attorney general about the alleged negative effects on employees after Prime acquired the Respondent, he did not explicitly determine whether Aguirre's presentation was statutorily protected activity. It seems clear, however, that, in testifying at the hearing, Aguirre solicited government action—i.e., the attorney general's rejection of the proposed acquisition of a hospital by Prime—in order to protect employees from an asserted potential degradation of their employment conditions and in furtherance of the Union's efforts to hold Prime accountable for its treatment of its employees. Activity of this kind generally is protected by the Act. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–68 (1978); *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 29–31 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001).

B. Respondent's Possible Knowledge of Aguirre's Testimony at the Attorney General's Hearing and Animus Toward that Activity

The judge failed to address evidence that bears on the Respondent's knowledge of Aguirre's union activity. The judge did find that the Respondent's CEO, Bob Bills, mentioned the attorney general's decision at a bargaining meeting on September 22, and stated that "employees had testified against the acquisition" of the other hospital.[5] But the judge also found that the record did not reflect whether Bills and Respondent's HR Manager Barbara Back knew about Aguirre's presentation. In making this latter finding, the judge did not address evidence showing that (1) Aguirre was the only one of the Respondent's employees who spoke at the attorney general's hearing; (2) the Union had distributed handbills that highlighted her testimony and contained only her photograph; and (3) the Respondent posted handbills responsive to the Union's position in close temporal and physical proximity to the union handbills that featured Aguirre's testimony. The judge also did not address the testimony of bargaining committee member Kenton Smartt, who observed Bills directing remarks towards Aguirre about the Union's negative publicity of Respondent's working conditions. On remand, the judge should address this evidence to determine whether to draw a reasonable inference that the Respondent knew of Aguirre's testimony at the attorney general's hearing. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995).

The judge should also fully address evidence bearing on the question of whether the Respondent bore animus towards Aguirre's protected activity at the attorney general's hearing. Although he noted that the Respondent had produced a handbill criticizing the Union for its position towards Prime, the judge did not discuss whether that handbill supported any inferences about the Respondent's knowledge of, or animus towards, Aguirre's activity as a union spokesperson. Nor did the judge discuss whether a finding of animus was supported by testimony from multiple witnesses that CEO Bills appeared to be angry when he spoke to the Union about the attorney general's decision. The judge should evaluate this evidence, as well as the timing of Aguirre's discharge, and analyze whether it supports finding that the Respondent had knowledge of, and bore animus towards, Aguirre's testimony.

C. Evidence of Possible Pretext and the Respondent's Wright Line Defense

In his conclusion, the judge determined that the Respondent established it would have taken the same action "regardless of any animosity harbored by the Respondent against Aguirre or the Union for engaging in" protected activity, but he failed to explain the basis for this finding. Moreover, in assuming that the Acting General Counsel had met his initial *Wright Line* burden, the judge failed to address evidence of pretext, which, if found, would defeat the Respondent's defense because its stated reasons for Aguirre's termination "either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); see also *Rood Trucking Co.*, 342 NLRB 895, 898 (2004). As explained below, because of the judge's failure to resolve inconsistencies in the testimony of the principal witness he relied on, and his failure to consider whether the Respondent adhered to its disciplinary procedures, we remand for further analysis on whether the Respondent's reasons for discharging Aguirre were pretextual.

The judge credited Barbara Back's testimony "in its entirety," and discredited the testimony of Aguirre and Union Representative Richard Ruppert "to the extent that their testimony differs from that of Back." But the judge failed to reconcile apparent inconsistencies in Back's

[5] The bargaining meeting took place shortly after the attorney general's decision denying Prime's acquisition of the other hospital. Although the judge made no finding about when the decision was made, the record suggests that it was September 20.

testimony. For example, Back testified that her normal practice was to interview an employee before making a decision to discharge, but also testified that she did not interview Aguirre until approximately a week after the decision to discharge her was made. The judge credited Back's testimony that she was prepared to reverse the discharge decision at the final interview, without addressing her testimony that she never made a discharge decision by herself.[6] Nor was Back's testimony on her customary procedures consistent with her telling Aguirre's union representative at that interview that it was "not necessary" to allow him to question Aguirre's accusers because "the final decision [had] been made."

On remand, the judge should resolve these apparent inconsistencies and analyze whether the Respondent's apparent departure from its normal practice suggested pretext. Other questions the judge should analyze on remand include whether Aguirre's conduct violated the specific policy the Respondent cited on her termination document, whether the Respondent provided shifting explanations indicative of pretext by not raising its progressive discipline policy until the hearing, and whether the timing of Aguirre's discharge or the disproportion between her infraction and the discharge suggested pretext.

III. THE ACTING GENERAL COUNSEL'S ALTERNATIVE THEORY

Finally, the judge entirely failed to address the Acting General Counsel's alternative theory that the discharge of Aguirre was unlawful because the conduct for which the Respondent purports to have discharged her was protected union activity. Specifically, the Acting General Counsel alleges that the Act protected Aguirre's efforts to procure information related to Arse's unemployment benefits appeal, and, further, that her statements in connection with that activity did not lose the protection of the Act under *Atlantic Steel Co.*, 245 NLRB 814 (1979). The judge should also analyze this theory.

IV. CONCLUSION

For the reasons explained, in the absence of detailed factual findings and credibility resolutions, we are unable to resolve the Acting General Counsel's exceptions to the judge's decision. Accordingly, we remand this proceeding to the judge with the following instructions. The judge shall reexamine the record in this case and prepare a supplemental decision. The decision shall specifically set forth credibility determinations regarding all of the relevant record testimony, a complete and accurate statement of the relevant facts, and a new legal analysis of each issue. In remanding this case, we express no opinion as to the correctness of the judge's original disposition of the merits of the complaint allegation.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Gerald A. Wacknov for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. March 19, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Juan Ochea-Diaz, Esq. and *Simone Pang, Esq.*, for the General Counsel.

Jonathan A. Siegel, Esq. (Jackson Lewis LLP), of Newport Beach, California, for the Respondent.

Monica Guizar, Esq. (Weinberg, Roger, & Rosenfeld), of Los Angeles, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice of hearing in this matter was held before me in Los Angeles, California, on April 30 and May 1, 2012. The charge in the captioned matter was filed by SEIU United Healthcare Workers–West (the Union) on October 14, 2011. Thereafter,

[6] For example, the judge did not address Back's testimony that in addition to CEO Bills, Regional HR Director Tari Williams, and Assistant General Counsel Mary Schottmiller also participated in the decision to discharge Aguirre. We note that the Respondent did not call Bills, Williams, or Schottmiller to testify. Because all three would reasonably be assumed to favor the Respondent's position and to have relevant factual knowledge, our precedent permits an inference that, had the Respondent called them, they would have testified adversely to the Respondent on factual issues. See *Champion Rivet Co.*, 314 NLRB 1097, 1098 fn. 8 (1994). The judge should consider on remand whether such an inference is warranted.

on February 28, 2012, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging violations by Encino Hospital Medical Center–Prime (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Acting General Counsel (the General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation operating an acute care hospital in Encino, California. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of $250,000 and annually receives and purchases at its Loveland, Colorado facility goods, materials, and services valued in excess of $5000 directly from points outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issue in this proceeding is whether the Respondent has terminated an employee in violation of Section 8(a)(1) and (3) of the Act.

B. Background

Facts and Analysis

The Respondent operates a hospital. Two unions represent the hospital employees, the Union herein and SEIU 121, which represents the Respondent's registered nurses. There are a total of approximately 400 employees who work at the hospital, about 80 percent of whom are represented by the two unions. The Respondent and Union have entered into at least two prior collective-bargaining agreements, the last agreement extending for over 4 years, from January 1, 2007 through March 31, 2011.[1]

Barbara Back began working for the Respondent on July 5 as human resources manager. Among her other duties and responsibilities, Back deals with the two unions representing the hospital employees; she handles grievances and participates in negotiations for both union contracts.

Patricia Aguirre worked for the Respondent for some 13 years as a lab technician/phlebotomist from 1998 to 2011. She was terminated by Back on October 11. She was a shop steward and a member of the Union's bargaining team. As a shop steward, she handled grievances. As a member of the Union's bargaining team, she attended bargaining meetings with Respondent's representatives including HR Representative Barbara Back and Respondent's CEO, Bob Bills.

At the time of Aguirre's discharge, negotiations for a successor contract were ongoing and the relationship between the Respondent and Union was contentious, although discussions at the bargaining table were apparently less adversarial.

Prime Healthcare Foundation (Prime) owns and operates the Respondent. The Union, among other things, was attempting to block the sale of a different hospital, Victor Valley Community Hospital (Victor Valley), to Prime. On August 17, Aguirre spoke on behalf of the Union's political department as a patient advocate at a hearing before the attorney general of California, attended by between 100 to 200 individuals, regarding the adverse changes at the Respondent's hospital after it had been purchased by Prime. She spoke about the negative effects on patients, the employees and the community as a result of the acquisition, implying that the same negative effects would befall Victor Valley.[2]

Aguirre, as well as other employees, were featured on many union handbills, posted or otherwise disseminated at the Respondent's facility, supporting the Union's positions against Respondent's practices and policies.

The sale of Victor Valley Community Hospital to Prime was not approved. The record evidence herein does not show why the license was denied. Richard Ruppert, a business agent and negotiator for the Union, testified that at a negotiating session on September 22, CEO Bob Bills mentioned the hearing before the attorney general, stating that employees had testified against the acquisition of Victor Valley. He said that the license had been denied, and that in his opinion "he thought that was unfortunate and very sad." He also said that the Union had "conducted ourselves professionally in our bargaining and had nonadversarial type of conversations, though we disagreed in bargaining." Aguirre, who also attended the session as a bargaining committee member, testified that Bills said it was the Union's fault that Prime lost the sale of Victor Valley, and that as a result Victor Valley may have to go bankrupt.

It appears that the Union was accusing Prime of engaging is some type of illegal conduct, and on September 19, 2011, the Respondent distributed a handbill to its employees entitled "The SEIU is DESTROYING Your Jobs." The handbill goes on to state:

> Since its purchase Prime Healthcare has invested millions of dollars in much needed capital equipment at Encino Hospital. But, instead of working with hospital management, the SEIU has reacted by doing everything possible to destroy the Hospital. It looks like they want to ensure that Encino closes.
>
> . . . .

[1] All dates or time periods hereinafter are within 2011, unless otherwise specified.

[2] The record reflects that 47 other individuals also spoke at the hearing for and against the acquisition. It appears that no supervisors or managers of the Respondent attended this hearing and the record herein does not reflect whether Bills or Back were aware of Aguirre's participation at the hearing.

> How do you gain anything if the SEIU is successful in destroying the company that you work for? SEIU leaders are fond of talking about how you are the union. If that's true, then it's time to say ENOUGH! Tell the SEIU leadership to start focusing on bargaining and stop using lies that threaten to put Encino Hospital out of business.

The incident resulting in Aguirre's termination involves a grievance matter over the termination/resignation of former employee Iris Arse. Aguirre had assisted Arse, a union member and friend, in a grievance matter that resulted in an agreement between Arse and the Respondent's former HR manager, Gail Brow, that Arse would resign rather than be terminated for some unexplained infraction; further, it was agreed that if Arse chose to apply for unemployment the Respondent would not contest her claim to receive unemployment benefits.

Arse's claim for unemployment was denied; the reason for the denial is not contained in the record and there is no showing or contention that the Respondent contested the claim. Arse appealed the denial of her claim, and a hearing on the appeal was scheduled for September 27. Arse advised Aguirre of this, and asked if Aguirre would assist her and take her to the hearing, as Arse did not drive. Aguirre agreed.

On September 23, Aguirre went to the Respondent's HR department to attempt to elicit some information from HR personnel regarding the unemployment appeal hearing. Rather than ask HR Manager Back whether any representative of the Respondent would be attending or representing the Respondent at the hearing, she first approached Christina Armenia, human resources assistant, who occupied a cubicle in the office. Armenia testified that Aguirre walked over to her desk, "lowered her tone and asked if I knew about a hearing regarding Iris Arse, which would take place on September 27." Armenia replied that she didn't know anything about it. Aguirre asked if she knew whether Carmen Soto, the human resources coordinator, would be attending the hearing. Armenia told her that she could ask Soto who was in the adjoining cubicle. Aguirre went to Soto's cubicle, and Armenia heard her tell Soto, "Barbara [Back] told me that you or Bob [Bills] would be attending the hearing." Soto told Aguirre that she was unaware of the hearing, and advised her to speak with Back herself.[3]

Soto testified that she overheard Aguirre whispering to Armenia, but could not make out what Aguirre was saying. She did hear Armenia tell Aguirre to speak with Soto. Then Aguirre approached Soto and asked, in a normal tone, "Do you know who will be attending Iris Arse's hearing?" Soto said she was not aware of such a hearing, and Aguirre replied, "Barbara [Back] told me that either you or Bob [Bills] would be attending." Soto, who had recently returned from a 3-month maternity leave, told Aguirre that she was not sure.

Soto asked Armenia about Aguirre's whispered conversation with her. It concerned her that Aguirre, by whispering to Armenia, seemed to be attempting to obtain information in a secretive fashion, as there simply was no reason to whisper. Soto also was concerned that in her absence perhaps she had been assigned by Back to attend a hearing that she knew nothing about. Later in the day, Soto approached Back, explained what had happened and what Aguirre had said to her and had whispered to Armenia, and asked whether she was supposed to attend any type of hearing. Back replied that she and Aguirre had never had the conversation that Aguirre had related to Soto.[4]

Upon receiving Soto's report of the incident and, upon further questioning, learning exactly what had happened, Back spoke with Armenia and with Laboratory Director Erlinda Roxas, Aguirre's supervisor. She also reviewed Aguirre's personnel file. Back, who had never had such a conversation with Aguirre, and had never been contacted by Aguirre about the matter, concluded from the foregoing reports and circumstances that Aguirre was lying and was using Back as leverage in attempting to manipulate Back's subordinates into eliciting information.

The review of Aguirre's personnel file disclosed the following:

- October 13, 2010, written warning and three-day suspension for attempting to take a cell phone photo of a patient in the geropsychology unit.
- May 12, 2011, written warning for two separate infractions:

  March 17, 2011, warning for compromising the quality of patient care by mislabeling specimens;

  April 5, 2011, warning for compromising the quality of patient care by mislabeling a urine sample specimen with another patient's name.

  Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to meet standards will result in further disciplinary action up to and including termination.
- May 12, 2011, verbal and written warning for two separate infractions:

  May 3, 2011, warning for barging in and interrupting a May 3, 2011 meeting to which she had not been invited between Respondent's managers and a union representative;

  May 5, 2011, warning for interfering with the security guard and nursing supervisor in the performance of their jobs.

  Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to comply with standards of conduct and/or interfere with other employees from performing their work will result in further disciplinary action up to and including termination.
- May 12, 2011, written warning for bossing around a mentally challenged employee on May 5, 2011, during a biohazard medical waste inspection and throw-

[3] I credit the testimony of Armenia, who appeared to be a credible witness and had no reason to fabricate her testimony.

[4] I credit the testimony of Soto, who appeared to be a credible witness and had no reason to fabricate her testimony.

> ing an open bag of biohazard waste materials at him while he was performing his duties.
>
> Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to comply with patient and employee safety standards in the workplace and to continue to interfere with other employees from performing their work will result in further disciplinary action up to and including termination.

None of the foregoing warnings had been issued to Aguirre during the tenure of HR Manager Back, who did not begin working for the Respondent until July 2011. Back testified that any inappropriate behavior that is unlawful or violates protocol, policy, procedure, or is otherwise impermissible, is considered collectively in the application of the Respondent's progressive discipline system; progressive discipline does not begin anew for each distinct or unrelated type of infraction.[5] The Union has never argued that each succeeding step in the progressive discipline system may only be imposed for the same or similar misconduct. Suspension and final warnings are the same thing in terms of severity, so that if a person has received a suspension it is the same as having received a final warning.

Upon a review of all the circumstances, including Aguirre's personnel file, Back determined that Aguirre's conduct in falsifying a conversation and using her name as leverage to gain information was dishonest and manipulative, and recommended that Aguirre should be discharged. Back testified as follows:

> I talked with Erlinda [Roxas] and reviewed the personnel file. My main concern was that Pat's [Aguirre] communication with the HR team, not only the whispering, but the communication in using my name as leverage to get confidential information. That was a concern for me because, number one, it's dishonest. Number two, it's trying to manipulate the girls to try and gain information that she easily could have come to ask me for.[6]

On October 11,[7] after receiving authorization to terminate Aguirre, Back, with Laboratory Director Erlinda Roxas as a witness, summoned Aguirre, accompanied by Union Representative Ruppert, into the office and confronted her with the reports of Armenia and Soto. Aguirre denied that any such conversations had taken place and repeatedly accused the two HR representatives of lying. Aguirre did say that she had asked Armenia for the phone number of a former supervisor.[8] Ruppert argued that Aguirre was performing her duties as a union steward in assisting Arse with the unemployment matter. Aguirre, however, disagreed with Ruppert, and maintained that she had been attempting to assist Arse only as a friend and not as a union steward. Ruppert asserted that Back was discharging Aguirre because of her union activities, and again Aguirre shook her head and said, "No, I just wanted to support my friend."

Back testified that as Aguirre merely denied the conversations and offered no credible response to the accusations, or any witnesses, or any excuse or explanation warranting a lesser degree of discipline, there was simply no reason to defer the termination and continue the investigation. She handed Aguirre her final paycheck and terminated her. The paycheck had been prepared in advance in conformity with State law that requires final payment at the time of termination.[9]

Back testified that although she had grievance and related discussions with other union stewards, she had never had any prior meetings or interaction with Aguirre other than their mutual attendance at bargaining sessions. Back specifically denied that the discharge of Aguirre was motivated by Aguirre's conduct in her capacity as a union steward or union advocate.

There is no showing that the Respondent has terminated or otherwise discriminated against any other union stewards or union advocates for engaging in activities on behalf of the Union.

Assuming arguendo that the General Counsel has established a prima facie case under *Wright Line*,[10] I find the Respondent has met its *Wright Line* burden of proof by demonstrating that Aguirre would have been discharged under the circumstances herein regardless of any animosity harbored by the Respondent against Aguirre or the Union for engaging in concerted, protected, or union activity.

On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended[11]

---

[5] I discredit Union Representative Ruppert's testimony to the contrary.

[6] Back, who convincingly attested to her high regard for and insistence upon honesty by and between her, her HR staff, and other employees, was a particularly forthright witness, and I have no reservations about crediting her testimony in its entirety. I do not credit the testimony of Aguirre or Ruppert to the extent that their testimony differs from that of Back.

[7] Back testified that Aguirre would have been terminated a week earlier had she appeared at work on October 6, as scheduled.

[8] This particular conversation, according to Armenia's testimony, which I credit, had occurred several weeks prior to the September 23 conversations. Aguirre testified that in attempting to assist Arse with her unemployment claim, she had asked Armenia for the phone number of Olga, a former supervisor. Olga spoke Spanish and had been helpful in assisting Aguirre speak with Arse, who apparently was not fluent in English.

[9] During a subsequent conversation in the cafeteria that same day, Aguirre again said to Back that the HR representatives were lying, and added that Back, too, was lying.

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The complaint is dismissed in its entirety.
Dated: Washington, D.C. July 26, 2012

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mended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2013, I caused the foregoing *LETTER TO HON. GERALD A. WACKNOV DATED APRIL 8, 2013* to be e-filed with the Division of Judges, National Labor Relations Board, using the CM/ECF system.

I further certify that I caused a copy to be served via electronic mail upon the following:

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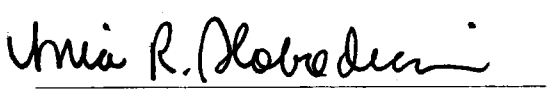

MIA R. SLOBODIEN