

**Veritas Health Services, Inc. d/b/a Chino Valley Medical Center and United Nurses Associations of California/Union of Healthcare Professionals, NUHCE, AFSCME, AFL-CIO.** Cases 31-CA-029713, 31-CA-029714, 31-CA-029715, 31-CA-029716, 31-CA-029717, 31-CA-029738, 31-CA-029745, 31-CA-029749, 31-CA-029768, 31-CA-029769, 31-CA-029786, 31-CA-029936, and 31-CA-029966

April 30, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On October 17, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, an answering brief to the Acting General's exceptions, and an answering brief to the Charging Party's exceptions. The Acting General Counsel filed exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions,<sup>3</sup> to modify his remedy,<sup>4</sup> and

<sup>1</sup> In its motion to stay proceedings, the Respondent contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. The motion is denied. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB 633, 633 1 fn. 1 (2013).

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility findings, we find it unnecessary to rely on the adverse inferences drawn by the judge based on the failure of the Respondent to call certain witnesses to corroborate or rebut testimony of other witnesses at the hearing. In addition, the Respondent asserts that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The judge stated that employee Ronald Magsino worked for the Respondent from January 2005 until May 10, 2010. Magsino was in fact

employed by the Respondent until his discharge on May 20, 2010. The judge also misstated that employee Rosalyn Roncesvalles' supervisor, Cheryl Gilliatt, was present at her March 31, 2010 meeting with Chief Medical Officer James Lally, and that Tina "Yago," rather than "Arriaga," was present during the May 14, 2010 meeting with Magsino and Chief Nursing Officer Linda Ruggio. These inadvertent errors do not affect our disposition of any issue in this case.

In exceptions to the judge's finding that it violated Sec. 8(a)(1) by issuing subpoenas duces tecum to employees, the Respondent argues that the Petition Clause of the First Amendment protects its subpoena requests. For the reasons fully set forth in *Santa Barbara News-Press*, 358 NLRB 1540 (2012), we find no merit in this argument.

We find it unnecessary to pass on the Acting General Counsel's exception to the judge's failure to find that statements made by the Respondent in a May 6, 2010 meeting violated Sec. 8(a)(1) by threatening employees with discipline, as such additional finding would be cumulative and would not affect the remedy.

In its exceptions, the Union renews its request for litigation expenses, contending that the Respondent's motion to reopen was frivolous. We affirm the judge's decision to deny the request because this case does not present the level of truly frivolous litigation that warrants such a remedy. *Frontier Hotel & Casino*, 318 NLRB 857, 864 (1995), enfd. denied *Unbelievable Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997); *Waterbury Hotel Management LLC*, 333 NLRB 482 (2001), enfd. 314 F.3d 645 (D.C. Cir. 2003).

<sup>3</sup> In accordance with the Acting General Counsel's exception, we shall amend the judge's Conclusion of Law 3 to specify the Union's status as a labor organization within the meaning of Sec. 2(5) of the Act and its status as the exclusive representative of the Respondent's unit employees for the purpose of collective bargaining within the meaning of Sec. 9(a) of the Act.

In adopting the judge's conclusion that the Respondent unlawfully discharged prounion employee Ronald Magsino, we agree in particular with the judge's finding that the Respondent's asserted reason for Magsino's discharge—his alleged breach of HIPAA—was pretextual. As the judge found, the Respondent failed to establish that Magsino's handling of certain medical records in defending himself against disciplinary action breached HIPAA. Indeed, as noted by the judge, the Respondent conceded that HIPAA permits access to medical records for the "resolution of internal grievances" like the one filed by Magsino. Moreover, the evidence establishes that the Respondent granted him permission to view, copy, and use the file in question for that purpose, and there is no evidence that he exceeded the scope of that authorization. In that respect, we agree with the judge's rejection of the Respondent's contention that it had a good-faith belief that Magsino had violated HIPAA. That the Respondent "seized upon the alleged HIPAA violation" to discharge him is further corroborated by the fact that, as found by the judge, the Respondent did not discipline either a doctor or Manager Cheryl Gilliat, both of whom similarly accessed and used the file in question in connection with Magsino's grievance. Finally, even had the Respondent concluded that Magsino was guilty of misconduct, it initially advised him that he would be disciplined and retrained, but then abruptly discharged him without any explanation for the change. In all of those circumstances, we agree with the judge that the Respondent's HIPAA charge against Magsino was a "thinly veiled attempt to disguise its unlawful motive."

<sup>4</sup> In accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB 518 (2012), we shall order the Respondent to compensate the unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

We shall also order the Respondent, in addition to our usual notice-posting remedy, to mail copies of the notice to all per diem employees

to adopt the recommended Order as modified and set forth in full below.<sup>5</sup>

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for the introductory paragraph of the judge's Conclusion of Law 3.

"3. United Nurses Associations of California/Union of Healthcare Professionals, NUHHCE, AFSCME, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act and, since April 2, 2010, has been the exclusive collective-bargaining representative of all of the employees in the unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act. By the following conduct Chino Valley has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act."

#### ORDER

The National Labor Relations Board orders that the Respondent, Veritas Health Services, Inc. d/b/a Chino Valley Medical Center, Chino Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Threatening to close the facility and terminate employees if they selected a union.
  - (b) Threatening employees with loss of benefits if they selected the Union as their collective-bargaining representative.
  - (c) Coercively interrogating employees about their union activities.
  - (d) Impliedly threatening employees with layoffs if they supported a union.
  - (e) Telling employees that they might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union.
  - (f) Giving employees the impression that their union activities are under surveillance.
  - (g) Threatening to discipline employees because they engaged in union activities.

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and former employees employed at any time since the alleged unfair labor practices. We find such a remedy necessary to effectuate the policies of the Act because former employees lack access to the Respondent's facility and will not see the posted notice, and per diem employees do not regularly report to the Respondent's facility and thus may not see the notice during the 60 days it remains posted.

<sup>5</sup> We have modified the judge's recommended Order to conform to the violations found, specifically including the Respondent's unlawful unilateral change to wages, hours, and other terms and conditions of employment, to add the notice-mailing remedy, and in accordance with *Latino Express*, supra. We shall substitute a new notice to conform to the Order as modified.

(h) Informing employees that they could no longer take vacations longer than 2 weeks because the employees had selected the Union to represent them.

(i) 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.

(j) Broadly prohibiting employees from speaking to the media, including about the Union or about terms and conditions of employment.

(k) Serving subpoenas on employees and unions that request information about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding.

(l) Unilaterally changing wages, hours, and other terms and conditions of employment of employees without first giving the Union notice and an opportunity to bargain about such changes.

(m) More strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule because employees supported the Union.

(n) 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.

(o) Disciplining employees who fail to attend mandatory meetings.

(p) Discharging or otherwise discriminating against any employee for supporting the Union or any other union.

(q) Beginning to discipline employees who fail to attend mandatory meetings without first giving the Union an opportunity to bargain concerning the change.

(r) 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.

(s) Failing to provide the Union with requested information that is presumptively relevant to the Union's performance of its representational duties.

(t) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time, regular part-time and regular per diem registered nurses employed by the Employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

(b) Rescind the discipline imposed pursuant to stricter enforcement of the tardiness rule and restore the practice that existed prior thereto.

(c) Rescind the discipline imposed on employees who failed to attend mandatory meetings.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of employees, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(e) Restore 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, and make whole, with interest compounded daily, those employees for any losses resulting from the unlawful termination of this practice.

(f) Furnish to the Union in a timely manner the following information requested by the Union on April 9, 2010: lists of employees including details as to full or part-time status, hourly wage rates, wage increases, fringe benefits, classifications, shifts, addresses and phone numbers, employee handbooks, company policies and procedures, job descriptions, benefit plans, costs of benefits, and disciplinary notices.

(g) Within 14 days from the date of this Order, offer Ronald Magsino full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(h) Make Ronald Magsino whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(i) Compensate Ronald Magsino for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(j) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Ronald Magsino, and within 3 days thereafter notify him

in writing that this has been done and that the discharge will not be used against him in any way.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at its facility in Chino, California, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all per diem employees and former employees employed by the Respondent at any time since March 8, 2010. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 8, 2010.

(m) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by a responsible management official or by a Board agent in the presence of a responsible management official.

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to close the facility and terminate employees if they selected a union.

WE WILL NOT threaten employees with loss of benefits if they select the United Nurses Associations of California/Union of Healthcare Professionals, NUHHCE, AFSCME, AFL-CIO (the Union) as their collective-bargaining representative.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT impliedly threaten employees with layoffs if they support a union.

WE WILL NOT tell employees they might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union.

WE WILL NOT give employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to discipline employees because they engaged in union activities.

WE WILL NOT inform employees that they can no longer take vacations longer than 2 weeks because the employees had selected the Union to represent them.

WE WILL NOT tell employees that the family atmosphere at Chino Valley is over and that from now on Chino Valley would begin strictly enforcing its policies and procedures, including tardiness, because the employees voted for the Union.

WE WILL NOT broadly prohibit employees from speaking to the media, including about the Union or about terms and conditions of employment.

WE WILL NOT serve subpoenas on employees and unions that request information about employees' union

activities, under circumstances where that information is not related to any issue in the legal proceeding.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of employees without first giving the Union notice and an opportunity to bargain about such changes.

WE WILL NOT more strictly enforce a tardiness rule and discipline employees pursuant to that more strictly enforced rule because employees supported the Union.

WE WILL NOT more strictly enforce a tardiness rule and discipline employees pursuant to that more strictly enforced rule without first giving the Union an opportunity to bargain concerning the change.

WE WILL NOT discipline employees who fail to attend mandatory meetings.

WE WILL NOT discharge or otherwise discriminate against employees for supporting the Union or any other union.

WE WILL NOT begin disciplining employees for failing to attend mandatory meetings without first giving the Union an opportunity to bargain concerning the change.

WE WILL NOT terminate 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.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time, regular part-time and regular per diem registered nurses employed by the Employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

WE WILL rescind the discipline we imposed as a result of our stricter enforcement of the tardiness rule and restore the practice that existed prior thereto.

WE WILL rescind the discipline we imposed on employees who failed to attend mandatory meetings.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of employees, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Ronald Magsino full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Magsino whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Ronald Magsino for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Ronald Magsino, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL restore 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, and WE WILL make whole those employees for any losses resulting from the unlawful termination of that practice, with interest compounded daily.

WE WILL furnish to the Union in a timely manner the relevant information requested by the Union on April 9, 2010.

VERITAS HEALTH SERVICES, INC. D/B/A CHINO VALLEY MEDICAL CENTER

*Joanna F. Silverman and Simone Pang, Esqs.*, for the General Counsel.

*Theodore R. Scott and Brady J. Mitchell Esqs. (Littler Mendelson, P.C.)*, of San Diego, California, for the Respondent.

*Lisa C. Demidovich, Esq.*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on June 6–10 and 15, 2011. The United Nurses Association of California/Union of Healthcare Professionals, NUHCE, AFSCME, AFL–CIO (the Union) filed the first charge on May 7, 2010,<sup>1</sup> and the General Counsel issued the order consolidating cases and consolidated complaint on February 23, 2011.

The complaint alleges that Veritas Health Services, Inc. d/b/a Chino Valley Medical Center (Chino Valley) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees with loss of employment, termination, and adverse consequences if they supported a union, threatening and impliedly threatening employees with a reduction in benefits if employees supported a union, interrogating an employee about union activities, telling employees that since employees chose union representation they would lose previously-enjoyed benefits, threatening employees that it would more rigorously enforce its policies and enforce previously unenforced policies since the employees chose union representation, instructed employees not to speak to third parties and/or the media about their protected concerted activities and/or their terms and conditions of employment, threatening to discipline employees since they chose union representation, creating the impression among employees that their union and/or protected concerted activities were under surveillance, and issuing subpoenas duces tecum to employees and union representatives requiring them to produce communications with each other and signed authorization and membership cards.<sup>2</sup>

The complaint alleges that Chino Valley violated Section 8(a)(3) by discharging employee Ronald Magsino because he supported the Union.

The complaint also alleges that Chino Valley violated Sections 8(a)(3) and (5) by beginning to enforce a rule requiring employees to be present for mandatory meetings and disciplined employees who broke this rule; beginning to enforce a rule requiring employees to clock in for their shifts at their start times, without any grace periods, and disciplined employees who broke this rule, all because employees engaged in union activities and all without first giving notice to the Union and giving it an opportunity to bargain about the changes.

Finally, the complaint alleges that Chino Valley violated Section 8(a)(5) when it notified employees that they could not make shift changes once schedules are posted, and ceased reimbursing employees who are not full-time for time spent attending certification classes,<sup>3</sup> without first giving notice to the Union and giving it an opportunity to bargain about the changes and by refusing to provide the Union with requested and relevant information.

Chino Valley's answer admitted the allegations in the complaint concerning the filing and service of the charges, jurisdic-

<sup>1</sup> All dates are in 2010, unless otherwise indicated.

<sup>2</sup> At the trial, I granted the General Counsel's motion to withdraw an allegation in the complaint concerning a *Weingarten* violation.

<sup>3</sup> At the trial, I granted the General Counsel's motion to withdraw the portion of this allegation concerning failure to reimburse expenses.

tion and interstate commerce, the Union’s labor organization status, certain agency and supervisory status, appropriate unit, the election, the request and refusal to provide information, and the termination of Magsino. It denied that the Union had 9(a) status, the relevance of the requested information, and that it committed any unfair labor practices. Finally, it admitted that the Board certified the Union but denies that the certification is valid. The answer set forth a number of affirmative defenses.

On the entire record,<sup>4</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Chino Valley, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Chino Valley, a corporation, operates an acute-care hospital at its facility in Chino, California, where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods or services valued in excess of \$5000 directly from points outside California. Chino Valley admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Chino Valley employs about 560–570 persons of whom about 130–135 are nonsupervisory registered nurses. The election was conducted on April 1 and 2. The Union won the election 72 to 39, Chino Valley filed objections, and on January 25, 2011, the Board overruled the objections and certified the Union as the collective-bargaining representative of the unit employees. Chino Valley has refused to recognize the Union and continues to test the validity of the certification.

During the election campaign Chino Valley distributed campaign leaflets to employees urging them to vote “no.” One of the leaflets announced:

PROTECT YOUR FLEXIBILITY!

What Might Happen If A Union Contract Locks In Working Rules That Don’t Fit Individual Needs?

Have You Ever . . .

....

had your schedule rearranged to make it to school or another job?  
changed your schedule with a co-worker after it was posted?

....

made an honest mistake and your director treated it as nothing more than a lesson learned (our practice of “Just Culture)?[”]

....

<sup>4</sup> Chino Valley’s unopposed motion to correct transcript is granted.

Contracts require complete and consistent obedience to what is spelled out in the contract. If privileges that you value now are not in the contract, the rules in the contract will prevail.

CAN UNAC GUARANTEE THAT ANY OF THOSE THINGS WILL BE IN A UNION CONTRACT?

B. Alleged 8(a)(1) Violations

The complaint alleges that on about March 8 Chino Valley threatened employees with loss of employment if employees supported the Union. Lisa Metheny works part time as a registered nurse for Chino Valley. She has worked there for 16 years. On March 8, Roberta (Robin) Buesching, a labor consultant hired by Chino Valley to speak to employees about the Union, visited Metheny’s work area. Metheny heard Buesching tell two other nurses that during negotiations, if lawyers were going “head-to-head” and management wouldn’t give anything else, there could be a strike. Buesching said that Chino Valley could bring in nurses from other facilities to replace them and Chino Valley could possibly keep some of those nurses at Chino Valley to work. One of the employees appeared frightened and asked Buesching if Chino Valley would let her continue to work. Buesching assured the employee that it would and then said, “You know, also the hospital could be closed down and they could fire all the nurses and then reopen it and keep some of the nurses if they want and bring in others from other facilities.”

The facts in the preceding paragraph are based on Metheny’s testimony. Metheny’s demeanor was convincing. Importantly, she did not strike me as a person with the knowledge to simply invent the fine-line distinctions presented by her testimony. Moreover, Chino Valley’s cross-examination established that Metheny’s testimony was consistent with the affidavit she had earlier given the Board during the investigation of the charge. Buesching denied making those statements but I did not find her to be a convincing witness.

Analysis

While Chino Valley lawfully told employees of the possibility of a strike and consequent permanent replacement of employees, Buesching also said that Chino Valley could close down, fire the employees, and then reopen; the latter statements are clearly unlawful. By threatening to close the facility and terminate employees if they selected a union, Chino Valley violated Section 8(a)(1). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

The complaint alleges that Chino Valley impliedly threatened an employee with reduction of benefits if employees supported the Union. Teer Lina has worked for Chino Valley since 2000 and works in the emergency room. Her supervisor is Cheryl Gilliatt. But during a time before the election, Carlos Gonzalez was emergency room supervisor. One day before the election, Lina was summoned into Gonzalez’ office where Gonzalez handed her the leaflet described above and said how the relationship between management and the employee would change when the Union was elected. Gonzalez then mentioned how Lina took her vacation an entire month overseas. Lina did not respond. These facts are based on Lina’s credible testimony.

ny. Gonzales, who is no longer employed by Chino Valley, did not testify at the hearing.

It will be recalled that the leaflet Gonzalez gave to Lina described how current flexibility could be lost if the Union was selected. Gonzalez then mentioned how Lina took her vacation for an entire month as she went to visit her home country. The implication was clear: Lina might not be able to take a 1-month vacation if the Union was selected by the employees as their bargaining representative. The coerciveness of the statement was heightened by the fact that she was summoned to Gonzalez' office. By threatening employees with loss of benefits if they selected the Union as their collective-bargaining representative, Chino Valley violated Section 8(a)(1). *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000).

Continuing, the complaint alleges that Chino Valley threatened employees with a reduction of benefits if employees supported a union. Ronald Magsino worked for Chino Valley from January 2005 until May 10, 2010. His discharge is alleged to be a violation of the Act and is discussed below. He worked as a registered nurse in the emergency room. A couple of weeks before the election he attended a meeting held in the conference room at Chino Valley. Present were Ruggio and Susanne Richards, Chino Valley's vice president of operations; less than 10 nurses were also present. Richards displayed slides about the Union. She explained about employees paying dues, the benefits employees already enjoyed at Chino Valley without the Union, and that after negotiations, employees could end up with more, the same or less benefits, and if the Union is selected, communications with Chino Valley have to go through the Union. Richards also said that if the Union gets voted in, the employees might lose or would lose the family atmosphere and flexibility of scheduling.

The foregoing facts are based on Magsino's credible testimony. Richards admitted having such a meeting and showing slides to employees. She also testified that she had been trained concerning what she could and could not say about a union to employees. Importantly, however, she did not deny telling employees that they might lose the family atmosphere and flexibility of scheduling.

#### Analysis

As indicated, Richards stated that employees might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union. By doing so Chino Valley violated Section 8(a)(1). *Flagstaff Medical Center*, 357 NLRB 659, 664 (2011); *Gissel Packing*, supra.

Next, the complaint alleges Chino Valley interrogated an employee about her union activities and impliedly threatened an employee with adverse consequences if employees supported the Union. Rosalyn Roncesvalles has worked at Chino Valley as a nurse for about 5-1/2 years and beginning in 2009 she became a per diem employee. As such she generally works only 1 day per week. She works in the emergency room where Gilliatt is her supervisor. She is paid \$35 per hour, plus \$4 per hour for the night shift, plus \$1.50 as a mobile intensive care nurse. Roncesvalles pictures, along with the pictures of many other employees, appeared in fliers distributed by the Union before the election; the pictures showed the employees holding

signs indicating that they supported the Union. On March 31, Roncesvalles was instructed to go to the conference room because James Lally, Chino Valley's chief medical officer, wanted to talk to her. Present in the conference with Lally were Ruggio and two other persons. After Roncesvalles said good evening, Lally asked how her evening was going. Roncesvalles replied that it was going okay. Lally produced the flier with Roncesvalles' picture and asked if she knew about the flier. Roncesvalles did not answer. Lally then looked at the flier and said, "[W]here are you at? Let me look at you. Oh, there you are. You look nice in this picture." Lally said that he knew that the signs the employees were holding were actually blank when they took the picture and the language on the sign was thereafter inserted into the blank sign held by the employees. Again Roncesvalles did not reply. Lally then jokingly belittled the flier and the employees appearing in it by saying that it was a good thing they didn't fill in blank sign held by one employee with "you're stupid" and an arrow pointing to the picture of another employee and filling the blank sign of that employee with "you're dumb" and an arrow pointing back to the first employee. Lally then asked Roncesvalles how long she had worked at Chino Valley; she replied she had worked there about 5 years. He then asked whether Chino Valley had "laid-off anyone during the five years" and she said, "No." Lally added that Chino Valley had "been through a lot of crises and still did not layoff anyone," Roncesvalles replied, "[Y]es." Lally ended by saying that he "knows what's going on in Chino . . ." and that he does not like the Union and he wanted Roncesvalles to vote no for him because they had a good working relationship even without the Union. Lally then mentioned that there was food available and Roncesvalles could help herself; Roncesvalles declined the offer. Roncesvalles had never before personally met Lally.

As further background, the Union admitted that Lally was correct when he asserted that some employees held blank signs that were thereafter filled in with words of support for the Union.

The facts in this section are based on Roncesvalles' credible testimony which seemed to have good recall of this meeting. Lally did not testify. I infer that his testimony would not have been helpful to Chino Valley.

#### Analysis

Questioning employees about their union activities is not necessarily a violation of the Act. Rather, all relevant circumstances must be considered to determine whether the interrogation was coercive. *Rossmore House*, 269 NLRB 1176 (1984). On the one hand, Roncesvalles was an open supporter of the Union; her picture appeared in a flier distributed to employees. On the other hand, the questioning was repetitive in the sense that Lally asked about whether Roncesvalles had seen the flier, where her picture appeared in the flier, and whether she knew that some employees in the flier had actually been holding blank signs. Importantly, Lally did not disclose to Roncesvalles the sources of his information; this might have made the questioning more rhetorical and less inquisitorial in nature. Lally was one of Chino Valley's highest ranking officials. Indeed, Roncesvalles had never met him before this meeting.

The location of the interrogations occurred away from the work floor in a conference room. Roncesvalles' supervisor, Gilliatt, was also in attendance. Roncesvalles faced Lally and Gilliatt alone. Under all the circumstances, I conclude that the questioning was coercive. By coercively interrogating employees about their union activities, Chino Valley violated Section 8(a)(1).

As described above, Lally then asked Roncesvalles how long she had worked at Chino Valley and she replied she had worked there about 5 years. He then asked whether Chino Valley had laid off anyone during the 5 years; she said no. Lally added that Chino Valley had been through a lot of crises and still did not layoff anyone; Roncesvalles replied yes. Lally ended by saying that he "knows what's going" on in Chino, that he does not like the Union and he wanted Roncesvalles to vote "no" for him because they had a good working relationship even without the Union. Lally thereby raised the matter of the lack of layoffs, even through hard times, and then linked that subject to how he did not like unions and said he wanted Roncesvalles to vote "no" in light of their good working relationship. Implicit in these comments was that with a union, Lally's good working relationship with Roncesvalles would end and layoffs could occur. By impliedly threatening employees with layoffs if they supported a union, Chino Valley violated Section 8(a)(1). *National Assn. of Government Employees*, 327 NLRB 676, 680-681 (1999), and cases cited therein.

The complaint also alleges that Chino Valley threatened an employee with termination because of his union activities and created the impression among its employees that their union activities were under surveillance. A couple of days after the election, Lally again spoke to Magsino, this time at an ambulance bay. Lally said he was going to give Magsino a warning. Lally said that Magsino had been really good about the whole union thing and they were saying that Magsino violated the solicitation policy. Lally continued, saying that they saw Magsino in a camera talking to a group of nurses during work hours and organizing something. When Magsino replied, "Dr. Lally . . ." he was not allowed to continue as Lally said he knew it was crap and they are making him do it. He said that the policy had been in place for a while and that he thinks the Union would be able to protect Magsino. Magsino asked when he could expect the letter; Lally said anytime before the end of the day. Magsino asked whether he would be written up or suspended; Lally said no, that it was grounds for termination. Apparently the plan of action described by Lally was changed, as nothing came of the alleged solicitation and no warning was given.

The foregoing facts are based on Magsino's credible testimony. I again infer that had Lally testified, his testimony would not have been helpful to Chino Valley.

#### Analysis

As indicated, Lally stated that Chino Valley had observed Magsino on camera engaging in what Chino Valley thought was union activity. This gave Magsino the impression that his union activity was under surveillance. By doing so, Chino Valley violated Section 8(a)(1). *Flexsteel Industries*, 311 NLRB 257 (1993). Lally also threatened to discipline Magsino because of what Chino Valley perceived to be his union activi-

ties. By threatening to discipline employees because they engaged in union activities, Chino Valley violated Section 8(a)(1).

The complaint also alleges that Chino Valley told employees that since they chose union representation, they would lose previously-enjoyed benefits. Terri Hower is a charge nurse and an admitted supervisor for Chino Valley. After the election in around late April, she announced to several nurses in the Telemetry department that employees could no longer take vacations longer than 2 weeks. Employees, including Tyrone Clavano, had previously been allowed to take vacations for periods over 2 weeks.

These facts are based on Clavano's credible testimony; at the time Hower made the announcement he had recently returned from an extended vacation in the Philippines. Hower, for her part, did not deny making those statements but instead testified that she could not recall making them.

#### Analysis

Hower's announcement of the change in vacation policy was not explicitly linked to the employee's selection of the Union. However, it came shortly after the election and was not accompanied by any other reason for the change. Remember that before the election, as described above, Chino Valley explicitly threatened employees that they would no longer be able to take month long vacations if they selected the Union. And Hower's announcement occurred in the context of many other unfair labor practices, described above and below. Under these circumstances, I conclude that the employees would reasonably link the announcement with their selection of the Union to be their collective-bargaining representative. In reaching this conclusion I rely the Supreme Court's admonition that we:

[M]ust take into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up implications of the latter that might be more readily dismissed by a more disinterested ear.

*Gissel Packing*, supra at 617. By informing employees that they could no longer take vacations longer than 2 weeks because the employees had selected the Union to represent them, Chino Valley violated Section 8(a)(1).

Next, the complaint alleges that Chino Valley created the impression among its employees that their union activities were under surveillance. Dolly Casas is a charge nurse and an admitted supervisor for Chino Valley. In May, Tyrone Clavano and other employees were having a conversation in the intensive care unit. Casas approached the group and said, "[W]hat are talking about because we're supposed to know what you are talking about." These facts are based on Clavano's credible testimony. Casas testified that she did not recall saying those words to Clavano and others and she did not remember much of anything else she was questioned about. I did not find her demeanor convincing.

#### Analysis

Like the preceding complaint allegation, the comments here were not explicitly linked to union activity. But here too, Chino Valley had earlier unlawfully given an employee the impres-

sion that his union activity was under surveillance. For reasons stated in the previous analysis section, I conclude that employees would reasonably make the connection to their union activities. By giving the impression to employees that their union activities were under surveillance, Chino Valley violated Section 8(a)(1).

Next, the complaint alleges that Chino Valley unlawfully threatened to more vigorously enforce its policies and enforce previously unenforced policies since employees chose union representation and instructed employees not to speak to third parties and/or the media about it. In early May, mandatory meetings for unit employees were held in the first floor conference room. Present at various times for management were Linda Ruggio, director of nursing, Arthi Dupher, director of human resources, and Cheryl Gilliatt, manager. Lex Reddy, Chino Valley chief executive officer, spoke at these meetings. Reddy told the employees that the election was over and they had to move on. He told the employees that from then on policies and procedures would be strictly enforced and that violators would be dealt with accordingly, being late and sick calls would be monitored. He said that there would be no more family atmosphere at Chino Valley. Reddy informed employees that Chino Valley was contesting the results of the election because the Union used charge nurses to intimidate the staff. Reddy said that Chino Valley knew about the employees' *Weingarten* rights but employees would be disciplined without a union representative present. He informed employees that someone had scratched Gilliatt's car with a key and he displayed a photograph of the car and blamed this on the Union. He mentioned that someone had been negligent in the emergency room. Reddy continued, informing the employees that Chino Valley would be hiring some additional nurses. He said they should make the newly-hired employees feel welcome. Reddy then instructed employees not to speak to the media but rather they should through channels.

The foregoing facts are based on a composite of the credible testimony of Teer Lina, Marlene Bacani, Vincent Hilvano, Ronald Magsino, Yesenia De Santiago, Lisa Metheny, and Tyrone Clavano. In this regard, I rely heavily on the testimony of Clavano; he seemed to have a clear and accurate recollection of what Reddy said at this meeting. Indeed, shortly after the meeting he made notes of what was said there. I note that Reddy did not testify at the hearing; I infer that his testimony would not have been favorable to Chino Valley. I have considered Gilliatt's and Dupher's testimony concerning these meetings but, I did not find their demeanor convincing; it seemed that they were attempting to disclose only evidence helpful to Chino Valley and withhold or gloss over testimony not so helpful. For example, when Gilliatt was examined by the Union concerning this meeting the following transpired:

Q. Okay. And do you recall who was present at that meeting other than you and Lex Reddy?

A. No, I don't recall.

Q. Do you recall anything that Lex Reddy said in that meeting?

A. I don't recall, no.

Q. Do you recall if Lex Reddy said anything about the Union?

A. I really, it's vague to me, the whole meeting. I don't recall. I'm sorry.

Q. Do you recall Lex Reddy showing a picture of your car?

#### Analysis

The foregoing facts show that Reddy announced the end of the family atmosphere at Chino Valley and that henceforth, because the employees voted for the Union, Chino Valley would begin strictly enforcing its policies and procedures, including tardiness. By doing so Chino Valley violated Section 8(a)(1). *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 495 (1995), citing *United Artists Theatre*, 277 NLRB 115 (1985). Reddy also instructed employees not to talk to the media but instead they should go through channels. In this regard Reddy did not narrowly tailor this instruction to not speak to the media on behalf of Chino Valley; rather it was a broad prohibition. Employees have a Section 7 right to speak to the media about the Union and to concertedly discuss their terms and conditions of employment. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990); *Auto Workers Local 980*, 280 NLRB 1378 (1986), *enfd. mem.* 819 F.2d 1134 (3d Cir. 1987); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). By broadly prohibiting employees from speaking to the media, including about the Union or about terms and conditions of employment, Chino Valley violated Section 8(a)(1). In its brief, the Union requests that I find that a related rule in Chino Valley's written confidentiality policy is unlawful. I decline to do so. The rule is not alleged to be unlawful in the complaint and the General Counsel did not challenge the policy either at the hearing or in his brief. The bare minimum of due process requires that a respondent know ahead of time what it must defend against.

The complaint alleges that by serving subpoenas duces tecum on employees and the Union, Chino Valley violated Section 8(a)(1). The hearing on the objections to the election began on May 10. One of the issues in that hearing was whether the conduct in favor of the Union by Chino Valley's supervisory charge nurses tainted the election results. Prior to that hearing, Chino Valley served issued subpoenas duces tecum to current or former employees and representatives of the Union requesting, *inter alia*, the following information:

Any and all documents relating to any communication during the relevant time period between you 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 you signed, if you were employed by Respondent as a Charge Nurse during said period,

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

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

The subpoena advised employees that if they were never employed as a charge nurse during the relevant time period, Chino Valley was willing to allow the documents to be produced to the hearing officer for:

[A]n *in camera* inspection, whereupon only non-privileged documents that are relevant to the Employer's Objections are provided to the Employer.

Tyrone Clavano has worked for Chino Valley as a registered nurse since July 2005. He received a subpoena duces tecum to appear at the hearing and he brought documents with him to comply with the subpoena but he was not required to actually give those documents to Chino Valley.

#### Analysis

Employers are generally not entitled to know which employees sign union cards. To do otherwise would discourage support for a union because employees might fear retaliation from their employer if the employer was armed with information concerning who had signed cards. *National Telephone Directory Corp.*, 319 NLRB 420 (1995). However, under certain circumstances employees can be required to reveal this information. *Guess?, Inc.*, 339 NLRB 432 (2003). Applying the analysis set forth in that case, the information sought by Chino Valley was not relevant to the issues at the objections hearing. Had Chino Valley narrowly subpoenaed information concerning the union activity of its supervisory charge nurses a different conclusion might be reached. But here Chino Valley sought information about employees' union activities with other employees and with the Union.

In its brief, Chino Valley argues that by advising the employees of the possibility of an *in camera* inspection by the hearing officer, it cured any otherwise unlawful requests. I disagree. The 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 to Chino Valley. Also, antiunion employees might be quite willing to share with Chino Valley the prouction activities of other employees. Chino Valley also raises *BE & K Construction Co.*, 351 NLRB 451 (2007). There, after remands from the Supreme Court concerning the need for the Board to recognize the First Amendment Rights of an employer, the Board concluded that the filing and maintenance of a reasonably-based lawsuit does not violate the Act. But here Chino Valley's conduct went well beyond what is protected by the First Amendment. It sought information that, even under broad discovery rules, was not related to any issue in the proceeding. In other words, Chino Valley's conduct was not "reasonably based." Certainly the Supreme Court in *BE & K* did not intend to privilege a lawsuit to compel employees to disclose evidence of their union activities and the union activities of others where that matter is not related to any legitimate issue. I am mindful of the Supreme Court's admonitions to the Board that the Act should not be interpreted in a manner that even chills the exercise of First Amendment rights. But this is not such a case. Here Chino Valley sought under the guise of subpoenas information that was not related to the legal proceeding and which otherwise violated the Act. By serving subpoenas on employees and unions that request information

about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding, Chino Valley violated Section 8(a)(1). *Dilling Mechanical Contractors*, 357 NLRB 544, 545 (2011).

#### C. The 8(a)(3) Allegation

The complaint alleges that Chino Valley fired Ronald Magsino in violation of Section 8(a)(3). Magsino was a visible supporter of the Union prior to the election; he talked to fellow nurses about the Union, helped arrange meetings with the Union and nurses, and his picture appeared frequently in flyers distributed by the Union. Indeed, a day or two before the election Lally appeared at a nursing station in the emergency room with such a flier in his hand and announced to Magsino that he was a "movie star" because his picture appeared in the flyer three times. Magsino smiled but said nothing.

I now turn to describing the events surrounding Magsino's termination. I first describe the written warning Chino Valley gave Magsino; although this discipline is not alleged to be unlawful, it is intimately tied to his subsequent termination. I alert the reader that Chino Valley contends that it fired Magsino for violating the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in that he accessed certain medical records and then copied a medical record that contained the transaction number<sup>5</sup> and a patient's medical record; I do this so that the reader may observe how Chino Valley itself handled such information.

At some point the California Department of Public Health inspected certain emergency room records. Thereafter Ruggio advised Gilliatt that the Department had found that Magsino and another employee, Yesenia De Santiago, did not take the vital signs of a patient a second time before the patient was discharged from the emergency room. Ruggio instructed Gilliatt to give Magsino a written warning. On May 5, Gilliatt summoned Magsino and showed him a final written warning, dated May 4, concerning events that occurred on April 1. The "reason for the action," according to the written warning, was:

Unsatisfactory work performance. Per California Department of Public Health surveyors, upon review during a complaint survey it was found that the documentation failed to meet the Standard of Care regarding appropriate re-assessment of a patient and failure to comply with Chino Valley Medical Center's Policy regarding re-assessment.

The "facts and events," again according to the warning, were:

See attached. On 4-1-10, Ronald was the primary nurse for patient MR# 178946. Ronald failed to obtain and document updated vital signs to patient Discharge Summary.

Note the use and dissemination of the patient's medical record number. The warning warned:

Continued failure to comply with any hospital policy will result in immediate termination with cause.

<sup>5</sup> The transaction number, otherwise described in the record a unit number or job number, is the number Chino Valley attaches to the transaction. This number may be used to locate and access the details of what occurred during the transaction.

Gilliatt said that she was giving Magsino a final written warning for unsatisfactory work performance. She explained that the Department of Health had come in and did a random audit of the charts and they discovered that Magsino and another employee did not reassess the patient's vital signs before releasing the patient from the emergency room. Gilliatt showed Magsino the nursing notes that Magsino had prepared concerning his treatment of the patient. The nursing notes contained the patient's name, medical record number, and transaction number. It also contained a description of the patient's medical condition and course of treatment. Gilliatt also showed Magsino the emergency room report containing the doctor's dictation regarding the patient visit; this document contains the patient's name, date of birth, and medical record number and describes how the patient was presented at the emergency room, the patient's signs and symptoms, and what the doctor did in terms of treatment and decision making. Gilliatt also showed Magsino Chino Valley's patient reassessment policy. Magsino looked at it and commented that the policy did not mention any requirement that a nurse had to repeat taking a patient's vital signs before being discharged from the emergency room. Magsino then asked if he could leave Gilliatt's office to more carefully review the emergency room report. Gilliatt allowed him to leave her office and also said that it was okay for Magsino to view and print a copy of the emergency room report as well; she wrote the patient's name and medical record number on a slip of paper and gave it to Magsino. Magsino then left the office and went to the nursing station where he accessed the electronic copy of his nursing notes and the emergency room report. He also printed a copy of the emergency room report. He then redacted the patient's name from the record using a marker, but he discovered that the name still appeared as if engraved on the copy, so he made a copy of that copy and then destroyed the original and first redacted copy of the medical record. Magsino returned to Gilliatt's office later that day, this time accompanied by coworker Ahmed Kassim. Magsino informed Gilliatt that he had reviewed the paperwork and according to the doctor's dictation the doctor was aware of the patient's blood pressure and the doctor was okay with the patient being discharged. Magsino also stated that there was nothing in the written policy concerning reassessment about taking the patient's vital signs. Rather, it indicates that the nurse should review the patient's chief complaint and that according to his nurse's notes he had done so. So he asked Gilliatt why he was getting a final warning. Gilliatt answered that Chino Valley was getting fined so that was why he was being disciplined. Magsino asked if Gilliatt thought this was unsatisfactory work performance and Gilliatt replied that she did not make the warning, that management just asked her to give the warning to him. Later that same day Gilliatt found Magsino at the nurses' station searching through material and writing things on scratch paper; Gilliatt told him that he had to get back to work and do his research at home. She admitted that she allowed Magsino to take the policies home with him.

A day earlier, on May 4, Chino Valley also gave a similar warning to Yesenia De Santiago. De Santiago was also a union supporter and her photo also appeared in literature the Union had distributed before the election. Like with Magsino warn-

ing, Gilliatt gave De Santiago the warning, explained that De Santiago could challenge the warning, allowed her to access the patient chart and wrote the patient's name and medical record number on a "sticky" for DeSantiago to use. Like Magsino, De Santiago accessed the patient's record and printed a copy of it.

Chino Valley invites its employees to use its internal grievance procedure. On May 6, Gilliatt had given a copy of this procedure to Magsino and urged him to use the procedure to challenge his written warning. On May 12, Magsino vigorously challenged his discipline under the grievance procedure. As described below, it is the content of that grievance that ultimately leads to Magsino's discharge. In his grievance Magsino wrote how Gilliatt informed him that Ruggio had instructed Gilliatt to give Magsino the final written warning. He went on to describe how the medical records showed that the patient had been presented to the emergency room complaining of flank pain, how the emergency room doctor was aware of the patient's high blood pressure, how the patient was in the emergency room for less than an hour, and how the doctor, of course, approved the discharge of the patient. He explained how the policies and procedures required him to assess and reassess the chief complaint of the patient—flank pain—and how he had done so and documented that in his nurse's notes. He stated that he examined the policies and procedures provided to him by Gilliatt and found nothing to indicate he should have reassessed the patient's blood pressure. He indicated:

If Chino Valley Medical Center would like RN's to take repeat vital signs when a patient is in the ER for less than one hour and the treating physician has ordered discharge knowing the initial vital signs, it must revise its policy regarding reassessment accordingly.

....

I respectfully request that the final written warning be removed from my file immediately, and that I receive written notification of the Hospital's decision.

Providing the highest quality of patient care is my constant objective, and I will continue to follow all known policies, standards of care, orders, and directives when treating patients in the ER.

Magsino had a number of documents attached to his grievance. One attachment was a copy of the emergency room report. This report describes the patient's condition upon arrival at the emergency room and the results of the physical examination. It sets forth the diagnostic data and how the doctor apparently treated the patient's complaint of flank pain with pain relief medication. Magsino was careful to redact the patient's name from the emergency room report. However, the medical record and transaction numbers remained in the attachment that Magsino provided to Chino Valley personnel. Another attachment was from the emergency room doctor that read as follows:

To whom it may concern,

In reference to unit # 178946, Ronald [Magsino] did inform me regarding her blood pressure. There was no indication for treating patient's blood pressure at the time. I did not order

any medications for her blood pressure. I reminded the patient to take her medications regularly.

In other words, the patient was already taking medication to control her blood pressure (Lipitor) and the doctor reminded the patient to take that medication regularly. The reader should note that the emergency room doctor also disclosed the transaction number involved.

Also attached to the grievance were a number of testimonials such as:

To Whom It May Concern:

I've had the pleasure of working with Ronald Magsino for 4 years. He is an excellent nurse and has always worked and conducted himself at the highest level. He takes pride in his work and is an outstanding nurse. Any questions about his dedication or commitment are without merit. Ronald has my complete confidence and support.

Sincerely,

Jose J. Diaz, M.D.  
Chino Valley Emergency Department  
Assistant Clinical Professor of Emergency Medicine  
Western University Medical School

Another testimonial read:

To Whom It May Concern:

My name is Lisa Giles and Ronald Magsino is one of my co-workers in the Emergency Room at Chino Valley Medical Center. In regards to his character he is always a team player and always willing to help his co-workers when they are in need. He has proven to be a great patient advocate by always putting their needs first. He continues to provide excellent patient care by furthering his education to learn better and more effective ways to help his patients. His kind and compassionate nature makes him a great asset to the ER and I am honored to work with him. Furthermore, I look forward to him mentoring me as I transition from EMT to RN. Thank you for your time and consideration.

Sincerely,  
Lissa Giles, EMT

Others descriptions included:

Ronald is a positive, influential, and inspiring person to me and in my work experience.

Working with Ronald has not only been a pleasure but a privilege.

and

I've seen Ronald take a deep interest in the lives of many of the people he comes in contact with. For example, Ronald taught me not only the value of helping others, but the importance of loyalty and commitment.

Ronald has many good qualities—he is caring, efficient, fair-minded, helpful, hard working, diligent and organized to name a few. Instead, I would simply like to state as a fellow co-worker, it is a pleasure to work with Ronald.

and

I know I can always depend on Ronald as my greatest resource. He is highly enthusiastic and very motivated when it comes to patient care. Ronald has excellent bed-side manners, very sensitive to patient's needs. Patient's respond to him with a smile and patients have told me, "He's such a nice nurse!"

and

I would like to take a moment to put into writing what an OUTSTANDING nurse Ronald Magsino is. His bedside manner is incredible, his knowledge is remarkable. He is such an inspiration to everyone around him. He always has a positive attitude and is always one step ahead to insure a great patient outcome.

I am currently an LVN and I hope one day I can be as great of an RN that Ronald is. It's hard to express in writing what a key attribute he is to our nursing staff. No words can really sum him up or adequately state how great Ronald is.

Per Chino Valley's grievance procedure Magsino submitted the grievance with the attachments to the human resources department.

On May 14 Magsino was summoned to Ruggio's office. There with Ruggio was Tina Yago, head of information technology. Ruggio said that on April 5 Magsino had viewed and printed a chart of a patient. After checking his schedule on his mobile phone to see if he worked that day, Magsino said that he had no idea why the record was printed that day and that the only thing he could think of was that he left his computer open and someone printed the patient record. Ruggio said that was a HIPAA violation.<sup>6</sup> Ruggio then said that Magsino had printed the chart of the same patient on May 5 and that was a HIPAA violation as well. Magsino explained that this was the time he received the final written warning from Gilliatt and Gilliatt gave him permission to copy the chart. Ruggio said that she would talk to Gilliatt about that. Ruggio asked what Magsino did with the record he printed. Magsino explained that after he printed the record he redacted with a marker the patient's name, birth date, date of service and left only the patient's medical record number and transaction number for reference. He explained that even after the redaction the patient's name remained engraved on the copy, so he printed a copy of the redacted version and shredded the original copy. Gilliatt said that was a violation also. Magsino retorted that when Gilliatt gave him the final written warning on May 5, she had an unredacted copy of the patient's record that included that patient's name, date of birth and date of service. Ruggio said that she would talk to Gilliatt about that also. Finally, Ruggio asked whether Magsino included a copy of the medical record with his grievance. After Magsino replied that he did, Ruggio stated that was another HIPAA violation. Magsino explained that he attached the redacted version in his grievance. Magsino asked if they wanted the copy of the medical record that he had retained; after Ruggio said yes Magsino left the office and retrieved the

<sup>6</sup> Chino Valley later excused Magsino from any wrongdoing concerning this April 5 incident.

copy from his backpack in his locker and came back gave it to her. Ruggio said that was another HIPAA violation.

On May 19 Ruggio prepared a "Potential Privacy Breach Reporting Form" describing the events involving Magsino and De Santiago and the potential HIPAA breaches. In that report Chino Valley acknowledged that Gilliatt did give Magsino and De Santiago permission to access the patient's medical record and had written the patient's name on a piece of paper so that they could do so. Importantly, the report also stated:

It is the opinion of [Chino Valley] that there was no breach when [Magsino and De Santiago] accessed the computer to review the electronic record as [they] did believe that [they were] accessing as part of [their] job because it was in direct relation to a disciplinary counseling [they] had received.

The report indicated that Chino Valley would retrain and reeducate both employees regarding accessing medical records and HIPAA and that Magsino and De Santiago would be given written warnings.

On May 20 Arti Dhuper, Chino Valley's human resources director, informed Magsino:

Thank you for the written dispute you submitted on May 12, 2010. I have conducted an investigation and the discipline will not be overturned.

Please be assured that there will be no retaliation as a result of your written dispute submitted on May 12, 2010.

Thus, Chino Valley never did address Magsino's contention that its existing policies did not require him to reassess the blood pressure of a patient complaining of treated for flank pain. After Dhuper gave Magsino this letter, she announced that Magsino can no longer work there because of the HIPAA violations; Remember the day before Ruggio reported that Magsino would receive a written warning and be retrained and reeducated. She gave him a termination notice that listed, under the heading "Has the employee been counseled and received counseling action for the same or similar reason" the following:

5/4/10: Per California Department of Public Health surveyor's documentation, employee failed to meet standard of care regarding appropriate re-assessment and discharge summary.

5/3/10: Not complying with the attendance policy (Policy #400.402).

I note the apparent disconnect between the similarity of attendance and patient care on the one hand and HIPAA matters on the other hand. Later in this decision, I describe how Chino Valley itself acknowledges this lack of similarity. Ruggio, who was also at the meeting, said that Chino Valley contacted the patient to advise the patient that there had been a breach in the privacy of her medical record and also advised the California Department of Public Health of the breach. Remember above Ruggio wrote that there was no breach and as described below Chino Valley Ruggio explained that there were four counts of HIPAA violations. First was when he viewed the chart on May 5; Remember the day before in the written report Ruggio acknowledged that this was not a HIPAA violation. Second was print-

ing the chart. Third was making copies of the chart. Fourth was when he put a copy of the chart in his backpack. Ruggio then added that when he attached the medical record to his dispute letter that was another violation of HIPAA.

That same day, May 20, Chino Valley sent a letter to the patient informing her of the accessing of her medical records. In that letter Chino Valley found it important to advise the patient:

We were able to establish that your records were not distributed to anyone else and your personal information was never compromised

After his termination for a period of time, Magsino was paid in excess of \$7000 while employed by the Union. He was no longer employed by the Union at the time of the hearing in this case.

Meanwhile, Yesenia De Santiago also submitted a grievance concerning the warning she had received. She too printed a copy of the patient's medical record and was thereafter summoned to Ruggio's office. Gilliatt was also there. Among other things, Ruggio told De Santiago that she had accessed a patient chart and that was a HIPAA violation. De Santiago replied that Gilliatt had given her permission to do so and in fact had written the patient's name and medical record number on a "sticky" so that she could do so; Gilliatt confirmed that she had done so. De Santiago also explained that otherwise she had no idea which patient she was being warned about and therefore no way to challenge the warning. Ruggio then asked why De Santiago had printed the medical record. De Santiago explained that she wanted to get the exact times to include in her written grievance. Ruggio answered that it would have been okay if Gilliatt had printed the record but it was not okay for De Santiago to print it herself. Ruggio warned that De Santiago might be fired or her record as a nurse might be blotted. However, unlike Magsino who was fired, De Santiago received a written warning on May 24 for:

Breach of information; HIPAA violation. Accessed patient electronic medical record and printed record without appropriate authorization.

This discipline is not alleged to be unlawful in the complaint. Even so, De Santiago received this warning despite the fact that Gilliatt *had* authorized her to access the record and had admitted doing so in the meeting with Ruggio. When Ruggio gave De Santiago a copy of the written warning, De Santiago asked whether she was being fired now that she had received two written warnings. Ruggio replied, "no" and explained that the written warnings were unrelated to each other; one was for treatment of a patient and the other was for HIPAA violations. Remember above, Magsino's identical two warnings were considered similar.

The facts in this section of the decision are based on Magsino's credible testimony. He impressed me as someone relating the facts to the best of his ability. His testimony is consistent with the written documents described above and overall consistency was again revealed during the cross-examination of him by Chino Valley. They are also based on De Santiago's testimony. Her tearfulness while testifying was certainly not staged for my benefit. Rather, it showed how these events viv-

idly remained in her memory. In certain respects the testimony of Magsino and De Santiago corroborated each other. For example, both testified that Gilliatt allowed them to access the patient records and gave them the patient's name and medical record number. I have considered but do not credit Gilliatt's testimony that she did not permit Magsino to copy the medical record. Given her admissions that she allowed Magsino to access the medical records and encouraged him to prepare a grievance but also admonished him that he could not research the matter while at work, her testimony in this regard seems unlikely, given that Magsino certainly could not access the medical records at home and as I have described elsewhere in this decision, I have not generally found Gilliatt to be a credible witness.

Importantly, records of the California Department of Public Health show that the alleged breaches of HIPAA reported to it by Chino Valley concerning Magsino and De Santiago were "unsubstantiated" in that:

No breach actually occurred, no information was shared. It was for personal use in defending themselves. (Internal P & P breach).

According to documents used by Chino Valley:

HIPAA permits use or disclosure of PHI (personal health information) for health care operations, which includes the resolution of internal grievances.

The term "**breach**" means the unauthorized acquisition, access, use, or disclosure of PHI that compromises the security or privacy of the PHI, unless the recipient would not reasonably have been able to retain the information.

The term "breach" does not include:

1. Unintentional acquisition, access, or use of PHI by an employer or individual acting under authority of a covered entity or business associate if:
  - a. The acquisition, access, or use was made in good faith and within the course and scope of employment (or other professional relationship); and
  - b. The PHI is not further acquired, accessed, used, or disclosed by any person

Employees have mistakenly sent medical records to the wrong address, thereby disclosing confidential information to third parties; those employees were counseled. An employee left a patient chart in a bathroom; Chino Valley considered that to be a HIPAA violation. That employee received a verbal warning and was reeducated. On another occasion, a patient's test order sheet was inadvertently given to the wrong patient; Chino Valley regarded this as a HIPAA violation. There is no evidence that the offending employee was disciplined. Of course, as Chino Valley points out, there is a difference between an unintentional breach of HIPAA and an unauthorized breach of HIPAA. However, there is no credible evidence as to why that difference should result in different penalties, especially where the unintentional breaches result in the actual compromise of a patient's personal medical information, something that did not occur in Magsino's case. Moreover, there is no credible evidence that Magsino's alleged breach was inten-

tional in the sense that he knowingly violated HIPAA. There is not even credible evidence that Magsino should have even reasonably known he was violating HIPAA because Chino Valley never produced a written policy that covered this situation or a training session or class that advised employees that they could not access and print a medical record, even with a manager's permission. To the contrary, the evidence shows that the information Chino Valley supplied to Magsino would objectively lead him to believe he was allowed to access the medical records. For example, the information security agreement that Chino Valley required Magsino to sign includes his agreement:

Not to operate or attempt to operate computer equipment without specific authorization from supervisors.

Not to disclose any portion of a patient's record except to . . . a recipient authorized by the Hospital who has a need-to-know in order to . . . discharge one's employment or other service obligation to the Hospital.

Other documents supplied by Chino Valley to Magsino indicate:

#### HIPAA & Confidentiality

(Health Insurance Portability and Accountability Act of 1996) All hospital personnel are obligated to protect patient privacy rights, including any form of media that is electronic, paper, oral, CD, or diskette. We value the confidentiality of our patients and information systems. Patient Health Information (PHI) is given only to those who have an appropriate and authorized need for this information. Patients have a right to privacy regarding PHI.

In other words, Chino Valley informed Magsino that while generally patient information should not be accessed or disseminated, it could be accessed with permission (Magsino had permission) and disclosed to those who had a need-to-know related to their employment at Chino Valley (Magsino needed to know in order to assert his employment related claim and HR needed to know in order to understand his grievance). Remember, Magsino did not gain information about a patient's medical condition or course of treatment that he did not already know; He treated the patient and Gilliatt had already shown him his nurse's notes and the doctor's dictation.

I have considered the testimony of Suzanne Richards. She is chief clinical officer and corporate compliance officer for Chino Valley. Her many duties include overseeing patient privacy issues. I conclude that her testimony is not credible as it pertains to the Magsino matter and I now explain why I reach that conclusion. Among other things, she testified that Ruggio informed her of a potential HIPAA breach when Magsino attached a copy of a medical record to something he gave to human resources. Richards had the Information Technology Department run a report concerning who had accessed the patient's medical record. The computer-generated report revealed that Magsino had accessed the patient's medical records on May 5 at 4:57 p.m. and then made a copy of a medical record. Richards testified that she then informed Ruggio that:

[T]here was activity on the patient's medical record when the patient was not in the hospital and I asked her to investigate a potential privacy breach.

The report, of course, also showed that Gilliatt had accessed the same patient's medical record and printed a copy of the same medical record that Magsino had printed; Gilliatt had a copy of the record and showed it to Magsino when she disciplined him. The report showed that this activity also occurred when the patient was not in the hospital. Richards testified that she concluded Magsino's conduct violated HIPAA and she later volunteered that Magsino (and De Santiago as well) be terminated for that conduct. When asked to explain why Gilliatt's accessing and copying the patient's medical report was not a HIPAA violation, Richards first testified that she believed that it could have been in connection with the state's request to view and copy the record; the state has a right to copy any record she explained. But then she testified that after she asked Gilliatt why Gilliatt accessed and copied the medical record she concluded that Gilliatt was performing quality assurance and therefore properly accessed and copied the medical records. When I asked Richards whether there was an exception in the law that allows employees to access medical records and patient information for use in internal grievance procedures she replied:

I would say no. We have a risk management policy 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. . . .

But Chino Valley never produced a copy of that policy, and no one else testified as to its existence. Indeed, Gilliatt did not follow such a policy; she admitted that she allowed both Magsino and De Santiago to access the medical records without anyone present while they did so. Ruggio was well aware of this fact and never chastised Gilliatt for failing to follow this alleged policy. And never in any of its written or verbal accounts of the reasons for Magsino's discharge did Chino Valley ever mention that Magsino should have had a manager with him when he accessed the medical records. I conclude Richards simply fabricated this testimony. And besides, she never directly answered my question. Richards conceded that typically the California Department of Health calls Chino Valley after Chino Valley reports an alleged breach of HIPAA and notifies Chino Valley of the outcome of the Department's investigation and then follows by sending Chino Valley a copy of its written report. However, when shown a copy of the California Department of Health report, described above, that showed that it concluded that no breach occurred, Richards was asked if she had seen that report. She answered, "I've seen hundreds of these forms." Richards testified that she would not know that report from any other report. I find this testimony incredible. In response to questions that I asked concerning how the process was to work when employees sought to disprove claims of poor patient care on their part, Richards ended her testimony by saying:

You're not supposed to just access a medical record and write an entire letter and then attach somebody's personal health information to that record. I don't know if that's been brought

[up] here, but this tells you everything about this person. I personally wouldn't want that in somebody's hand.

I make two comments about this testimony. First, it appears that at that point Richards was mixing her personal views with the existing policy that Magsino allegedly violated. Second, it leads me to infer that Ruggio never bothered to tell Richards that Magsino had redacted that patient's name from his copy of the medical record; Richards never testified that she was informed of this fact. This is important because, as Ruggio conceded, someone viewing Magsino's copy of the medical record would have no idea of who the patient was unless they could access Chino Valley's computer system and thereby connect the patient with the medical record, but Chino Valley has the ability, and indeed is required by law, to monitor such access and act accordingly. In sum, if Magsino's copy of the medical record pertained to Richards, no one would have been able to connect that record to her. I am left uncertain how, if at all, Richards' testimony would have changed if she had been informed of this fact.

I also reject much of the testimony given by Linda Ruggio. Parts of her testimony were given in response to leading questions, with Ruggio appearing eager to give the response sought by the question. I have also examined the notes she made of interviews during the investigation she conducted that lead to Magsino's termination. For example, the notes of her interview of De Santiago do *not* indicate that De Santiago claimed that Gilliatt allowed her access to the medical record but rather curiously the notes do indicate that De Santiago understood that she could not remove the records from the facility. Remember, there was no assertion that De Santiago had done so. To that extent it seems Ruggio was more concerned about building a case against Magsino than conducting an impartial interview and making accurate notes. Ruggio also had notes of her interview of Gilliatt after Ruggio directed Gilliatt to interview Magsino; those notes indicate that Gilliatt said that she:

[D]oes not recall ever telling [Magsino] it was okay to print as long as he blanked out the pts name and but to leave the account # or the MR # for future research use.

By the time of trial, Ruggio testified that Gilliatt flatly denied she ever permitted Magsino to print the medical record. Richards testified that Ruggio informed her that the California Department of Public Health:

[D]id report that they were not going to give us any kind of fine because they were happy with the disciplinary process of (Magsino and De Santiago); that the reason they weren't going to write anything was that the employee that took the record out of the building was not going to have the opportunity to take medical records because he had been discharged.

Of course, the Department said no such thing. This testimony shows the depth of the fabrications that Chino Valley created to justify its termination of Magsino.

Finally, I have considered the evidence proffered by Christy Navarro. She was offered by Chino Valley as an expert witness with respect to privacy issues involving California acute-care hospital standards, practices, and procedures. I conclude she is not qualified as an expert in those areas. Rather she is an em-

ployee with training and experience in those areas; that is not, of course, sufficient to qualify as an expert. Moreover, the proffered testimony does not qualify as the type of scientific, technical, or other specialized knowledge that would assist me. Instead of offering expert testimony on how hospitals must deal with HIPAA and related policies as they pertain to employee use of medical records to defend themselves against discipline, the proffered testimony dealt with the Navarro's assessment of the reasonableness of Chino Valley's actions against Magsino. Certainly under HIPAA Chino Valley must have a procedure in place that allows employee access to medical records under those circumstances yet safeguards patient privacy, but Navarro offered no insight into that area. And to the extent that Navarro's testimony can read that employees must first get a lawyer to do so, that testimony, standing alone, is simply not credible.

#### Analysis

I apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to determine whether Chino Valley unlawfully discharged Magsino. I have already described above Magsino's union activity and Chino Valley's knowledge of that activity. Chino Valley's animus toward that activity is shown by the numerous unfair labor practices it committed, as described both above and below. Magsino was fingered as a union "movie star" and was himself the subject of several unfair labor practices. His discharge occurred in the weeks following the election and, as described more fully below, it was part of a general crackdown Chino Valley initiated after the election. Moreover, prior to the election Magsino had no disciplinary record and was widely regarded among coworkers as a highly professional and competent employee. I conclude that the General Counsel has made a very strong showing in meeting his initial burden under *Wright Line*. Where, as here, the General Counsel makes a strong showing of discriminatory motivation, an employer's rebuttal burden is substantial. See *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); see also *Van Vlerah Mechanical*, 320 NLRB 739, 744 (1996).

I turn now to examine whether Chino Valley has shown that it would have fired Magsino anyway, even if he and the employees would not have supported the Union. As an initial matter, I conclude that Chino Valley has failed to show that Magsino's conduct violated HIPAA. In this regard I am careful not to conclude that Magsino did not violate HIPAA; I leave that assessment to the appropriate governmental authorities. Rather, I conclude only that to the extent Chino Valley relies on breaches of HIPAA to justify its firing of Magsino, it has failed to establish by a preponderance of the evidence that any violations occurred. In reaching this conclusion, I rely on the assessment of the California Department of Public Health that no breach occurred. Up through the trial Chino Valley provided no credible evidence concerning how, under HIPAA, Magsino would have been able to gain access to information necessary to defend against wrongful discipline; certainly such a procedure must exist. But finally in its brief, Chino Valley concedes that HIPAA allows access to patient's records for the "resolution of internal grievances" of the type filed by Magsino. But then it argues that this does not allow Magsino access because

"Magsino was a nurse and was employed by the Hospital to provide patient care, not to investigate or process internal grievances." Chino Valley provides no authority to support such a peculiar interpretation and I reject it. And in this regard Chino Valley ignores the fact that, as it knew, it had given permission to Magsino to access the information and even supplied him with the information to do so. Next, Chino Valley argues that even if disclosure of patient information was allowed, such disclosure should be "to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." But here all Magsino did was view the patient's record, print it so he could study it carefully on his own time, and attach a copy of the partially redacted record to his grievance, thereby allowing human resources to view the patient's full file if necessary. He appears to have nothing beyond what was necessary to effectively present his grievance.

Citing cases such as *Affiliated Foods*, 328 NLRB 1107 fn. 1 (1999), and *GHR Energy Corp.*, 294 NLRB 1011, 1012-1013 (1989), Chino Valley argues that even if Magsino's conduct did not "technically" violate HIPAA, Chino Valley acted under a good-faith, if mistaken, belief that he had done so. I reject that assertion; to the contrary, for reasons that follow I conclude Chino Valley seized upon the alleged HIPAA violation as a pretext in a thinly veiled attempt to disguise its unlawful motive. Chino Valley charged Magsino with a HIPAA violation when he first viewed the patient chart even though it knew that Gilliatt granted him permission to do so and even though it had otherwise indicated that this was not a HIPAA violation. Permitting an employee to do something and then using that as a basis to terminate the employee is a classic example of pretext.

Other facts support the pretextual nature of Magsino's discharge. When reporting the potential privacy breach, Chino Valley indicated it would give Magsino a written warning, yet the next day it fired him. The emergency room doctor revealed the transaction number in an attachment to Magsino's grievance, just as Magsino had done, yet Chino Valley was entirely indifferent to that potential HIPAA breach. Of course, that doctor was not a direct employee of Chino Valley. Nonetheless Chino Valley's own HIPAA policies cover doctors and those policies require action be taken against doctors for HIPAA breaches. As the Union points out in its brief, the emergency room doctor wrote his letter of support for Magsino over a month after the patient's emergency room visit. I infer that the doctor too accessed the patient's medical record to refresh his recollection of that visit and gain the transaction number. And in the termination notice that Chino Valley gave to Magsino it equated the warning it gave Magsino for tardiness as "similar" in nature to the alleged HIPAA breaches. In the absence of some credible explanation, the similarity between the two escapes me. Moreover, I conclude below that the discipline for tardiness itself was unlawful. Gilliatt herself accessed and printed the patient's medical record and showed the entirely unredacted version to Magsino, and she admitted she wrote the patient's name and medical record number on a slip of paper, gave it to Magsino and authorized him to view the medical record. Indeed, as described above, in the final written warning that Chino Valley gave Magsino prior to his termination for alleged HIPAA violations, Gilliatt herself included the patient's

medical record number thereby disseminating this information. None of this raised any concerns by Chino Valley nor is there any credible explanation as to why it did not. Chino Valley contends Gilliatt had a “need to know,” but of course as Gilliatt conceded by her conduct, so did Magsino.

I turn now to describe the evidence of disparate treatment. As described above, other employees actually breached patient confidentiality by, for example, leaving a patient’s medical record in a restroom where it was viewed by another patient. Unlike the copy Magsino attached to his grievance, that patient record named the patient as well as the patient’s medical information. Moreover, De Santiago also accessed and copied a patient’s medical record, yet she was not discharged.

Even assuming that Chino Valley established that Magsino either violated HIPAA protocol or that it reasonably believed he had, it remains Chino Valley’s burden to show that it would have *fired* him for the violations even absent his union activity. Chino Valley has an enforcement and discipline policy that covers HIPAA infractions; it is divided into three levels of violations.

#### Level and Definitions of Violations

- I. Accidental and/or due to lack of proper education
- II. Purposeful break in the terms of the Confidentiality Agreement, Security Agreement, or an unacceptable level of previous violations
- III. Purposeful break in the terms of the Confidentiality Agreement or an unacceptable level of previous violations and accompanying verbal disclosure of patient information regarding treatment and status

The recommended penalty for a level I violation is an oral warning or reprimand accompanied by retraining and discussion of policy and procedure. Level II is a written warning and acknowledgement of consequences of subsequent infractions, and for level III it is termination of employment. Applying Chino Valley’s own standards to the facts it knew concerning any infraction that Magsino may have committed, Level I seems to squarely fit Magsino’s situation; at most Magsino’s use of the patient’s partially redacted medical record stemmed from a lack of proper education. Any assertion to the contrary is simply not backed by credible evidence. In this regard, recall how before the election Chino Valley bragged about how employees may have “made an honest mistake and your director treated it as nothing more than a lesson learned (our practice of Just Culture)?” After all, Magsino had been careful to redact the patient’s name from all copies of the medical record, thereby assuring that no one could connect the medical information with the name of the patient without accessing Chino Valley’s computer system, something that Chino Valley would have been aware of. This is not a matter of substituting my judgment for that of Chino Valley’s concerning the type of discipline that should have more fairly been given to Magsino. Rather, I am careful to use Chino Valley’s own standards and statements to examine whether it has met its burden, in the face of a strong showing of unlawful motivation, that it would have fired Magsino anyway even absent his union activities.

For all these reasons I conclude that Chino Valley has failed to show that it would have terminated Magsino even if he and

the employees had not supported the Union. Rather, the utter lack of justification for his discharge strengthens the conclusion that it was unlawful.

Finally, Chino Valley asserts that Magsino was a supervisor under Section 2(11) and therefore not entitled to engage in union activity in that he sometimes worked as a relief charge nurse. I note that Magsino voted without challenge in the election. As part of the election agreement, Chino Valley and the Union specifically named several charge nurses who they agreed were supervisors; Magsino was *not* one of them. And as described above Chino Valley was aware of Magsino’s union activities; it even commented about his “movie star” status. Yet it never advised Magsino that he was a supervisor and had to stop his union activity on that basis.

Nurses work three 12-hour shifts per week. Chino Valley assigns a charge nurse to each of the 14 weekly shifts. Chino Valley has three fulltime charge nurses; they each also work at least three shifts per week. There are several other nurses who work as relief charge nurses besides Magsino. Nurses are selected to serve as relief charge nurses based on their seniority and experience and willingness to do so. Chino Valley asked Gilliatt several leading questions concerning the duties of charge nurses, Gilliatt answered affirmatively to those questions. But I have already explained why I have discounted Gilliatt’s other testimony and for the same reasons I do not rely on this testimony. It is not sufficient to present entirely conclusory evidence to show supervisory status. *Avante at Wilson*, 348 NLRB 1056, 1057 (2006). The burden is on Chino Valley to prove Magsino’s supervisory status; it has failed to do so. *Oakwood Health Care*, 348 NLRB 686, 694 (2006). By discharging Ronald Magsino because he and other employees supported the Union, Chino Valley violated Section 8(a)(3) and (1).

#### D. Alleged 8(a)(3) and (5) Violations

In this section of the decision I first describe some analysis before getting to the specific allegations in the complaint. In assessing whether an employer violates the Act by retaliating against employees because they supported a union, I again apply the shifting burden analysis in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). In determining whether the General Counsel has met his initial burden under that case, I describe the conclusions that I rely on that are common to the 8(a)(3) allegations that follow. First, obviously, the employees engaged in union activity and Chino Valley knew this. Indeed, they selected the Union as their collective-bargaining representative over the strenuous objections of Chino Valley. Next, Chino Valley had deep hostility towards the lawful right of employees to select the Union. This is shown by the numerous violations of the Act, described above, that it committed. Those violations of the law were committed by a wide range of individuals, from front line supervisors through middle management and include some of the highest ranking officials at Chino Valley. Next, all the alleged discriminatory acts were committed in close proximity to the election; thus timing also supports the General Counsel’s case. Continuing, Chino Valley explicitly threatened employees that it would impose harsher

working conditions on employees because they selected the Union. All these factors point to a very compelling case made by the General Counsel under *Wright Line*.

An employer violated Section 8(a)(5) and (1) when it unilaterally changes terms and conditions of employment for employees represented by a union without first notifying the union of the proposed change and giving it an opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962). Here, it is undisputed that Chino Valley did not give the requisite notice to the Union. Chino Valley has not yet recognized the Union and is pursuing an appeal challenging the results of the election. However, the Board has certified the Union and I am bound by Board law at this point. Nonetheless, should a final ruling emerge from the appeal process that overturns the results of the election it will follow that the Section 8(a)(5) should be dismissed. So the only remaining issue in the 8(a)(5) allegations is whether Chino Valley actually made changes to the working conditions of the represented employees.

On April 12, 10 days after the election, Lally sent the following message to his managers and supervisors:

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. This is a survey year and that is an area of focus. The manuals are available for your review through HR and/or soon on-line. Thank you for your anticipated cooperation.

I make several observations concerning this message. First, the timing of the message in the context of the prior unlawful statements leaves little doubt that this directive was in response to the employees' union activities. As such, it constitutes additional evidence of unlawful motivation for conduct taken by Chino Valley's supervisors in compliance with this directive. Next, implicit in the message is an admission that managers and supervisor had been lax in enforcing policies and procedures, especially attendance and tardiness.

#### Tardiness Policy

The complaint alleges that Chino Valley violated Section 8(a)(3) and (5) when it began to enforce a rule requiring employees to clock in at their start times, without any grace periods, and thereafter disciplined employees who violated the rule. Before the election, the employees understood that there was a 7-minute grace period in reporting for work. As long as employees were no more than 7 minutes late they were not disciplined for tardiness. The foregoing facts are based on a composite of the credible testimony of Teer Lina, Marlene Bacani, Vincent Hilvano, Ronald Magsino, Yesenia De Santiago, and Rosalyn Roncesvalles. In particular, I find Roncesvalles to be a credible witness; her demeanor was impressive and her testimony detailed. Chino Valley's cross-examination of her added the factor of consistency to her credibility. And Chino Valley's exhibit 6 confirms that De Santiago was late in March several times during the 7-minute window period but was not disciplined.

On May 11 Ruggio sent an email message to employees as follows:

I would like to clarify the issue of what constitutes tardy:

Tardy is defined as 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 12 minute (formerly 7 minute) grace period; This grace period is a JD Dev policy that is strictly for time-keeping purposes and has absolutely no bearing on Tardiness. Following is the verbiage from JB Dev

\* A grace period of 12-minutes is applied to the total time worked for the day. The paid hours will be rounded up to the nearest hour or half hour if the total worked minutes fall within the 12-minute grace period. All minutes falling outside the 12-minute grace period will be rounded to the nearest tenth of an hour\*.

For the issue of tardiness, the grace period is non-consequential. Whatever the hour you have been instructed to begin your work shift is the time you are expected to be at your work station ready to begin that shift. Even 1 minute late is considered Tardy.

On May 4, Chino Valley gave Yesenia De Santiago a written warning for being tardy eight times during the month of April and, on May 5, Chino Valley gave Marlene Bacani and Ronald Magsino a copy of a verbal warning for being tardy two or more times in 1 month. This was the first time that they had ever been disciplined for tardiness by clocking in within the 7-minute period described above. That same day Chino Valley gave Vincent Hilvano a copy of a verbal warning for being tardy two or more times in 1 month. Hilvano had earlier received a written warning for tardiness on December 30, 2009, but that warning indicated that Hilvano frequently came to work late by over 30 minutes. On May 12, Chino Valley gave Rosalyn Roncesvalles a copy of a verbal warning for being tardy two or more times in 1 month. This was the first time she had ever been disciplined for tardiness for clocking in within the 7-minute period. Other employees have also been similarly disciplined.

#### Analysis

First, as to the 8(a)(3) allegation, the facts show that before the election employees were allowed a 7-minute grace period before they were disciplined for tardiness but after the election, per Lally's directive, that policy changed and Chino Valley began disciplining employees who were tardy even 7 minutes or less. Having already described the other elements of the General Counsel's case, I conclude he has easily met his burden under *Wright Line*. I turn now to whether Chino Valley has established its burden to show the change and consequent discipline would have occurred even in the absence of union activity. In this regard Chino Valley points to the policies that it had not previously strictly enforced. However, such unenforced policies do not satisfy Chino Valley's burden under *Wright Line*. *Flagstaff Medical Center*, supra at 7. Chino Valley also contends that the "verbal" warnings did not constitute discipline. That argument is frivolous; verbal warnings are part of Chino Valley's disciplinary process. In fact, as described above, the verbal warnings given to Magsino and De Santiago were considered by Chino Valley in deciding whether to fire

them. By more strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule because employees supported the Union, Chino Valley violated Section 8(a)(3) and (1) of the Act.<sup>7</sup>

Tardiness and attendance policies are mandatory subjects of bargaining; an employer may not unilaterally change them for employees who are represented by a labor organization. *Alcoa, Inc.*, 352 NLRB 1222, 1223 (2008). Similarly, an employer may not unilaterally change the enforcement of policies. *San Luis Trucking*, 352 NLRB 211, 229 (2008). By 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, Chino Valley violated Section 8(a)(5) and (1) of the Act.

#### Mandatory Meetings

The complaint alleges that Chino Valley Section 8(a)(3) and (5) of the Act when it began enforcing a rule requiring employees to be present for mandatory meetings. Chino Valley holds “mandatory” meetings every few months for emergency room staff. Teer Lina did not attend any of these meetings, save for one, over the last several years; she had never been disciplined for failure to attend these meetings. Tyrone Clavano’s supervisor allowed employees to miss one mandatory meeting per year without discipline. Marlene Bacani also missed several mandatory meetings; she was not disciplined. Similarly, Roncesvalles did not attend a couple of the meetings in the past and was not disciplined for failing to attend. On March 31 Gilliatt announced a mandatory meeting for April 4. On April 9, a week after the election, Lina and Roncesvalles each received a copy of a verbal warning for missing the mandatory staff meeting the day before. Lina wrote on the warning that she was working at her other job and that that had been approved by Carlos Gonzalez, her former supervisor; she also told this to her supervisor, Cheryl Gilliatt. Roncesvalles wrote on her warning that she was working at her full-time job and got off work at 8 a.m. and that was why she was unable to attend the meeting. In fact Gilliatt knew that per diem nurses like Roncesvalles, who work at Chino Valley only 1 day per week, work full-time jobs elsewhere and that it would be difficult if not impossible for them to attend every mandatory meeting. Other employees were also disciplined for failing to attend these meetings.

There are no real credibility issues to resolve thus far in this section of my decision, because the testimony that Chino Valley itself elicited from Gilliatt shows that before the election, only about 25 percent of the nurses attended mandatory meetings and at the April mandatory meeting again only about 25 percent attended. The only difference was before the election, employees were not disciplined and after the election the employees were disciplined. I do not, however, credit Gilliatt’s testimony that she decided to discipline employees without regard to Lally’s instructions to start fully enforcing the rules. Gilliatt both received his written instructions and also heard him tell employees that Chino Valley would begin doing so.

<sup>7</sup> I leave the full identification of these employees to the compliance stage of this proceeding. However, that assessment should begin with the comprehensive charts located in pp. 18–23 of the General Counsel’s brief.

Gilliatt impressed me as someone who, at times, was doing her best to defend the actions taken by her superiors rather than someone simply truthfully relating factual information.

#### Analysis

As to the 8(a)(3) allegation, the facts show that before the election employees were not disciplined for failing to attend mandatory meetings but after the election, per Lally’s directive, that policy changed and Chino Valley began disciplining employees who did not attend those meetings. Having already described the other elements of the General Counsel’s case, I conclude he has again easily met his burden under *Wright Line*. I turn now to whether Chino Valley has established its burden to show the change and consequent discipline would have occurred even in the absence of union activity. In this regard Chino Valley again points to the policies that it had not previously strictly enforced. However, as I have already concluded, such unenforced policies do not satisfy Chino Valley’s burden under *Wright Line*. By disciplining employees who failed to attend mandatory meetings because employees supported the Union, Chino Valley violated Section 8(a)(3) and (1) of the Act.<sup>8</sup>

As to the 8(a)(5) allegation, attendance and disciplinary measures concerning attendance are mandatory subjects of bargaining. In its brief Chino Valley argues that this change was not substantial, but it does so by ignoring the testimony it elicited from its own witness Gilliatt who confirmed that 75 percent of employees were not regularly in attendance at mandatory meetings and that after the change that 75 percent either were disciplined or were subject to discipline for conduct that Chino Valley had previously overlooked. Also in its brief, Chino Valley argues that the Union waived its right to bargain by not requesting to bargain; Chino Valley correctly points out that the mere filing of a charge does not constitute a request to bargain. But all this obviously misses the point because Chino Valley has not yet recognized the Union. Chino Valley began disciplining employees for failing to attend mandatory meetings; it did so without giving the Union an opportunity to bargain. By doing so, Chino Valley violated Section 8(a)(5).

#### E. The 8(a)(5) Allegations

##### 1. Attending certification classes

The complaint alleges that Chino Valley violated Section 8(a)(5) by ceasing to pay employees for time spent attending certification classes. Nurses, of course, must retain certain certifications. In order to do so they must periodically attend refresher courses. Chino Valley notifies its nurses when their requisite certifications are about to expire. Prior to the election, Chino Valley paid Rosalyn Roncesvalles, then a part-time, per diem nurse, for the time she spent taking the classes needed to retain her certifications. At some time prior to March 31 Chino Valley notified Roncesvalles that her certification was about to expire and she needed to take a course to renew it; Roncesvalles did so and then completed a timesheet requesting payment for the 8 hours she spent on March 31 attending the

<sup>8</sup> I leave the full identification of these employees to the compliance stage of this proceeding. That assessment should begin with the comprehensive charts located in pp. 11–12 of the General Counsel’s brief.

course she needed to retain the certification. However, thereafter Gilliatt disallowed the claim and indicated on the timesheet that payment was for full-time employees only. So Roncesvalles called Gilliatt and explained that when she checked the timesheet she noticed that Gilliatt had indicated that payment for class time was for full-time employees only. Roncesvalles asked if this was a new policy because previously she and other per diem nurses had been paid for that time. Gilliatt said she would check with human resources and get back to her. Chino Valley's written policy concerning this subject is not limited to full-time employees; rather it indicates that all employees will be paid for time spent attending these classes. On April 14, after not having received a response from Gilliatt, Roncesvalles sent her a message as follows:

I checked my time adjustment sheet and saw the note regarding my PALS renewal and I just want to clarify my situation because I was not paid on the 8 hours class renewal. I changed my status as per diem January 2009 and Carlos [Gonzalez] paid me the hours that I attend on class credentials that I have to renew, including my MICN. I was surprised when you noted that only full time employees will be reimbursed with the class. Is this new policy? John and I checked on our policy that we get paid on attending and renewing the mandatory class. I never saw anything that is written that only full time employees get paid and not per diem.

On about May 12 Roncesvalles again raised the matter with Gilliatt. This time Roncesvalles said that another required certification was going to expire in June 2011; she asked if she would be paid for time spent renewing that certification. Gilliatt replied that Chino Valley needed nurses with that particular certification so they might pay for that time, she would have to find out. Gilliatt said that there were a lot of changes happening then. In December Roncesvalles again asked about whether she would be paid for the time spent getting her next certification; this time Gilliatt gave her an unambiguous "no."

As noted, Chino Valley distributed flyers to employees prior to the election. One flyer touted the benefits the employees received. A benefit listed there was

- Flex Ed, paid while you are learning.

There was no indication that this was limited to only full-time employees. And as Chino Valley's counsel highlighted during cross-examination, this is despite the fact that third and fourth bullet points above the quoted portion of the flyer it read:

- Education Tuition Reimbursement (\$2,500 for FT and \$750 for PT, per calendar year with prior approval
- 1x base annual salary company paid life insurance (FT only)

and the two bullet points immediately following the original quoted bullet point read:

- Paid BLS/ACLS certifications & required courses for employment (FT)
- Certification Recognition (\$500 for FT, \$300 for PT)

I conclude that a practice developed whereby Chino Valley paid part-time employees for the time spent attending classes

needed to maintain the certification necessary to perform their work at Chino Valley.

These facts in this section are based on the credible testimony of Roncesvalles. Her testimony was corroborated by documentary evidence. I have considered Gilliatt's testimony; to the extent it is inconsistent with the facts described above, I do not credit that testimony. Again, her demeanor was not convincing and her answers were, at times, evasive.

#### Analysis

Work-related educational assistance programs are mandatory subjects of bargaining and cannot be changed unilaterally. *Tocco, Inc.*, 323 NLRB 480 (1997). Chino Valley had a practice of paying part-time employees for the time spent attending classes needed to maintain the certification necessary to perform their work at Chino Valley. Chino Valley then terminated that benefit without first allowing the Union an opportunity to bargain concerning that change. By doing so Chino Valley violated Section 8(a)(5).

#### 2. Shift changes

The complaint alleges that Chino Valley violated Section 8(a)(5) when it notified employees that they could not make changes or exchange shifts once schedules are posted. Remember, before the election Chino Valley distributed flyers that asked, among other things, if the employee had "changed your schedule with a co-worker after it was posted?" On April 13, the day after the marching orders from Lally as described above, Anne Marie Robertson, Chino Valley's director of nursing, on behalf of Gilliatt sent a message that read in pertinent part:

This is a reminder to ALL staff. . . .

Once a schedule is posted by the Nursing managers there will be no changes or exchanges. If an emergency arises the Manager needs to be informed to remove the staff member from the Master /unit schedule. If it is off shift/the House supervisor will make the immediate change and forward the the [sic] department manager. If an employee has a request for time off they are to utilize the "Request for time off" form which is found on the intranet under Human Resources/forms. The form needs to be completed by the employee and submitted to the Manager for approval allowing sufficient time for review- The employee is responsible to contact the Manager to confirm that a change has or has not been granted. Please do not leave requests on voicemail.

As General Counsel's witness Teer Lina admitted, the practice has always been that after a schedule is posted, an employee needed a supervisor's permission to alter the schedule. Sometimes the supervisor would make the change and other times the supervisor would tell her to find another employee willing to change shifts with her. And as General Counsel's witness, Marlene Bacani and others credibly explained, before the election employees were able to switch shifts with other employees so long as no overtime resulted; she simply informed her supervisor of the change. Bacani also admitted that Gilliatt told her the same thing concerning the shift change policy after the election notwithstanding the message described above. Vincent Hilvano worked as a registered nurse in the emergency room

from August 2008 until July 2010. Before the message, Hilvano changed his shifts about once every 3 months even after the schedule was posted, but he admitted that even after receiving the message, he continued to trade shifts with coworkers. Before the message, Ronald Magsino switched shifts with coworkers every 2 weeks or so. His former supervisor said that employees could do that so long as it did not generate overtime costs. After the message, Magsino did not attempt to change his shift after the schedule was posted. Robertson, Chino Valley's director of nursing in April 2010, similarly explained that there had not been a formal written policy concerning shift changes but that the practice had been that employees could switch shifts after the schedule was posted with approval of the appropriate supervisor and that if the switch involved the creation of overtime, the supervisor might not approve. I conclude that the practice concerning shift changes after the schedule is posted remained the same both before and after the election; if the two employees agreed to swap shifts and no overtime was generated then the change was approved by the supervisor.

#### Analysis

To the extent that the complaint alleges and the General Counsel argues that an actual change occurred, I have concluded that the facts do not support that allegation. However, the General Counsel also argues that the announcement of a change alone may violate Section 8(a)(5). In *ABC Automotive Products Corp.*, 307 NLRB 248, 249–250 (1992), the Board did hold that the announcement of a change, even if not implemented, may constitute a violation of Section 8(a)(5). That case involved a situation where the employer announced that when strikers returned to work, the employer would no longer make contributions to the union's health fund; the striker's never returned to work and thus the change was never actually implemented. But there the announced change was significant—an end to contributions to the union's health fund. Here, the announcement was roughly consistent with the existing practice. I dismiss this allegation of the complaint.

#### 3. Information request

On April 9, 2010, the Union requested Chino Valley to furnish it with, *inter alia*, the following information:

lists of employees including details as to full or part-time status, hourly wage rates, wage increases, fringe benefits, classifications, shifts, addresses and phone numbers; employee handbooks; company policies and procedures; job descriptions; benefit plans; costs of benefits; and disciplinary notices.

On April 14 Chino Valley refused to provide the information, indicating that it had filed objections to the election.

#### Analysis

The information sought by the Union is presumptively relevant to the Union's performance of its representational duties. Chino Valley violated Section 8(a)(5) and (1) by failing to provide this information. The Union in its brief faults me for failing to consider additional information that it requested but was not provided. However, the additional information was not specifically alleged in the complaint and I reaffirm my conclu-

sion that sufficient due process has not been provided to Chino Valley to allow it to mount a defense to the Union's claim.

#### F. Procedural Issues

Prior to and during the hearing, I disposed of several petitions to revoke subpoenas. Because Chino Valley will apparently challenge my rulings I explain my reasoning. Prior to the hearing, Chino Valley served six subpoenas on the California Department of Public Health. The subpoenas sought documents from the Department concerning *other* health care providers who had disciplined employees who violate patient privacy rights. The Department filed a petition to revoke the subpoenas and on June 1, during a pretrial conference call, I granted the petition to revoke. I granted the petition to revoke because Chino Valley sought information that concerned the disciplinary practices of other employers. Of course, only Chino Valley's disciplinary practices are at issue in this proceeding; what other hospitals do is not the least bit relevant. As I stated on the record, I challenge Chino Valley to cite a single Board case that holds that the disciplinary records of nonlitigant employers are relevant in determining the lawfulness of a termination of an employee.

On June 8, 2011, I received into evidence a document (GC Exh. 84) from the California Department of Public Health that indicated that it concluded that no breach had occurred when Magsino accessed the patient's medical record.

On June 7, 2011, Chino Valley served another subpoena on the Department and the Department filed a petition to revoke that same day. Chino Valley sought the testimony of Lena Resurreccion. On June 15, moments before the hearing closed, Chino Valley asked that I deny the petition to revoke and require the testimony of Resurreccion. Chino Valley indicated that it wanted the testimony "to explain what is in evidence as General Counsel's Exhibit 84." But after Chino Valley conceded that Resurreccion did not participate at all in preparation of that exhibit, I granted the Department's petition to revoke. I reaffirm that ruling. Absent first hand participation in the matter Resurreccion's testimony would have minimal value in this case. In this regard I also note that Chino Valley did not make a more detailed offer of proof concerning this testimony, so it should not be allowed hereafter to raise matters not presented to me for my consideration.

On July 18, over a month after the trial had closed, Chino Valley filed a motion to reopen the record. The motion again concerns General Counsel's Exhibit 84 that I had received into evidence on June 8, 2011; the hearing did not close until June 15. The General Counsel and the Union filed oppositions to the motion to reopen. In the motion Chino Valley seeks to reopen the record to present testimony and evidence from the supervisor of the Department's employee who prepared the document to show that the "investigator incorrectly stated in those notes that no breach had occurred with respect to the actions reported to her by Respondent, and that the reported actions of Ronald Magsino constituted an intentional breach of HIPAA." In support of the motion Chino Valley filed an affidavit from Ruggio containing email exchanges between her and Lena Resurreccion of the Department that culminate in a telephone conversation as follows:

Ms. Resurreccion called me and we discussed Mr. Magsino's conduct in greater detail. During this phone call Ms. Resurreccion stated that Mr. Magsino's conduct was indeed a breach of HIPAA because the breach was intentional even if it was not malicious. Ms. Resurreccion also stated that she could not comment on what Ms. Robin Burton may have been thinking when she wrote the comment on her worksheet stating "no breach actually occurred" because there definitely was a breach by Mr. Magsino.

I first note that this exchange confirms my ruling that Resurreccion had nothing to contribute concerning General Counsel's Exhibit 84; rather she could only provide testimony concerning other situations presented to her by Chino Valley; the fact pattern that Ruggio apparently presented Resurreccion omitted critical facts such as Magsino use of the information for internal grievance matters and the permission granted to him by Gilliatt. Chino Valley has not shown the "extraordinary circumstances" as required under Section 102.65(e)(1) of the Board's Rules and Regulations. I therefore deny the motion to reopen the record.

In its opposition to the motion to reopen, the Union asks that I award attorneys fees to it for having to defend against the motion to reopen. Chino Valley's motion was indeed utterly without merit. Although the issue is a close one, I cannot say that Chino Valley's motion was so frivolous so as to warrant the extraordinary sanction of attorney's fees. I deny the Union's request.

Citing *Peyton Packing Co.*, 129 NLRB 1358 (1961), and *Jefferson Chemical Co.*, 200 NLRB 992 (1972), in its brief, Chino Valley again asserts that the complaint that issued in the test of certification case should have been consolidated with the complaint in this case. That assertion is wholly without merit. The Board has historically allowed test of certification cases to proceed in an expedited fashion through summary judgment. That case is already before a court of appeals for review; this case is still at the initial stages of litigation. There is simply no reason to delay the resolution of that case by consolidating it with this case.

#### CONCLUSIONS OF LAW

1. By the following conduct Chino Valley has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

(a) Threatening to close the facility and terminate employees if they selected a union.

(b) Threatening employees with loss of benefits if they selected the Union as their collective-bargaining representative.

(c) Coercively interrogating employees about their union activities.

(d) Impliedly threatening employees with layoffs if they supported a union.

(e) Telling employees that they might lose the family atmosphere and flexibility of scheduling at Chino Valley if they selected the Union.

(f) Giving employees the impression that their union activities are under surveillance.

(g) Threatening to discipline employees because they engaged in union activities.

(h) Informing employees that they could no longer take vacations longer than 2 weeks because the employees had selected the Union to represent them.

(i) 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.

(j) Broadly prohibiting employees from speaking to the media, including about the Union or about terms and conditions of employment.

(k) Serving subpoenas on employees and unions that request information about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding.

2. By the following conduct Chino Valley has engaged in unfair labors affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

(a) More strictly enforcing a tardiness rule and disciplining employees pursuant to that more strictly enforced rule because employees supported the Union.

(b) Disciplining employees who failed to attend mandatory meetings because employees supported the Union.

(c) Discharging Ronald Magsino because he and other employees supported the Union.

3. By the following conduct Chino Valley has engaged in unfair labors affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

(a) 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.

(b) Beginning to discipline employees who failed to attend mandatory meetings; without first giving the Union an opportunity to bargain concerning the change.

(c) 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.

(d) Failing to provide requested information that is presumptively relevant to the Union's performance of its representational duties.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent has unlawfully more strictly enforced a tardiness rule and unlawfully disciplined employee pursuant to that more strictly enforced rule, I shall require the Respondent to rescind the stricter enforcement of the rule and restore the practice that existed prior thereto and rescind to all discipline resulting from the stricter enforcement of the rule.<sup>9</sup> Having found that Respondent unlawfully began disciplining employees who failed to attend

<sup>9</sup> Said differently I am only requiring Respondent to go back to its old practice concerning the 7-minute grace periods.

mandatory meetings because employees supported the Union, I shall require the Respondent to rescind that discipline.<sup>10</sup> Having found that the Respondent unlawfully terminated 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 I shall require it to make whole those employees who lost money as a result of the unlawful termination, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent, having discriminatorily discharged Ronald Magsino, it must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center*, 356 NLRB 6 (2010). Because of the serious nature of the violations and because of Respondent's egregious widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357

<sup>10</sup> Although I have concluded that Chino Valley's conduct also violated Sec. 8(a)(5), in this case the 8(a)(3) remedy subsumes that 8(a)(5) remedy in this regard.

(1979). Finally, as requested by the General Counsel, we order Respondent to have the attached notice publicly read by a responsible corporate management official or by a Board agent in the presence of a responsible management official. We find that the Respondent's unfair labor practices are sufficiently serious and widespread to warrant having the attached notice read aloud to the employees so that they "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920, 929-930 (D.C. Cir. 2005). The public reading of the notice is an "effective but moderate way to let in a warming wind of information and, more important, reassurance." *United States Service Industries*, 319 NLRB 231, 232 (1995) (citations omitted), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997). In order to monitor the reading of the notice, representatives of the Board and of the Union shall have the right to be present. *Texas Super Foods*, 303 NLRB 209, 220 (1991). See also *Santa Barbara News-Press*, 357 NLRB 452, 460-461 (2011). In its brief the Union seeks a requirement that Respondent mail the Notice from this matter to all persons employed by Respondent from the time that the unfair labor practices were committed to the present. But I will issue a broad cease and desist order, require Respondent to post, email, and read the notice to employees. I think this will adequately remedy the unfair labor practices.

[Recommended Order omitted from publication.]