UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

GREENBRIER VMC, LLC D/B/A	:	Case No. 10-CA-094646
GREENBRIER VALLEY MEDICAL	:	
CENTER	:	
	:	
and	:	
	:	
NATIONAL NURSES ORGANIZING	:	
COMMITTEE	:	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF THE HONORABLE ROBERT A. RINGLER, ISSUED ON JANUARY 23, 2014

Kaitlin K. Brundage
Attorney for Respondent
62 Ledgewood Road
West Hartford, CT 06107
(860) 307-3223
brundagekk@gmail.com

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STATEMENT OF THE CASE

The National Labor Relations Board (the "Board") issued a Certification of Representative in favor of the National Nurses Organizing Committee (the "NNOC" or the "Union") for a collective bargaining unit of registered nurses employed by Greenbrier VMC d/b/a Greenbrier Valley Medical Center ("Greenbrier" or the "Hospital") on September 25, 2012. (GC Ex.4). The Hospital's challenge to the Certification of Representative is pending in Case No. 10-CA-093065.

The Unfair Labor Practice Charge, Amended Charge, and Second Amended Charge in this proceeding were filed December 11, 2012, January 16, 2013 and April 22, 2013 respectively in Case No. 10-CA-094646. (GC Ex. 1(a), 1(c), 1(e)). The initial Charge alleged violations of the Act by (1) "issuing a disciplinary write-up to RN [Registered Nurse] James Blankinship because of his support for and activities on behalf of" the Union and because he engaged in protected, concerted activity; and (2) inter alia, telling unit employees that there is no Union and that it would be futile to support the Union as its bargaining representative. (GC Ex. 1(a)).

The First Amended Charge added allegations that the Hospital had violated the Act by placing Blankinship on a Performance Improvement Plan ("PIP") and by changing his work hours in retaliation for his union activities. It also alleged that the statements of futility referenced in the original Charge included indications that the Hospital would not recognize employees' Weingarten rights and continuing refusal to recognize the NNOC as the exclusive collective bargaining representative of the registered nurses. The Second Amended Charge added the allegation that the Hospital had extended the PIP. (GC Ex. 1(e)).

The initial Charge included one allegation that was dismissed by the Regional Director and one allegation that was not included in the Complaint. Specifically, the Regional Director determined that statements made by Emergency Department Director Connie Rose to James Blankinship in a closed-door meeting on November 29, 2012 did not constitute statements of futility in violation of the Act. The Regional Director dismissed this allegation by letter dated July 12, 2013. The Union appealed the dismissal and the Board denied the appeal by letter dated October 29, 2013. In addition, the Complaint did not include the allegation that any violation of the Act occurred by the Hospital's issuance of a written warning to Blankinship. (GC Ex. 1(g)).

Complaint and Notice of Hearing issued on July 31, 2013 on behalf of Regional Director Claude T. Harrell Jr. by Officer-In-Charge Jane P. North of Sub-Region 11 of the Board. (GC Ex. 1(g)). The Complaint alleged that Respondent violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Act") by its issuance and extension of the PIP and by its implementation of the change in Blankinship's work schedule that was included in the PIP.

Respondent filed its Answer on August 14, 2013 denying all material allegations of the Complaint. (GC Ex. 1(i)). At the outset of Hearing, the Answer was amended to include two Affirmative Defenses. (Tr. 9-10).

Hearing was held on November 12 and 13, 2013 in Ronceverte, West Virginia before the Honorable Robert A. Ringler, Administrative Law Judge. In a Decision issued on January 23, 2014, the Judge concluded that the Hospital violated Sections 8(a)(1) and (3) of the Act by issuing Blankinship a written

warning, PIP and schedule change because he engaged in Union or other protected concerted activities. (Decision P. 15, Lines 10-12).

QUESTIONS PRESENTED

1. Did the Judge err in concluding that the written warning issued to Blankinship constituted a violation of the Act, in circumstances where the allegation concerning the written warning was included in the original Unfair Labor Practice Charge, but specifically omitted from the Complaint; Exception Nos. 1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 20, 21, 22, 27, 28, 29, 31, 37, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 70, 72, 74, 75, 76, 77, 78, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95.
2. Did the Judge err in concluding that the Performance Improvement Plan issued to Blankinship and the extension of same violated the Act; Exception Nos. 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95.
3. Did the Judge err in concluding that the assignment of Blankinship to a later shift as part of the PIP violated the Act; Exception Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,

13, 14, 15, 16, 17, 18, 20, 21, 22, 37, 39, 40, 41, 42, 50, 51, 52, 53, 54, 57, 58, 59, 60, 70, 72, 75, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 95.

4. Did the Judge err in issuance of a Remedy that is unsubstantiated by the Record, unclear and impossible to effectuate; Exception Nos. 94, 95, 96.

SUMMARY OF ARGUMENT

Unfortunately, the Decision in this matter is replete with mischaracterizations of evidence and speculation in furtherance of what can only be described as advocacy rather than adjudication by Judge Ringler. The Judge's erroneous finding that the General Counsel made a *prima facie* "Wright Line" case forms the flimsy foundation for a fiction that the Hospital was motivated by anti-union animus when it attempted to fulfill its obligation to patient safety by administering a PIP and schedule change to remediate poor performance by James Blankinship.

The singular evidence upon which the Judge relies for finding anti-union animus is a brief meeting which took place on or about November 29, 2012 during which Blankinship presented Emergency Department Director Connie Rose with a letter stating that he and two other Emergency Department nurses would be serving as NNOC representatives from her department. Rose advised Blankinship that the Hospital did not recognize the Union and she therefore did not accept the information in the letter. The Judge characterized Rose's response as "hostile". From this characterization, the Judge built a fiction of "pretext", wholly unsupported by the Record, for the Hospital's imposition of a PIP and

schedule change warranted by several incidents of poor performance that Blankinship admitted to committing in late November and early December 2012.

As noted above in the Statement of the Case, the Union initially charged that the Respondent violated Section 8(a)(1) of the Act by alleged statements of futility in the November meeting between Blankinship and Rose. The Region dismissed these allegations by letter dated July 12, 2013 and the Union pursued an appeal of same. In its October 29 letter denying the Appeal, the Acting General Counsel stated in pertinent part:

> A manager told an employee, who was acting as a Union representative, that the Employer was not recognizing the Union and rights that flow from Union representation. The statement, which was made while the Employer was testing the Union's certification, occurred during a private, one-on-one discussion. Apart from the exercise of its right to test the Union's certification through Section 8(a)(5) proceedings, the remark had not been preceded by Employer unfair labor practices that would indicated futility to employees of Union support.

Yet, despite the dismissal of these allegations by both the Regional Director and the Board, the Judge relies on the meeting at which the statements were allegedly made as the root of a soaring speculation of anti-union animus to bootstrap the conclusion that the Act was violated by the Hospital's effort to improve the performance of a nurse whose compound lapses in judgment put human patients at risk. Significantly, Blankinship admitted the performance lapses and testified that his relationship with Rose remained professional both before and after the meeting. There is no evidence of any word or deed alleged to indicate anti-union animus outside of the Judge's characterization of Rose's reaction in the meeting as "hostile".

The sum and substance of the Judge's Decision is that, because the timing of the clinical errors made by Blankinship occurred within close proximity to the time of that meeting, the Hospital's issuance of a PIP designed to remedy Blankinship's performance, including his assignment to a shift that afforded more support because of higher staffing, and the limited extension of the PIP, was based not on his performance during that time period, but on the fact that he advised his supervisor that he was a member of the Union's facility bargaining committee.

This reasoning is flawed in that it ignores volumes of documentation and testimony that explain the reason for the PIP was not any single issue among the five noted in the PIP, but the cumulative effect of poor judgment and poor performance displayed by Blankinship in the weeks surrounding the November 29 meeting. The Judge notes that Blankinship was a credible witness throughout, and truthfully, Blankinship admitted each of the occurrences. Yet, astonishingly, the Judge substitutes his own view of the significance of the medical errors and failures in practice not only for that of the Department Director, but also that of the General Counsel's own witnesses, who serve as Registered Nurses in the Emergency Department.

Moreover, with respect to the extension of the PIP, uncontroverted testimony establishes the Director's acknowledgement of significant improvement, limited extension of the PIP related to the one lingering issue of faulty charting and documentation, and Blankinship's admission that the specific charts identified by number in the PIP extension were discussed. But, inexplicably, the Judge discredits the supervisor's testimony regarding the charting because the Hospital did not produce the patient charts themselves and credits Blankinship's view over that of the supervisor regarding whether the charting deficiencies he admitted were significant.

The Decision completely ignores the fact that there is not one iota of testimony citing a single comment or action that demonstrates anti-union animus in the Record. In fact, unlike Blankinship, the other two nurses who signed the letter Blankinship presented to Rose were outspoken Union supporters throughout the Union's organizing campaign. They testified that they were not affected in any way by Rose's receipt of the letter. Nor did they testify to any other indicia of anti-union animus. Blankinship testified that his relationship with Rose was the same before and after he submitted the letter. Uncontroverted testimony shows that: (1) Rose assured Blankinship the PIP was not an indication that he was "on probation" and (2) in response to concerns Blankinship had expressed that the PIP might be related to union activity, Charge Nurse Tom Flis assured Blankinship that such was not the case and that he personally had verified the correctness of his statement with Rose. Clearly, all of the foregoing demonstrates a work environment free of anti-union animus, but the Judge considered none of it in reaching the Decision's erroneous conclusions.

Documented performance evaluations of Blankinship's work submitted by the Hospital, all of which were written prior to Union activity at the Hospital, evince a propensity for the same type of inattention or oversight underlying the performance issues which warranted the Hospital's action with regard to Blankinship. But the performance evaluations are mischaracterized in the Decision, and even the meaning of the numerical evaluations is misrepresented in what seems like an effort by the Judge to boost the notion that Blankinship was a stellar performer who, implausibly, "all of a sudden forgot what he previously knew and became an incompetent". The Hospital never asserted that Blankinship "all of a sudden forgot what he previously knew and became an incompetent." Rather, for whatever reasons, Blankinship exhibited a combination of poor judgment and questionable performance in several instances over a very short period of time that caused his supervisor to issue the PIP in a manner designed to help him perform better – not hurt him.

Perhaps most inexplicably, the Judge finds that the corrective action imposed by the Hospital was pretextual because the employee's errors did not cause actual physical harm to the patients in his care. If that were the standard for corrective action in a health care environment, patient safety in America would be in grave danger. But the message of this Decision says precisely that; its logical interpretation is that motivation for corrective action, including ensuring more staff support on a scheduled shift, is "suspect" if actual harm does not result from failures in health care protocol or apparent confusion with regard to same.

Unfortunately, propelled only by the issue of "timing" – which was dictated by Blankinship's compound lapses in performance on the dates they occurred – and the Judge's mischaracterization of Rose's reaction to the news that three bargaining representatives had been selected from her Department as "hostile", the Decision finds "pretext" where there was none in the actions of the Hospital toward one of the three bargaining representatives. In order to achieve this result, the Judge ignores testimony of both Hospital and General Counsel witnesses as to the significance of Blankinship's errors, substitutes his own judgment for that of the health care professionals, and mischaracterizes the documentation presented by the Hospital concerning lack of disparate treatment.

The faulty Findings and Conclusions of the Decision result in the imposition of a faulty Remedy that is totally unsupported by the evidence presented at Trial. In sum, the Judge's Findings and Conclusions are wholly inconsistent with the evidence of Record, and for the reasons illustrated more fully below, should be overturned.

ARGUMENT

I. The Judge Abused His Discretion By Finding A Violation of the Act Based Upon An Allegation That The Regional Director Failed To Put Before Him.

A. The Issue of the Written Warning Was Not Properly Before the Judge for Decision and Findings, Conclusions, and Remedies with Respect to It Should Be Overturned.

The original Unfair Labor Practice Charge here alleged that the Hospital violated Section 8(a)(3) by the issuance of a "disciplinary write-up to RN James Blankinship". The First Amended Charge alleges violation of Section 8(a)(3) by three discrete actions: (1) the issuance of discipline to James Blankinship on December 6, 2012 ***AND*** (2) his placement on a Performance Improvement Plan on that date; ***AND*** (3) initiation of a change in his work hours on that date. A Second Amended Charge alleges violation of Sections 8(a)(3) by extension of the Performance Improvement Plan on April 16, 2013. The Complaint says absolutely nothing about the issuance of discipline to James Blankinship on December 6, 2012, which discipline consisted of a written warning. It alleges violations of the Act in Paragraph 7(a) by issuing a Performance Improvement Plan, in Paragraph 7(b) by changing hours of work, and in Paragraph 7(c) by extending the Performance Improvement Plan. (GC Ex. 1(g)).

Yet, despite the Region's failure to pursue allegations based on the imposition of the written warning, the Judge abused his discretion by raising the issue *sua sponte* and improperly ruling that the imposition of the written warning was a violation of the Act. (Decision, P. 1, 12-13, fn. 16). In so doing, the Judge contends that the Hospital's assertion that the Complaint did not cover the written warning is "unreasonable". (Decision P. 12, FN. 16). Specifically, the rationale offered in the Decision states:

> The PIP and warning were simultaneously issued by the same document, flow from the same series of events and cannot be logically separated for substantive or remedial purposes. Second, both matters were covered by timely charges. Third, Counsel for the General Counsel announced at the onset of the hearing that he was challenging both the PIP and warning, and both matters were exhaustively litigated by all. Lastly, even if the complaint were somehow construed to not include the warning, an unplead matter can nevertheless support an unfair labor practice finding, where it is closely connected to the complaint's subject matter and has been fully litigated, which is the case herein. See Pergament United Sales, 296 NLRB 333,334 (1989), enf'd. 920 F. 2d 130 (2d Cir. 1990).

The Judge's citation to Pergament United Sales is inapposite to the case at bar. In Pergament, the Board found that a Judge was justified in finding that actions alleged to be a violation of Section 8(a)(3) of the Act also violated Section 8(a)(4) of the Act. Thus, Pergament stands for the proposition that an action alleged to violate one section of the Act may be found to violate another section of the Act. In stark contrast to that fact pattern, here, the Judge has found an action not alleged in the Complaint at all to be a violation of the Act.

Moreover, the specific action the Judge raises *sua sponte* was specifically alleged in the Unfair Labor Practice Charge and omitted from the Complaint. The Respondent is entitled to conclude that the allegations of the Complaint are complete, and cannot be held to a standard of notice of issues to be litigated that goes beyond the Complaint, particularly in circumstances where the charge was first made, and then omitted. None of the elements of the Judge's rationale for incorporating the written warning in his Findings, Conclusion, and Remedy can overcome the facts that the Regional Director failed to allege that the written warning violated the Act, and that the Respondent had no notice that the written warning was an issue for litigation.

In addition to the absence of relevant case law support for the Judge's finding, a review of each of the elements of the Judge's rationale supports the Respondent's contention that the finding of a violation for issuance of the written warning must be overturned. First, the statement that the matters cannot be logically separated for substantive or remedial purposes is incorrect. The overwhelming evidence of Record demonstrates that the PIP had a remedial objective and was quite separate from the written warning. In this regard, the Hospital's Discipline and Discharge Policy (GC Ex. 11), clearly states that a PIP is intended to "assist with identifying tangible goals and objectives for employees needing performance improvement". Uncontroverted testimony demonstrates previous administration of a PIP in

the same department for similar performance lapses that did not result in the escalation of progressive discipline as a result of the PIP for repeated failures after the PIP. (R. Ex. 6, T. 370).

Next, the fact that timely charges were filed with respect to both the written warning and the PIP militates in favor of the Respondent's position here, because the timely charges filed with respect to the written warning were obviously dropped by the Regional Director and the timely charges filed with respect to the PIP resulted in Complaint allegations.

Third, the fact that Counsel for the General Counsel announced belatedly *at* Hearing that he was challenging the warning is of no consequence in overcoming the fact that allowance of litigation on the issue would negate the most basic presumption of litigation, which is an opportunity for the Respondent to be fully and fairly informed of the charges against it prior to litigation. Notably, neither the General Counsel nor Counsel for the Union included arguments regarding the written warning in their Post Hearing Briefs. Despite the Judge's statement that the issue of the written warning was fully litigated, the Hospital presented no evidence whatsoever on the issue, and the General Counsel's presentation on the issue consisted of a few words of his opening statement. This constitutes further evidence that none of the parties had any notice that the written warning was at issue.

Finally, the Judge's contention that the matter was "exhaustively litigated by all" is simply not true, as can be seen by a review of the Record. Twice, when the issue of the written warning was brought up, counsel for the Hospital objected to its introduction. (T. 70, 150). The Hospital examined no witnesses regarding the written warning, and it was mentioned only a few times in passing. Because the issue of the written warning was not fully litigated, the Judge was not permitted to make a finding on the subject.

In this regard, it is worthy of note that the established Board rule is that the Trial Examiner and Board can pass upon an issue that has not been specifically alleged to be an unfair labor practice in a complaint only if the issue is fully litigated at a hearing and the subject matter of the allegation is closely related to the allegations of the complaint. Aztec Bus Lines, 289 NLRB 1021, 1057 (1988); H. C. Thomson, 230 NLRB 808, 811 (1977). In the case at hand, although the written warning was closely related to the allegations of the complaint, it was not fully litigated. In glaring contrast to the facts at bar, in Monroe Feed Store, 112 NLRB 1336, 1338 (1955), the Board found that an issue not raised in a complaint was fully litigated, noting that "it was the General Counsel who, by his questioning of the Respondent's general manager, first raised the question of the validity of the second discharges. Neither the General Counsel nor the Respondent objected to the full introduction by the other side of all relevant testimony. They both examined and cross-examined witnesses as to the circumstances concerning the discharges. No one attempted to remove the issue of the validity of the discharges from the proceeding." 112 NLRB at 1338.

In sum, there is no basis in law or fact for the Judge's deliberation and conclusions regarding the written warning, and the Findings, Conclusions, and Remedy related to the written warning in the Decision should be overturned.

B. Even if the Issue of the Written Warning was Properly before the Judge, the Decision's Findings and Conclusions that the Written Warning Violated the Act Are Erroneous and Wholly Unsupported by the Record.

As noted above, the Parties proffered no evidence concerning the written warning issued to Blankinship on December 6, 2012. However, as can be seen by a review of GC Ex. 5, the bases for the written warning included the five clinical errors cited as areas for remediation in the PIP. The Decision's rationale for finding a violation of the Act in the imposition of the written warning is ultimately the

Judge's substitution of his own judgment for that of the medical professionals regarding the significance of Blankinship's admitted commission of the clinical errors.

The Decision offers a summary of evidence presented regarding discipline of other registered nurse in the Emergency department, which clearly demonstrates the error in the Judge's conclusion with regard to the written warning. (Decision P. 11; R. Ex. 4, 6, 8; U. Ex. 6). The five instances of written warnings noted by the Judge include the following:

- The first, issued in June, 2010, is to RN Dowdy for scowling at patient, family and physician, taking psychiatric patient to ICU without monitor, and sitting at front desk while ignoring cardiac alarms";
- The second, issued in August, 2010 is to RN Post for failing to properly triage a patient, substandard care, failure to relay key patient information to a doctor and repeated usage of the internet during work time;
- The third, issued in November, 2010, is to RN Yancy for personal telephone usage after repeated warnings;
- The fourth, issued in February, 2011, is to RN Post for failing to properly triage a possible cardiac patient, failing to attach a monitor to cardiac patient, taking a break before replacing intravenous bag for diabetic, and delaying triage of a critically ill infant, all of which constitutes substandard care; and
- The fifth, issued in April 2012, was issued to RN Samples for verbally and physically abusing a patient, refusing to help coworkers care for a patient, and making negative comments to coworkers and patients.

All five of the foregoing written warnings were imposed by Rose prior to the Union organizing campaign. All except Yancy's note multiple infractions, just as Blankinship's did. Significantly, none of the incidents that resulted in written warning involved actual physical harm to a patient. Yet, the lack of physical harm to a patient is one of Judge Ringler's primary rationales for concluding that the written warning issued to Blankinship was pretextual. (Decision, P. 14, FN 24).

The transgressions cited above are characterized by the Decision as "potentially endangering patients" while Judge Ringler, substituting his own judgment for that of the medical professionals, inexplicably determines that Blankinship's transgressions did not endanger patients! (Decision P.14, FN. 23). Blankinship's errors included: (1) discharging a patient with dangerously low blood pressure without informing the physician of a precipitous drop in blood pressure that could have resulted in patient harm; (2) attempting to dispense the wrong medication to a teenager whose mother intervened to stop Blankinship before he effectuated the error, which could have resulted in patient harm; (3) failing to properly interpret a heart monitor which could have resulted in patient harm if others were not present to correct him; (4) asking a physician which medicine to administer first during a routine intubation procedure, which, if done incorrectly would result in temporarily paralyzing a patient who would then remain awake but paralyzed while a large ventilator tube was inserted in their throat; and (5) repeatedly failing to follow the Hospital protocol for charting and documentation, which protocol seeks to avoid patient harm by ensuring that timely entries in patient charts keep the entire medical team apprised of every aspect of the patient's current condition.

With respect to the discharge of the patient with low blood pressure, the Judge erroneously credits Blankinship's general testimony the blood pressure drop was consistent with the medication she was taking. (Decision P.14, FN. 24). But this testimony was contradicted specifically by Rose who stated on

cross examination that the level of the patient's drop in blood pressure exceeded that which would be expected to be attributable to the medication, and that the nurse should have alerted the physician. (T. 453). Given Blankinship's personal interest in the matter, it was inappropriate for the Judge to ignore the fact that Blankinship's opinion was controverted in crediting Blankinship, and to wholly ignore the testimony presented by Rose on the subject.

Fortunately, no actual harm resulted to an individual patient as a result of the transgression noted above, either by Blankinship or those of his colleagues. Yet, it cannot be gainsaid that procedures and protocols exist simply to ensure that no actual harm will result from nursing care – they exist to prevent even the threat of such patient harm. Blankinship's transgressions were every bit as, if not more, serious than those past disciplines enumerated in the Decision by way of comparison. In addition, Blankinship's errors all occurred in the space of just a few weeks, which compounded the concern they caused the Hospital. Accordingly, Rose appropriately addressed them by issuance of the written warning, consistent with the Hospital's discipline policies.

Significantly, all of the comparable disciplines discussed above were meted out prior to the Union's organizing campaign. All were similar in severity and level of progressive discipline. The Judge's determination of pretext and corresponding violation of the Act cannot be supported in light of these comparisons. Consequently, to the degree that the Board determines the issue of the written warning was properly considered by the Judge, the Decision's Findings and Conclusions with respect to the written warning should be overturned.

II. <u>The Decision's Finding That The Performance Improvement Plan And Its Extension Violated The Act Is Erroneous And Should Be Overturned.</u>

A. The Decision's Finding that the General Counsel Made a *Prima Facie* Wright Line Showing Is Erroneous and Should Be Overturned.

The Judge's analysis of whether the General Counsel made out its *prima facie* case is severely lacking. (Decision P. 12). With no union activity on the part of Blankinship other than the single conversation which the Regional Director had already dismissed as not violating the Act, the Judge concludes that the close timing between that meeting and the PIP, warning and schedule change, and what he characterizes as the "hostile reaction" of Rose in the meeting – which is unsupported by the Record – warrants a finding of anti-union animus. The Judge relies for this finding on La Gloria Oil & Gas Co., 337 NLRB 1120 (2002), enf'd. 7 Fed. App.441 (5th Cir. 2003). In La Gloria, the Board stated:

> The General Counsel contends that the terminations of Saylor and Lampe were attributable to their union activity. In response, the Respondent argues that it terminated Saylor and Lampe because of their driving violations and disciplinary record. Thus, the issue presented is one of motivation. In cases alleging 8(a)(3) violations that turn on the employer's motivation, we apply the analysis set forth in Wright Line, 251 NLRB 1083 (1980). Under that analysis, the General Counsel must make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) *the activity was a substantial or motivating reason for the employer's action*. Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Manno Electric, 321 NLRB 278, 283 fn. 12 (1996). 337 NLRB at 1123 (emphasis added).

But here, there was no showing that the "activity was a substantial or motivating reason for the employer's action" as required by Wright Line and its progeny, including La Gloria. Also, although timing was "a" factor in the La Gloria finding that the General Counsel had satisfied its burden of demonstrating anti-union animus, it was not the "only" factor, as it is in Judge Ringler's decision.

Moreover, in La Gloria, the employer could show no history of comparable discipline, or terminations, whereas in the case at bar, the Hospital presented the example of a PIP administered to RN Post in 2010 by the very same supervisor which was, like that accorded Blankinship, 90 days in length, accompanied

by a schedule change to afford more support on a shift with higher staffing, and designed to result in performance improvement. (R. Ex. 4, T. 288, 354).

The Judge's reliance on La Gloria is further undercut by important distinguishing facts in that case. There, two truck drivers were terminated a few days after their employer learned of their desire to introduce a union. In addition to the timing of the terminations, the employer had interrogated several of the employees regarding their union activity and threatened job loss if the union were successful in obtaining representation. The Board noted that the timing of their discharges *along with* the interrogations and threat of job loss led them to believe the employees were fired to stop the budding union sentiment. Here, the uncontroverted, and in fact agreed upon, testimony of Record is that Charge Nurse Tom Flis specifically told Blankinship that the PIP and accompanying schedule change were *not* related to his Union activity and Rose assured him that he was *not* on probation. (T. 242).

Judge Ringler characterizes the reaction of Rose to Blankinship's proffer of news that he and two other employees will serve as bargaining representatives as "hostile". Yet, the Regional Director dismissed the Union's allegation that the statements attributed to Rose constituted a violation of the Act, and the Board denied the Union's appeal of that finding. There is no support in the Record for the Judge's attribution of "hostility" to Rose's reaction, and this finding should be ignored.

Once having erred in concluding that a *prima facie* case had been established, Judge Ringler moves on to analyze whether the reasons proffered by the Hospital for issuance of the PIP and schedule change were pretextual. Yet, under a proper Wright Line analysis, the burden would never have shifted to the Respondent because there was no *prima facie* case established by the General Counsel.

The Judge first notes that Rose's "hostile reaction" when Blankinship informed her that he was a Union Representative supports a finding of animus. (Decision P.12, Line 34). But this finding is improper, as the Judge's characterization of events is not borne out of the record as a whole. He credits Blankinship's version of the meeting with Rose, which Blankinship of course has incentive to describe as adverse. Even taking Blankinship at his word, nothing in his description of the meeting warrants the Judge's characterization of Rose's reaction as "astonished and hostile." (Decision P. 5, Line 8). Blankinship's testimony, indeed, notes that his relationship with Rose did not change after this interaction, further evincing a neutral reaction to Blankinship's announcement. (T. 244).

The Judge also fails to credit Rose's testimony as to why the performance improvement plan was issued so close temporally to Blankinship's announcement of union participation. Instead of believing, as the evidence clearly indicated, that a series of events that occurred near the time of the meeting had led to Blankinship's PIP, the Judge stepped into the role of Hospital management and decided that Blankinship should have been "disciplined" before he announced he was a union representative. At that point, however, all five of the clinical errors had not yet been committed, and Rose was not yet aware of them! Thus, the Judge relies not just on speculation, but speculation of an impossibility to support his unfounded suspicion of pretext.

In essence, the Judge ignores logical, uncontested facts in reaching a thoroughly illogical and unfounded conclusion. Specifically, in addition to the fact that the Judge cites Rose's failure to act sooner as evidence of unlawful motive, the uncontroverted testimony of Record is that Blankinship only worked three days per week, that the events occurred over the course of three weeks, that they were reported to Rose after they within days of when they occurred, and that the PIP was issued only after Rose realized

that the cumulative impact of multiple errors in such a short time period was a danger signal and warranted corrective action. (T. 148, 314, 402). No matter how you slice it, these facts do not create an unlawful motive, but the Decision steadfastly ignores or disturbs both the Record and reality to reach the conclusion that they do.[1]

B. The Decision's Finding that the Hospital's Issuance And Extension of the PIP Constituted a Violation of the Act Is Erroneous and Should Be Overturned.

The Decision also cites the PIP issued to Blankinship as pretextual because, contrary to the documented evidence of the performance evaluations which had been written long prior to the Union's organization campaign, much less Rose's knowledge of Blankinship's Union support, Judge Ringler determined that Blankinship's performance evaluations indicated stellar performance. In this regard, the performance evaluation system rates employees on a host of issues on a scale of 1 to 5, with 5 being "Distinguished". It is impossible to reconcile the Judge's finding with the fact that Blankinship's 2012 performance evaluation rating was a 2.8, and with the uncontroverted testimony of Rose that this rating was the lowest among all the Registered Nurses in her department. (R. Ex. 3, T. 399, Lines 6-7).

Not only does this finding misrepresent the documented Exhibit, it also includes Judge Ringler's crediting of Blankinship's testimony about the quality of his own work over the opinion of his supervisors. In this regard, a continuing theme throughout the performance evaluations in the Record is deficiency in charting and documentation. Testimony with regard to this deficiency and its impact on patient care was offered by two Charge Nurses as well as Rose. (T. 198, 286-87, 347). Proper protocol

[1] It is worthy of note that, in reaching his conclusion, the Judge discredits most, if not all, of the testimony of each one of the Hospital's witnesses. Though well-settled case law imbues the trial examiner with great discretion in making credibility determinations, the Judge's universal finding that each of the Hospital's witnesses exhibited a demeanor suggesting he or she "strongly favored the

with respect to charting documentation was offered as well by General Counsel witness RN Kelly Morgan. (T. 86, 87). Yet the Judge credits Blankinship's opinion of the sufficiency of his own charting documentation and dismisses the remainder of testimony on the issue. This is in sharp contrast with the Judge's own statement that he detracted greatly from the credibility of Charge Nurse Christy Pack because she appeared highly motivated to advance the Hospital's cause. (Decision P. 9, Lines 20-21). This does not stop him, however, from describing Blankinship as a "stellar" witness (Decision P.11, Line 9) and crediting his testimony over that of Rose's (Decision P.4, Line 21), despite the fact that, in the Judge's own words, Blankinship would have naturally been "highly motivated to advance his own cause."

While there are positive comments in some of Blankinship's previous performance evaluations, which the Judge correctly points out (Decision P. 3, Lines 11-25), the more negative comments have been conveniently left out of the Decision. It is commonly considered good management practice for a supervisor to include positive comments in an evaluation to keep an employee motivated in addition to pointing out developmental needs. It also would defy common sense to conclude that Blankinship's performance included no positive aspects, and the Hospital's witness did not suggest otherwise. However, Rose testified that Blankinship had the lowest score of any nurse in the ER for his 2012 performance evaluation and that his score signaled his performance needed improvement, by way of the key included on the performance evaluation itself. This calls into question the Judge's characterization of the evaluation as "more neutral" and as Blankinship "essentially meeting his job requirements." Instead, Ms. Rose's uncontested testimony suggests that Blankinship, while doing some things positively, had room for improvement in other areas, including a developmental need throughout his history of employment with regard to charting. This is not to mention the fact that he received an overall

score of slightly less than 3 out of 5 in his April 2012 performance evaluation, the lowest in the department, which resulted in Rose's desire to improve his performance. See, R. Ex. 3, stating that a Performance Evaluation of "3" signifies "Meets Requirements", while one of "2" means the employee "Needs Improvement". The fact that Blankinship's average evaluation and individual scores for a host of items including Charting and Documentation fall below a "3" supports the Hospital's issuance of a PIP after Blankinship experienced a spurt of errors. In particular, Rose scored Blankinship a 2.0 out of 5.0, indicating that he needed to improve, in the following areas:

- "Documents accurately and timely according to guidelines."
- "Performs accurate ongoing assessment of patient status."
- "Effectively plans interventions, evaluates response and reassesses plan of care. Documents response on the care plan."
- "Charting reflects patient problems identified in the plan of care and is timely and accurate."
- "Monitors and administers and charts all medications prescribed in a timely manner."
- "Accurately follows policies in patient care."

R. Ex. 3, pp. 2-3. Additionally, Rose accorded Blankinship a score of 2.5 in her "Delegates responsible decision making in planning, providing and delegating care based on assessment." Significantly, in her comments on Blankinship's 2012 performance review, Rose indicated that Blankinship had made improvements, but "needed to stay focused in the patient rooms." R. Ex. 3, p. 7. Clearly, the deficiencies noted in the 2012 Performance Evaluation are consistent underpinnings to the clinical errors that warranted the PIP. Yet, the Judge erroneously characterized Blankinship's 2012 evaluation as "more neutral" and failed to observe the obvious probative value of the shortcomings noted prior to the alleged Union activity in evaluating the performance deficiencies that led to the PIP. This is not only a failure in

logic, but an indication that the Decision's discrediting of the Hospital's rationale for the PIP must fail because it was based on a distortion of the documented evidence.

Further evidence of this distortion comes in the Judge's characterization of Blankinship's appraisals as "glowing" (Decision P. 13, FN. 22), his performance as "strong" (Decision P. 13, Line 23), and his early appraisals as "positive" and "glowing" (Decision P. 3, Lines 11, 15, and 20). Albeit these appraisals contained some positive comments, the picture painted by the Decision blatantly mischaracterizes the evidence, and in turn these incorrect misrepresentations of evidence support the Decision's erroneous findings.

C. The Decision's Characterization of the PIP as Discipline is Not Supported by the Record.

The Judge's insistence that the PIP constitutes discipline, as opposed to an effort to support performance improvement, is a primary piece of his rationale in finding union animus, and is severely misplaced. The basis for this insistence hinges only on the fact that the PIP document states that ongoing failure to address performance issues could result in termination. (Decision P. 2, FN. 15, citing GC. Ex. 5). This logic is unconvincing. In accordance with the Hospital's Discipline and Discharge Policy, many performance issues, could result in termination. (GC. Ex. 11). As demonstrated by Respondent's Exhibits 4, 6, and 8 concerning discipline of Emergency Room nurses, discipline is often accorded without benefit of a PIP, which is a positive means of identifying objectives and resources to support particular aspects of deficient performance.

In Bliss Clearing Niagara, Inc., 344 NLRB 296, 308 (2005), the Board noted that performance improvement plans aren't necessarily disciplinary, the decision turning on whether the PIP was designed

to lead to discharge of deficient employees or intended to alter their performance so their services could be retained in improved form. Clearly the latter situation pertains here. Blankinship was never discharged and testimonial evidence supports the conclusion that he was placed on the plan for the purpose of improvement. This is further supported by the fact that the Hospital provided resources to Blankinship in the form of training and the time of other employees to improve his performance in the ER, and rather than administering discipline for the one failed aspect of the PIP, extended the PIP for an additional opportunity to improve that element. (R. Ex. 9, 11; T. 371).

The Judge's finding of "invidious intent" on the part of the Hospital is undercut by the fact that in Wright Line cases, "willingness to offer rehabilitation by subjecting [the] employee to a less onerous penalty contradicts an invidious intent." Dish Network Corp., 359 NLRB No. 108, slip op at 10 (2013). In Dish Network, the Board agreed with the Judge that the employer's decision to simply issue a disciplinary warning instead of possible termination was strong evidence that the employer was not truly focused on eradicating a union threat. This can be analogously applied to Blankinship's case, where the employer could have issued discipline but instead chose to take progressive action to improve Blankinship's performance.

One of the primary elements cited in the Decision for the Finding that the Hospital was unlawfully motivated in issuing the PIP was the Judge's erroneous view that the Hospital extended the PIP several times and failed to end it (Decision P.13, Line 17). In fact, the PIP was extended only once. The root of the Judge's error is based on his calculation of the end date of the initial PIP as January 6, 2013. However, this calculation is not supported by the Record. It is true that the PIP document says thirty days, but it does not specify whether it is thirty work days or thirty calendar days. Indeed, the Judge

ignores Rose's testimony that the standard length of a PIP in their department is 90 days (T. 354, Line 9-14) and that she had told Blankinship during their December 6, 2013 meeting that although the PIP form said 30 days, because of the nature of the emergency department, and the fact that it would take some time to effectuate the remedial steps, she wanted to keep him on the plan for 90 days. (T. 400-401). Further proof in the Record that the original PIP was intended to last 90 days are its extension at the 90-day mark (Decision P. 10, Line 23), the fact that, in 30 calendar days, Blankinship would only have worked approximately 10 days, which would not have afforded sufficient chance for improvement, Rose's contemporaneous notes citing the 90 days, (R. Ex. 9), Rose's testimony (T. 423), and the fact that another RN in the ER, Richard Post, was given a 90-day performance improvement plan for conduct similar to Blankinship's. (R. Ex. 4; T. 354).

Ironically, the Judge's comments in the Decision support the fact that, as was the case in Dish Network, *supra*, the PIP was extended in lieu of the Hospital administering a higher level of discipline or termination. He notes that "[i]f Blankinship's charting had remained deficient, the Hospital would have elevated his discipline." (Decision P. 9, Line 34). But instead of disciplining Blankinship for his continued charting deficiencies, the Hospital further demonstrated its lawful motivation of remediation by extending the PIP to give Blankinship additional time to improve. The Judge's assumption that the Hospital would have disciplined Blankinship for his continued charting deficiencies if the deficiencies were not pretextual is illustrative of his absolute refusal to credit the Hospital's witnesses that the purpose of the PIP was remedial and not punitive. The only true probative value of the extension, when coupled with the absence of any even alleged indicia of anti-union animus following issuance of the PIP is to show that there *was* no anti-union animus motivating the Hospital.

Astoundingly, the Judge credits Blankinship's own opinion of the quality of his charting documentation over that of his supervisor and Charge Nurses in finding that the PIP was arbitrarily extended for the final 30-days. (Decision P.13, FN. 19). Not only does the Judge once again credit the testimony of an employee with a great personal interest in the outcome of the case regarding his own work performance, but he ignores Rose's acknowledgement of improvement in four areas and extension only in the area of continued improvement need. (R. Ex. 11). The reason for this omission is clear: these are not the actions of an individual motivated by anything other than the improvement of work performance and acknowledging them would detract from the intent of the Decision to support a violation of the Act by the extension of the PIP.

The Record is clear that the extension of the PIP was related solely to charting. And even though both Blankinship and Rose testified that Rose discussed a number of specific charting issues with Blankinship in explaining the decision to extend the PIP, the Judge did not credit the Hospital on this issue because the Hospital did not offer copies of the allegedly deficient charts. (Decision P.10, Line 37). Not only would it have been extremely time-consuming and burdensome for the Hospital to go back through its records to find these charts, but there was no disagreement that the charting was lacking that would have warranted such an evidentiary production. Blankinship did not dispute the deficiencies of the charting, but simply stated that he thought it wasn't as important as Rose did. The Judge's dismissiveness of the Supervisor's view of the charting deficiencies is wholly inappropriate, especially in light of the fact that the General Counsel's own witness testified to the proper protocol for charting, as did the Hospital's witnesses. (T. 72, 86, 87, 286). Achievement of this protocol 90% of the time was the goal sought by extension of the PIP. (T. 425).

D. The Substitution of the Judge's Opinion for the Professional Judgment of Registered Nurses Regarding the Significance of Blankinship's Errors Was Inappropriate and Inconsistent with the Evidence of Record.

The PIP issued to Blankinship was clearly based on five discrete clinical errors, which occurred in late November and early December of 2012. They evinced either or all of a lack of knowledge, a lack of focus, or a lapse of applied knowledge. The Judge's erroneous conclusions of pretext are fed by repeated misunderstanding and/or mischaracterization of the evidence regarding Blankinship's errors. Specifically, the Judge calls the errors "harmless" and "innocuous" despite testimony to the contrary from Blankinship's supervisor and other department RNs, including those who testified for the General Counsel. (T. 196-97, 282, 309, 374, 376-77, 379, 409). The Judge effectively disregards the medical expertise and professional knowledge of those witnesses and replaces it with his own opinion of the meaning of Blankinship's errors in the context of safe patient care in the Emergency Department. In the space of approximately ten work days, Blankinship had five clinical errors or missteps that caused great concern among his supervisors and co-workers. (T. 148, T. 200, T.216,, T.218, T.283, T.411). The danger signal created by the accumulation of these errors was the impetus for the issuance of his performance improvement plan. While it may have been "unlikely," as the Judge put it, for Blankinship to have made these simple errors (Decision P. 3, FN. 17), the fact is that they occurred. Their occurrence rang the danger bell loudly, and it was incumbent upon the Hospital to remediate his performance for the safety of its patients.

A good example of the Judge's dismissiveness of the significance of these events is evident in the Decision's address of the intubation incident, which was one of Blankinship's enumerated performance failures in the PIP. The Decision erroneously describes Blankinship's question regarding medication protocol during intubation as "solely blurt[ing] out a redundancy". (Decision P. 6, Line 38). This

description is not only inaccurate, but wholly unsupported by the Record. The testimony of Charge Nurse Christy Pack, who was present for the incident, clearly recounted the attending physician's astonished reaction to Blankinship's question of whether to apply a paralytic or an anesthetic first, and credibly conveys her own concern that the question evinced Blankinship's serious lapse in performing basic nursing procedure. (T. 282). Essentially, Blankinship was questioning whether he should administer medication that would paralyze a patient who would then remain awake but unable to speak while the doctor inserted a large tube down his throat. The astonishment of both Pack and the Doctor upon Blankinship's asking of the question led her to report the incident to Rose. In so doing, Pack noted that the incident caused her concerned about having Blankinship working as one of the few RNs to perform such a procedure on the 7am shift, which in turn caused Rose to consider addressing scheduling assignment as part of the PIP. (T.283, Line 18).

In abject contrast to Judge Ringler's characterization of Blankinship's question as "blurting out a redundancy," the question is alarming to health care professionals. They cannot afford the Monday morning quarterback luxury of considering why an experienced nurse would ask this question. There could be a thousand reasons; but none of them are relevant. The potential compromise of patient safety is too great; it is simply incumbent on the Hospital to address remediation before patient harm occurs. Moreover, the General Counsel's own witnesses identified the intubation medication procedure as clear and unwavering. In spite of this, the Blankinship's testimony is erroneously paraphrased as stating that the sedative is "generally" administered first, and in essence the Judge belittles the significance of the

event. (Decision P. 6). Again, this is simply erroneous, as established by all health care professionals who testified, including the nurses presented by the General Counsel. (T. 86, 241, 280, 379).[2]

Similarly, the Decision evinces the Judge's substitution of his own view for that of the health care professionals in addressing Blankinship's incorrect interpretation of the spikes on a heart monitor as he was working with colleagues to resuscitate a patient. Proper reading of telemetry is a basic nursing skill utilized frequently in the Emergency Department. Blankinship's error again signified a dangerous lapse to the health care professionals. But incomprehensibly, the Decision suggests that the Hospital should "welcome such exchanges as opportunities to promote dialogue that might benefit its staff" and characterizes its inclusion in the PIP as "suspect". (Decision P. 13, FN. 18).

In the same vein that the Judge's downplays the significance of the events above, his description of Blankinship's errors as "harmless" is wrong, dangerous, and contrary to all of the testimony of Record. (T. 196-97, 282, 309, 374, 376-77, 379, 409). What constitutes "harm" in the Judge's view appears to be limited to actual harm to a patient. But every act inconsistent with the protocol of the Emergency Department, whether willful or not, endangers patient welfare. The protocols are developed specifically to maintain patient safety. The fact that in one of the instances cited in the PIP, Blankinship got lucky because an adolescent patient's mother was in the room to question the wrong medication he was about to administer does not mean that the patient was not endangered. Blankinship's errors warranted a PIP not because each one, taken separately would have warranted the same action. The need for the PIP arose from the fact that all five occurred in combination in a concentrated period of time, and all five

[2] Parenthetically, Blankinship himself admitted that his question was stupid, saying that he would "rather look stupid" than make an error in the order of medication. He also acknowledged that, contrary to the Judge's paraphrase that the paralytic is "[generally]" offered first, the paralytic is "never" offered first. (T. 165, 241).

were rooted either in Blankinship's lack of knowledge or focus or both. But whatever the cause, the Hospital had not just the right, but the obligation to correct before more serious and actual harm was done. Sadly, the Judge steadfastly refused to credit any of the testimony supporting that fact.

The Decision notes as evidence of pretext that the Hospital's decision to implement a PIP was suspect, given Blankinship's "considerable health care resume and strong past performance". (Decision P. 13, Lines 23-24). This basis for asserting pretext defies logic, in that it suggests that anyone with significant experience cannot have a lapse in professional performance. It also erroneously characterizes Blankinship's performance as "strong", when, as demonstrated above in the analysis of his performance evaluations, although his performance largely "met expectations", several elements of that performance failed to meet expectations. (R. Ex. 3). The Judge further mischaracterizes Blankinship's performance evaluations as "glowing appraisals" because they contain select compliments, and cites those appraisals as a basis for finding that a person whose performance warranted those compliments could not possibly require a PIP years later. (Decision P. 13, FN. 22). Again, this characterization ignores the evidence of Record; it also betrays a failure to consider human life experience.

Finally, the Judge substitutes his opinion for that of the health care professionals in claiming as evidence of pretext his view that "Blankinship was disciplined more drastically than other ER RNs, who committed vastly more serious transgressions." (Decision P.14, Lines 1-2 and FN. 23). Nothing could be more inconsistent with the evidence of Record. First of all, the PIP was an expression of confidence that Blankinship had the capacity to improve. Secondly, the Judge ignored evidence of the 90-day PIP issued to Richard Post, long before the Union's organizing campaign. (R. Ex. 4). The Post PIP exemplifies the Hospital's practice of affording an opportunity for improvement to an RN with a similar series of

incidents reflecting inattention. Post's delivery of substandard care and failure to relay key information to a doctor are both incidents similar to those that resulted in the administration of a PIP to Blankinship of the same length. Blankinship, among other things, improperly discharged a patient without checking with the doctor first and also gave or attempted to give the wrong medication to different patients, which by any definition would be considered substandard care. In both instances the Hospital thought the employees capable of improving and thus placed them on a PIP. No disparate treatment can reasonably claimed on the basis of this Record.

III. The Decision's Finding That The Schedule Assignment Of Blankinship To A Later Shift Was A Violation Of The Act Is Erroneous And Should Be Overturned

The Decision erroneously states that the Hospital failed to show that it would have changed Blankinship's schedule absent his Union activity. The reasons cited in support of this finding are: (1) the same reasons that rendered the IP and warning unlawful tarnished the schedule change; (2) if Blankinship were genuinely unqualified to regularly perform the 7:00am shift, Rose would not have regularly assigned him this shift for a three month period as an inducement to remain with the ER, (3) Rose's claim that Blankinship was only temporarily assigned the 7:00am shift in order to replace an RN on leave was not supported by the schedule, and (4) the schedule change closely followed his Union activity. (Decision P.14, Lines 7-13).

Regrettably, the Judge's conclusion is incorrect, because the elements cited in support of the conclusion are incorrect and wholly unsupported by the Record. As discussed above in Points I and II of the Argument, the Judge's findings that the PIP and written warning were unlawful are erroneous, and so those findings cannot "tarnish" the schedule change. The second reason offered -- that Rose would not

have assigned Blankinship to the early shift "as an inducement to remain in the ER" if she thought he was unqualified -- is not only untrue but illogical. Rose did not offer Blankinship more 7am shifts as an inducement for him to remain in the Emergency Department, and at the time the early shifts were scheduled, Blankinship had not yet committed the performance failures that caused Rose to assign him to a later shift. The third reason fails because the Judge has either misunderstood or mischaracterized the schedule evidence. And the last reason fails because the schedule change initiated in January had absolutely nothing to do "Union activity", by which the Judge refers to the November 29 meeting which the Board found did not violate the Act.

All Emergency Department staff who testified at the trial, including the General Counsel's witnesses, testified consistently that nurses assigned to that department did not "own" a shift, but were assigned based on operational needs, and that Emergency Department management attempted to accommodate nurses' preferences or needs regarding schedule. (T. 80, 114, 203-04, 342, 428). In the fourth quarter of 2012, pursuant to Blankinship's request, with the approval of Rose, Charge Nurse Rae Smith began to assign him more frequently to the 7:00am shift. That shift was staffed with only three nurses, including the Charge Nurse. At 10:00am, another nurse was added to staff, followed by another at 11:00am, and still another at 1:00pm. (T. 189-90, 211, 341).

The PIP issued to Blankinship on December 6, 2012 included a prospective change in his most recently scheduled 7:00am shift assignments to ensure that, while he was working on the specific performance objectives included in the PIP, he would be assigned to the 11:00am shift. (R. Ex. 9, T. 177, 220). The reason for this was obviously so that he would have the support of additional nurses in caring for the patients in the Emergency Department. Correspondingly, the assignment to a later shift with more nurses

available would reduce the strain of a heavier patient load on the early shift and allow more time for Blankinship to focus on improving his performance. (T. 211, 283, 309, 342).

Unfortunately, the Judge missed or ignored the common sense of this assignment, and chose to discredit the Hospital's testimony with regard to it. (Decision P. 14, Lines 7-13, T. 177, 220). In so doing, he also discredits the General Counsel's witnesses with regard to scheduling practice. Instead, the Judge mistakenly characterized the reduction in Blankinship's 7am shifts as a punishment for his "Union activity" – that is, the brief November 29 meeting on which the entirety of the Decision's finding of unlawful behavior turns.

On Decision P. 4, Lines 5-11, Judge Ringler credits Blankinship's testimony that Rose said he was a "good fit" for the Outpatient Surgery day position. The Judge extrapolates, with no support whatsoever, that Rose believed Blankinship was an equally good fit for the Emergency Room *and* that she began to allow the assignment of more 7am shifts in an effort to induce him to remain with the Emergency Department. (Decision P. 4, Line 19). To the contrary, Rose would not have supported Blankinship's desire to transfer to the Outpatient Surgery Department at all if she was motivated to keep him in the Emergency Department. The only reasonable conclusion supported by the Record is that, in keeping with the policy and practice of the department, and consistent with operational needs and Blankinship's skill as it was known prior to the rash of clinical errors he committed in late November, Rose was merely attempting in the ordinary course of business to provide Blankinship with the shift he preferred more often. Support for this conclusion is evident in Blankinship's testimony that Rose told him she was "just trying to give [him] . . . days", Rose's testimony that she just tried to give him what he wanted, and testimony that the schedule was created based on departmental need, desires of staff, and skill level. (T.

203-04, 311, 342-43). It is noteworthy that even the General Counsel witnesses testified cogently that schedules change frequently. (T. 80, 112).

Moreover, instead of crediting the weight of evidence from both Hospital and General Counsel witnesses regarding scheduling practice, the Judge characterizes as an "important exchange" a brief, casual encounter between Rose and Blankinship in the department lounge, and spins the foregoing speculation -- completely inconsistent with both logic and the Record --as to why Blankinship's 7am shift assignments were increased in October, 2012.

In keeping with his general refusal to credit the Hospital's witnesses, Judge Ringler unjustifiably discredits Rose's testimony that some of the increase in 7am shifts assigned to Blankinship in the fourth quarter of 2012 because the Department "had a day shift person on time out or time off," (T. 428) The Judge stated that he examined the schedule and could not find anyone who was "taking extensive leave," so he erroneously concludes that Rose's testimony is false. However, this conclusion completely ignores the fact that Blankinship could still be filling holes in the schedule without one single nurse taking extensive time off. This finding additionally entirely ignores the testimony of Rae Smith, which stated that the "hole" Blankinship was filling was not created by someone taking leave, but rather by someone opting to switch to the 11 am shift because she was taking college courses. (T.209-10).

Moreover, even though the schedules do not provide sufficient data to determine the absence of each nurse on each given day, even by the Judge's own limited calculation, in the month of December, over 50% of Blankinship's 7am shifts coincided with leave of another RN, over 33% of the 7am shifts in November coincided with leave of another RN, and 20% of the 7am shifts in October coincided with

leave of another RN. (Decision P. 4, FN. 9). Beyond the Judge's seeming misunderstanding of the testimony of both Rose and Smith, and his perplexing, erroneous discrediting of their testimony, the Judge's own limited deciphering of the schedules proffered by the Hospital demonstrate that he has no legitimate basis for concluding that Blankinship's shift assignment change was motivated by anti-union animus.

Finally, the Judge's reliance on the schedule change "closely following his Union activity" is erroneous for multiple reasons. First, the "Union activity" relied upon is the single November 29 exchange between Blankinship and Rose that both the Regional Director and the Board already have found did not violate the Act. Secondly, even if the Board were to rule that Rose evinced anti-union animus at the November 29th meeting, the schedule assignment change did not occur until at least six weeks after that meeting. Perhaps most importantly, the Record is barren of any suggestion of indicia of anti-union animus outside of the November 29th meeting. So even characterizing the evidence in the light most favorable to the Judge's faulty conclusion, the Decision's reliance upon timing is misplaced.

In sum, there is no logical reading of the Record that supports the Judge's conclusion that the change in schedule assignment violates the Act, and this finding and conclusion should therefore be overturned.

IV. <u>The Decision's Remedy And Order Are Unlawful And Should Be Overturned.</u>

The Decision cites as Conclusion of Law that the Hospital violated Section 8(a)(1) and (3) of the Act by issuing Blankinship a written warning, PIP and schedule change because he engaged in Union or protected concerted activities. For all of the reasons discussed above, the supporting bases for this

conclusion are erroneous both factually and legally and should be overturned. Correspondingly, the Decision's Remedy and Order are inconsistent with the law and should be overturned.

However, to the degree that the Board upholds the Judge's Decision, it is important to note the following issues that should be clarified or corrected with respect to the Remedy. In this regard, the Remedy orders the Hospital "to restore the 7am schedule that [Blankinship] was assigned between October 7 and December 29, 2012". (Decision P. 15, Lines 23-24). According to the evidence highlighted in the Decision in the chart on Page 4, Blankinship was assigned the 7:00am shift five times in October, nine times in November, and 11 times in December. Consequently, this element of the Judge's Remedy is unclear and impossible to follow without further clarification.

In addition, the Remedy directs distribution of remedial notices to unit employees in the facility "electronically via email, intranet, internet, or other electronic means" in reliance on J. Picini Flooring, 356 NLRB No. 9 (2010). However, such a remedy is only appropriate in circumstances where there is evidence that communication with unit employees is regularly done by electronic means. Given that such is not the case here, this element of the Remedy should be overturned.

CONCLUSION

For all of the reasons set forth above, the Hospital submits that the factual findings and conclusions of law set forth in the Decision are erroneous and should be overturned.

Dated: West Hartford, Connecticut
March 3, 2014

Respectfully submitted,

_____/S/_____

Kaitlin K. Brundage
Attorney for Greenbrier Valley Medical Center
62 Ledgewood Road
West Hartford, Connecticut 06107
(860) 307-3223
BrundageKK@Gmail.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GREENBRIER VMC, LLC D/B/A GREENBRIER VALLEY MEDICAL CENTER	:	Case No. 10-CA-094646
and	:	
NATIONAL NURSES ORGANIZING COMMITTEE	:	

CERTIFICATE OF SERVICE

The Undersigned, Kaitlin K. Brundage, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. §1746, that the Respondent's Brief in Support of Exceptions to the Decision issued by Administrative Law Judge Robert Ringler was served on March 3, 2014 upon the following:

Micah Berul
Counsel for the Charging Party
2000 Franklin Street
Oakland, CA 94612
MBerul@calnurses.org

Jasper Brown
Counsel for the General Counsel
National Labor Relations Board, Region 10
4035 University Parkway, Suite 200
Winston-Salem, NC 27106-3325
Jasper.brown@nlrb.gov

Dated: West Hartford, Connecticut
March 3, 2014

Respectfully submitted,

____/S/_____

Kaitlin K. Brundage
Attorney for Greenbrier Valley Medical Center
62 Ledgewood Road
West Hartford, Connecticut 06107
(860) 307-3223
BrundageKK@Gmail.com