UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RIDGEWOOD HEALTH CARE CENTER, INC. AND RIDGEWOOD HEALTH SERVICES, INC., A SINGLE EMPLOYER	)	
and	)	**Case 10-CA-113669**
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO	)	

RESPONDENTS RIDGEWOOD HEALTH CARE CENTER, INC. AND RIDGEWOOD HEALTH SERVICES, INC. ANSWERING BRIEF TO USW'S CROSS-EXCEPTIONS

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RESPONSE TO USW'S EXCEPTIONS

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2. Exception 2 lacks merit because the ALJ properly determined that RHS demonstrated that it did not hire Mr. Borden for legitimate business reasons. The ALJ's credibility determination which supported the decision was reasonable, and also supported by the weight of the evidence in the record and the fact that Mr. Borden did not refute the reasons he was not hired.

3. Exception 3 lacks merit because the ALJ properly determined that RHS had a legitimate business justification for not hiring Ms. Kimbrell. Furthermore, as set forth in Respondents' Exceptions and Brief, the General Counsel failed to establish union animus or that RHS's hiring decisions, including the decision not to hire Ms. Kimbrell, were motivated by union animus.

4. Exception 4 lacks merit because the ALJ properly determined that RHS demonstrated that it did not hire Ms. Kimbrell for legitimate business reasons, including her performance in her interview, which was not refuted. The ALJ's credibility determination which supported the decision was reasonable, and also supported by the weight of the evidence in the record.

5. Exception 5 lacks merit because the ALJ properly determined that RHS demonstrated that it did not hire Ms. Kimbrell for legitimate business reasons, including the

complaint Joette Brown received from a trusted friend regarding Ms. Kimbrell's impolite and disrespectful patient care. The ALJ's credibility determination which supported the decision was reasonable, and also supported by the weight of the evidence in the record.

6. Exception 6 lacks merit because the ALJ properly determined that RHS had a legitimate business justification for not hiring Marcus Waldrop prior to October 1, 2013. Furthermore, as set forth in Respondents' Exceptions and Brief, the General Counsel failed to establish union animus or that RHS's hiring decisions, including the decision not to hire Mr. Waldrop prior to October 1, were motivated by union animus.

7. Exception 7 lacks merit because the ALJ properly determined that RHS demonstrated that it did not hire 7 of 11 of the employees for whom discrimination was alleged for legitimate business reasons. The ALJ's credibility determinations which supported the determinations were reasonable, and also supported by the weight of the evidence in the record. Furthermore, neither the USW nor the General Counsel has offered any specific record or case citations or any argument regarding the ALJ's determination that RHS did not hire 4 of the 11 employees (Midge Lechey, Teresa Diane McLain, Charlotte Kimbrough, and Lacee Cox) for legitimate business reasons. Therefore, this exception is improper, not supported by any record evidence citations, and due to be rejected.

8. Exception 8 lacks merit because the ALJ properly determined that RHS had legitimate business justifications for not hiring Paul Borden, Hope Kimbrell, and Marcus Waldrop (before October 1). Furthermore, as set forth in Respondents' Exceptions and Brief, the General Counsel failed to establish union animus or that RHS's hiring decisions, including the decision not to hire these particular applicants, were motivated by union animus.

9. Exception 9 lacks merit because the ALJ properly determined that RHS had legitimate business justifications for not hiring Paul Borden, Hope Kimbrell, and Marcus Waldrop (before October 1). Furthermore, as set forth in Respondents' Exceptions and Brief, the General Counsel failed to establish union animus or that RHS's hiring decisions, including the decision not to hire these particular applicants, were motivated by union animus.

RESPONSE TO USW'S "RELEVANT FACTUAL BASIS"

In its "Relevant Factual Basis" section, the USW discusses issues irrelevant to its exceptions. The USW's exceptions relate only to the ALJ's determination that RHS did not hire three employees (Borden, Kimbrell, and Waldrop); thus any alleged facts not related to RHS's decision not to hire these three individuals should be disregarded by the Board.

The USW also largely misrepresents record testimony. For example, contrary to the USW's brief, page 7, the evidence does not reflect that RHS and Preferred knew the lease would end October 1, 2013 a year before October 1, 2013. No record evidence supports the USW's factual assertions, and thus, it must be rejected. In fact, RHS and Preferred did not notify the union or employees of the lease ending date until July 2013 and did not notify the state until August 2013.

The evidence reflects that RHS conducted a fair, non-discriminatory hiring process. Former Preferred employees were given a period when only they could apply before applications were opened to the outside. (Stip. Facts, JE-2, ¶ 29). Ms. Brown encouraged all of the Preferred employees to apply. (T 70:5-7.) The letter of July 15, 2013 from Ms. Brown's counsel and her belief at the time that she would need to bargain with the union when she began operations, at the same time as notifying employees they would need to go through the application process, reflects Ms. Brown's intent to conduct hiring decisions without regard for whether or not employees were employed by Preferred or members of the union. (T 415-16, 601-02 (Brown)).

The evidence reflects that Preferred employees were provided preferential treatment in hiring. Although the USW argues that RHS did not consider the Preferred applicants' experience working at the Ridgewood facility, in fact, RHS hired a much greater percentage of Preferred applicants that applied (nearly 80%) than non-Preferred applicants (around 50%). See JE-2, ¶¶ 33-35. In addition to the employees who were hired, out of the bargaining unit employees that applied, RHS offered employment to at least three other employees, Stephanie Eaton, Peggy Ayers, and Melissa Uptain, who declined their offer of employment. (T 82 (Eaton), 229, 233 (Uptain), 629-630 (Holland)). If those employees are considered, the percentage of Preferred bargaining-unit employees hired out of those who applied is greater than 80%.

The USW offers only speculation, and tellingly cites no evidence, in support of its argument (USW brief, note 2) that RHS decided to abandon its "earlier position" that 99.9% of employees would be retained. The evidence is consistent that RHS notified employees throughout the process they would have to proceed through its application process to be hired. The evidence reflects, after early August 2013, RHS continued encouraging all Preferred employees to apply, and offered employment to more than 80% of those who applied, which fails to provide evidence of discriminatory intent.

As set forth in Respondents' Brief, the evidence reflects RHS did not mislead employees into believing there would be no changes to the terms and conditions of employment if they accepted a job with RHS. In misrepresenting the evidence regarding Joette Brown's initial meeting with employees, the USW relied only on non-bargaining unit employees and employees who did not accept employment, and therefore, could not have been misled into accepting employment.[1] See USW brief, page 5, ¶ 1. Their testimony is contradicted by the weight of the

[1] T 350:14-22 (former Director of Nursing not hired, not in bargaining unit); 230:15-21 (Uptain) (did not accept employment).

record testimony.[2] Contrary to the USW's brief, pages 5 and 6, the evidence is overwhelming that Ms. Brown made clear during all meetings with Preferred employees that she was still evaluating what they could do and that there would be changes to benefits, policies, and possibly to wages.[3]

Contrary to the USW's brief, the second meeting occurred in August after Preferred had sent a WARN letter to employees notifying them their employment would be terminated as of September 30, 2013[4] and reflects that in this meeting employees were informed that although pay may remain close to the same, benefits would change as well as other terms and conditions of employment.[5] The testimony of Audrie Borden, a non-bargaining unit employee, does not reflect that she participated in meetings with bargaining unit employees (T 340-342), and her testimony is contradicted by their testimony.[6]

Bargaining unit employees were **not** asked if they were in the union during the interview process. The **only** bargaining unit employee who alleged he was asked that question, was maintenance employee Paul Borden,[7] who **stated** he was **not** in the union. The other 15 bargaining unit employees who testified were not asked that question.[8] The testimony as a whole

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[2] See, e.g. Resp. Brief, notes 17 and 18.

[3] See Resp. Brief, notes 18-19, 70, 74 and accompanying text.

[4] Id. at notes 73-74, 19 and accompanying text.

[5] See, e.g., T 77-78 (Eaton), 66-67 (Kimbrell).

[6] See Resp. Brief, notes 73-74, 19 and accompanying text.

[7] Pam McPherson and Audrie Borden were not in the bargaining unit. Although on direct examination at trial, Stephanie Eaton, who was offered but declined employment with RHS, testified that she was asked if she was in the union, on cross, she clarified that she was asked what her paycheck deductions were, not if she was in the union. See Resp. Brief, note 95.

[8] See Resp. Brief, note 95.

indicates that employees were asked questions about their job, questions regarding what they liked and wanted to improve and questions about their personal characteristics.[9]

Hope Kimbrell testified that she "came in late" to Joette Brown's first meeting at Ridgewood in the summer of 2013, missing the ongoing discussion regarding insurance. (T 54:16-22, 55:13-15, 65:13-19 (Kimbrell)). She heard Deb Thomas ask about the bath team, because "[a]t that time, the bath team had been kind of cut down because census in the building was low." (T55:15-20 (Kimbrell)). Contrary to the general testimony the USW relied on, Ms. Kimbrell made clear on cross and in her Affidavit to the NLRB that **all that she remembers** regarding the initial meeting was discussion about insurance and Deb Thomas's question about the bath team and Ms. Brown's response regarding **the bath team**, "If it ain't broke, don't fix it." (T 64:1-10 (everything in Affidavit true and correct), 64:19 – 66:18 (accurate description of what was said; other things were said, but she does not remember them)). Ms. Thomas who asked the question about the bath team testified that Ms. Brown's comment about "If it ain't broke, don't fix it" was only about the bath team. (T 156 (D. Thomas)).

In the second meeting Kimbrell attended, with only 4 to 5 employees including Stephanie Eaton, Kimbrell testified that Ms. Brown said that the pay would remain relatively the same but that employees would have to work with her regarding insurance. (T 66:19-67:7 (Kimbrell)). Eaton testified Ms. Brown said "the benefits could not stay the same," "they were going to try to keep pay around the same," but "if benefits had to stay the way they were, the pay would have to go down." (T 77:7-17, 78:3-6 (Eaton)). Ms. Brown told them that employees "would have to start over with their vacation days and sick days and things of that nature." (T 78:9-11 (Eaton)). Ms. Brown' sister said in this meeting that they were starting the company out at zero dollars,

[9] See T 83-84 (Eaton), 131-32 (Wilbert) 45-46 (Baker).

employees would be new hires, and the contract was up for negotiation and there were things to be negotiated. (T 86:2-87:7 (Eaton)). Ms. Kimbrell understood the application process and participated in a 15-minute interview where she testified she was "basically" asked about strengths and weaknesses and about insurance, but she does not remember all that was asked. (T 70:14 – 71:2 (Kimbrell)). Eaton stated that she was asked how long she worked there, her position, what shift she worked, her pay, whether she got holiday pay, her good qualities, if she had to change something, and her suggestions about work. (T 83:22 – 84:6 (Eaton)).

The USW's "Relevant Facts" section ignores that Waldrop missed his physical without first asking to reschedule. Waldrop testified that he understood a physical was required and had been scheduled for him (T 92:13-14), but he did not attend and did not talk to anyone before failing to attend his scheduled physical. (T 97:5-7 (Waldrop)). He called a Preferred office employee only after he had missed the physical. (T 97:8-15 (Waldrop)). Although he provided hearsay testimony that Preferred employee Sonya Carroll had been able to reschedule her physical, he does not know whether she called to reschedule before the scheduled date of her physical, so the ALJ properly did not rely on that testimony. (T 97:18-20 (Waldrop)). He does not know of anyone else who was hired who missed their scheduled physical date. (T 97:21-23 (Waldrop)). He spoke to Sheila Cooper, who was in transition from the DON at Shadescrest to Ridgewood after October 1, she indicated Ridgewood needed to hire more LPNs, and he was subsequently hired after completing his physical. (T 98:2-17 (Waldrop)).

ARGUMENT

The ALJ properly concluded that RHS did not hire Paul Borden and Hope Kimbrell and Marcus Waldrop before October 1 for legitimate business justifications. Furthermore, the General Counsel failed to demonstrate union animus during the hiring process on behalf of RHS or that the hiring decisions themselves were motivated by union animus. The ALJ's decision that

RHS did not violate §§ 8(a)(3) or 8(a)(1) in the failure to hire Borden, Kimbrell, or Waldrop should be affirmed.

I. The Record Does Not Reflect Union Animus which Motivated RHS's Hiring Decisions.

As set forth in the Respondent's Exception and Brief, in the hearing, the General Counsel failed to demonstrate that RHS's hiring decisions were motivated by union animus or an unlawful hiring scheme. The authorities the USW cites in support of finding an unlawful hiring scheme actually compels a finding that RHS did not engage in discrimination in its hiring decisions.

Contrary to the inapposite cases cited by the USW, RHS hired the vast majority of the Preferred employees who applied. While RHS hired roughly 80% of the Preferred applicants who applied, in Pace Industries, cited in USW brief, p. 9, the employer hired only 22 out of 103 former employees who applied, or 21%. 320 N.L.R.B. 661, 669 (1996). Love's Barbeque Restaurant, cited at p. 9, hired zero of the employees which had been employed less than a month before at the predecessor's restaurant. 245 N.L.R.B. 78, 81-82 (1979). In Daufuskie Club, Inc., cited p. 9, the employer hired 30 of 138 (22%) predecessor's employees who applied. 32 N.L.R.B. 415, 416-17 (1999). Galloway School Lines, Inc., cited at p. 9, hired 23 of either 48 or 54 (48% or 43%) of the predecessor's bargaining unit drivers and monitors. 321 N.L.R.B. 1422, 1422-23 (1996). None of the cases relied upon by the USW for an unlawful hiring scheme resemble this case in which the overwhelming percentage of Preferred employees were hired by RHS.

Unlike the cases cited by the USW where the successor employer opened up applications to predecessor employees either after or at the same time as the general public, here, RHS provided Preferred employees a three-week window to apply before it even considered outside

applications. In Love's Barbeque, the Board found that the employer's "method of hiring indicated a desire to avoid hiring [predecessor] employees," and, in fact, the employer did not hire any predecessor employees out of the 30 who were hired. 245 N.L.R.B. at 79-80. Although the predecessor had closed the restaurant just three weeks before its franchisee began hiring (Id. at 79), the franchisee's "initial newspaper advertisements made no mention of the name of the restaurant, the initial 2-1/2 days of interviewing was done at a motel rather than the restaurant," and hiring at the restaurant did not commence until it was clear a majority of predecessor employees would not be hired. Id. at 80-81. In Galloway School Lines, although the employer knew for months it would take over operation, instead of first interviewing predecessor employees, the employer first advertised in the local newspapers.[10] 321 N.L.R.B. at 1422. Waterbury Hotel Management found that the successor employer's proferred reasons were a prextext for not hiring predecessor employees when it refused to participate in a job fair at the predecessor's job site, delayed its announcement of its own job fair, and, despite knowing of the facility's re-opening for months, refused to interview predecessor employees until opening the application process to outside employees through the job fair.[11] 333 N.L.R.B. at 492-494, 496-504. RHS did not engage in any secretive or discouraging hiring tactics, but instead actively encouraged Preferred employees to apply to work with RHS. However, some Preferred employees chose not to apply or accept offers from RHS (and some who were hired did not show up for work) which led to a bargaining unit which unexpectedly did not consist of a majority of Preferred employees.

[10] Galloway School Lines included direct evidence that the President would not hire union employees through the hiring process. 321 N.L.R.B. at 1422.

[11] Likewise, Daufuski Club conducted job fairs open to predecessor and non-Predecessor employees to commence its hiring. 328 N.L.R.B. at 416.

Also, contrary to the cases cited by the USW (page 9), RHS utilized the same hiring procedures it already utilized at its sister facility Ridgeview and the same procedures as with applicants who were not employed by Preferred. In Galloway School Lines, for hiring monitors, the employer for the first and only time utilized a new procedure of "random selection" where applicants were selected allegedly "randomly" after the employer completed only the state-mandated age and police checks. 321 N.L.R.B. at 1424. This process was contrary to all other decisions and all other districts, where the terminal manager alone had made hiring decisions of bus monitors. Id. Waterbury Hotel utilized far more stringent hiring criteria for hiring predecessor bargaining unit employee than non-predecessor employees; for example, non-predecessor applicants with greater scheduling limitations were selected over predecessor applicants who were denied employment because of their scheduling limitations. 333 N.L.R.B. at 526-528. Daufuskie Club subjected predecessor applicants to a rating system not applicable to non-predecessor applicants, and required a greater level of approval prior to hiring predecessor employees. 328 N.L.R.B. at 416-17. Love's Barbeque, while clarifying that it was not holding that "it was inherently unreasonable for the Respondent to use employment screening procedures such as application forms, aptitude testing, or physical examinations, or to make employment decisions on the basis of information gleaned from those procedures," affirmed the ALJ's determination that the use of the criteria in that case was unlawful because of the direct evidence that the employment screening criteria were adopted to avoid union representation. 320 N.L.R.B. at 661-62. In contrast to each of these cases relied upon by the USW, here, **all the evidence** reflects that RHS used the same hiring criteria and steps already in place at its sister facility and used consistent criteria and steps between Preferred and non-Preferred applicants.

As reflected in the Respondents' Exceptions and Brief, the evidence does not support a finding that the RHS implemented the Helping Hands position to inflate staffing levels. RHS's use of the Helping Hands position was consistent with its pre-existing operation practices at its sister facility Ridgeview, where Helping Hands were represented in the bargaining unit. (T 407-08 (Brown)). The USW states that no predecessor employees were considered for the position, but there is no evidence that Preferred employees sought to be considered for the position. There is also no evidence that any Preferred employee was not hired due to the new position. Likewise, contrary to the USW's unsupported, conclusory assertion that the staffing levels in the one-year period after October 1, 2013 mirrored the historical staffing levels, the record evidence actually demonstrates that RHS maintained more employees in the bargaining unit one year after commencing operation in October 2014 than it had when it started operations on October 1, 2013.[12]

Not only does the record evidence not support a scheme designed to avoid hiring a majority of Preferred employees, but the evidence the USW cites in its brief does not provide evidence of animus during the hiring process.[13] Each of the alleged statements by Joette Brown cited by the ALJ were alleged to have occurred after October 1, 2013, when Ms. Brown already knew that former Preferred employees were not a majority. Her statement that the nursing home was operating as a non-union facility was consistent with the factual situation and the NLRA,

[12] The schedules for October 1, 2014, reflect that at least 105 bargaining unit employees (including 2 maintenance) were scheduled, not counting bargaining unit employees not listed on the schedules or out on leave. See CP-12 (total of 103 bargaining unit employees on schedules with no maintenance schedule); CP 12-1 (22 LPNs); CP 12-2 (16 Helping Hands); CP 12-3 (36 CNAs); CP 12-4 (15 dietary (not including supervisor or employee not scheduled)); CP 12-5 (8 Housekeeping); CP 12-6 (6 Laundry). The schedules for the subsequent period, the second half of October 2014, reflect at least 102 bargaining unit employees (including 2 maintenance), not counting bargaining unit employees not listed on the schedules or out on leave. See CP 13 (100 bargaining unit employees listed on schedules); CP 13-1 (19 LPNs), 13-2 (39 CNAs), 13-3 (12 Helping Hands); 13-4 (16 Dietary); 13-5 (8 Housekeeping); 13-6 (6 Laundry).

[13] See Resp. Brief, pp. 34-38.

which prohibits employers from recognizing majority unions. The alleged response to a question that it is possible the plant could close if the union was voted in, did not occur until 2014 (T 163-164 (D. Thomas), more than four months after RHS commenced operations, and was not made the subject of an unfair labor practice charge by the USW.

II. The ALJ Properly Determined RHS Had a Business Justification for Not Hiring Paul Borden.

Based on the testimony of various witnesses at the hearing and his credibility determinations, the ALJ properly determined that RHS demonstrated a valid business justification for not hiring Paul Borden. (Order, 19:18-20). After hearing testimony from Borden, Joette Brown, and Kara Holland regarding Borden's interview and observing Borden for himself, the ALJ "found testimony by Brown and Holland regarding his interview performance to be credible and corroborated by the interview notes." (Order, page 7, note 39). In discharge cases, "[t]he 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 they are incorrect." Flex Frac Logistics, LLC, 2014 NLRB LEXIS 408, *2, 8 (2014) (affirming ALJ's determination that employer's discharge of employee was lawful, based on ALJ's credibility determinations).[14]

The relevant evidence demonstrates no reason for second-guessing the ALJ's credibility determination. Here, Brown and Holland provided credible, consistent testimony, corroborated by Holland's interview notes, that Borden was not hired because he was "defensive and aggressive" during the interview, even concerning basic questions.[15] Brown testified that Borden scared her and made her feel uncomfortable. (T 430, 528 (Brown)). Holland testified that

[14] See also Standard Dry Wall Products, 91 N.L.R.B. 544 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951).

[15] T 429, 430, 528 (Brown), 618-20 (Holland) & R-1.

Borden appeared that he did not want to be there or participate in the interview process through the whole interview. (T 618-19 (Holland)). Borden himself failed to refute Brown's and Holland's testimony regarding his demeanor in the interview and spent most of his account of the interview describing how he expressed his concerns that during his drug test a female made sure he provided a valid test.[16] (T 223 (Borden)). Borden himself believed he was not hired because of a disability. (T 431 (Brown), RX-2). The Judge listened to Borden's testimony and was able to assess RHS's testimony that he appeared defensive, aggressive, and made other employees uncomfortable.[17]

The cases the USW cites do not support its erroneous assertion that subjective[18] reasons are generally insufficient to satisfy an employer's *Wright Line* defense.[19] In the cases cited in the USW's brief, the ALJ did not hold that the subjective reasons were insufficient *per se*, but, in contrast to this case, concluded that the subjective reasons were not credible and that discrimination based on protected conduct was the real reason.[20] In Wismarq Valencia, LLC, the

[16] There is no evidence that Borden's drug test was conducted any differently than other applicants. RHS's reasons for having an employee observe the employee provide the test are legitimate and implemented to ensure that it obtains accurate drug tests. T 223 (Borden).

[17] The ALJ did not credit the "uncorroborated hearsay" testimony regarding the reports that Borden made employees feel uneasy because he began using a power tool during a prayer to start a meeting (T 526-27 (Brown)). This report, offered not for its truth but notice and mental state, is corroborated by Brown's and Holland's observations of his interview behavior and is an additional example of Borden's demeanor towards others.

[18] The USW provides no argument why the reasons for not hiring Borden were "amorphous."

[19] See, e.g., D&F Electric, Inc.,1998 NLRB LEXIS 9, *50-51 (NLRB ALJ 1998)("whether or not the Respondent should have hired these individuals based on their prior work record is a purely subjective decision which the Respondent has the exclusive right to make on the basis on its own judgment and experience").

[20] In Centerline Construction Co., 347 N.L.R.B. 322, 325-26 (2006), the Board specifically stated that "an applicant's proficiency in selling herself could be a factor in a hiring decision," but, based on a credibility determination, determined that her failure to sell herself was not the real reason when, she made comments to her interviewers regarding her union experience, the decisionmaker did not speak to her, the only interviewer who spoke to her said he did not tell the decisionmaker she had a lack of enthusiasm, and the applicant log reflected no reference to her ability to sell herself. Likewise, in So-White Freight Lines, Inc., 301 N.L.R.B. 223, 224-25, 229-30 (1991), the Board rejected the employer's reason for the laying off an employee directly after he engaged in protected activity that he ranked at the bottom of the employees because of poor performance when the evidence

ALJ rejected the subjective reasons for not hiring the three most vocal union advocates, not because they were subjective, but because he found them to be false. 2011 NLRB LEXIS 236, *75-77 (NLRB ALJ 2011). The ALJ found that credibility determinations were very important in evaluating subjective reasons for not hiring applicants,[21] and that, while the applicants' testimony was "plausible, internally consistent at every point, and provided in a manner that seemed believable," one of the two decisionmakers had very poor memory, the other contradicted his own testimony regarding hiring decisions several times, and the detailed interview notes contained no mention of the disputed testimony that arose in the interviews and allegedly caused the decision not to hire. Id. at *40-41. In contrast, here, there is no evidence which contradicts Brown's and Holland's accounts. Clearly, the NLRA does not require an employer to hire an employee who was defensive, aggressive, and made interviewers uncomfortable. The undisputed testimony demonstrates this was the reason Borden was not hired.

Contrary to the USW's argument, the evidence establishes that the reasons for not hiring Borden were consistent with the reasons for not hiring applicants who had not been employed by Preferred. Applicants not employed by Preferred were rejected for subjective reasons – RHS did not hire Stephen Campbell because he was "aloof" and he appeared he "did not want to be there" (T 485-86 (Brown)) did not hire Dana Padgett because she took an unreasonable amount of time to complete the application (T 670 (Warren)), and did not hire Casmere Greenwade because she was not a good fit for working with residents when she took an extreme amount of time to

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supporting such a ranking was inconsistent and the evidence reflected that he was excluded from any layoff decision process.

[21] 2011 NLRB LEXIS at *37. The NLRB adopted the decision because exceptions were not filed. Wismarq Valencia, LLC, 2011 NLRB LEXIS 310 (2011). Therefore, the decision is nonbinding.

complete the application, used white-out, and "rambled a lot" while completing the application. T 671-72 (Warren). The evidence also reflects that like Borden, other employees who failed to disclose current or recent employers on their application were not hired. (T 669-672 (Warren), RX-25, 31). Borden points to no applicants who failed to disclose employers who were hired. Borden admits he did not disclose the VA cleaning service employer and provides no good reason for not doing so. (T 226 (Borden)).

That RHS did not contact Preferred regarding Mr. Borden's work history does not give reason to second-guess RHS's reasons or the ALJ's credibility determinations. RHS refused to hire Borden, not based on whether he could actually do the maintenance work, but based on his interview performance and the interviewers' judgment of the impression that he would leave for residents and other employees. (T 429-30 (Brown), 618-19 (Holland)). In a residence facility like RHS, maintenance employees worked in and around residents, family members and other employees. RHS was looking for employees who would meet its expectation of creating a good impression for its facility. (T 424 (Brown)), and, based on his interview, Brown and Holland concluded Borden would not. GPS Terminal Services, 333 N.L.R.B. 968, 980 (NLRB 2001)(upholding employer's hiring decisions as lawful, stating "I am satisfied with Severini's explanation of why Stemler, Mutzabaugh, and Evans were not hired which in simplest terms was that they did not measure up to the Respondent's expectations regarding flexibility, teamwork, and willingness to train or cross-train.").

The date of the interview notes does not make the testimony conflicting. Borden himself testified that his interview occurred before the second meeting with Ms. Brown and Ms. Stewart at the facility and that, as a maintenance employee he was allowed to interview before the note

was posted for other employees to get their applications in.[22] Furthermore, the USW provides no explanation as to why a misdated application provides evidence that the reasons for not hiring him were conflicting.

Mr. Borden's own testimony regarding his interview is not credible and contradicts the interview notes and other witness accounts. He alleges that the only questions asked in the interview were, (1) if he was in the union (and he said no) and (2) what he would change in the facility, in response to which he testified he replied nothing (contrary to his interview notes (R-1)), and alleged that an interviewer made a comment congratulating him on passing his drug test. (T 222-23 (Borden)). He testified he was not asked about his job cleaning the VA clinic (T 225-26) when the notes reflect he was (R-1) and RHS would have no reason to know of the job if he did not bring it up in the interview since it was not on his application. The interview notes reflect much more detailed interview discussion. (R-1). Finally, Borden's sister, Melissa Uptain (T 238 (Uptain)), who worked with him in maintenance in the bargaining unit (T 229), was offered a position by RHS, but she declined (T 233), reflecting that RHS chose not to hire Borden for non-discriminatory reasons.

The ALJ's credibility determination was reasonable and must be upheld. The undisputed testimony and notes establishes Borden's poor interview performance and failure to list an employer, and the USW has failed to point to any relevant evidence that suggests the finding is incorrect, much less the clear preponderance of the relevant evidence.

III. The ALJ Properly Determined RHS Had a Business Justification for Not Hiring Hope Kimbrell.

[22] T 219-21 (Borden); 79 (Kimbrell)(made clear there were different interview dates for different groups of employees).

The ALJ correctly determined that RHS had demonstrated a business justification for refusing to hire Hope Kimbrell. Order, p. 19:18-20. Ms. Brown provided the undisputed testimony that she decided not to hire Ms. Kimbrell because of the complaint she received from Stacy Alley about Kimbrell, and also, because Kimbrell did not have a good interview and was sarcastic, short and evasive. (T 445-446 (Brown)). Neither Kimbrell nor any other witness provided any testimony or evidence to refute Ms. Brown's testimony. On the contrary, Ms. Alley testified at trial, and gave very persuasive and convincing testimony about her negative experience with Ms. Kimbrell and her complaint about Ms. Kimbrell to Ms. Brown. The ALJ determined that Stacy Alley's testimony was credible, and therefore, he credited Ms. Brown's and RHS's reason for not hiring Ms. Kimbrell. Order, p. 7, note 41. In discharge cases, 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 they are incorrect." Flex Frac Logistics, LLC, 2014 NLRB LEXIS 408, *2, 8 (NLRB 2014)(affirming ALJ's determination that employer's discharge of employee was lawful, based on ALJ's credibility determinations). Here, no relevant record evidence challenges the credibility finding, and thus, it must be affirmed.

The USW has failed to articulate any relevant evidence which challenges the ALJ's determination that RHS did not hire Kimbrell because of the complaint. The complaint was clearly a memorable event that Alley undisputedly made to Brown at the Ridgewood facility before August 30, 2013, when her father passed away. (T 609-10 (Alley)). The ALJ reasonably credited Brown and Alley's testimony.[23] The USW argues that the complaint was not legitimate

[23] At trial, RHS relied on the testimony by Brown and Alley and not Alley's email in November 2013 confirming her earlier verbal complaint to Ms. Brown. The email sent by Alley in November 2013 was, in response to a request from the NLRB, to provide a document describing the reason Kimbrell was not hired. (T 570-572 (Brown)). RHS

because it was not included in Kimbrell's interview notes, but Brown did not participate in Kimbrell's interview (T 448 (Brown)), so the complaint would not be included in interview notes. Ms. Brown testified that she made a mental note to herself when Alley made the report because "we're a service industry. We work for these people. We need to bend over backwards for them." (T 446, 601 (Brown)). That Brown did not report the complaint to Preferred has no relevance because she had no responsibilities for Preferred or role in the management of their employees. (T 530 (Brown)). However, as an owner of RHS, she does have the discretion to hire only employees that she believes will treat the residents as she wants them to be treated.

Likewise, the USW failed to provide any evidence reflecting that Kimbrell's poor interview performance contributed to RHS's decision not to hire her. Kara Holland testified convincingly and consistent with her interview notes (R-9) that Ms. Kimbrell was unfriendly, very short in answering questions, rolled her eyes at times and would laugh out loud inappropriately. (T 623 (Holland)). The General Counsel and counsel for the USW had the interview notes but failed to question Ms. Kimbrell about Ms. Holland's observations. (T 60-61 (Kimbrell)). Unlike the cases on which the USW relies rejecting the employer's subjective reasons for action, here, the USW has provided no evidence and no basis for rejecting Ms. Holland's reasons for recommending that Kimbrell not be hired. Kimbrell did not even dispute Holland's testimony. Clearly, refusing to hire an applicant who is unfriendly, short, and inappropriate during her interview is a sufficient recent for action. The USW provides no basis for questioning Holland's testimony consistent with her interview notes.

That Kimbrell was not informed of or questioned about Alley's report does not provide evidence that the complaint was not the real reason for not hiring her. Ms. Brown made clear in

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never purported that document to be contemporaneous documentation or provided it for any reason other than it was requested by the NLRB.

her testimony that her goal in hiring employees was to hire employees who would provide excellent care and service to patients and their families. (T 446, 601 (Brown)). Alley, a trusted friend, reported to Ms. Brown that her father and their family had been provided excellent service by Ridgewood staff, except by Kimbrell, who had treated them with "disrespect" and acted like "it was putting her out" when the family asked normal questions or made simple requests. (T 609 (Alley)). Alley's complaint did not require investigation. Nothing Kimbrell could have said would have justified such a complaint from a patient's family at a patient care facility. Taking action against an applicant or employee based on a serious customer or patient complaint is a legitimate, non-discriminatory reason for action. Boston Cab Company, Inc., 212 NLRB 560, 564 (1974)(discharge decision based on "single complaint" not unlawful as it concerned a serious issue and originated from a "good customer of the Company."); Rent Me Trailer Leasing, Inc., 1991 NLRB LEXIS 944, *12-13 (NLRB ALJ 1991)(discharge because of customer complaint was a legitimate, non-discriminatory reason, and employer's failure to show the employee "the complaint letter or to give him a chance to answer it" did not show pretext.)

The cases the USW cite do not support its position. Unlike here where the complaint from the patient's family was sufficient cause for action in itself, in Rood Trucking Co., the Board determined that the employer's total reliance on an incomplete report, without investigating the allegation or the information missing from the report, and which did not even in itself support the Company's finding that "the leading union and workplace activist" was stealing time, was improper.[24] Likewise, unlike here, where Ms. Brown had no reason to question Ms.

[24] 342 N.L.R.B. 895, 899-900 (2004) ("[T]he report fundamentally fails to reflect accurately either the beginning or ending of Marangoni's workday. . . . The surveillance report did not fully report Marangoni's onduty time while he was employed at the Rochester facility. . . .The evidence in this case – which shows that the Respondent ignored aspects of what it knew and miscalculated what it did not bother to investigate – underscores our conclusion that it used the surveillance report merely as a pretext.").

Alley's complaint, New Orleans Cold Storage & Warehouse Co., found the employer's presentation of three written warnings for tally errors to be pretextual, when the disciplines occurred directly after protected activity, no one had ever been written up for tally errors, the warnings had no evidentiary basis, no investigation was conducted into the disciplines, and after the employee refuted the reasons behind the disciplines they were not removed.[25] Moreover, Ms. Brown did hire Cindy Dudley, the union president, who Alley complemented at the same time that she complained about Kimbrell.

The USW has provided no basis to reject the ALJ's crediting of Ms. Brown's testimony that she did not hire Ms. Kimbrell based on Stacy Alley's credible testimony about her complaint regarding Ms. Kimbrell. The USW has provided no relevant evidence, only unsupported speculation, to second guess the ALJ's finding that Ms. Kimbrell was not hired because of the complaint and interview notes. Therefore, the ALJ's decision finding that RHS had a legitimate business justification should be affirmed.

IV. The ALJ Properly Determined RHS Had a Business Justification for Not Initially Hiring Marcus Waldrop.

The ALJ correctly concluded that RHS had a business justification for not hiring Marcus Waldrop prior to October 1, 2013. Order, p. 19:18-20. It is undisputed that RHS required applicants to pass a physical prior to hire. (T 476-77 (Brown), 664 (Warren)). Before the RHS hiring decisions were made, the evidence is undisputed that RHS's sister-company Ridgeview required physicals before hiring decisions were made. (T 648-650 (Warren)). Waldrop admits that he was scheduled for a physical, that he did not show up for his physical because he "did not have time," and that he did not notify anyone before his physical that he was not attending. (T 92, 97 (Waldrop; did not talk to anyone before he missed his physical and talked to Preferred

[25] 326 N.L.R.B. 1471, 1477 (1998).

employee Sonya Carroll after she missed her physical)). As the ALJ determined, non-Preferred applicants who missed their physicals without prior notice were not hired. (Order, p.8, note 44; 492-93 (Brown; Connie Wood missed physical and was not hired), 628-29 (Holland, same), R-32). The evidence is undisputed that no applicants who missed their scheduled physical without prior notice were hired prior to October 1. (T 97 (Waldrop; does not know of anyone), 664 (Warren)).

The USW bases its entire argument on speculation regarding RHS's motivation to limit the Preferred employees as of October 1 and that Sonya Carroll was allowed to reschedule her physical and Audrie Borden was allowed to retake hers. (USW brief, p. 16). However, Waldrop, whose hearsay testimony was the only testimony provided regarding Ms. Carroll, admitted that he did not know if she had rescheduled the physical before the scheduled date. (T 97 (Waldrop)). There is no record evidence that she missed her physical without first rescheduling it. (Id.). Thus, the hearsay testimony regarding Carroll does not establish that Waldrop was treated differently than other employees.

Audrie Borden's testimony that she was allowed to return to have her blood pressure taken for her physical does not demonstrate that Marcus Waldrop was treated inconsistently. Ms. Borden testified that she showed up for her scheduled physical appointment. (T 345 (A. Borden)). Ms. Borden does not know what the health provider told RHS regarding her physical, but only knows that she was told her blood pressure was too high. (T 345 (Borden)). That she showed up for her scheduled physical but had to have her blood pressure rechecked provides no evidence that Marcus Waldrop, who did not show up for his scheduled physical and did not call anyone, was treated inconsistently.

The USW has failed to point to any evidence which challenges the ALJ's determination that RHS did not hire Mr. Waldrop prior to October 1 for a valid business reason - that he failed to show up for his physical or notify anyone in advance that he would not attend. The USW has failed to identify any evidence that Waldrop was treated inconsistently with non-Preferred bargaining unit employees, therefore, the decision must be affirmed.

CONCLUSION

For all the foregoing reasons, the ALJ's decision that RHS had a valid business justification for not hiring Paul Borden, Hope Kimbrell, and Marcus Waldrop (prior to October 1), and therefore did not violate §§ 8(a)(1) or 8(a)(3) in refusing to hire them, must be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29nd day of May, 2015, I filed the foregoing via the Board's electronic filing system, and served a copy of the foregoing by electronic mail upon the following:

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