Columbia Memorial Hospital *and* 1199 SEIU United Healthcare Workers East. Cases 03–CA–120636, 03–CA–122557, 03–CA–124333, 03–CA–124803, and 03–CA–124816.

July 30, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On January 12, 2015, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the Charging Party and the General Counsel each filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's cross-exceptions, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as amended,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by maintaining an overly broad confidentiality rule and violated Sec. 8(a)(5) and (1) by unilaterally implementing an access card policy and by failing to furnish relevant, requested information to the Union. In addition, no exceptions were filed to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by unlawfully denying union representation to an employee during investigative interviews and Sec. 8(a)(3) and (1) by issuing the access card policy in response to employees' Sec. 7 activity and to discourage employees from engaging in such activities.

[2] In finding the 8(a)(3) and (1) violations, we note that no party excepted to the judge's application of *Wright Line*, 251 NLRB 1083 (1980). However, Members Hirozawa and McFerran disavow the judge's articulation of a four-element test, and instead note the applicability of the long-standing three-factor test for establishing unlawful discrimination, as set forth in *Nichols Aluminum*, 361 NLRB 265, 271 (2014), while Member Johnson adheres to his position as fully set forth in *St. Bernard Hospital & Health Care Center*, 360 NLRB 208, 208 fn. 2 (2013). Further, we reject the Respondent's challenge to the judge's finding that the General Counsel met his initial *Wright Line* burden. Although the Respondent asserts that the judge mistakenly relied "exclusively upon the timing" of Northrup's discipline to infer animus, the judge also considered, and we rely upon, other strong circumstantial evidence of animus, including: (1) the Respondent's displeasure with the Union's meeting in its lobby, to which Northrup used her access card to allow entry to Union Vice President Rosamaria Lomuscio; (2) the Respondent's lack of a written policy and inconsistent verbal instructions concerning access card usage; and (3) the Respondent's disparate treatment of Northrup, as evidenced by the use of access cards by management personnel, including Human Resources Vice President Kelly Sweeney, to allow public entry, its failure to demonstrate that it had ever investigated or disciplined any other employee for an access-card or sign-in policy violation, and its investigation of Northrup, but not Kim Bishop, for allowing Lomuscio access to the main lobby following cigarette breaks.

Consistent with the complaint allegations, we find separate 8(a)(3) and (1) violations for the January 8 verbal warning and the February 11 suspension. In agreeing with the judge that Northrup's suspension was unlawful, however, we do not rely on the judge's statement that "[w]hile it may strain credibility that Northrup could not recall, it is also understandable and reasonable for an employee not to self-incriminate him or herself. However, that is not being dishonest." In finding the violation based on the suspension, Members Hirozawa and McFerran conclude that, because the Respondent demonstrated discriminatory animus toward Northrup's access-card usage, the very conduct that spurred the investigation, and because it already knew that Northrup had used her access card to admit Lomuscio to the facility when it asked Northrup whether she had done so, the record establishes that the Respondent's investigation of Northrup's December 26 conduct was unlawfully motivated. Accordingly, the February 11 suspension for Northrup's allegedly dishonest answers—elicited during the tainted investigation—cannot serve as a lawful basis for discipline. See *Supershuttle of Orange County*, 339 NLRB 1 (2003).

Member Johnson would not rely on *Supershuttle* but, like the judge, finds that the Respondent has failed to meet its burden under *Wright Line* to establish that it would have suspended Northrup for being "dishonest" even in the absence of the protected activity. He notes, moreover, that an employee does not have the right to refuse to cooperate with an employer's investigation into unprotected conduct. See generally *ATC/Forsythe & Associates*, 341 NLRB 501 (2004).

[3] We have modified the judge's recommended Order to conform to the Board's standard remedial language. Specifically, we find merit in the General Counsel's cross-exceptions that the judge's recommended Order omitted appropriate cease-and-desist and affirmative action paragraphs to remedy the 8(a)(5) refusal to furnish information violation that he found. Similarly, the judge also failed to include appropriate language fully remedying the 8(a)(5) violation based on the Respondent's implementation of the access card policy. We have substituted a new notice to conform to the Order as modified.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3.

"3. Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Cindy Northrup with a verbal warning because she engaged in union activity."

2. Insert the following as Conclusion of Law 4 and renumber the subsequent paragraphs.

"4. Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Cindy Northrup with a five-day suspension because she engaged in union activity."

ORDER

The National Labor Relations Board orders that the Respondent, Columbia Memorial Hospital, Hudson, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a provision in its "Organizational Ethics Policy" prohibiting the disclosure of "[a]ny information, whether patient information, employee information or corporate information, which is accessed or disclosed in any way other than in the course of conducting hospital business," to the extent that it prohibits the disclosure of employee information.

(b) Promulgating and maintaining a provision in its "Organizational Ethics Policy" entitled "Access Card."

(c) Issuing disciplinary warnings, suspending, or otherwise discriminating against employees because of their support for and activities on behalf of the Union.

(d) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) Unilaterally changing the terms and conditions of employment of its unit employees.

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

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

(a) If it has not already done so, rescind or revise the overly broad confidentiality rule referenced above in 1(a) to the extent that it prohibits the disclosure of employee information.

(b) Make Cindy Northrup whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

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

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning and suspension issued to Cindy Northrup, and within 3 days thereafter, notify her in writing that this has been done and that the disciplines will not be used against her in any way.

(e) Furnish to the Union in a timely manner the information requested by the Union on February 21, March 3 and 6, 2014.

(f) Rescind the access card policy referenced above in 1(b) in its "Organizational Ethics Policy."

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

> All full-time and part-time registered professional nurses licensed to practice in the State of New York including per diem registered professional nurses, pharmacists, physical therapists, medical technologists.

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

(i) Within 14 days after service by the Region, post at its existing facilities and clinics in the Greater Hudson, New York area, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 8, 2014.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a provision in our "Organizational Ethics Policy" prohibiting the disclosure of "[a]ny information, whether patient information, employee information or corporate information, which is accessed or disclosed in any way other than in the course of conducting hospital business," to the extent that it prohibits the disclosure of employee information.

WE WILL NOT promulgate and maintain a provision in our "Organizational Ethics Policy" entitled "Access Card."

WE WILL NOT issue disciplinary warnings, suspend, or otherwise discriminate against you because of your support for and activities on behalf of the Union.

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

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the overly broad confidentiality rule referenced above in our "Organizational Ethics Policy."

WE WILL make Cindy Northrup whole for any loss of earnings and other benefits resulting from her suspension, less any net interim earnings, plus interest.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning and suspension issued to Cindy Northrup, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the disciplines will not be used against her in any way.

WE WILL furnish to the Union in a timely manner the information requested by the Union on February 21, March 3 and 6, 2014.

WE WILL rescind the access card policy referenced above in our "Organizational Ethics Policy."

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

All full-time and part-time registered professional nurses licensed to practice in the State of New York including per diem registered professional nurses, pharmacists, physical therapists, medical technologists.

COLUMBIA MEMORIAL HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/03-CA-120636 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

John Grunert, Esq. and *Amy L. Cocuzza, Esq.*, for the General Counsel.
Richard P. Walsh, Esq. and *Paul E. Davenport, Esq. (Lombardi, Walsh, Davenport & Amodeo, P.C.),* for the Respondent.
Susan J. Cameron, Esq. (Levy Ratner, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Albany, New York, on July 29, 30, 31, and August 1, 2014, pursuant to a consolidated complaint issued by Region 3 of the National Labor Relations Board (NLRB). The 1199 SEIU United Healthcare Workers East filed several amended charges on various dates in January, February, March, and April 2014.[1] The General Counsel issued a consolidated complaint on April 29 and a subsequent consolidated complaint on May 28, 2014, further consolidating cases (GC Exh. 1).[2] The Columbia Memorial Hospital (Respondent) filed timely answers denying the material allegations in the consolidated complaint.

The consolidated complaint alleges that the Respondent violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (Act) by disciplining Cindy Northrup for engaging in Section 7 protected activity; failing to provide requested necessary and relevant information to the union; maintaining an overly broad organizational ethics confidentiality policy that reasonably construed to chill employees' Section 7 rights; implementing a security access card policy without bargaining with the union; issuing the access card policy in response to union activity; and failing to provide Weingarten rights to Kristen Bartholomew.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

[1] All dates are in 2014, unless otherwise indicated.

[2] Exhibits for the General Counsel are identified as "GC Exh." and the exhibits for the Respondent are identified as "R. Exh." The closing briefs for the General Counsel, Respondent and the charging party are identified as "GC Br.," "R. Br.," and "CP Br." The transcript testimony is noted as "Tr."

[3] Given the amount of testimony and evidence taken throughout the hearing regarding the arbitrator's decision on the union's rights of access to the Respondent's facility and the grievances filed on behalf of Cindy Northrup when she was subjected to discipline, I instructed the parties to address whether deferral to the grievance/arbitration process would be appropriate. Upon review of the arguments presented by the parties in their closing briefs, I find that deferral to the grievance and arbitration to be inappropriate. Without going into the merits whether individual issues should be deferred, it is well settled that deferral to the grievance and arbitration process of the collective-bargaining agreement is an affirmative defense that must be timely raised in the answer to the complaint or at the trial. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1136 (2014); *SEIU United Healthcare Workers-West*, 350 NLRB 284 fn. 1 (2007). Therefore, the Respondent's assertion of this defense after the trial closes is untimely. *SEIU Healthcare Workers-West*, above.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a corporation, operates as a hospital providing inpatient and outpatient medical care at its facility in Hudson, New York, where it annually deprives gross income in excess of $250,000 and purchases and receives goods at its Hudson, New York facility valued in excess of $5000 from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union is the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate bargaining unit of

> All full-time and part-time registered professional nurses licensed to practice in the State of New York including per diem registered professional nurses, pharmacists, physical therapists, medical technologists.

There are approximately 700 bargaining unit employees. The Respondent and the Union have been party to a series of collective-bargaining agreements for several years, the most recent being from January 1, 2011, to December 31, 2015 (GC Exh. 2).[4] Article 4, Section 8 of the current contract states, in part

> A representative of the Union shall have access to the Employer's premises for the purposes of conferring with the Employees, Delegates of the Union and/or Employers, provided there is no interruption of service. Such access shall be preceded by telephone notice to the VP of Human Resources or his/her designee.

The interpretation of Section 8 of the contract was grieved by the union. An arbitrator decision issued in January 2012 held, in part, that the Respondent violated Section 8 of article 4 of the contract by denying the union access to the hospital's premises for the purpose of conferring with the employees, delegates of the union and/or employer to the extent that the hospital's policy regarding access precluded access between the hours of 8 p.m. and 6 a.m. and precluded access to the public areas (GC Exh. 3 at p. 29).[5]

B. Credibility

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a

[4] The parties could not agree as to when the union became the exclusive party representative (Tr. 9).

[5] The allegation of restricted access to the hospital facility was not raised in this complaint and only serves as background information for the discipline taken against Cindy Northrup (Tr. 11, 12).

variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

C. The Testimony of Timothy Rodgers

Timothy Rodgers (Rodgers) testified he was and is employed by the union as the administrator organizer. He attends labor-management meetings, arbitrations, and union meetings at the Respondent's premises. He testified that the union meetings are usually held on a monthly basis in a public area of the hospital. The meetings are attended by union delegates and unit employees from 8 a.m. until 12 a.m. Rodgers said that since the unit employees are only available to attend during a break or after completing their shift, the meeting would start at 8 a.m. and conclude at 12 a.m. so that all employees would have the opportunity to meet with the organizer or delegate. Rodgers testified that he would notify the Respondent's human resources office through his contact person (Susan LoGiudice) usually a couple of hours to a few minutes before arriving when he plans to enter the hospital. Rodgers said that when he arrives at the hospital, he would usually enter through the main lobby and sign his name in a visitor register log near the customer greeter's area. He said that the greeter's name was "Jack" and that it is rare to find a security guard in the main lobby area. Rodgers also said that he has entered the hospital from a locked side door located on Prospect Avenue during the day by being "swiped" in with a security access card when accompanied by management officials, who he identified as Ray Jones, the former vice president of human resources, Kelly Sweeney (Sweeney), the HR director, and Patricia Finnegan, the current HR vice president (Tr. 304–311).

When Rodgers needed access to the hospital during the night, he would go through the Emergency Department (ED) entrance after the hospital's main lobby doors are closed, usually at 8 p.m. He testified he makes every effort to enter the hospital before 8 p.m. so that he does not have to use the ED entrance (Tr. 312).

D. The Discipline of Cindy Northrup

In December 2013, Rodgers was busy with other union matters and the responsibility for attending the monthly meetings and other union matters at the hospital was given to Rosamaria Lomuscio (Lomuscio), who was and is the union vice president. Lomuscio said that the monthly meeting was scheduled for December 26. Lomuscio said that the December 26 meeting was planned for the entire day and night to enable unit employees to attend after their work shifts, during their breaks and lunch periods. Usually 7 to 10 employees would attend the meeting at various scheduled time periods during the day and night (Tr. 44–50).

Lomuscio testified that she informed Sweeney on December 19, 2013, by telephone that she would be arriving on December 26 to lead the monthly meeting. Lomuscio informed Sweeney that the meeting would continue past 8 p.m. According to Lomuscio, when Sweeney objected and said that the union does not have access to the hospital after 8 p.m., Lomuscio referenced the arbitrator's decision which did not restrict the union's access as long as the meeting was held in a public area of the hospital. Lomuscio reminded Sweeney on December 24 during a grievance proceeding pertaining another matter that the arbitrator's decision did not restrict the union's access time when holding meetings at the hospital. Lomuscio said that Cindy Northrup (Northrup) was present and overheard her conversation with Sweeney (Tr. 51–55). Northrup is a staff pharmacist, employed by the Respondent for over 25 years. Northrup has also been a union delegate for over 15 years.

Sweeney recalled a telephone conversation with Lomuscio on December 19, 2013, regarding the union access to the hospital for December 26. Sweeney denied she was upset that the union planned to meet after 8 p.m., but she told Lomuscio that her concern was over the location the union was planning to meet after 8 p.m. When informed that the union planned to meet in the hospital lobby after 8 p.m., Sweeney informed Lomuscio that the hospital lobby was not a public area when the hospital was closed. Sweeney said that there are certain security measures that have to be taken after the union informs her as to the time and place of the meeting. In this manner, security would then know that the union was authorized to meet after the hospital had closed and in a public area. Sweeney denied having a second conversation with Lomuscio on December 24 regarding the December 26 meeting (Tr. 446–450). Susan LoGiudice, the executive assistant to Sweeney at the time, sent out an email to the hospital directors on December 26 that the union will be on the premises from noon to 7 p.m. on December 26, but did not mention the union's presence at the facility after 7 p.m. (GC Exh. 33).

1. T he December 26 union meeting

Lomuscio testified that she arrived at the hospital parking garage around 10:20 a.m. on December 26, 2013, and walked to the hospital main lobby area to sign the visitor log at 10:25 a.m. Lomuscio said that she was greeted by a security guard during her sign-in (GC Exh. 5 at p. 2). Lomuscio said that that she met with the unit employees in the hospital cafeteria between 10:30 and 7 p.m. and only took restroom and smoke breaks. Lomuscio said that she did not encounter any security guards but did speak to the director of housekeeping while holding the meeting in the cafeteria.

Northrup arrived at the cafeteria after her shift around 3 p.m. and conversed with Lomuscio and other employees. Northrup left shortly afterwards, but arranged to return and meet with Lomuscio that evening at the hospital. Northrup arrived before 7 p.m. and met with Lomuscio. They then left the hospital facility for dinner through 70 Prospect Avenue door. After dinner, they returned to the hospital between 7:45–8 p.m. and reentered the hospital through the same 70 Prospect Avenue door. Posted on the door is a sign that reads "Authorized entry only" (R. Exhs. 6, 7), which is visible on the video tape record-

ed by the door's surveillance camera (R. Exh. 14). In order to enter the locked 70 Prospect Avenue door, an employee, authorized to possess a security access card, would swipe the card through a card reader. The card reader recorded Northrup's swipe at 8:01 p.m. It is not in dispute Northrup swiped the card to allow herself and Lomuscio through the 70 Prospect Avenue entrance that night.

Lomuscio said that she was never informed by the Respondent not to use the 70 Prospect Avenue for access and it was her understanding that it was common practice to allow employees with access cards to swipe employees and non-employees through that entrance (Tr. 62). Lomuscio also stated that she was never instructed to use the ED entrance and to sign in upon entering the premises (Tr. 137). Northrup testified that it was standard practice for her to swipe employees and non-employees through the locked 70 Prospect Avenue entrance. She said that she has done so "hundreds of times." Northrup said that she was never given any instructions or provided a policy statement on the use of her access card (Tr. 215, 222).

Upon entering the facility, Lomuscio and Northrup headed to the cafeteria to resume their meeting with the unit employees. Upon discovering that the cafeteria was now closed, Lomuscio decided to hold the meeting in the front lobby area of the facility. Lomuscio testified that the lobby was open until 8:30 p.m., but credible testimony from Sweeney and Rodgers indicated that the lobby was closed at 8 p.m. Nevertheless, the union meeting was held in the lobby until shortly after 12 midnight. Northrup had already departed from the facility around 9:30 p.m.

During the 8:30 p.m. and midnight timeframe, several employees stopped by to discuss union matters with Lomuscio. Kim Bishop, a union delegate, also attended part of the meeting. Lomuscio testified she left the building for a cigarette break on two occasions and Bishop opened the locked lobby doors to let her back in (Tr. 69). The record also established that a security guard walked by the lobby and acknowledged the union members and that a supervisor, Cindy Blair, also passed by the lobby and was introduced to Lomuscio by Bishop (Tr. 226).

2. The verbal warning

Sweeney testified that part of her responsibilities as the HR director is to investigate employee misconduct. Sweeney said that the first time she became aware that someone was unauthorized to be in the main lobby on December 26, 2013, was an email from Cathy DeChance (DeChance), director of nursing operations. DeChance reported to Sweeney that another supervisor on the night shift of December 26 observed Bishop and a ". . . union person were meeting with staff in the lobby from 11–1230 (p.m.) last night" (GC Exh. 33). Sweeney testified that she was concerned that the union had access to a closed area of the facility and requested on December 27, 2013, that the chief of security, Michael Hochman (Hochman), investigate as to how the union gained access to the lobby.

Hochman reported back to Sweeney by email on the afternoon of December 27 and stated "It appears that the union gained access by using an employee's swipe card. They entered the building through the (70) prospect avenue entrance." Hochman indicated that he has a copy of the access history record and a video recording of the entrance doorway for that night. Following this email, Sweeney replied back a few minutes later and asked Hochman who was the employee that had used the swipe card and whether she could get the access card report and video tape. Hochman replied a few minutes later that the employee was identified as Northrup and he will have someone bring the access card report and video tape to Sweeney the following Monday (GC Exh. 33; Tr. 445–447, 513–517).

Following a review of the video tape and access card report, Sweeney determined that Northrup had swiped Lomuscio through the 70 Prospect Avenue entrance at 8:01 p.m. Sweeney requested that security prepared a video snippet between 8 to 8:05 p.m. from the December 26 surveillance tape (R. Exh. 14).

Sweeney said that after reviewing the video tape, she thought that the security and access policy was violated by Northrup in letting Lomuscio through an unauthorized entry. Sweeney stated that the policy in place at the hospital since 2008 was that when the facility doors are locked, the only entrance available for visitors is through the Emergency Department (ED). Upon entering the ED, visitors would sign in and escorted by security to other parts of the facility. Sweeney admittedly indicated that this policy was not in writing prior to December 26 (Tr. 454–463).

On December 30, 2013, Lomuscio received a letter from Finnegan that Lomuscio had unauthorized access to the main lobby on December 26 (GC Exh. 6). The letter reads in part

> The purpose of this letter is to inform you that the Union's inappropriate and unauthorized access of Columbia Memorial Hospital's main lobby on Thursday, December 26, 2013 is currently under investigation.

Lomuscio replied back on January 3 that she was authorized to be in the facility and that the hospital ". . . is engaging in inappropriate and unlawful actions by seeking to restrict the Union's access rights" (GC Exh. 7; Tr. 74, 75).

On January 2, Northrup was called into a meeting by her supervisor, Shanda Steenburg, who was and is the director of pharmacy at the hospital. Tracy Johnson (Johnson), a pharmacist supervisor, was also present at their meeting but did not speak. Steenburg testified that she received a phone call from Sweeney and asked her to question Northrup about the December 26, 2013 incident. Steenburg was informed by Sweeney that questioning Northrup was part of an investigation regarding an access situation. Prior to the meeting, Steenburg was directed by Sweeney on the questions to ask Northrup (GC 34; Tr. 572, 573). Sweeney testified she requested that Steenburg conduct the questioning of Northrup because Steenburg was her supervisor. Sweeney stated that she prepared specific questions for Steenburg to ask Northrup. She denied telling Steenburg the purpose of the interview or that it was an investigation regarding access (Tr. 465; 520, 521).

Northrup was pointedly asked by Steenburg whether she was alone when she swiped her access card at the 70 Prospect Avenue entrance on December 26. Northrup replied that she could not recall. Northrup testified that she could not recall letting

anyone in after 5:30 p.m. on that day. Sweeney testified that she reviewed the responses provided by Northrup to Steenburg. Upon review of the questions and responses, Sweeney felt that the questions she had prepared for Steenburg to ask Northrup were "too broad" and requested that Steenburg conduct a second interview with more specific questions. Sweeney thought that the second interview would allow Northrup an opportunity to explain her answers from the first interview (Tr. 465, 466; 524).

Northrup met with Steenburg and was interrogated a second time on January 3. She was asked by Steenburg whether she had let anyone in with her at the 70 Prospect Avenue entrance when she entered using her access card on December 26. According to Steenburg's notes, Northrup repeated that "I don't recall" three times. Northrup was then specifically asked by Steenburg if she allowed Lomuscio in the night of December 26, 2013, and Northrup replied "Do not recall" (GC Exh. 34 at p. 3; Tr. 227–229).

The questions and responses were again reviewed by Sweeney after the January 3 interview. Sweeney said that one of the questions specifically asked whether Northrup had allowed anyone in with her and Northrup responded that she could not recall. A second question asked if Northrup allowed Lomuscio in and Northrup again responded that she could not recall. Sweeney felt that Northrup was not being honest and forthcoming with her answers to these two questions because Northrup had remembered many specific details, such as time and events on December 26 but could not remember if she had let anyone or Lomuscio in when she returned to the facility at approximately 8 p.m. (Tr. 466–468).

On January 3, Lomuscio received a second letter from Finnegan. This letter stated that after the investigation of December 26, 2013 incident, it was confirmed that it was Lomuscio who had unauthorized access to the hospital's main lobby (GC Exh. 8). By letter dated January 7, Lomuscio stated that the union had not violated the collective-bargaining agreement regarding access (GC Exh. 9).

Northrup met with Steenburg on January 8 and was issued a verbal warning, memorialized on a Corrective Action Process (CAP) document. The CAP process is a procedure to issue discipline. The CAP counseling stated that the "employee has been found to allow an unauthorized visitor to enter the hospital premises. Additionally, the employee did not require the visitor to sign in." Northrup replied that the disciplinary action was ridiculous, did not sign the CAP and left the meeting (GC Exh. 10; Tr. 230–232).

Northrup filed a grievance on the same day she received her CAP. The grievance stated that the hospital was in violation of the collective-bargaining contract and that the discipline was issued without just cause. Northrup testified that she had conversations with Lomuscio shortly after receiving her CAP. During her conversations with Lomuscio, Northrup realized for the first time (after Lomuscio reminded her) that it was Lomuscio who Northrup allowed through the 70 Prospect Avenue entrance on December 26, 2013 (Tr. 235, 236; 161, 162).

Sweeney testified that she made the decision to discipline Northrup. Sweeney concluded that Northrup allowed an unauthorized person on the premises against hospital policy. Sweeney reiterated that all visitors were required to enter the premises through ED, sign in and be escorted by security. Sweeney concluded that the only way Lomuscio was able to get in the hospital on the night of December 26 was with Northrup and her access card through the 70 Prospect Avenue entrance (Tr. 468–470).

The grievance was denied at step 1 by Steenburg on January 9 (GC Exh. 11). Lomuscio mentioned that there was a second step in the grievance process that was denied by the vice-president of nursing. Lomuscio said that the local delegates would handle the grievance at steps 1 and 2 with the union not really involved until the 3rd step in the process. At the 3rd step, a meeting was held on January 28 attended by Northrup, Lomuscio, Rodgers, Steenburg, Sweeney, and a HR representative. According to Northrup, Lomuscio did all the talking while Sweeney and Steenburg listened. Lomuscio complained that none of the information requested by the union regarding visitor's access policies applied to the December 26 incident. Lomuscio specifically stated that the hospital's policy on visiting hours did not pertained to the union because it dealt with patient visitors and industrial representatives visiting hospital and not situations with union access (GC Exhs. 14, 15; Tr. 85, 87, 90, 91; 237, 238).

Lomuscio also asked the reason for the discipline and the questions asked of Northrup by Steenburg. Lomuscio maintained that Sweeney interrupted this discussion and told Lomuscio that Steenburg did not have to respond. Lomuscio also stated that she viewed the surveillance video and did observe her and Northrup entering the 70 Prospect Avenue entrance on December 26, 2013 (Tr. 88–91, 95). Lomuscio maintains that she was not an unauthorized visitor because the Respondent was on notice that the union would be at the facility all day, including after 8 p.m. on December 26. The meeting concluded after Lomuscio's summation as to why the policies did not apply to her (Tr. 93–97; 242, 243). By letter dated January 31 to Rodgers, the union was informed by Sweeney that the grievance was denied because the grievant allowed an unauthorized visitor to enter the hospital premises (GC Exh. 16).

3. The suspension

Upon her return from vacation on February 9, Northrup was called to a meeting by Steenburg on February 11 (Tr. 252; R. Exh. 15). Northrup went into Sweeney's office and Steenburg read another CAP document to her. The CAP discipline was for a 5 day suspension for infractions occurring on the dates of January 2, 3, and 28 (GC Exh. 20). The CAP, issued on February 11 stated

> The employee engaged in dishonest behavior by not being forthcoming to questions asked by the Director of Pharmacy and the Director of Human Resources in two separate forums.

Northrup asked for a copy of the policy that was violated and Sweeney responded that a copy will be provided at the 3rd step of the grievance process. Northrup testified that she has never been disciplined prior to the issuance of the verbal warning and suspension. She denied engaging in dishonesty and Steenburg never identified the dishonest behavior allegedly committed by Northrup.

The union received notice of Northrup's suspension on February 13 (GC Exh. 19; Tr. 104). On behalf of Northrup, the union filed a grievance on February 22 alleging that the Respondent was in violation of several articles in the collective-bargaining agreement when the suspension was issued (GC Exh. 21). Pursuant to a request for information for the policy relating to the suspension, the union received from the Respondent a copy of the organizational ethics policy. Northrup said that she had previously received a copy of the ethics policy as part of her last annual evaluation in June 2013 (GC Exhs. 22, 23; Tr. 252–258).

Sweeney testified that she made the decision to discipline Northrup for dishonesty. Sweeney said that dishonesty is a serious offense and only initially disciplined Northrup with a verbal warning in order to give her an opportunity to be forthcoming after she spoke with Northrup. Sweeney stated that during the grievance hearing on January 28, the union representatives had reviewed the video tapes of Northrup and Lomuscio entering through the 70 Prospect Avenue entrance together and when Lomuscio was in the main lobby area. Northrup was not present during the viewing of the video tapes. After viewing the tape, the meeting continued with Lomuscio asking questions of Sweeney about hospital policies regarding access and unauthorized visitors. Lomuscio also asked Steenburg questions about the two interviews with Northrup. Sweeney maintained that she allowed, for the most part, Steenburg to answer all of Lomuscio's questions (Tr. 471–481). After Lomuscio had completed her questioning, Sweeney then asked Northrup several questions. Sweeney testified

> I asked Cindy if she worked on December 26th, and she stated that she did work. I asked her what hours she worked. She stated that she worked 7:00 to 3:00. I asked her if she came back that night. She stated that she did. I asked her what entrance she used to enter the building. She stated that she used the Prospect door entrance; and I asked her if she left Rosa Lomuscio in, and Cindy's response was she could not recall (Tr. 481).

Rodgers was present at the January 28 grievance meeting. Rodgers stated that when Sweeney asked Northrup if she had let in an unauthorized visitor on December 26, Lomuscio interjected and stated that the question was "asked and answered" during the Respondent's investigation. Rodgers also said that when Sweeney questioned Northrup if she had let Lomuscio in, Lomuscio again interjected and said that the question had already been answered during the investigation. Rodgers said that Northrup made no responses (Tr. 317, 318).

However, Sweeney determined that Northrup had engaged in three instances of dishonesty on January 2, 3, and 28 (Tr. 526; GC Exh. 23). Sweeney concluded that Northrup was not being honest after receiving Northrup's responses of "I do not recall." She stated that the basis for her conclusion was that after the union had viewed the video of Northrup letting in Lomuscio and her continued failure to recall if she had allowed anyone or Lomuscio through the 70 Prospect Avenue entrance. Sweeney again repeated that dishonesty was a serious offense with serious consequences. Sweeney mentioned several comparative employees who were discharged for dishonesty but made the decision to only suspend Northrup based upon her years of employment with the hospital (R. Exhs. 8–11; GC Exh. 27; 481–492).

Discussion and Analysis

It is alleged in complaint that Northrup's verbal warning and suspension violated Section 8 (a)(3) and (1) of the Act. Section 8(a)(3) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities of the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). The General Counsel argues that Northrup's discipline was directly caused by the Respondent's antiunion animus as displayed by its attempt to limit the hours and locations at the hospital for the union to confer and meet with bargaining unit employees.

As 8(a)(3) cases generally turn on the question of employer motivation, the Board and the courts employ a causation test to analyze the merits of such allegations. *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Sea-Land Service*, 837 F.2d 1387 (5th Cir. 1988). The Wright Line test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. The General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

To rebut the presumption, the Respondent bears the burden of showing the same action would have taken place even in the absence of protected conduct. See *Manno Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros., Co.*, 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *Durham School Services, L.P*., 360 NLRB 694 (2014).

In the matter before me, I find that the General Counsel has made a prima facie showing that Northrup's union activity was a motivating factor in the Respondent's decision to discipline her. In *Tracker Marine, LLC*, 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework

established in *Wright Line.* Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employees protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act.[6]

There is no dispute that Northrup, as a delegate, was meeting with the union and other bargaining unit members to discuss terms and conditions of employment on December 26. There is also no dispute that Respondent had knowledge that the union was meeting with members for the entire day and night. Although Sweeney disagreed with Lomuscio of the union's right to access the facility after 8 p.m., Sweeney knew that Lomuscio and other union delegates intended to continue meeting after 8 p.m. Applying the *Wright Line* analysis to Northrup's discipline, it is clear that prior to December 26, 2013, Northrup was known for her union delegate responsibilities and was an open employee advocate for the union. On December 26, she met with union representatives and bargaining unit members during the latter part of the day and in the evening until approximately 9 p.m. Through the video surveillance recording of the lobby area, the Respondent was made aware that Northrup was engaged in discussions with Lomuscio and other union members. In addition, I find that the timing of the discipline issued to Northrup, shortly after she engaged in open union activity on December 26, 2013, supports an inference that the Respondent's discipline was motivated by Northrup's union activity. *State Plaza Hotel*, 347 NLRB 755, 755–756 (2006); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004).

The Respondent has demonstrated its antiunion animus in violation of Section 8(a)(3) and (1) in this case. I find that Northrup's verbal warning and suspension was motivated by her union activity, and the burden of persuasion shifts to the Respondent to demonstrate the same action would have taken place even in the absence of the protected conduct. *Wright Line*, above, at 1089.

Turning to the Respondent's defense, the Respondent contends that Northrup was given a verbal warning because of her unauthorized use of her access card in allowing Lomuscio entry to the premise. Northrup's suspension was justified because she was dishonest for allegedly not recalling who she had allowed in the facility. Respondent contends that Northrup's insistence that she could not recall constituted dishonesty.

Discriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB 271 (2014); *ManorCare Health Services—Easton*, 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

The record as a whole supports the fact that the Respondent had an intense interest as to whether in the Union was intending to meet after 8 p.m. on December 26 and I simply do not believe that Sweeney disciplined Northrup for being dishonest during her investigatory interviews. Northrup was given a verbal warning for the inappropriate use of her access card. However, the Respondent failed to show that any other employee had ever been disciplined for the improper use of his or her access card. Credible testimony from Rodgers and Northrup indicated that the public had been swiped into the facility by other card holders, including by Sweeney and the former director of human resources. The record also show that the access card policy was never reduced to the writing and credible testimony from Northrup indicate that verbal instructions on the use of the access card has not always been consistently provided to all card holders. While it is reasonable to assume that the card holder would know not to swipe someone else in, it is entirely a different matter not to have written objective standards in place and to discipline an employee for that assumption.

Further, in this instance, the verbal warning was not sufficient discipline and the inquiry did not end for the Respondent at this point. At the time of the verbal warning, Sweeney had already identified Lomuscio as the person that Northrup allowed access into the facility. The subsequent two interviews conducted by Sweeney and Steenburg were not to gather additional information, but designed to have Northrup admit that she allowed Lomuscio access. Sweeney testified that she wanted Northrup to admit that she swiped Lomuscio through the entrance. The two interviews were designed not to gather information but an attempt to charge Northrup with another infraction, in this instance, the charge of dishonesty because she could not remember. While it may strain credibility that Northrup could not recall, it is also understandable and reasonable for an employee not to self-incriminate him or herself. However, that is not being dishonest. It might be evasion, but the Respondent definitely failed to articulate the objective standard in defining dishonesty to justify the suspension.

In assessing the Respondent's defense, I note that the Board has held "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of

[6] However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.*, 352 NLRB 815 fn. 5 (2008) (citing *Gelita USA, Inc.*, 352 NLRB 406, 407 fn. 2 (2008)); *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 269 (2008); also see *Praxair Distribution, Inc.*, 357 NLRB 1048 fn. 2 (2011).

the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co*, 311 NLRB 1118, 1119 (1993). In order to meet the Wright Line burden of persuasion, an employer must establish that it is consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB 730, 736 (2014). In *Septix Waste, Inc.*, 346 NLRB 494 (2006), the Board indicated that in order to establish a valid Wright Line defense, an employer must establish that it is applied its disciplinary rules regarding the conduct at issue consistently and evenly. Northup has never been subjected to discipline during her 25 years of employment. In the instant case, the Respondent has produced no evidence of other employees who have been disciplined for using the access card on behalf of another individual or for being "dishonest" by failing to recall or refusing to identify someone. In this regard, the Respondent does not point to any evidence that establishes objective standards regarding what constitutes "dishonesty" except to provide examples of fraud in constructively covering up potential harm to a patient and falsifying time cards (R. Exhs. 9–11). No examples were proffered by the Respondent of comparative discipline of employees charged with dishonesty for refusing to provide an answer during an investigative interview.

Accordingly, the Respondent violated Section 8(a)(3) and (1) of the Act when it failed to demonstrate that it would have disciplined Northrup in the absence of her protected activity.

E. The Information Request

In preparation for Northrup's grievance on her verbal warning, the union, through Rodgers, requested on January 8 following information from the hospital (Tr. 315; GC Exh. 12)[7]

> 1. Copies of any video surveillance which the Employer has based on this claim;
> 2. Copies of the policies regarding visitor's access;
> 3. Copies of any and all statements and investigations done on who was allegedly allowed to access the premises.

On January 27, the Respondent, through Sweeney, provided the following information with regard to the January 8 information request (GC Exh. 14)

> 1. The Hospital will make the relevant video surveillance tapes available to the Union for viewing. Please contact me to schedule a time to view this footage.
> 2. Copies of the Hospital's policies regarding visitors' access.
> 3. The Hospital has no documents or information in its possession relative to this request.

In preparation for Northrup's grievance on the suspension, there was a union request for information on February 13 by Rodgers to Finnegan for (GC Exh. 22)

> 1. Copies of any relevant documentation related to the suspension;
> 2. Copies of any and all previous disciplines;
> 3. Copies of any and all of the Employer investigation, leading up to the suspension, including any witness statements received;
> 4. Copy of Employer policies related to the suspension of the employee.

In response to the February 13 request for information, the Respondent provided the following information in a letter with attachments dated February 20 (GC Exh. 23)

> 1. Copies of relevant documentation related to the suspension;
> 2. Copies of previous disciplines;
> 3. The Employer does not have witness statements;
> 4. Copy of the Employer's policy related to the suspension.

On February 21, Rodgers sent out a second information request on the suspension grievance (GC Exh. 24). Rodger's letter for the request did not reference any dissatisfaction with Sweeney's February 20 response. The February 21 letter requested the following information

> 1. Any and all Information regarding the facts underlying the suspension to be provided immediately.
> 2. Copies of any and all disciplines issued to any Employee regarding dishonesty, regardless of whether they are Union or Non-Union Employees;
> 3. Copies of any policies regarding dishonesty;
> 4. Copies of any notes done during the investigation regarding the alleged dishonesty;
> 5. Copies of any video surveillance used during the interview process;
> 6. Any and all questions asked during the alleged dishonesty and who the questions were presented by.

The union's request for information on February 21 was more specific than its February 13 request. The February 21 request specifically asked for disciplines regarding the dishonesty as an infraction and included union and nonunion employees. The February 21 request had several new items, including a request for any notes taken and the questions asked during the investigation and any video recording of the interview process.

The union requested that the information be provided 48 hours before any scheduled hearings (on the suspension). On March 3, the union reiterated its request for exactly the same information as in its February 21 request. The March 3 request again asked that the Respondent provide the information 48 hours before any scheduled hearings (GC Exh. 25). On the same day, Rodgers sent out another request for information, captioned *Additional Information Request* on Northrup's grievance hearing (GC Exh. 26). In a letter to Sweeney, the union requested

> Copies of any and all Bargaining Unit and Non-Bargaining Unit Employees who have been disciplined for allowing an unauthorized visitor. (Copies of Actual Disciplines).

In response to the information request of February 21 and March 3, Sweeney replied on March 5 (GC Exh. 27) as follows

> 1. The Hospital objects to the demand as it is unclear and ambiguous as to what the Union is seeking. Notwithstanding

[7] At the start of the hearing, the counsel for the General Counsel withdrew the allegation regarding an information request for the incident and investigation reports on an alleged infraction that occurred on January 8 and the unreasonable delay in providing the two reports as stated in pars. 12 (a), (d), and (e) of the consolidated complaint (Tr. 35–37).

that objection and without waiving same, the Hospital possesses surveillance videos which are available for viewing. Please contact me to schedule a time to view those videos.
2. Please find attached documents reflecting prior discipline for dishonesty.
3. Please find attached a copy of the Hospital's policy for organizational ethics.
4. Notes taken by the Hospital are not disclosable.
5. No surveillance videos of the interview process exist.
6. To the extent the Hospital has documents in response to this demand, they are not disclosable.

By letter dated March 6 (GC Exh. 29), Rodgers informed Sweeney that the union was still missing the following information

1. Any and all information regarding the facts underlying the suspension to be provided immediately;
2. Any and all questions asked during the interview in which Northrup was allegedly dishonest and who asked the questions;
3. Copies of any and all disciplines concerning Bargaining Union and/or Non-Bargaining Unit Employees who have been disciplined for allowing an unauthorized visitor.

In response, the Respondent provided the following on March 10 (GC Exh. 30)

1. The information requested is not disclosable.
2. The information requested is not disclosable.
3. None.

Rodgers repined that the union never received any of the video surveillance tapes from his January 8 request for information. Rodgers said he was informed that the video of Northrup and Lomuscio entering the 70 Prospect Avenue door was not available at the time of the request and was not available at the January 28 grievance meeting. The only video observed by the union was the recording of Lomuscio and Northrup entering the facility lobby and meeting with the employees. The union's information request was for all video surveillance tapes and would have included the recording from the 70 Prospect Avenue camera at the time when Northrup entered with Lomuscio. Rodgers stated that the union still had not viewed or received the 70 Prospect Avenue entrance video tape (Tr. 320). Lomuscio testified that the information provided by the Respondent was not fully responsive because the actual facts underlying the suspension were not provided; the names of employees who were also disciplined were redacted in the response; the union never received the video surveillance tapes; and the Respondent never gave an explanation why the investigative notes were not disclosable (Tr. 115–120).

In contrast, Sweeney testified that the Respondent replied to the to the initial January 8 information request (GC Exhs. 12, 14) and that the union never objected to the response. With regard to the information request of February 13 (GC Exh. 22), Sweeney stated that the Respondent fully replied to the request on February 20 (GC Exh. 23). Sweeney stated that prior to the information request of February 21; the union was already in possession of all the information made in the earlier requests. Sweeney believed that the February 21 request was redundant on items already requested. With regard to item 1 of the February 21 request, Sweeney said that since she had already provided all relevant information on the suspension, she felt it was unclear and ambiguous as to what the union is seeking. She stated that the union never clarified the ambiguity of this request with her. With regard to items 4 and 6, Sweeney believed that the notes were not disclosable because they were taken during an investigation. Sweeney also believed that the union's information request of March 3 was duplicative to the earlier request and information provided by the Respondent. Sweeney said that she provided the discipline of other employees, the policies and procedures used in the discipline of Northrup and the videos. She said there were no statements taken from witnesses during the investigation and that the only information not disclosed were the notes from the investigation (Tr. 499–506).

Discussion and Analysis

The General Counsel argues that the Respondent violated Section 8(a)(5) of the Act when it failed to provide the union's information request relating to the discipline and grievance of Northrup. The General Counsel alleges in his closing brief that the Respondent failed to provide information on four discrete items[8]

1. Any and all Information regarding the facts underlying the suspension of Cindy Northrup;
2. Copies of any and all disciplines issued to any Employee regarding dishonesty, regardless of whether they are Union or Non-Union Employees;
3. Copies of any notes done during the investigation regarding the alleged dishonesty;
4. Any and all questions asked during the alleged dishonesty and who the questions were presented by.

The Respondent argues that item one was unclear and ambiguous, but was willing to provide the surveillance videos for viewing. Sweeney believed that the information underlying the discipline had already been provided and the latest request was duplicative. Sweeney said that the union never clarified this request to the Respondent. The Respondent also argues that documents pertaining to prior disciplines of employees were provided to the union on March 5. Sweeney testified that items three and four were not disclosable to the union because they were taken during an investigation.

In regard to item one, the union made a second request for the information on March 6 (GC Exh. 29). In response to this request, the Respondent informed the union on March 10 that the information regarding the facts underlying the suspension of Cindy Northrup was not disclosable (GC Exh. 30).

The General Counsel argues that the information requested was necessary for the union to carry out its representative responsibilities under the collective-bargaining contract. It is well established that parties to a bargaining relationship are required, upon request, to provide certain information within their pos-

[8] The General Counsel did not allege in the complaint or in the closing brief regarding the refusal of the Respondent to provide the video surveillance tapes although Rodgers testified that the union never received the tapes pursuant to the information request.

session that is relevant and necessary to the union's performance of its duties as collective-bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967). It is a violation of 8(a)(5) and (1) of the Act when an employer fails or refuses to provide information requested. An employer's refusal to furnish information pertaining to grievances during the term of the collective-bargaining contract is a violation of the duty to bargain in good faith. *Chapin Hill at Red Bank*, 360 NLRB No. 27 (2014); *Curtiss-Wright*, 145 NLRB 152, 156–157 (1963). That information could have helped the union to assess the merits of the grievance and whether Northrup was discriminated against for her union activity in comparison to the discipline of other employees. The Board has held that by failing to provide information necessary to decide whether to proceed with a grievance or arbitration, the employer violated Section 8(a)(5) and (1) of the Act. *Endo Painting Service, Inc.*, 360 NLRB 485 (2014); *Acme Industrial*, above; *Eazor Express*, 271 NLRB 495 (1984); *Island Creek Coal Co*., 292 NLRB 490, 491 (1989); *Bud Antle, Inc*., 359 NLRB 1257, 1264–1265 (2013).

The Respondent argues that the information for the underlying facts regarding Northrup's suspension was unclear and ambiguous. The Respondent subsequently asserted that the information was not disclosable. The Respondent also asserts that copies of any notes done during the investigation regarding the alleged dishonesty and information on any and all questions asked during the alleged dishonesty and who the questions were presented by were not disclosable.[9] Contrary to the Respondent's argument that the union was required to clarify its information demand, it is well settled that an employer is obligated to request clarification if the initial request was not understood. *Azabu USA (Kona) Co*., 298 NLRB 702 (1990). Here, the Respondent failed to request a clarification if it believes that the February 21 and March 6 requests were unclear or that it was duplicative of information already provided.[10]

With regard to the contention that the information was not disclosable, it is also well settled that substantial claims of confidentiality may justify refusals to furnish otherwise relevant information. As the Board explained in *National Steel Corp*., 335 NLRB 747, 748 (2001)

> With respect the confidentiality claim, it is well established than an employer may not avoid its obligation to provide a union with requested information that is relevant to bargaining simply by asserting a confidential interest in the information. Rather, the employer has the burden to seek an accommodation that will meet the needs of both parties.

Relating to the Respondent's refusal to provide the outstanding information because it was not disclosable, the Supreme Court articulated a balancing test for determining an employer's duty under the Act to furnish information. The party claiming confidentiality has the burden of proving that such interests are so significant as to outweigh the union's need for the information. *Detroit Edison Co*., supra. It is well settled that even assuming that the Respondent has a legitimate privacy or confidential concern over releasing the information, it was obligated to notify the Union of its concern and to bargain for an accommodation that will satisfy the Union's need for the information and the employer's need to keep the information confidential. In addition, such claims of confidentiality must be timely raised by the employer so that the parties can bargain over an accommodation. *West Penn Co.*, 339 NLRB 585 (2003); *Salem Hospital Corp*., 358 NLRB 837 (2012).

In applying the balancing test articulated in *Detroit Edison Co*., the Respondent has not met its burden of providing a rationale that the information underlying the facts of Northrup's suspension was confidential or that the redacted names of employees with comparative discipline was somehow a privacy issue. The Respondent has not shown that such interests are so significant as to outweigh the Union's need for the information, as well as a duty to seek an accommodation. *GTE California, Inc*., 324 NLRB 424, 427 (1997). [11] Here, the Respondent merely states that the requested information was not disclosable because the information was part of the investigation.

Accordingly, the Respondent violated Section 8(a)(5) and (1) of the Act when it failed to provide the Union with relevant information that is necessary to properly perform its duties as the exclusive bargaining representative. *Truitt Mfg. Co.*, above, and that it has not met its burden to articulate any confidential concerns that are significant enough to outweigh the Union's need for the information or had requested bargaining to accommodate the confidential nature of the information. *Pacific Bell Telephone Co.*, 344 NLRB 243 (2005); *Allen Storage & Moving Co.*, 342 NLRB 501 (2004).

[9] The Respondent did not challenge the relevance of the requested information.

[10] The Respondent also argued that the March 6 request for information regarding the facts underlying the suspension was an impermissible attempt to obtain discovery for the NLRB hearing and pending arbitration (R. Br. at 39). An employer's refusal to provide information was proper because of the timing of the request made it clear that the information was intended to assist the union and the General Counsel in presenting evidence in support of the unfair labor practice complaint. *Sahara Las Vegas*, 284 NLRB 337 (1987); see *Frontier Hotel & Casino*, 318 NLRB 857 (1995). However, my close review of item one in the February 21 request was merely restating the same request made by the union on January 8, which the Respondent never asked for a clarification and simply felt to ignore the request believing it to duplicative, unclear and ambiguous. I do not find there was an effort by the General Counsel to engage in impermissible discovery.

[11] The Respondent failed its burden to show that the information regarding the underlying facts of the suspension was not disclosable except for Sweeney's assertion that the information was pertaining to the investigation of the infraction. The Respondent also failed to explain or prove the significance of keeping confidential by redacting the names of other employees who were disciplined for being dishonest. Identifying the names of the employees with prior discipline is clearly relevant to the union in showing disparate treatment. It is well established that information concerning, names, addresses, telephone numbers, as well as wages, hours worked, personnel files, and other terms and conditions of employment of unit employees is presumptively relevant and should not have been redacted by the Respondent. *Bryant Stratton Business Institute*, 323 NLRB 410 (1997); *Fleming Co*., 332 NLRB 1086 (2000).

F. The Respondent's Confidential Policy

In response to the union's request for information of February 13 for a copy of employer policies related to the visitors' access to the facility and for the suspension of Northrup, the Respondent provided a copy of its organizational ethics policy as an attachment to its February 20 response (GC Exh. 23). The ethics policy has been in effect since February 1, 2007, and in the paragraph captioned CONFIDENTIALITY states

> Information relating to patients/residents or which is proprietary to Columbia Memorial Hospital in any way shall be maintained in a strictly confidential manner. The Administrative policy on confidentiality shall be adhered to by all Columbia Memorial Hospital staff members, physicians, volunteers, students, consultants and board members. I have read and fully understand the information Systems-Access and Confidentiality policy. Any information, whether patient information, employee information or corporate information, which is accessed or disclosed in any way other than in the course of conducting hospital business, is grounds for immediate termination.

Employees are required to read, acknowledge and sign the organizational ethics policy, as evidenced by Northrup's signature at the bottom of the policy statement on June 23, 2013 (GC Exh. 23). Sweeney testified that the confidentiality paragraph has been effect since 1996 and that the union (until this time) had never challenged the provision. Sweeney said that no employees have ever been disciplined for disclosing such information. She said that the purpose of the provision is to keep confidential any information pertaining to

> . . . patients and potentially relative to other employees…(F)or example, Human Resources has a lot of information on employees. Our Payroll Department, our Staff Health Department, has a lot of information to employees, and I don't want that information shared (Tr. 506, 507).

Discussion and Analysis

The complaint alleges that the confidentiality policy restricts the employees' Section 7 rights in violation of Section 8(a)(1) of the Act because employee and corporate information which is accessed or disclosed in any way other than in the course of conducting hospital business would be grounds for immediate termination. The General Counsel argues that the Respondent's confidential information rule violates Section 8(a)(1) of the Act because employees would reasonably interpret the rule to prohibit their Section 7 right to discuss their terms and conditions of employment (GC Br. at 37).

The Respondent argues that employees would not reasonably construe the rule to also prohibit discussing wages and other terms and conditions of employment. The Respondent argues that the confidential policy has been in existence for over 20 years and has never been challenged by the union. The Respondent states that the policy is to prevent the disclosure of patient and employee information other than in conducting hospital business and not to limit the Section 7 rights of employees. It is not in dispute that the confidentiality policy has been in effect at least since February 1, 2007. It is also not in dispute that no unit employee had been disciplined over the disclosure of any confidential information.

The issue is whether the confidentiality rule is unlawfully overbroad because employees would reasonably construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, above. First, there does not appear to be any dispute over the validity of the portion of the rule that prohibit employees from disclosing acquired confidential or proprietary information about the Respondent and not to discuss with outsiders such information since that portion is ". . . designed to protect the confidentiality of the [the Company's] proprietary business information." See, *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003); also, *Super K-Mart*, 330 NLRB 263 (1999) (affirming the employer's "legitimate interest in maintaining the confidentiality of its private business information").

Nevertheless, I find that the confidentiality rule that prohibits the disclosure of confidential information, including patient information, employee information and corporate information to include the prohibition for employees to discuss their wages and conditions of employment. This rule, by its terms, prohibits employees from discussing employee information, such as wages and conditions of employment to any persons on penalty of discharge.

There are no exceptions to the confidentiality rule which would permit employees to discuss wages, compensation or any other specific terms and conditions of employment. While I find that the Respondent apparently sought to prevent the disclosure of proprietary and patient information, I also find that the Respondent when prohibiting the disclosure of employee information would also prevent the disclosure of various kinds of information about such items as wages and working conditions would also be prohibited. In *Flex Frac Logistics*, 358 NLRB 1131 (2012), affd. in relevant part, 198 LRRM 2789 (5th Cir. 2014), the Board restated established precedent that ". . . nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act," citing *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011) (finding rule unlawful that prohibited "[a]ny unauthorized disclosure from an employee's personnel file"); and *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding rule unlawful that stated all information about "employees is strictly confidential"). The Board has also held that the maintenance of the policy is an unfair labor practice even absent evidence of enforcement. *Lafayette Park Hotel*, 326 NLRB 824 (1998).

Here, the Respondent's confidentiality rule does not present accompanying language that would tend to restrict its application. It therefore allows employees to reasonably assume that it pertains to—among other things—certain protected concerted activities, such as communications that are critical of the Respondent's treatment of its employees. By including nondisclosure of "employee information," in its confidential policy, the Respondent leaves to the employees the task of determining what is permissible and ". . . speculate what kind of information disclose may trigger their discharge." *Flex Frac*, above at slip

op. at 10. In trying to comply with this restriction, employees would reasonably believe they would not be permitted to discuss with other employees or union representatives, their wages, benefits and other terms and conditions of employment. *MCPc, Inc.*, 360 NLRB 216 (2014) (the Board held that an employee handbook stating that "dissemination of confidential information, such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination" as an overly broad confidentiality rule and violated Section 8(a)(1) because employees would construe the rule to prohibit discussion of wages and other terms and conditions of employment with their coworkers, an activity protected by Section 7 of the Act).[12]

Accordingly, I find that the Respondent's maintenance of a rule that prohibits employees from disclosing employee information has a reasonable tendency to inhibit employees' protected activity and, as such, violates Section 8(a)(1). *The NLS Group*, 352 NLRB 744, 745 (2008); *Security Walls, LLC*, 356 NLRB 396 (2011); and *Quicken Loans, Inc.*, 359 NLRB 1201 (2013).

G. The Respondent's Implementation of the Access Card Policy

The organizational ethics policy is routinely signed by the employees during their annual evaluation. Northrup said that she had previously acknowledged and signed the ethics policy on June 28, 2013. A copy of the organizational ethics policy with Northrup's signature was provided by the Respondent in its February 20 response (GC Exh. 23). Northrup testified that the organizational ethics policy provided by the Respondent in its March 5 response contained an added paragraph captioned *Access Card* made part of the organizational ethics policy (Tr. 256–261; GC Exh. 27). The effective date of the revised organizational ethics policy was February 26, 2014. The access card provision states

> Individuals associated with Columbia Memorial Hospital that have been issued an Access Card must ensure that no other Individuals utilize such card or facilitates the access of unauthorized individuals to secure areas including secured buildings. The Access Card is the property of Columbia Memorial Hospital and is the responsibility of the card holder.
>
> The Access Card is to be used for business purposes only. If the Access Card is lost or stolen, the individual may be required to pay a $10.00 replacement fee. Should the card holder be separated from employment, he/she agrees to surrender the card immediately.
>
> Failure to do so may result in him/her being charged for the card. Non-adherence to any of the above restrictions may result in revocation of the Access Card. Any willful violation of any part of this agreement shall be considered sufficient cause for disciplinary action against the cardholder, up to and including termination.

The response by the Respondent on March 5 to the information request was the first time the union was made aware of the written access card policy. Northrup and Lomuscio similarly testified that they never knew of or was provided a copy of the access card provision prior to the effective date of the policy on February 26. Lomuscio said that the Respondent never requested to bargain over the provisions of the access card policy (Tr. 114, 115, 259).

Sweeney testified that the new access card provision became effective on January 6. Sweeney said that the unauthorized entry of Lomuscio with Northrup's access card lead to the development of a written policy which Sweeney maintained has always been verbally told to the employees. According to Sweeney, the security department developed the access card policy and provided draft language to the HR Department. By email dated January 6, Chief of Security Hochman informed Sweeney and other HR officials that a final version of the access card policy was ready and it became effective on the same date (R. Exh. 12). Sweeney testified that HR determined that the access card provision could appropriately be made part of the organizational ethics policy and the new ethics policy became effective on February 26. Sweeney said the access card policy was implemented before any discipline was taken against Northrup (Tr. 492–497).

Hochman testified that he and another individual from the security department drafted the language for the card user agreement (R. Exh. 12 at p. 2). He testified that he was not involved in drafting the access card policy itself noted above.[13] Hochman felt that it was a security issue with visitors with unauthorized access entering the facility with an employee's access card. He believed that the security incident with Lomuscio solidified the need to put something in writing to the employees. He denied that the card user agreement was in response that it was a union person (Tr. 614–619, 621–623).

Discussion and Analysis

The complaint alleges that the Respondent failed to bargain over the access card policy and implemented the card policy in response to restrain employees from meeting with their union in violation of Section 8(a)(5), (3), and (1) of the Act. It is not in dispute that the Respondent did not bargain with the union over the implementation of the access card policy because Sweeney felt that the arbitrator's decision allows the employer to implement reasonable rules regarding union access. Sweeney believed that Respondent was merely codifying in writing the access card policy that had already been verbalized to employees holding access cards under the management's rights article of the collective-bargaining agreement (Tr. 497, 498).

It is well-established that an employer violates Section 8(a)(5) and (1) of the Act by deviating from, or modifying, the terms and conditions employment established by that agreement without obtaining the consent of the union. See *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962); *Amoco Chemicals Corp.*, 211 NLRB 618 (1974). Even when negotiations for a new

[12] In contrast, more narrowly drafted confidentiality rules that do not specifically reference and restrict information concerning employees and their jobs have been found lawful. *Super K-Mart*, at 263–264.

[13] The language in the access card user agreement is identical to the language in the access card provision made part of the organizational ethics policy.

collective-bargaining agreement are not in progress, an employer must give a union notice of an intended change sufficiently in advance to permit an opportunity to bargain meaningfully about the change. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) ("To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain"). The General Counsel has the burden of showing by a preponderance of the evidence that the Respondent made a unilateral change that was material and substantial. *Ampersand Publishing, LLC*, 358 NLRB 1415, 1442 (2012); *Fremont Medical Center*, 357 NLRB 1899, 1905 (2011).

The Respondent argues that the implementation of the access card policy was a proper exercise of management prerogative under the management-rights clause of the collective-bargaining agreement (GC Exh. 2). In its closing brief, the Respondent cited that portion of article 3 (Management Rights and Prerogatives) as applicable to this situation

> Section 1: Operations of Memorial Hospital and the Director of Employees, including making and enforcing reasonable rules to assure orderly and efficient operations and safety…are rights vested exclusively in the employer.
>
> Section 2: The employer reserves the right to establish and administer policies and procedures related to—the control and regulation of the use of the facility (emphasis added) [R. Br. at 45, 47].

The Respondent contends that the union waived its right to bargain over unilateral actions where the employer acts pursuant to a clear and unmistakable management-rights clause, citing *Allison Corp*., 330 NLRB 1363 (2000). The Respondent also contends that the change was not material, substantial and significant to violate the Act. *UNC Nuclear Industries*, 268 NLRB 841 (1984); *Rust Craft Broadcasting*, 225 NLRB 327 (1976).

I find that the Respondent made a unilateral change regarding a mandatory subject of bargaining that was "material, substantial and significant."[14] *Katz*, above, *Crittenton Hospital*, 342 NLRB 686 (2004); *Bath Iron Works Corp*., 302 NLRB 898, 901 (1991). The management-rights clause reserves the right of the Respondent to establish and administer policies and procedures regarding the control and regulation of the use of the facility. Conceivably, a reasonable interpretation of this portion of the management-rights clause would include the employer's prerogative to implement regulations assuring the security of the hospital. However, the Respondent went beyond implementing procedures to maintain the security of the premises. Here, aside from regulating the use of the access card (which is the employer's prerogative), the Respondent included a lost card penalty of $10 and threatened discharge of an employee for violating any portion of the access card policy. The policy now adds a penalty fee and subjects the employee to discipline. The imposition of a $10 fee for a lost access card is a particularly significant change given that the Respondent also announced that failure to comply with the policy was the type of offense for which discharge is a designated penalty. It is well-settled Board law that new work rules that invoke discipline are mandatory subjects for bargaining. *Murits Taylor Human Services Systems*, 360 NLRB 546 (2014); *California Offset Printers, Inc.*, 349 NLRB 732 (2007).

I also find that the union did not waive its rights to bargain over the implementation of the access card policy. Under the established standard set forth in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), a waiver of statutory rights must be clear and unmistakable. The burden is on the party asserting a waiver to establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term." *American Medical Response of Connecticut, Inc*., 359 NLRB 1301, 1302 (2013); *Murtis Taylor Human Services Systems*, above at 4. To meet this standard, the contract language must be specific and the Board looks to the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver. *Allison* at 1365.

Here, the reference to implementing rules and regulations in management-rights clause affecting orderly and efficient operations and safety, including the control over the use of the facility is too general and vague to waive the union's right to bargain over a penalty fee charged to an employee for a lost access card and the discipline for not abiding to the new policy. Indeed, the management-rights clause makes no mention to any policies or procedures relating to penalty fees or discipline of any kind. Therefore, in the absence of any specific language referencing such fees or discipline, the clause is too vague to constitute a waiver of the union's statutory right to bargain over the imposition of this new requirement. *Murtis*, above (management-rights clause referencing reasonable rules and regulations does not waive the union's right to bargain over a investigative interviews); *Frontier Hotel & Casino*, 323 NLRB 815, 818 fn. 12 (1997) (management-rights clause allowing respondent to establish work rules did not privilege it to introduce a rule require ing union representatives to acknowledge their familiarity with the visitation section of the contract).

The General Counsel also argues that the policy was implemented to "thwart the ability of its employees to meet with their certified bargaining representative" in violation of Section 8(a)(3) and (1) of the Act (GC Br. at 41).

[14] Not every unilateral change in working conditions constitutes a breach of the bargaining obligation. For examples of employer action held not to have material, substantial, and significant effects, see *J. W. Fergusson & Sons*, 299 NLRB 882, 892 (1990) (employer increased the lunchbreak by 5 minutes while decreasing the employees' afternoon break by 5 minutes); *St. John's Hospital*, 281 NLRB 1163, 1168 (1986), enfd. 825 F.2d 740 (3d Cir.1987) (reimposition of restrictions on smoking and drinking during the 15-minute employee report time); *Alamo Cement Co*., 277 NLRB 1031 (1985) (change in one employee's classification from ''mix chemist'' to ''assistant chief chemist'' resulting in ''a slight increase in his hourly wage,'' ''sporadic substitution'' for a supervisor, and his assisting in the preparation of a monthly report); and *Weather Tec Corp*., 238 NLRB 1535 (1978) (employer unilaterally ended its practice of paying for the coffee supplies that the employees used to make the coffee for their morning and afternoon breaks).

Contrary to the arguments of the General Counsel, I do not find that the Respondent violated Section 8(a)(3) and (1) of the Act when the access card policy was implemented in response to and in order to restrain employees in their exercise of Section 7 activities.

A rule or policy violates Section 8(a)(1) if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel*, above, enfd. 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board's analytical framework for determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act was set forth in *Lutheran Heritage Village-Livonia*

> In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

I find that the access card policy does not explicitly restrict activity protected by Section 7. The policy, on its face, does not prohibit Section 7 activity. The policy is neutral and affects all employees holding the access card, including management officials, and not merely bargaining unit members. The policy merely reaffirmed to the holders of the access card the simple common sense and reasonable manner in which the card should be used. While the timing for the implementation of the policy was shortly after Northrup had used her access card to let Lomuscio in the facility, I credit the testimony of Hochman that the incident was a wake-up call to put in writing the instructions for the authorized use of the access card and not because it was motivated and promulgated in response to Northrup's union activity in using the card to allow Lomuscio access to the facility or to restrict Section 7 activity. As the General Counsel points out, the policy has been in place for "many decades" and "thousands of employees, patients, visitors and other members of the public have entered and exited the facility" (GC Br. at 43). The employees, public and union representatives will continue to enter and exit the facility. The policy merely restates what has been in place "for many decades" as to the proper use of the access card and a reasonable reading of the policy would not construe the language to prohibit or tend to chill Section 7 activity.

Further, the written policy was not intended to discourage union activity. The bargaining unit members continued to enjoy the unfettered right to meet with their union representatives. The policy does not restrict the use of the access card only to bargaining unit members. I find that a fair reading of the access card policy does not "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, above. In *Intermet Stevensville*, 350 NLRB 1349 (2007), cited by the General Counsel, the Board also held that the employer did not violate Section 8(a)(1) of the Act because the employer's resolution opportunity program did not foreclose employees from using other avenues to address their workplace concerns or require them to invoke the resolution opportunity program first and therefore it would not reasonably be understood to forestall employees from acting in concert to deal with management about matters affecting their terms and conditions of employment. *Intermet Stevensville* at 1351. Similarly, here, the access card policy would not foreclose employees from acting in concert with union representatives. The access card policy merely restricts the use of the card to only authorized users. Therefore, I find that the General Counsel failed to establish that the rule was promulgated or motivated by protected activity in violation of Section 8(3) and (1) of the Act.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented a new policy that imposed a penalty fee for a lost access card and subject to discipline for nonadherence violation to the policy.

I also find that the Respondent did not violate Section (8)(a)(3) and (1) of the Act when it promulgated the access card policy.

H. Kristen Bartholomew's Weingarten Rights

Kristen Bartholomew (Bartholomew) has been employed with the Respondent as an X-ray technologist since 2011. She works in the main hospital facility and also at an outpatient medical imaging clinic. Bartholomew's supervisor was Rhonda Makoske (Makoske). Makoske was and is the director of medical imaging employed by the Respondent. Bartholomew was not involved in any of the allegations noted above. Rather, the complaint (03–CA–124816) alleges that the Respondent refused Bartholomew's request to exercise her Weingarten rights to have union representation present during an investigatory interview on March 4, 2014. Bartholomew said that she is represented by the union, but had no involvement with any union activities until she was the subject of discipline (GC Exh. 1 at VIII (a), (b) and (c); Tr. 357, 358).

1. The interview of February 28

Bartholomew testified that on February 28, she was working at the outpatient clinic. She noticed that the receptionist at the clinic was inputting a data error (the patient's birth date) into the computer when she was registering a patient for an examination. Bartholomew said that she caught the mistake and informed the transcriptionist ("Liz") to correct the data in the computer program. According to Bartholomew, Liz informed her that the entire record had to be deleted and redone. Instead, Bartholomew decided to rescan the data information and was able to proceed with the examination of the patient.

Bartholomew complained that after the examination was completed, her supervisor Makoske and Kelly Vorez, the supervisor of the X-ray department, spoke to her about the error inputting the patient's personal data. According to Bartholomew, Makoske insisted that the error was not corrected on the paperwork despite the fact that Bartholomew had circled the corrected date of birth on every document (Tr. 358–363).

Bartholomew said that Makoske then proceeded to bring up past incidents of wrong data being entered by Bartholomew. At this point, Bartholomew said that she asked for union representative. She was allegedly told by Makoske that ". . . she was just gathering information and I didn't need Union Rep." No additional questioning occurred after this statement was made by Makoske. Bartholomew said that Makoske would be back and when they next met, Bartholomew was told to go home by Makoske. Bartholomew was scheduled to work until 4 p.m. on February 28, but instead left work at 10:30 a.m. (Tr. 363).

Makoske testified that Liz was the secretary and that she informed her that Bartholomew was having some problem with the examination of a patient and that the patient's date of birth was incorrectly inputted in the computer. Makoske said she went to see Bartholomew to assess what happened. She said that there was paperwork scattered around the examination area and that Bartholomew was visibly upset. She informed Bartholomew that Liz had said there was some kind of problem. Consistent with Bartholomew's testimony, Makoske related that she had rescanned the information and everything was corrected. However, Makoske was not convinced and asked Bartholomew to gather the paperwork and they would both go through the patient's medical record to ensure accuracy of the data. Makoske said that Bartholomew took about 15-20 minutes to organize the paperwork and Makoske returned for a second time to meet with Bartholomew. Makoske said that the paperwork was given to Allyson Neefus to make the corrections in the data system.

Makoske said that Bartholomew was still visibly upset over the incorrect data and suggested that she take leave for the rest of the day. According to Makoske, Bartholomew did not want to leave work, but admitted she was stressed and could not think straight and was afraid she might make another mistake. At this point, Makoske directed Bartholomew to leave work and she agreed. Makoske testified that Bartholomew did not request union representation at the second meeting on February 28 (Tr. 432–436).

2. The interview of March 4 and suspension of Bartholomew

On the morning of March 4, Bartholomew was working at the ultrasound department at the hospital and met with Makoske in her office. Makoske asked Bartholomew why she had called Liz on February 28. Bartholomew felt that this interview was going to result in discipline and asked that the questioning be stopped and told Makoske she wanted a union representative. According to Bartholomew, Makoske replied that the only time she is allowed to have a union representative is when she is issued a CAP (disciplinary) form. According to Bartholomew, she told Makoske that under her "Weingarten Right," the questioning must stop if it made her uncomfortable. Makoske then responded that her understanding of Weingarten rights is incorrect and then proceed to say that Bartholomew was the worse employee she had ever supervised. Bartholomew said that at this point, the meeting ended and Bartholomew went back to work (Tr. 364–367).

Bartholomew testified that a "couple of hours later," she was asked to return to Makoske's office. Makoske again asked why Bartholomew had called Liz to fix the computer error on February 28. Bartholomew again explained that Liz was the person to contact when there are personal data errors in the computer. Bartholomew said that she did not ask for a union representative at this meeting because Makoske already said in the earlier meeting that she was not entitled to union representative. The meeting then concluded.

Bartholomew said that she was called by Makoske for a third time on March 4. Makoske again asked why Bartholomew had called Liz and Bartholomew gave the same answer. At this point, Makoske said that she was issuing her a CAP. Bartholomew understood the disciplinary nature of a CAP, but did not request union representation at this point in the meeting. Bartholomew said that Makoske had denied her earlier request for union representation and did not believe her request would be granted at this meeting. This meeting ended with Makoske telling Bartholomew that she will be terminated before the end of the week (Tr. 367–371).

In contrast, Makoske said there was only one meeting on March 4 regarding the incorrect patient name. Makoske testified that she called Bartholomew on March 4 to discuss the February 28 incident. Makoske asked Bartholomew as to how the wrong patient's name was on the X-ray images and whether she had followed the procedure in identifying the patient. According to Makoske, the patient had told Bartholomew that the birth date was incorrect and that Bartholomew did not make the correction. Bartholomew denied this and said "If I'm going to be in trouble for this, I want a Union Representative." Makoske said that the interview ended at this point. Makoske denied that there were any other interviews or meetings with Bartholomew on March 4 (Tr. 437, 438).

Makoske said that Bartholomew was disciplined on March 7 and given a 3 day suspension for failing ". . . to identify patient properly for ultrasound" (Tr. 436–439; GC Exh. 32). When Bartholomew met with Makoske on March 7,[15] Makoske said Bartholomew could have a union representative at this time because she was being disciplined. Bartholomew contacted a union representative at this point (Tr. 371–373).

3. The prior discipline of Bartholomew

Bartholomew asserts that Makoske had also previously informed her in November 2013 and February that the only time Bartholomew was entitled to union representation is when discipline was being issued. [16]

Bartholomew testified that she met with Makoske in November 2013 over an incident where she allegedly burned the skin of a patient. Bartholomew denied the charge and requested union representation. Makoske told her that she was just asking questions in an interview. Bartholomew said she subsequently received a verbal warning over this incident.

Bartholomew also testified that she received another discipline on February 28 over an X-ray she had done on a patient's foot. Bartholomew met with Makoske on February 24 over the

[15] Neefus, supervisor/manager of the X-ray department was present throughout all four meetings with Bartholomew and Makoske, but said very little in the meetings.

[16] The November and February discipline serve only as background information and testimony was allowed over the objection of the Respondent (Tr. 374).

foot incident and said that she wanted union representation. Makoske replied that she was merely asking questions of Bartholomew during an investigation over the incident and union representation was not available to Bartholomew. Bartholomew said that she was subsequently issued a written warning on February 28 over the foot incident (Tr. 373–378).

Makoske testified that the Respondent received a complaint from a patient in November 2013 that Bartholomew allegedly burned the patient with some gel that Bartholomew had applied on the patient's skin. Makoske recalled discussing the complaint with Bartholomew on November 21, 2013. Makoske said she could not recall if Bartholomew requested union representation at the meeting (Tr. 426, 427). Makoske said that she met with Bartholomew later that same day and issued her a CAP for failing ". . . to meet customer service expectations as evidenced by formal patient complaint." Bartholomew was disciplined with a verbal warning. Also noted on the CAP was Bartholomew's handwritten statement "Denied Union Rep" and initialed by her. Makoske testified that Bartholomew never requested union representation when the CAP was issued on November 21 (R. Exh. 5; Tr. 428–430).

Makoske said that she continued to have performance deficiencies with Bartholomew and testified to another incident in February 2014 regarding a foot X-ray of a patient. Makoske testified that the radiologist informed her that the X-ray done by Bartholomew for the foot was actually a different part of the patient's body. Makoske discussed the X-ray with Bartholomew on February 24. She said that Bartholomew did not request union representation at the February 24 interview. Bartholomew was disciplined on February 27 with a written warning with regard to the foot incident (Tr. 430–432).

Discussion and Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by denying employee Bartholomew union representation at an investigatory meeting on March 4. Under Section 7 of the Act, a union-represented employee has the right to the presence and active assistance at an investigatory interview that the employee reasonably fears may result in discipline. *NLRB v. J. Weingarten*, 420 U.S. 251, 257 (1971).

To be sure, great leeway was offered to the General Counsel regarding the specific events of Bartholomew's prior disciplines in November 2013 and February in the attempt to establish a pattern that Bartholomew was routinely denied her request for union representation. However, the complaint only alleges a violation of the Act when Bartholomew was denied representation on March 4. There are major credibility issues regarding the events of March 4. The General Counsel argues that there were three separate meetings on March 4 that constituted investigatory interviews. According to Bartholomew, she testified to three separate interviews on March 4. The counsel for the Respondent argues that there was only one interview on March 4 and that Makoske stopped questioning Bartholomew upon her request for representation.

Upon my review, I find that Makoske to be the more credible witness. Makoske consistently testified that Bartholomew did not request union representation during the November and February 24 interviews and she stopped questioning Bartholomew when she requested union representation on March 4. Makoske interviewed Bartholomew in November and February 24 regarding her performance deficiencies. Makoske said that Bartholomew never requested representation during the November interview. In contrast, Bartholomew maintains that she asked for representation. Bartholomew testified

> Did you answer their questions?
>
> Yes.
>
> Did you say anything else?
>
> I did ask for a Union Rep that day and she told she was just—it wasn't the time or place and that she was just asking questions plus doing the interviewing.
>
> Now, who is she?
>
> Rhonda (Makoske).
>
> What happened next?
>
> That meeting was ended and she told me it was going to CAPS and it was ended.[17]

Makoske further testified that Bartholomew never requested representation during the February 24 interview. In contrast, Bartholomew testified

> What questions were asked of you?
>
> She was asking me about the foot and why I didn't culumniated (sic) the foot. And I explained to her that the woman had a disease. I clearly remembered the woman.
>
> Did you say anything else during this meeting?
>
> I did ask to—I stopped to get a Union Rep and she said, no, it wasn't the time or place. She was asking questions.
>
> What happened next?
>
> That meeting ended. She said it was going to go into –she was going to go into CAPS and see if there was going to e a discipline for that. [18]

In an attempt to buttress the alleged violation of Bartholomew's Weingarten rights on March 4, the General Counsel (over the objections of the Respondent) presented testimony by Bartholomew of prior violations of her Weingarten rights during the November and February investigative interviews. However, the factual record shows that the two incidents did not establish any alleged pattern leading to the March 4 event. In my opinion, whether or not Makoske was told by Bartholomew she wanted union representation is not material because it is clear through Bartholomew's own testimony that Makoske stopped questioning her once the request for representation was made in November 2013 and on February 24.

With regard to the events leading to the March 4 interview, Makoske testified that she spoke to Bartholomew regarding the error to the patient's birth date on February 28. She said that Bartholomew did not request union representation at that time.

[17] Tr. 376.
[18] Tr. 378.

Bartholomew was permitted to leave work early on February 28. Makoske testified that Bartholomew was distraught over the patient's complaint and she suggested that Bartholomew go home. Makoske's testimony that Bartholomew was not disciplined for going home early is undisputed.

With regard to March 4, Makoske insisted there was only one interview at 11 a.m. with Bartholomew. Makoske testified to the following

> At what point during this meeting did she (Bartholomew) ask for Union Representation?
>
> After I told her that the patient had said that she had told her that it was the wrong date of birth and didn't correct it.
>
> Did you discuss with her any further after she asked for Union Representation about any of the issues involved with this misidentification issue?
>
> I did not.[19]

Contrary to the General Counsel's contentions that ". . . it is not clear if Makoske asked Bartholomew more investigatory questions at this first meeting,"[20] the testimonial record of Bartholomew is actually very clear and consistent with Makoske's testimony that she stopped questioning Bartholomew upon her request for representation. The General Counsel examined Bartholomew on this point

> Did you say anything else during this interview?
>
> Yes. I asked to stop and have a Union Rep with me and she took off her glasses and threw them on the desk and she said let me explain to you again why—when you're allowed to call the Union and what they're for. She said the only time I'm allowed to have a Union Rep is when she's handing me the CAPS form.
>
> Did you agree with her?
>
> No. I told under the Weingarten Right that I was allowed to stop at any time if I was uncomfortable.
>
> Did she ask you any more questions during this meeting?
>
> Not during that meeting.[21]

The incident that created the instant situation occurred on February 28 when Bartholomew was called to explain the misidentification of a patient's date of birth. The Board has constantly held that an interview is investigatory for Weingarten purposes where, as here, an employee is summoned in front of management to explain her version of the disputed event. *Bentley University*, 361 NLRB No. 125 (2014); *Titanium Metals Corp*. 340 NLRB 766, 774 (2003); *Storer Communications*, 292 NLRB 894, 897 (1989) (finding meeting investigatory where the purpose ". . . was to give the employees an opportunity to tell their side of the story"). The Court in *Weingarten*, above provided the rationale for union representation during investigatory interviews and articulated "Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the act was designed to eliminate. . . " 420 U.S. at 261. The role of the union representative is to provide assistance and counsel to the employee being interrogated. However, the curative cupola of Weingarten is not triggered when the need for a union representative is rendered unnecessary when, as here, the interview was terminated upon the request for representation. Although the meetings held on February 28 and March 4 were investigatory interviews, no violation of the Act occurred inasmuch as the interview and questions stopped upon Bartholomew's request for representation. By Bartholomew's own testimony, the questioning stopped once she requested union representation during the February 28 investigatory interview. It is also clear that during the March 4 investigatory interview, Makoske stopped the interview once Bartholomew requested her union representation.

The remaining issue in dispute is whether there was more than one investigatory interviews held on March 4. The General Counsel contends there were 3 interviews. The Respondent argues only one. I agree with the Respondent that there was only one investigatory interview conducted by Makoske with Bartholomew on March 4.

On this point, I find that Bartholomew to be an untrustworthy witness whose testimony had many inconsistencies and cannot be fully credited. It is not credible to me that Bartholomew would testified that she requested a union representative in November 2013 and on February 24, but also asserted that she was not familiar with her Weingarten rights until she searched the internet sometime between her February 28 written warning and her March 7 suspension (Tr. 400). In contrast, Rodgers testified that Bartholomew told him that one of the union activists had showed Bartholomew the Weingarten rights that the union posted on the bulletin board in November 2013 (Tr. 354). In my opinion, Bartholomew was aware of her Weingarten rights in November and February and would have affirmatively asserted her right to union representation based upon this knowledge. The record also shows that the first time she contacted a union official (Rodgers) was not until March 5. Bartholomew has a history of disciplinary action and not unfamiliar with investigatory interviews and the CAPS process. However, she left unexplained as to why she did not contact a union official earlier in November for assistance. Further, when she asserted that she was denied Weingarten rights in November and February, she also admitted that the investigatory interviews immediately stopped and she returned to work (testimony, above). With regard to March 4, Bartholomew testified that she writes down the day's event in a diary either that same evening or the following day. Bartholomew's notes for March 4 did not indicate that there were 3 separate investigatory interviews. Her notes reflected only one meeting. When queried on this point, Bartholomew testified

> I don't talk about many things. I mean this is just scribble for me at home to get things out so I can go to sleep at night (Tr. 415).

It is beyond my reasonable belief that Bartholomew would only reference one investigatory interview on March 4 in her handwritten notes but neglected or did not find it significant

[19] Tr. 438.
[20] GC Br. at 44.
[21] Tr. 365, 366.

enough to memorialize the two additional interviews. It is also stretches credibility that there were additional interviews when Rodgers stated in his Board affidavit that Bartholomew only described one investigative interview with Makoske (Tr. 412, 413).

Accordingly, I find that the Respondent did not violate Section 8(a)(1) of the Act by denying employee Bartholomew union representation at an investigatory meeting on March 4.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Columbia Memorial Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, 1199 SEIU United Healthcare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Cindy Northrup with a verbal warning and suspension because she engaged in union activity.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish relevant and necessary information for the fair representation of Cindy Northrup in the grievance process.

5. The Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thus violated Section 8(a)(1) of the Act by promulgating and maintaining an overly broad work rule that proscribes disclosure of confidential information, including employee information.

6. The Respondent refused to bargain collectively with representatives of its employees, and thus violated Section 8(a)(5) and (1) of the Act by unilaterally promulgating an access card policy.

7. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not violate Section 8(a)(3) and (1) of the Act when it allegedly issued the access card policy in response to employees engaged in Section 7 activity and to discourage employees from engaging in Section 7 activities.

9. The Respondent did not violate Section 8(a)(1) of the Act when it allegedly denied union representation to Kristen Bartholomew during her investigatory interviews.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily issued a verbal warning and suspension to Cindy Northrup, must make her whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against her. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with the decision in *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), my recommended order requires Respondent to compensate Northrup for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarter(s) for Northrup.

My recommended order requires the Respondent to expunge from its files any and all references to the unlawful discipline of the aforementioned employee and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.

In addition, having found that the Respondent violated Section 8(a)(1) of the Act by maintaining a unlawful overly broad confidentiality rule and access card policy, I find that the Respondent be ordered to 1) rescind that rule and policy found to be unlawful, and 2) post ". . . an appropriate notice at all of its facilities where the unlawful rule and policy had been or is in effect." *Guardsmark, LLC*, 344 NLRB at 812; and *DirectTV*, 359 NLRB 545 (2013).

[Recommended order omitted from publication.]