

**Nos. 15-2466, 15-2586**

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**1621 ROUTE 22 WEST OPERATING COMPANY, LLC  
d/b/a SOMERSET VALLEY REHABILITATION &  
NURSING CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**1199 SEIU UNITED HEALTHCARE WORKERS  
EAST, NEW JERSEY REGION**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of issues .....	1
Statement of related cases .....	2
Concise statement of the case .....	2
I. Relevant procedural history .....	2
II. The Board’s findings of fact.....	3
A. Somerset’s operations .....	3
B. The nursing staff organizes .....	4
C. Management responds; the Union wins the election .....	5
D. Somerset disciplines and discharges union supporters .....	8
1. Jillian Jacques .....	10
2. Shannon Napolitano.....	11
3. Sheena Claudio .....	13
4. Valerie Wells .....	14
E. Somerset accelerates Tyler’s resignation .....	15
F. Somerset reduces per-diem employees’ hours .....	16
III. The Board’s conclusions and order .....	18
Standard of review .....	19

## TABLE OF CONTENTS

<b>Headings – Cont’d</b>	<b>Page(s)</b>
Summary of argument.....	20
Argument.....	22
I. Somerset’s challenge to the Acting General Counsel’s appointment is waived and, in any event, without merit.....	22
A. Somerset waived any challenge to Acting General Counsel Solomon’s authority .....	22
B. Lafe Solomon validly served as the NLRB’s Acting General Counsel.....	26
II. Substantial evidence supports the Board’s findings that Somerset unlawfully interrogated its employees and solicited their grievances .....	41
III. Substantial evidence supports the Board’s findings that Somerset violated the Act by disciplining and discharging several employees .....	44
A. Applicable principles .....	44
B. Somerset disciplined and discharged employees because they engaged in protected union activity .....	45
1. Somerset’s knowledge of the discriminatees’ union activities and its hostility toward the Union were “beyond question” .....	45
2. Somerset failed to prove it would have disciplined and discharged the discriminates absent their union activity .....	48
a. Jillian Jacques.....	49
b. Shannon Napolitano.....	52
c. Sheena Claudio.....	53
d. Valerie Wells .....	54

## TABLE OF CONTENTS

<b>Headings – Cont’d</b>	<b>Page(s)</b>
e. Lynette Tyler.....	56
C. The Board acted within its broad remedial discretion by issuing a reinstatement remedy .....	57
1. Applicable principles .....	57
2. The Board acted within its discretion by ordering reinstatement.....	58
D. Somerset unlawfully reduces the hours of per-diem employees .....	62
E. The Board did not abuse its discretion when it denied Somerset’s motion to recuse Chairman Pearce .....	63
Conclusion .....	65

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Atlantic Limousine, Inc. v. NLRB</i> , 243 F.3d 711 (3d Cir. 2001) .....	19, 42
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978).....	58
<i>Champion Parts Rebuilders, Inc. v. NLRB</i> , 717 F.2d 845 (3d Cir. 1983) .....	48
<i>Citizens Publishing &amp; Printing Co. v. NLRB</i> , 263 F.3d 224 (3d Cir. 2001) .....	19
<i>City of Arlington v. FCC</i> , 133 S. Ct. 1863 (2013).....	24
<i>D.R. Horton, Inc. v. NLRB</i> , 737 F.3d 344 (5th Cir. 2013) .....	23
<i>Family Nursing Home &amp; Rehabilitation Center</i> , 295 NLRB 923 (1989) .....	59
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	19
<i>Freytag v. CIR</i> , 501 U.S. 868 (1991).....	23
<i>Graham Architectural Products Corp. v. NLRB</i> , 697 F.2d 534 (3d Cir. 1983) .....	43
<i>Grane Health Care v. NLRB</i> , 712 F.3d 145 (3d Cir. 2013) .....	19
<i>Gustafson v. Alloyd Co.</i> , 513 U.S. 561 (1995).....	30

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Hanlon &amp; Wilson Co. v. NLRB</i> , 738 F.2d 606 (3d Cir. 1984) .....	44, 48
<i>Hedstrom Co. v. NLRB</i> , 629 F.2d 305 (3d Cir. 1980) .....	41, 43
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002).....	60
<i>Hunter Douglas, Inc. v. NLRB</i> , 804 F.2d 808 (3d Cir. 1986) .....	48
<i>IBEW, Local 211 v. NLRB</i> , 821 F.2d 206 (3d Cir. 1987) .....	56
<i>In re Kensington International, Ltd.</i> , 368 F.3d 289 (3d Cir. 2004) .....	64
<i>John Cuneo, Inc.</i> , 298 NLRB 856 (1990) .....	58
<i>LaRouche v. FEC</i> , 28 F.3d 137 (D.C. Cir. 1994).....	23
<i>Lightner v. 1621 Route 22 West Operating Co., LLC</i> , CIV.A. 11-2007, 2012 WL 1344731 (D.N.J. Apr. 16, 2012) .....	60
<i>Lightner v. 1621 Route 22 West Operating Co., LLC</i> , 729 F.3d 235 (3d Cir. 2013) .....	61
<i>Marshall Durbin Poultry Co.</i> , 310 NLRB 68 (1993), <i>enforced in pertinent part</i> , 39 F.3d 1312 (5th Cir. 1994) .....	57
<i>Metropolitan Council of NAACP Branches v. FCC</i> , 46 F.3d 1154 (D.C. Cir. 1995).....	63

**TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	44
<i>Morgan v. United States</i> , 304 U.S. 1 (1938).....	64
<i>NLRB v. Baptist Hospital, Inc.</i> , 442 U.S. 773 (1979).....	59
<i>NLRB v. Clapper’s Manufacturing</i> , 458 F.2d 414 (3d Cir. 1972) .....	43
<i>NLRB v. Fant Milling Co.</i> , 360 U.S. 301 (1959).....	56
<i>NLRB v. K&amp;K Gourmet Meats, Inc.</i> , 640 F.2d 460 (3d Cir. 1981) .....	43
<i>NLRB v. New Vista Nursing &amp; Rehabilitation</i> , 719 F.3d 203 (3d Cir. 2013), rehearing granted (Aug. 11, 2014) .....	2, 23, 24
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	3
<i>NLRB v. Omnitest Inspection Services, Inc.</i> , 937 F.2d 112 (3d Cir. 1991) .....	44, 45
<i>NLRB v. Sun Drug Co.</i> , 359 F.2d 408 (3d Cir. 1966) .....	64
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	44, 45
<i>NLRB v. Western Clinical Laboratory, Inc.</i> , 571 F.2d 457 (9th Cir. 1978) .....	59

**TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013), <i>aff'd on other grounds</i> , 134 S. Ct. 2550 (2014).....	24
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	57
<i>Quick v. NLRB</i> , 245 F.3d 231 (3d Cir. 2001) .....	19, 57, 59
<i>Rendell v. Rumsfeld</i> , 484 F.3d 236 (3d Cir. 2007) .....	61
<i>Roberts v. Sea-Land Services, Inc.</i> , 132 S. Ct. 1350 (2012).....	30
<i>Railroad Yardmasters of America v. Harris</i> , 721 F.2d 1332 (D.C. Cir. 1983) .....	25
<i>Sebelius v. Auburn Regional Medical Center</i> , 133 S. Ct. 817 (2013).....	23
<i>Smucker Co.</i> , 341 NLRB 35 (2004), <i>enforced mem.</i> , 130 Fed.Appx. 596 (3d Cir. 2005).....	58
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	56
<i>SW General, Inc. v. NLRB</i> , 796 F.3d 67 (D.C. Cir. 2015).....	22, 24, 26, 28, 31, 32, 33
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	25

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	23
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	19
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	44

<b>Statutes:</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157) .....	18
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 18, 41, 43, 44
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	2, 18, 44
Section 10(a) (29 U.S.C. § 160(a)) .....	1
Section 10(c) (29 U.S.C. § 160(c)) .....	57
Section 10(e) (29 U.S.C. § 160(e)) .....	1, 19, 22, 24
Section 10(f) (29 U.S.C. § 160(f)) .....	1
Section 10(j) (29 U.S.C. § 160(j)).....	60
Federal Vacancies Reform Act of 1998 (5 U.S.C. § 3345 et seq.)	
5 U.S.C. § 3345 .....	22
5 U.S.C. § 3345(a)(1).....	26, 27, 28, 29, 30, 31, 32, 33, 35, 37
5 U.S.C. § 3345(a)(2).....	26, 27, 28, 29, 30, 31, 35, 36, 37, 40
5 U.S.C. § 3345(a)(3).....	26, 27, 28, 29, 30, 36, 38, 40
5 U.S.C. § 3345(b)(1).....	26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39
5 U.S.C. § 3345(b)(2).....	27, 32, 33, 35, 36
5 U.S.C. § 3345(c)(1).....	29
5 U.S.C. § 3348(e)(1).....	25

**Legislative Materials:**

S. 2176, 105th Cong., 2d Sess. (as reported July 15, 1998) ..... 38  
S. Rep. No. 105-250, 105th Cong., 2d Sess. (1998)..... 32, 35, 37, 38  
144 Cong. Rec. 12432 (1998)..... 34  
144 Cong. Rec. 22016 (1998)..... 38  
144 Cong. Rec. 27496 (1998)..... 39

**Other Authorities:**

23 Op. O.L.C. 60 (1999) ..... 27

*GAO, Eligibility Criteria For Individuals To Temporarily Fill Vacant Positions Under The Federal Vacancies Reform Act of 1998,*  
GAO-01-468R (Feb. 23, 2001)..... 34

Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative*  
(Nov. 2, 1998) ..... 34

Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General For Civil Rights*  
(Jan. 14, 1998)..... 34

## **STATEMENT OF JURISDICTION**

This case is before the Court on the petition of 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center (“Somerset”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against Somerset. 1199 SEIU United Healthcare Workers East, New Jersey Region (“the Union”), which represents a unit of Somerset employees, has intervened on the Board’s behalf.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (“the Act”) 29 U.S.C. §§ 151, 160(a). The Board’s Decision and Order, reported at 362 NLRB No. 113 (June 11, 2015) (JA1-5),<sup>1</sup> is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The Court has jurisdiction pursuant to Section 10(e) and (f) because the unfair labor practices were committed in New Jersey. The petition and cross-application were timely; the Act imposes no time limit on such filings.

## **STATEMENT OF ISSUES**

1. Did Somerset waive its FVRA argument and, if not, did Life Solomon validly serve as the NLRB’s Acting General Counsel when he issued the complaint?

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<sup>1</sup> “JA” references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Does substantial evidence support the Board's findings that Somerset unlawfully interrogated its employees about their union sympathies and solicited employee grievances?

3. Does substantial evidence support the Board's findings that Somerset unlawfully disciplined and discharged four union supporters, accelerated Lynette Tyler's resignation date, and reduced per-diem employees' hours, and did the Board act within its broad remedial discretion by reinstating those discharged employees?

### **STATEMENT OF RELATED CASES**

Somerset challenged the Union's certification as the Somerset nurses' bargaining representative. *See 1621 Route 22 W. Operating Co. v. NLRB*, 3d Cir. Nos.12-1031,12-1505. That case is in abeyance pending *NLRB v. New Vista Nursing Home and Rehabilitation*, 3d Cir. Nos. 11-3440, 12-1027 and 12-1936.

### **CONCISE STATEMENT OF THE CASE**

#### **I. RELEVANT PROCEDURAL HISTORY**

Pursuant to a complaint filed by the Board's Acting General Counsel, and following a hearing, an administrative law judge found that Somerset violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3), in multiple ways. (JA6,36.) Somerset filed exceptions. The Board (Chairman Pearce, Members Griffin and Block) issued a Decision and Order, affirming, with slight

modifications, the judge's findings, conclusions, and proposed order, as described below. (JA6-9.)

Somerset petitioned this Court for review (No. 12-3768); the Board cross-applied for enforcement of that Order (No. 12-4007). On August 12, 2013, the Court granted the Board's motion to vacate and remand the case based on *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board—including the appointments of Members Griffin and Block—were invalid. (JA1.) On June 11, 2015, the Board (Chairman Pearce, Members Hirozawa and McFerran) issued the Decision and Order before the Court, which incorporates the reasons stated in the vacated decision and order. (JA1-5.)

## **II. THE BOARD'S FINDINGS OF FACT**

### **A. Somerset's Operations**

Somerset is one of several nursing centers owned by Healthbridge Management, Inc., CareOne Management, Inc. (JA10;3019,3025,3682.) CareOne Regional Director Jason Hutchens has overall responsibility for the facility. Somerset has an administrator and a director of nursing (DON) who heads the nursing department. Somerset employs full and part-time Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and Certified Nurses' Aides (CNAs). Somerset employs per-diem CNAs who work on an as-needed basis. Some nurses

serve as supervisory “unit managers,” and some as nonsupervisory charge nurses. (JA10;2064-2069,3018,3025-26,3568.)

RNs and LPNs administer medicine to patients based on physicians’ orders transcribed onto a medication administration record (MAR) kept on nursing carts. Nurses initial the MAR when medication is administered. Nurses also administer treatments to patients, which are recorded in a treatment administration record (TAR) kept at the nurses’ station. CNAs assist patients with daily living activities. (JA10;1650,1777-79,2064-67,2524-26,2571,3021-22.)

### **B. The Nursing Staff Organizes**

Around June 2010, Administrator Elizabeth Heedles announced that, effective August 1, Somerset would reduce nurses’ hours and change their schedules. Upset about this, nurses spoke with each other and various supervisors, including Jacquie Southgate. Jillian Jacques, an experienced senior nurse, called Vice President of Human Resources Andrea Lee, who met with a group of nurses and promised to investigate but never did. (JA10-11;1659-65.)

After meeting with a union organizer, LPNs Sheena Claudio and Shannon Napolitano reported back to employees and supervisors, including Southgate, Mary Apgar, and Irene D’Ovidio. D’Ovidio told Claudio, “ok, you got to do it; it’s unfair what’s going on,” and asked her to keep them updated. (JA11;1653,1666-68,1672-73,1677,1688-91,1931-32,2116.)

On July 22, 2010, the Union filed a petition to represent a unit including LPNs and CNAs. (JA11;5027.) The parties agreed that, to be eligible to vote, part-time and per-diem employees must have worked an average of at least 4 hours per week during the preceding 13 weeks. (JA26;5015-16.)

Employees openly expressed support for the Union. Two weeks before the election, the Union distributed a flyer entitled “At Somerset We’re Voting Yes for 1199 SEIU,” containing individual photographs and statements of support from 35 employees, including Jacques, Napolitano, Claudio, Valerie Wells and Lynette Tyler. (JA11;5032-41.) The employees made a video, posted on youtube.com, of employees, including Jacques, Claudio, Tyler, and Wells, expressing support for the Union. (JA11;1705-06,5042.) Management officials, including Hutchens and Illis, saw the flyer before the election; Hutchens watched the video. (JA11;3135-36,4720.) Employees wore union insignia; one day 25-30 employees wore a “respect-1199” sticker to work. (JA11;1700,1935,2230,2321,5029.)

### **C. Management Responds; The Union Wins the Election**

The petition surprised Regional Director Hutchens, who believed the facility performed well. (JA12;3130.) In a July 28 letter, Administrator Heedles told employees the petition was “very disappointing” and “it would be a mistake to bring in a union here.” (JA12;5031.)

Although Hutchens insisted he had “concerns” with Heedles’ performance, on August 3 he abruptly transferred Heedles to the administrator position at CareOne’s much larger Holmdel facility and transferred Holmdel’s administrator, Doreen Illis, to Somerset. (JA10,12;2536,3036,3070-71,4292-94.) Hutchens terminated DON Kovacs in early August. Inez Konjoh, who transferred from another CareOne facility, became DON. (JA12;3071-72,3613.)

Throughout August, managers held several meetings with employees. Hutchens told employees he was “very disappointed” that they sought union representation, apologized for issues he had missed, and stated he thought he had rectified their problems by transferring Heedles and bringing in Illis and Konjoh. (JA13;1951,26281801,2478.) He asked for a chance to fix the employees’ problems. (JA13,31;1720.) At another meeting, Illis said she wanted to learn why employees wanted a union and to try to fix things. (JA13,31;2129-30,2636.)

When employees complained that the corporate office was unresponsive, Hutchens offered to have his and Illis’ cell phone numbers posted for employees. (JA13;1721-22.) After Lynette Tyler reported at one meeting that her job was “very overwhelming,” Illis responded she could make no promises but would see what changes she could make; one week later, Somerset reduced Tyler’s duties. (JA13,31;2630-33.) After nurse Annie Stubbs complained at a meeting that

necessary garbage bags were kept locked up, Hutchens told Illis to take care of it. Illis distributed garbage bags the following morning. (JA13,31;3170-72.)

Managers and supervisors, including Illis, Konjoh, Apgar, Southgate, and Hutchens, discussed the organizing campaign. Labor relations advisor Pat Fleming, who worked for Somerset's law firm, polled managers to determine how individual employees were likely to vote. Some supervisors knew their employees well and were "in a position to know which way employees felt about the union..." Hutchens asked managers to get information about employees, "feel them out," and determine where they stood. (JA14,30;2560-65,3130-35.)

Managers questioned employees. Illis asked Tyler "where are you in terms of voting? Do you know if you were going to vote for the Union or not?" She asked whether Tyler knew how her coworkers were voting and whether she could convince them to vote no. (JA30-31;2637-39.) Konjoh asked Claudio how she felt people were going to vote and asked her to give Konjoh a chance and vote no.

(JA30;1723-26.) Konjoh asked Stubbs what she thought of the Union.

(JA30;2481-82.) CareOne Nursing Official Jessica Arroyo asked CNA Avian Jarbo whether she was "going to get a 'no' vote from" her. (JA30;2307-10.)

The Union won the September 2 election, 38-28. (JA11;5014.)

#### **D. Somerset Disciplines and Discharges Union Supporters**

Prior to the election, employees who expected to arrive late would call the office and tell the person answering the phone. Employees generally were not disciplined for lateness or absenteeism. After the election, Konjoh directed Southgate to transfer any calls from late employees directly to her.

(JA7,15,32;2567-68.) Illis also scrutinized attendance records and disciplined employees based on their attendance dating back to January 1, 2010. Somerset issued Claudio, Napolitano, and Jacques written notices for tardiness. It also issued Claudio and Jacques separate notices for “pattern absenteeism” based on the number of times they had called in during the previous months, noting when those call-ins preceded or followed a scheduled day off or holiday. (JA15,32;4334,5045, 5090,5103-07,5108-09.) Konjoh told Claudio that an employee-handbook rule prohibited using sick days adjacent to nonworking days; the handbook contained no such rule. (JA7,16;1736-37,1741,5051-74). At least one other employee received only a verbal notice despite having more absences than Claudio.

(JA7;6282.) When Claudio complained to supervisor Southgate, she told Claudio “be careful because you already know what’s going to happen. What they’re trying to do. Just be careful and don’t be late.... Don’t give them a reason.”

(JA7,33;1745.)

Somerset began scrutinizing administration records and disciplining employees for performance errors that previously warranted only training and correction. Preelection, officials only reviewed MARs and TARs in response to incidents brought to their attention and, if they found errors or omissions, instructed nurses to correct the error, but would generally not impose discipline. (JA18;2532,2584,2597-98.) Postelection, managers reviewed the MARs and TARs daily and disciplined nurses for any errors. (JA18,33;1780,2076-78,2527-32.) Konjoh told Southgate management “would be obviously looking at the people who they believed to be union organizers ... actively involved in trying to get a union in ... closely and if they were given a reason to write up they would write them up.” (JA7,18-19;2733.)

In October, Illis convinced former Holmdel employee Mohamed Bockarie, to transfer to Somerset, stating Somerset needed more employees to “be on their side ..., not in the favor of the union” at a “re-election.” Illis instructed him to “spy” on his coworkers and look for documentation errors committed by specific employees, including Jacques. (JA8,19,21,23,24,29,33,34,36;4783-89.)

Somerset quickly amassed disciplinary records against union leaders and, in a few months, discharged each of them.

## 1. Jillian Jacques

Jacques worked at Somerset for 11 years. In the 2 years before her discharge, Somerset often selected her to serve as a charge nurse, a position given to “dependable” nurses who were “high performers.” (JA7&n.5;3568-69,4683-84.) After the September election, Konjoh told Southgate that Jacques “was being very careful to follow all the rules and regulations; being very careful so that she wouldn’t get written up.” (JA8 n.6,19,23;2575-76.)

On September 28, Somerset issued Jacques a written notice for failing to complete documentation on a patient who had fallen and on two newly-admitted patients. (JA7;5117.) Jacques informed Konjoh that nurse Patty Beck was responsible for one of those incidents; although Konjoh agreed, she did not discipline Beck. (JA7,21;2169-70,3876-77.)

In October, Illis instructed Bockarie to look for documentation errors committed by Jacques. (JA8,21,23;4788-89.) On November 1, on Konjoh’s orders, Southgate issued Jacques a written notice for not fully completing incident reports. (JA21-22;2599-2600,5122.) By contrast, on October 21, Beck received only a verbal notice for failing to complete several incident reports. (JA7,4092,5437.) Prior to the election, management did not discipline nurses for failing to complete admission or incident reports, but merely asked the nurse to complete them the next day. (JA7;1785-86,2582-83.)

On February 10, 2011, Somerset suspended Jacques for failing to transcribe a medication order properly—Jacques recorded that the patient was to receive aspirin instead of enteric-coated aspirin—and for failing to record the medication on the MAR. Jacques admitted that she had made the error and explained that she was very busy admitting five patients. She asked why the night nurse, who was responsible for conducting a daily “24-hour chart check” to ensure physicians orders were properly entered, did not catch the error.<sup>2</sup> (JA22;2188-90,5124.) Konjoh stated she was unaware of the chart-check requirement and did not enforce it; the night nurse was not disciplined. (JA22-23;4168-69.) Somerset also cited Jacques for failing to document the status of a patient who had fallen the previous day. (JA22;2191,5124.) That disciplinary notice referenced the September 2010 notice Jacques received for lateness and pattern absenteeism. (JA7;5124.) Based on these incidents, Somerset discharged Jacques. (JA22.)

## **2. Shannon Napolitano**

Napolitano worked as an LPN at CareOne facilities since 2006 and at Somerset since March 2009, until she was terminated 2 weeks after the election. (JA19;1898.) Around September 16, a patient complained to Konjoh that Napolitano included a pink pill in her medications. Although Konjoh did not yet

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<sup>2</sup> The 2010 plan of correction required that night-shift nurses check the completion of the MAR and TAR daily. (JA21.)

know what the pill was, she did not remove it from the cart or otherwise act to ensure that it was no longer administered. (JA19-20;4014,4188-90.) Instead, she told the patient that if she received the pill again, she should hold it and show it to Konjoh. (JA19;2578-80.) The following day, the patient called Konjoh and showed her a pink pill, which Napolitano had just given her. (JA19;1974-77.)

Konjoh investigated and ultimately learned that the pill was a zinc supplement, which Napolitano and several other nurses had continued dispensing to the patient despite a physician's discontinuation order. (JA19-20;1990-91,3766-67,4188-90,5095.) According to Jacqueline Engram, CareOne's vice president of clinical operations, if a medication is discontinued but dispensed, it is removed from the medication cart by whoever discovered the error and the matter investigated. (JA19,34;3563-64.)

Several hours later, Konjoh informed Napolitano about the zinc error. She also said that, during that shift, Napolitano had recorded a patient's pulse oxygen level as 0 percent, which would have meant that the patient was deceased. Napolitano responded that she reviewed her MAR entries at the end of each shift, as did many nurses, and would have caught the mistake. (JA19;1983-84.) Konjoh also reported that Napolitano conducted a pain assessment of a patient that day at the start of her shift when it should have been done at the end of her shift. Napolitano responded that she always conducted pain assessments at the beginning

of her shift and that CareOne corporate nurse Jessica Arroyo, who had previously observed Napolitano, approved the practice. Konjoh invited three nurses into the meeting to ask when they conducted pain assessments; all three agreed with Napolitano. (JA20;1746-47,1993-94.)

Konjoh then terminated Napolitano for the zinc error, failing to properly document the patient's oxygen saturation level, and failing to ensure that the patient ingested the (discontinued) pill. She did not reference the pain-assessment issue. (JA19;5098.)

Although three other nurses also recorded on the MAR that they had administered the zinc supplement after it had been discontinued, Somerset did not discipline any of them. (JA20;4000-01.) The following day, Southgate confided to Claudio that Napolitano had been "set up." (JA20;1749.)

### **3. Sheena Claudio**

On October 1, Somerset issued Claudio a written notice and a 2-day suspension for failing to properly document the status of three patients. (JA20,34;5077-78.) Four days earlier, Somerset issued nurse Sandy Mootosamy only a written notice for virtually the same errors. (JA20,34;6363.) On October 7, after administering treatments, Claudio recorded them in her notes but failed to enter them into the TAR. (JA20;1778.1783.) Realizing her error, she returned to Somerset that evening and began recording the treatments. Illis instructed her to

stop and leave the facility. (JA20,21,34;1778,1783,1785.) Somerset suspended Claudio pending an investigation and ultimately terminated her on October 21. (JA21;5084.) Prior to the election, it was not uncommon for employees to complete the TAR the following day without receiving discipline. (JA20,21,34;1793,2582.)

#### **4. Valerie Wells**

After working as a Somerset CNA for 10-12 years, Valerie Wells began working part-time as the staffing coordinator and became the full-time staffing coordinator in January 2010. She scheduled staff based on the number of patients at the facility. Her duties included generating a master schedule and daily assignment sheet, ensuring schedules were current, and finding replacements for absent employees. She also “reconciled” discrepancies between the schedule and the actual employee complement for each shift. (JA24; 2819,2823,3321-22,3341.) Before the election, Wells received no discipline as staffing coordinator. (JA24;2848-49.)

Although Wells was on vacation during the week of the September 2 election, she returned to vote. The morning of her next work day, September 7, Illis and Konjoh called her into a meeting. They gave her a document listing discrepancies between the September 6 daily schedule that Wells prepared before her vacation, and the schedule as it was entered into Somerset’s Smartlinx

computer scheduling system. The list included discrepancies that had occurred while she was on vacation, although she had no opportunity to reconcile the data upon her return. (JA25;2854,4652.)

On September 15, Somerset issued Wells a written notice for making mistakes inputting schedule changes into Smartlinx. Although Wells stated that she was not adequately trained in Smartlinx, Illis wrote on the notice that Wells' problem was "laziness and lack of attention to detail." (JA25;5246.) That same day, Somerset issued Wells another notice for failing to give Konjoh a daily schedule as well as schedule changes on September 14, although Wells had left the schedule at the nurses' station. (JA25-26;2888-89;5247.)

On September 20, Wells received a third written notice for scheduling issues. Wells explained each of the items listed, including one faulting her for incorrectly scheduling CNA Guerline for a 7-3 shift instead of 3-11, when it was established that Illis made the incorrect schedule changes. The discipline was not changed. (JA26;2895-96,5248-49,5251.)

The next day, Konjoh discharged Wells, citing lack of improvement since the September 20 meeting. (JA26;3757-58,5252.)

#### **E. Somerset Accelerates Tyler's Resignation**

Before the election, Tyler told Illis and Konjoh that she wanted to return to school to become a nurse. They encouraged her to remain, explaining that

Somerset had a tuition reimbursement policy. (JA15;2640-45.) Thereafter, Tyler appeared in the Union's flyer and video. On September 9, Tyler resigned, effective September 22, to pursue a nursing program. (JA15;4221.) Illis informed Tyler that she need not work through September 22, but should leave immediately and would be paid for those 2 weeks. (JA15;2654-55.) In the personnel form documenting Tyler's resignation, Illis wrote "not eligible for rehire—resigned with bad attitude toward company." (JA15;5225.)

#### **F. Somerset Reduces Per-Diem Employees' Hours**

Prior to the election, Somerset had a longstanding practice of scheduling per-diem CNAs to work regular schedules. (JA26;2571-72.) One week after the election, Konjoh told Southgate not to use per-diem employees without first clearing it with her because, if a second election were held, per-diem employees would need a minimum number of hours worked to be eligible to vote. (JA26;2573-74.) Somerset immediately reduced the hours of five per-diem employees who were union advocates and thereafter terminated them for having insufficient active hours. Union supporter Daysi Aguilar had regularly worked an every-other-weekend evening shift. After the election, Konjoh told Aguilar she could work only one weekend per month, never again placed her on the schedule, and ultimately terminated her. (JA27;2768-72,5514.)

Gertrudis Rodriguez-Arias, who appeared in the Union's flyer and video, averaged 32 hours biweekly before the election, but was removed from the schedule for the weekend of September 18-20, never again scheduled, and ultimately terminated. (JA27;2441-42.)

Dominique Joseph, who spoke favorably about the Union with CareOne official Andrea Lee, worked every other weekend before the election. When she reported for work after the election, she learned she was not on the schedule. She was never scheduled again and was ultimately terminated. (JA28;2378-78,2382-84,2389-95,5513.)

Part-time CNA Rita Onyeike, who regularly worked weekends before the election, was sent home the week after the election for wearing a union scrub top. The following day, Somerset informed Onyeike she was being changed from part-time to per-diem status because she had only worked four shifts since she was hired in July; in fact, she had worked more shifts than that. Onyeike asked Illis whether this was because she wore the union scrub. Illis responded "you should have known if you are wearing an 1199 scrub, we would look at you as part of the union." Several days later she was told not to come to work due to a low census. She received the same call the following week. Somerset never again scheduled her to work and ultimately terminated her. (JA28-29;2312-14,2323-38,5210-13,5512.)

Annie Stubbs, whose picture appeared on the Union's flyer, regularly worked weekends and some weekdays. Before the election, Konjoh asked her what she thought about the Union, stated she knew Stubbs was in a union at her other job, and said "we don't want one here." After September 19, Somerset never scheduled Stubbs to work again and ultimately terminated her. (JA29;2476-90.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On June 11, 2015, the Board issued a Decision and Order affirming the judge's finding that Somerset violated Section 8(a)(1) by interrogating employees about their union sympathies and activities and by soliciting their grievances. (JA3,6,36.) The Board, affirming the judge, found that Somerset violated Section 8(a)(3) and (1) by disciplining and discharging employees Napolitano, Jacques, Claudio, and Wells; accelerating Tyler's resignation; and reducing the hours of per-diem employees, including Aguilar, Rodriguez, Joseph, Onyeike, and Stubbs. (JA3,36.)

The Board ordered Somerset to cease and desist from the violations found or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. (JA3,37.) Affirmatively, the Board ordered Somerset to reinstate Claudio, Jacques, Napolitano, and Wells; make them whole, along with Tyler and the per-diem employees; compensate them for any adverse tax consequences; remove from

its files references to unlawful actions, make records available to calculate backpay; and post a remedial notice. (JA3,37.)

### STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "The Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it *de novo*." *See Universal Camera*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). The Board's credibility determinations are entitled to "great deference" and must be affirmed unless they are shown to be "inherently incredible or patently unreasonable." *Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001); *Grane Health Care v. NLRB*, 712 F.3d 145, 149 (2013) (citations and internal quotations omitted). The Board's legal conclusions must be upheld if based on a "reasonably defensible" construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

## SUMMARY OF ARGUMENT

1. Somerset's argument that the Board's Order must be set aside because Acting General Counsel Lafe Solomon, who issued the complaint and amended complaint, was serving in violation of the Federal Vacancies Reform Act of 1998 should be rejected. Somerset waived this argument by failing to raise it with the Board. And in any event, Solomon validly served as the NLRB's Acting General Counsel. Consistent with the FVRA's text, purpose, and history, and as every President subject to the statute has understood, an individual is only barred from being both the acting official and nominee if he became the acting official by virtue of being the first assistant—a category that does not describe Solomon.

2. After learning that employees sought union representation, Somerset engaged in multiple unlawful actions to coerce its employees into voting against the Union, and then punish them for doing so. Substantial evidence supports the Board's findings that Somerset officials coercively interrogated employees about their union sympathies and solicited grievances from its employees. Somerset did not merely oppose the Union or engage in "innocuous" discussions with employees, but pointedly asked employees how they would vote and, after soliciting employees' grievances, promised to, and did, address certain issues.

3. Following the election, Somerset targeted and punished union supporters by auditing its attendance records, then disciplining prominent union supporters for

prior attendance issues. It scrutinized its medication and treatment records admittedly to find errors in order to discipline targeted union supporters. Somerset then disciplined and discharged four known union supporters, and accelerated the resignation of another, for errors that did not result in comparable discipline for others. While Somerset insists that it took actions to improve the facility, substantial record evidence of disparate treatment supports the Board's findings that Somerset would not have taken those actions absent the discriminatees' union activity.

Substantial evidence also supports the Board's findings that Somerset unlawfully reduced the hours of pro-union per-diem employees to ensure they could not vote in any rerun election.

The Board acted well within its broad remedial discretion by issuing a reinstatement remedy. The Board reasonably rejected Somerset's claim that the discharged employees were dangerous based on its findings that the employees were disciplined and discharged for conduct that did not warrant discipline prior to the election.

## ARGUMENT

### I. SOMERSET’S CHALLENGE TO THE ACTING GENERAL COUNSEL’S APPOINTMENT IS WAIVED AND, IN ANY EVENT, WITHOUT MERIT

Invoking the D.C. Circuit’s recent decision in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), Somerset argues (Br. 35-39) that Acting General Counsel Lafe Solomon, who issued the complaint and amended complaint in this case, was serving in violation of the Federal Vacancies Reform Act of 1998 (“FVRA”), 5 U.S.C. § 3345, *et seq.*, and that the Board’s order must therefore be set aside. Somerset waived this argument by failing to raise it with the Board. In any event, *SW General* was wrongly decided, and this Court should not follow it. Rather, consistent with the longstanding interpretation of the FVRA that has been followed by every President subject to the statute, this Court should uphold Solomon’s acting service.

#### A. Somerset Waived Any Challenge to Acting General Counsel Solomon’s Authority

Section 10(e) of the NLRA, 29 U.S.C. § 160(e), provides that “[n]o objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Somerset admits (Br. 38) that it never urged the Board to find that Solomon served in violation of the FVRA. Its sole justification for belatedly raising the issue now is that it is “jurisdictional.” For this proposition

Somerset relies exclusively on the now-vacated opinion in *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), *rehearing granted* (Aug. 11, 2014), in which this Court *sua sponte* invalidated Member Becker's 2010 recess appointment. Somerset's argument fails.

First, once the Court granted the Board's petition for panel rehearing in *New Vista*, the panel's decision and judgment in that case were vacated. *See* 3d Cir. I.O.P. 8.3.1. Second, because *New Vista* has been vacated, this Court can and should join the other circuits that have recognized that appointments challenges like those at issue in *New Vista* are waivable. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 351-52 (5th Cir. 2013) (belated challenge to Board member's recess appointment held nonjurisdictional) and cases cited; *see also Freytag v. CIR*, 501 U.S. 868, 878-879 (1991) (belated Appointments Clause challenge was a "nonjurisdictional" claim that Court had "discretion," but not obligation, to decide); *LaRouche v. FEC*, 28 F.3d 137, 139-140 (D.C. Cir. 1994) (rejecting argument that constitutional challenge to FEC's membership was jurisdictional). Those decisions accord with both the established principle that constitutional and statutory rights may be waived if not timely asserted, *see United States v. Olano*, 507 U.S. 725, 731 (1993), and the Supreme Court's more recent admonition that issues are not "jurisdictional" unless Congress has clearly so stated. *See Sebelius v. Auburn Reg. Med. Ctr.* 133 S. Ct. 817, 824 (2013). They also accord with the

Supreme Court's recent refusal to equate agency "jurisdiction" with judicial jurisdiction, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013), which undermined a fundamental premise in *New Vista*'s analysis, see *New Vista*, 719 F.3d at 210-12.

Furthermore, even assuming that *New Vista*-type appointments challenges are "extraordinary circumstances" that Section 10(e) authorizes courts to consider even if waived before the Board, see *Noel Canning v. NLRB*, 705 F.3d 490, 496-98 (D.C. Cir. 2013), *aff'd on other grounds*, 134 S.Ct. 2550 (2014), Somerset's FVRA challenge does not fall within that category. That is the teaching of the very case Somerset relies on (Br. 36-37) to challenge Solomon's authority.

In *SW General*, the D.C. Circuit addressed the employer's FVRA challenge because it had been raised before the Board. 796 F.3d at 83. Given Section 10(e)'s exhaustion requirement, the court "doubt[ed]" it would address a similar FVRA challenge that had not been so preserved. *Id.* at 83. The court (*id.*) contrasted the challenge to the Acting General Counsel with the challenge to the validity of the Board's quorum at issue in *Noel Canning*, which that court had considered under Section 10(e)'s extraordinary circumstances exception.

As the D.C. Circuit correctly recognized, a challenge to Solomon's authority to prosecute differs significantly from a challenge to the composition of the agency issuing a final order. The former merely challenges a single officer's authority,

and so like other such challenges is waivable. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (rejecting belated challenge to hearing examiner's authority while acknowledging that defective appointment would have invalidated resulting order "if the [Agency] had overruled an appropriate objection made during the hearings"). As explained in *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1337-38 (D.C. Cir. 1983), the failure to timely challenge the authority of particular employees is subject to exhaustion requirements that may not apply to belated challenges to an agency's lack of a quorum. That different treatment is a reflection of the agency's greater authority. A single officer like Mr. Solomon may have unreviewable discretion to initiate prosecutions, but only the Board has the authority to issue final orders commanding Somerset to take action. Had Somerset timely challenged Solomon's authority, the Board could have either chosen to stop issuing decisions based on complaints he authorized, or "at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence." *L.A. Tucker Truck Lines*, 344 U.S. at 37.<sup>3</sup> Somerset's failure to timely challenge the complaint on FVRA grounds constitutes waiver.

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<sup>3</sup> Further, after Richard Griffin was confirmed as General Counsel and sworn in on November 4, 2013, he could have assessed the claimed defect and decided whether to ratify Solomon's actions. *See* 5 U.S.C. § 3348(e)(1) (exempting the NLRB's General Counsel from FVRA provisions that would otherwise preclude ratification of certain actions of persons found to have served in violation of the FVRA).

## **B. Lafe Solomon Validly Served As The NLRB's Acting General Counsel**

In any event, there is no merit to Somerset's argument (based on *SW General*) that Acting General Counsel Solomon's authority ceased on January, 5, 2011, when the President nominated him to be General Counsel. *SW General*, which is the subject of a pending rehearing petition, was wrongly decided.

1. Within the Executive Branch, over a thousand civilian offices are subject to Presidential nomination and Senate confirmation—so-called “President-and-Senate” (PAS) offices. Since 1998, such offices have generally been subject to the FVRA, which prescribes who may fill a PAS office in an acting capacity and for how long. *See* 5 U.S.C. §§ 3345-46.

The FVRA starts with a baseline rule, codified in § 3345(a)(1), which provides that the “first assistant” to a vacant PAS office automatically assumes that office's functions and duties. 5 U.S.C. § 3345(a)(1). But subsections (a)(2) and (a)(3) then create exceptions to that rule by authorizing the President to designate someone else from two specified groups instead. Those subsections provide that, “notwithstanding” subsection (a)(1), the President can designate someone who already serves in a different PAS position (subsection (a)(2)), or someone who has served in a senior position (GS-15 or above) in the same agency for at least 90 days in the year preceding the vacancy (subsection (a)(3)). The President relied on

subsection (a)(3) in designating Solomon; Solomon had spent the previous ten years in a senior NLRB position.

Subsection (b)(1) contains a further exception to subsection (a)(1)'s otherwise automatic accession of the first assistant. Section 3345(b)(1) provides that “[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section” if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he “did not serve in the position of first assistant” or “served in the position of first assistant” for less than 90 days. *Id.* § 3345(b)(1). But if the first assistant position is, itself, a PAS office, and the Senate confirmed the first assistant, this length-of-service restriction does not apply and that first assistant automatically assumes the vacant PAS office's functions and duties even if he also is the nominee. *Id.* § 3345(b)(2).

In 1999, shortly after the FVRA's enactment, the Office of Legal Counsel explained that “[t]he limitation [in § 3345(b)(1)] on the ability to be the nominee ... and to serve as the acting officer applies only to persons who serve as acting officers by virtue of having been the first assistant to the office,” *i.e.* under § 3345(a)(1), and not to those designated because they were already serving in another PAS office under § 3345(a)(2), or as a senior agency employee under § 3345(a)(3). 23 Op. O.L.C. 60, 64 (1999).

Every President subject to the FVRA has followed that position, and the D.C. Circuit was wrong to conclude in *SW General* that the restriction in subsection (b)(1) also applies to individuals who serve by virtue of their designations under subsections (a)(2) or (a)(3). Because Solomon had been designated under subsection (a)(3), and not under subsection (a)(1), his continued acting service following his nomination complied with the FVRA.

2. The Executive's longstanding interpretation best accords with section 3345's text and structure.

Subsection (a)(1) prescribes the general rule that "the first assistant to the [vacant] office ... shall perform the functions and duties of the [vacant] office temporarily in an acting capacity." Subsection (a)(1) thus operates *automatically*, assigning the vacant office's responsibilities by operation of law. Absent exceptions elsewhere in the statute, it would preclude the performance of such responsibilities by anyone else.

The rest of § 3345 creates exceptions to subsection (a)(1)'s automatic operation. The first two exceptions are subsection (a)(2), which permits the President, "notwithstanding paragraph (1)," to designate another PAS officeholder to fill temporarily a vacant PAS office, and subsection (a)(3), which similarly permits the President, "notwithstanding paragraph (1)," to designate as the acting PAS officer certain senior officers or employees from the same agency. A third

exception is in subsection (c)(1), which says that, “[n]otwithstanding subsection (a)(1),” the President may direct a PAS officer to continue serving after his term expires and the office becomes vacant if he is renominated for the same position. In all three instances, Congress needed to disable the automatic operation of the general rule in subsection (a)(1), which applies only to first assistants and provides for their automatic assumption of the vacant PAS office’s functions and duties. In each case, Congress disabled that automatic accession by providing that the relevant subsection operates “notwithstanding” subsection (a)(1).

Subsection (b)(1), the provision at issue here, is yet another exception to subsection (a)(1)’s otherwise automatic rule for first assistants. It establishes an exception where the first assistant is nominated to fill the vacancy but had been first assistant for less than 90 days in the year preceding the vacancy. To make clear that the exception trumps the automatic accession rule, subsection (b)(1) provides that the exception applies “[n]otwithstanding subsection (a)(1)” — mirroring the formulation employed by Congress in subsections (a)(2), (a)(3), and (c)(1).

The government’s interpretation of subsection (b)(1) gives the same meaning and function to the directly parallel “notwithstanding” clauses in each subsection. Somerset’s interpretation, in contrast, gives subsection (b)(1)’s “[n]otwithstanding” clause a fundamentally different import and function from its

usage elsewhere in § 3345. The other “notwithstanding” clauses can only be understood, in accordance with their text, as directed exclusively at subsection (a)(1)’s automatic accession rule for first assistants. Yet Somerset would have subsection (b)(1)’s same language displace not only that automatic rule for first assistants, but also subsections (a)(2) and (a)(3), which allow the President to designate another PAS officeholder, or someone who has been a senior agency official for at least 90 days in the year proceeding the vacancy. Somerset’s interpretation thus runs afoul of the normal rule that “identical words used in different parts of the same act are intended to have the same meaning.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). And it creates tension with the principle that a statute’s words “must be read in their context and with a view to their place in the overall statutory scheme.” *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012).

Somerset’s reading is also belied by subsection (b)(1)’s express linkage to subsection (a)(1). If Congress had meant to subject all three categories in subsections (a)(1), (2), and (3) to subsection (b)(1)’s requirement of 90 days of prior service as first assistant, it would have used the phrase “notwithstanding subsection (a),” embracing all three. Or, it could have omitted the “notwithstanding” clause altogether. Instead, Congress specifically and narrowly provided that “[n]otwithstanding *subsection (a)(1)*, a person may not serve as an

acting officer under this section” in the specified situations (emphasis added). Even if subsection (b)(1) is read in isolation, the most natural reading of the highlighted language is that Congress wanted subsection (b)(1)’s restriction to operate solely as to subsection (a)(1), and thus to be limited to persons serving as first assistant. By instead reading subsection (b)(1) to operate as to all of subsection (a), *Somerset* deprives the specific reference to “(a)(1)” of meaning.

*SW General* did not fully address the above points, and its textual analysis is unpersuasive. The opinion construed “notwithstanding” to mean “in spite of,” and claimed it was rejecting the government’s contrary interpretation. 796 F.3d at 75. But the government has long read subsection (b)(1) to mean that, in spite of subsection (a)(1)’s directive that a vacant PAS office’s first assistant automatically becomes the acting officer, subsection (b)(1) *prohibits* the first assistant from taking that role if he is also the nominee, unless he served as first assistant for a sufficient period before the vacancy. Reading “notwithstanding” to mean “in spite of” is thus no basis for rejecting the government’s interpretation.

Nor is there significance in *SW General*’s observation that subsection (b)(1) provides that “*a person* may not serve as an acting officer for an office under *this section*” in the circumstances specified in that subsection. 796 F.3d at 75 (quoting 5 U.S.C. § 3345(b)(1) (emphasis added by the court)). Because the statute refers to “a person” rather than a “first assistant,” and “this section” rather than “subsection

(a)(1),” *SW General* inferred that the restriction in subsection (b)(1) applies to all categories of acting PAS officers. *Id.* But the reference to “this section” serves a different purpose: it provides additional clarity that subsection (b)(1) is applicable only to persons serving pursuant to § 3345, not to persons serving pursuant to *other* statutes. *Cf.* 5 U.S.C. § 3347(a)(1) (FVRA does not displace other statutory provisions that expressly authorize persons to serve in an acting capacity). And as for the reference to “person,” it is unremarkable that the text refers to the individual occupying the first assistant position rather than to the position itself. Subsection (a)(2) is written the same way, providing for designation of “a person” who already serves in a different PAS office.

Significantly, the version of the FVRA that was reported by the Senate Committee used the exact same formulation in subsection (b), even though (as *SW General* recognized, 796 F.3d at 77) that version unambiguously applied only to first assistants. *See* S. Rep. No. 105-250, 105th Cong., 2d Sess., 25 (1998). The “person” and “under this section” language from that earlier version was simply carried forward in subsection (b)(1) as enacted. The use of “person” and “under this section” therefore does not reflect a determination by Congress to apply subsection (b)(1) beyond first assistants.

*SW General* also erroneously faulted the government for producing a superfluity in subsection (b)(2), which creates an exception to subsection (b)(1) for

an individual who “is serving as the first assistant” and has been confirmed in that position. *SW General* reasoned that if subsection (b)(1) is limited to first assistants, it is superfluous to require current service as first assistant in subsection (b)(2). 796 F.3d at 76. But subsection (b)(1) imposes a restriction based on the brevity of a person’s past service as first assistant, while the subsection (b)(2) exception is based on the person’s *current* service as a Senate-confirmed first assistant. Given that contrast, it is understandable that Congress would restate with completeness the criteria for subsection (b)(2) to apply, and clarify that it applies only to currently-serving first assistants. Moreover, subsection (b) contains a seeming redundancy under either interpretation: because subsection (b)(1)(A)(ii) disqualifies nominees who “served in the position of first assistant ... for less than 90 days” in the year preceding the vacancy, there is no need for subsection (b)(1)(A)(i), which disqualifies persons who never served as first assistants in that period. These provisions, each apparently aiming for descriptive precision, do not demonstrate that the Executive Branch’s interpretation is fatally flawed. To the contrary, as noted above, Somerset’s interpretation creates a far more fundamental problem: it makes superfluous the reference to “subsection (a)(1)” in the “notwithstanding” clause of subsection (b)(1) (emphasis added). And when the language of subsection (b) and § 3345’s other provisions are read all together,

using directly parallel “notwithstanding” formulations, the government’s interpretation remains on firmer textual and structural ground than *Somerset*’s.

3. The government’s interpretation of subsection (b)(1) is also more faithful to the purposes of that provision and the broader FVRA.

The FVRA was precipitated in part by the Senate’s perception that Presidents had been using acting officers to circumvent the Senate confirmation process. *See, e.g.*, 144 Cong. Rec. at 12432 (Sen. Thompson); *id.* at 12434 (Sen. Thurmond). In 1997, the Department of Justice had allowed a newly named first assistant—not previously employed by the agency—to temporarily fill a vacant PAS office in an acting capacity. The service of that first assistant as the acting PAS officer occurred after the Senate had returned his nomination for that vacant position. Some regarded that as a striking example of evasion of the Senate’s advice-and-consent function. *See id.* at 12434 (Sen. Thurmond); *id.* at 22507-08 (Sen. Thompson). The FVRA was enacted against that backdrop the following year.<sup>4</sup>

Subsection (b) prevents that scenario from recurring. It does not categorically disqualify first assistants from continuing as an acting official

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<sup>4</sup> *See* Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative* 1 (Nov. 2, 1998); Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General For Civil Rights* (Jan. 14, 1998) (exhibit to S. Hrg. 105-495, S. Comm. On Gov. Affairs (March 18, 1998)).

following a nomination. Instead, it attempts to confine that practice to situations where concerns about manipulation and evasion are far less acute. The pre-vacancy 90-day service requirement as first assistant in subsection (b)(1) reduces the risk that an individual who might be unacceptable to the Senate is newly made the first assistant after the vacancy occurs or is about to occur, in order to take advantage of subsection (a)(1)'s automatic accession rule. *Cf.* S. Rep. No. 105-250, at 13 (1998) (“The Committee believes that the length of service of the first assistant eligible to be both the nominee and the acting officer should be sufficiently long to prevent manipulation of first assistants to include persons highly unlikely to be career officials.”). And subsection (b)(2) allows first assistants to fill the PAS office in an acting capacity, regardless of prior service length, if the Senate confirmed them as first assistant—a scenario in which Congress presumably would have been unconcerned about the person’s service length as first assistant.

Congress had no reason to apply subsection (b)(1) to subsections (a)(2) and (a)(3), however, because they already included similar provisions addressing such concerns. Persons designated under subsection (a)(2) *already* occupy other Senate-confirmed positions, and therefore are unlikely to have been designated in an attempt at evasion of the Senate’s advice-and-consent role—just like Senate-confirmed first assistants who are allowed to serve as acting PAS officers under

subsection (b)(2). And agency employees designated under subsection (a)(3) *already* must have been serving in a senior agency position for at least 90 days during the year preceding the vacancy, the same minimum-service requirement that subsection (b)(1) imposes on first assistants. In short, subsections (a)(2) and (a)(3) already subject the other categories of acting officers to the same safeguards against manipulation that subsections (b)(1) and (b)(2) provide for first assistants.

The government's interpretation accordingly harmonizes the statute, providing the same treatment for officers and employees who are similarly situated in terms of the policy concerns underlying subsection (b)(1). Somerset's interpretation, in contrast, produces anomalous results: it renders virtually all officers already serving in other *Senate-confirmed* offices and designated under subsection (a)(2) ineligible to fill vacant PAS offices in an acting capacity following their nominations, while allowing a non-Senate-confirmed first assistant to serve and be the nominee merely by having been in his position for at least 90 days before the vacancy occurred. And by forbidding all nominees from serving as acting PAS officers unless they first served as first assistant for more than 90 days in the year preceding the vacancy per subsection (b)(1)—even if the person served in *another* PAS position or senior agency position under subsections (a)(2) and (a)(3)—Somerset's interpretation would render virtually everyone designated by

the President ineligible to be nominated by him. There is no indication Congress intended to impose such an impediment.

4. The government's interpretation also best accords with the FVRA's legislative history. In the version of section 3345 voted out of committee, the statute only authorized two categories of acting officers: first assistants (who assumed office by default under subsection (a)(1)) and other PAS officers (who could be presidentially designated under subsection (a)(2)). *See* S. Rep. No. 105-250, 105th Cong., 2d Sess., 25 (1998). As noted, this version of the statute had a limitation in subsection (b) which expressly applied only to first assistants, and which restricted the individuals who could be both the acting officer and the nominee. *See id.*

This version of section 3345 engendered objections from numerous Senators in the minority party who felt the bill did not give the President sufficient flexibility. *See* Additional Views, S. Rep. No. 105-250, 105th Cong., 2d Sess., 31 (1998) (arguing that the President should be allowed to select from a broader pool of individuals, and that "the length of service requirement for first assistants who are nominees"—180 days in that bill version—should be shortened). During floor debates, Senators echoed those concerns to urge the Senate to defeat cloture on the bill, since cloture would prevent them from offering those and other flexibility-enhancing amendments. *See* 144 Cong. Rec. at 22512-14 (Sen. Levin); *id.* at

22515-18 (Sen. Durbin); *id.* at 22519-20 (Sen. Glenn); *id.* at 22524-25 (Sen. Lieberman). These arguments were successful and cloture was defeated. *Id.* at 22526.

Unsurprisingly then, the enacted version of section 3345 included several flexibility-enhancing amendments desired by this group, including ones creating the new subsection (a)(3) category of officers, and reducing the time-in-service requirement for first assistants who are nominees to 90 days from 180. Against that backdrop, it makes little sense to think these flexibility-enhancing amendments had introduced a new and significant *restriction* in (b)(1) with respect to who could be the acting official and the nominee.

That is reinforced by the express floor statement of Senator Thompson, who chaired the relevant committee, stewarded the FVRA to passage, and was the author of the relevant amendment to subsection (b) that became that subsection's final language.<sup>5</sup> *See* 144 Cong. Rec. at 22015 (Amendment No. 3653); S. 2176, 105th Cong., 2d Sess. (as reported July 15, 1998). In a floor speech explaining the revisions made after the failed cloture vote, Senator Thompson explained that “the revised reference to § 3345(a)(1)” in subsection (b)(1) “means that this subsection applies only when the acting officer is the first assistant, and not when the acting

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<sup>5</sup> Sen. Thompson's amendment referred to “section 3345(a)(1)” while the final language referred to the equivalent “subsection (a)(1).” There are also slight punctuation differences. Otherwise, the language is identical.

officer is designated by the President pursuant to §§3345(a)(2) or 3345(a)(3).” 144 Cong. Rec. at 27496. That is exactly the Executive’s longstanding interpretation.

Nor is this point undermined by an offhand statement from Senator Byrd that “a person may not serve as an acting officer if: (1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2), the President nominates him to fill the vacant office.” 144 Cong. Rec. at 27498. Unlike Senator Thompson, Senator Byrd was not the author of the language he was (arguably) purporting to interpret. His floor statement should accordingly be given substantially less weight. And that is all the more true given its obvious tension with the flexibility-enhancing history of the change to subsection (b)(1) discussed above.

5. Somerset’s approach would upset settled interbranch understandings and hamper the President’s constitutional duty to take care that the laws are faithfully executed. The Executive’s interpretation has been in place since the FVRA’s enactment and has been applied to scores of acting officers. Many former acting officers, including senior officials in the Department of Health and Human Services’ Centers for Medicare and Medicaid Services, OPM, the Department of Justice, the Department of Defense and the Air Force, the Export-Import Bank, and GSA, would be viewed as having improperly served as acting officers under the

D.C. Circuit's interpretation. And the service of approximately a dozen current acting officers would be subject to question under Somerset's interpretation as well, including senior officials in the Departments of Justice, Treasury, Health and Human Services, and Defense, and the EPA.

Yet despite the historical pedigree supporting the Executive's interpretation, so far as we are aware that interpretation has never prompted objection from the Senate, nor has Congress amended the FVRA to foreclose it. On the contrary, the Senate has confirmed numerous nominees who were serving as acting PAS officers under subsections (a)(2) or (a)(3) and were not previously the first assistant. The lack of recorded Senate objection, in an area where Congress has shown considerable vigilance in protecting its institutional prerogatives, adds substantial weight to the Executive Branch's interpretation. And reinforcing that weight, the then-General Accounting Office—an organization that works for Congress rather than the Executive—agreed with the Executive's interpretation in 2001. *See GAO, Eligibility Criteria For Individuals To Temporarily Fill Vacant Positions Under The Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 3-4 (Feb. 23, 2001).

The selection of officers and employees to fill vacant PAS offices is a core constitutional and statutory power of the President and is vital to the federal government's operation. Under the government's interpretation, when the President determines that the person best qualified to perform the functions and

duties of a vacant PAS office is a senior agency employee or another PAS officer, he can designate that person to serve in an acting capacity while also nominating him for the office. Under Somerset's interpretation, however, the President must either choose someone else as the acting officer; choose someone else as the nominee; or have the acting officer give up the office's functions and duties when nominated, with the attendant disruption to the agency caused by yet another temporary change in leadership. Each of these alternatives would burden the President's discharge of his Article II duty to take care that the laws are faithfully executed, and provides further reason to eschew Somerset's interpretation.

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT SOMERSET UNLAWFULLY INTERROGATED ITS EMPLOYEES AND SOLICITED THEIR GRIEVANCES**

Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of protected concerted activities. 29 U.S.C. § 158(a)(1). To establish a violation, "it need only be shown that under the circumstances existing, [the employer's conduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 (3d Cir. 1980) (internal quotations omitted). An employer violates Section 8(a)(1) by interrogating employees about their union sympathies and by expressly or impliedly promising to remedy employee

grievances if they reject the Union. *Id.* Substantial evidence supports the Board’s findings (JA25-26) that Somerset did both.

The credited evidence established that high-ranking Somerset officials interrogated employees before the election when:

- DON Konjoh asked Claudio how other employees would vote and to give her a chance and vote “no.” (JA25.)
- CareOne official Jessica Arroyo asked CNA Jarbo whether she was “going to get a ‘no’ vote” from her. (JA25.)
- Konjoh asked Stubbs what she thought of the Union and stated that she knew Stubbs had a union at her other job “but we don’t want one here.” (JA25.)
- Administrator Illis, the highest-ranking official at the facility, asked Tyler where she was in terms of voting, whether she would vote for the Union, whether she knew how her coworkers were voting, and whether she could convince them to vote no. (JA25.)

The judge credited (JA25-26) the employees’ testimony (as well as supervisor Southgate’s) over other supervisors and managers, explaining that they “testified in a straightforward, confident, consistent manner.” The Board affirmed (JA1n.2) the judge’s decision (JA25) to credit employee testimony where it conflicted with testimony of Somerset’s witnesses. Somerset does not challenge these credibility determinations in its brief, instead mischaracterizing them as “allegations.” (Br. 58-59). Credibility determinations are entitled to “great deference.” *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (citations and internal quotations omitted).

The Board reasonably found (JA31) that these preelection questions by high-ranking officials—directly asking employees about their union sympathies without providing assurances against retaliation—were unlawfully coercive. *See NLRB v. Clapper's Mfg.*, 458 F.2d 414, 417 (3d Cir. 1972) (questioning by employer's president about employees' attitudes toward union shortly before election was coercive). Contrary to Somerset's suggestion (Br.57-59), these probing questions are not the "casual questioning" found lawful in *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534 (3d Cir. 1983) (casual conversations between employees and low-level supervisors who offered assurances against retaliation).

Substantial evidence supports the Board's findings that Somerset unlawfully solicited grievances and promised corrections before the election. The Board (JA31) credited employee testimony that, after the petition was filed, Hutchens and Illis told employees they would try to "fix" things. Management transferred Heedles and eliminated the proposed schedule changes that created the employees' unrest; eliminated some of Tyler's job duties after she complained her job was overwhelming; and distributed garbage bags in response to Stubbs' complaint. By soliciting the employees' grievances, promising to fix them, and then doing so, Somerset violated Section 8(a)(1) of the Act. *See Hedstrom Co.*, 629 F.2d at 314. Contrary to Somerset's assertion (Br. 58), this finding is not inconsistent with *NLRB v. K&K Gourmet Meats, Inc.*, 640 F.2d 460, 466-67 (3d Cir. 1981), where

the Court found that an employer's willingness to consider employees' concerns, without any implied or express promises from the employer, was lawful.

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SOMERSET VIOLATED THE ACT BY DISCIPLINING AND DISCHARGING SEVERAL EMPLOYEES**

#### **A. Applicable Principles**

Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), prohibits an employer from taking adverse employment actions against an employee because of her union membership or activities.<sup>6</sup> See *NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 122 (3d Cir. 1991). To demonstrate a Section 8(a)(3) violation, the General Counsel must prove that union animus motivated the employer's adverse action. See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 402-03 (1983) (approving *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)). Unlawful motive can be inferred from either direct or circumstantial evidence, which includes knowledge of employees' union activity, hostility towards the union, the timing of the adverse action, the employer's reasons (or lack thereof) for acting, and the treatment accorded similarly-situated employees. See *Omnitest Inspection Servs.*, 937 F.2d at 122; *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 614 (3d Cir. 1984).

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<sup>6</sup> A violation of Section 8(a)(3) results in a "derivative" violation of Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

If the General Counsel establishes that the employee's protected conduct was a substantial or motivating factor in the adverse action, the employer's action constitutes unlawful discrimination unless the employer meets its burden of proving, as an affirmative defense, that it would have taken the same action even absent the employees' union activities. *See Omnitest Inspection Servs.*, 937 F.2d at 122 (citing *Transp. Mgmt. Corp.*, 462 U.S. at 401-03). Applying this analysis, the Board reasonably found that Somerset unlawfully disciplined and discharged several employees after the election because of their protected union activities.

**B. Somerset Disciplined and Discharged Employees Because They Engaged in Protected Union Activity**

**1. Somerset's Knowledge of the Discriminatees' Union Activities and its Hostility Toward the Union Were "Beyond Question"**

Substantial evidence supports the Board's findings (JA32,35) that Somerset knew that Jacques, Napolitano, Claudio, Tyler, and Wells each supported the Union. Each employee's photograph and supportive statement was on the Union's flyer (JA5032-41), which Hutchens and Illis admittedly saw. All but Napolitano appeared in the union video (JA5042), which Hutchens admittedly watched. Moreover, Jacques and Napolitano served as the Union's election observers; Napolitano and Claudio were described during management meetings as being pro-union; and Southgate spoke with Napolitano, Claudio, and Wells about the Union.

Substantial evidence further supports the Board's findings (JA6,32) that Somerset's union animus, which was "beyond question," was a substantial or motivating factor in its discipline and discharge of union supporters. Somerset unlawfully interrogated employees about their union sympathies and unlawfully solicited their grievances. Management officials acknowledged their intent to target union supporters. Southgate warned Claudio to "be careful because you already know what's going to happen. What they're trying to do." (JA7,16.) DON Konjoh told Southgate that "they would be obviously looking at the people who they believed to be union organizers ... actively involved in trying to get a union in ... closely and if they were given a reason to write up they would write them up." (JA7,18-19.) In September, Konjoh told Southgate that Jacques "was being very careful to follow all the rules and regulations; being very careful so that she wouldn't get written up." (JA8 n.6,18-19.) Illis instructed Bockarie to look for documentation errors by Jacques.

Somerset implemented those plans days after the election when it began disciplining union supporters for conduct that had not warranted discipline prior to the election, and for which others were not disciplined equally after the election. Its abrupt, post-election changes regarding attendance, and targeting of union supporters further demonstrates union animus. Before, Somerset permitted employees to call in when they were going to be late, without discipline. After, it

not only ended this policy but audited attendance records. Despite Konjoh's promise when she arrived in August 2010 that employees would receive a "clean slate" (noting otherwise most employees would be discharged), she disciplined Napolitano for lateness dating to January 2010. (JA16;4197.) Likewise, in September Somerset issued Jacques a written warning for "pattern absenteeism" for calling out 3 times in the prior 60 days. Other employees with greater tardiness did not receive the same discipline.

Somerset insists (Br. 50) that its actions were motivated only by its "history of poor performance that long predated union activity at the facility," notably a "near disastrous recertification survey" in December 2009 by New Jersey's Department of Health, which put its certification at risk. However, although the survey uncovered two significant deficiencies, both were deemed "isolated," and Regional Director Hutchens acknowledged that citations for lesser deficiencies were "common." (JA12;3242-43.) Within weeks, Somerset corrected the deficiencies and submitted a successful correction plan to the Department. Following a January 2010 resurvey, Somerset was found to be in substantial compliance. (JA12;3052,5934-36.) As the Board found (JA12), Somerset took no steps to change its administration or increase oversight of employees' performance immediately following the 2009 survey.

However, once the Union filed its representation petition, CareOne made immediate changes to its top personnel, transferring a “struggling” Heedles (JA12,3037) to a larger facility, bringing in Illis, and appointing Konjoh the new DON. It is evident, as the Board found (JA17), that these changes were not precipitated by the poor survey results, which were addressed more than 6 months earlier, but by the employees’ union activity.

In sum, direct and circumstantial evidence amply supports the Board’s finding that Somerset was unlawfully motivated when it disciplined and discharged the four union activists. *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 814 (3d Cir. 1986) (timing and departure from past practice indicates unlawful motive); *Hanlon & Wilson Co.*, 738 F.2d at 614 (union animus and disparate treatment); *Champion Parts Rebuilders, Inc. v. NLRB*, 717 F.2d 845, 850-51 (3d Cir. 1983) (timing and disparate treatment).

## **2. Somerset Failed To Prove It Would Have Disciplined and Discharged the Discriminatees Absent Their Union Activity**

Somerset aggressively disciplined and discharged union leaders Jacques, Napolitano, Claudio, and Wells for attendance and performance issues that did not warrant discipline before the election and did not warrant discharge of other employees following the election. Substantial evidence of repeated disparate treatment of union activists supports the Board’s finding that Somerset would not have taken those actions absent their union activity.

**a. Jillian Jacques**

Jacques served as a Somerset LPN for 11 years, and Somerset often selected her to act as a charge nurse, a position reserved for “dependable nurses who were “high performers.” (JA7 n.5;3568,4683-84.). As discussed above (pp. 9-10), after the election, Somerset closely watched Jacques, issued frequent discipline, suspended her, and ultimately discharged her, assertedly for attendance and performance issues that did not result in such discipline for other employees.

On September 13, Somerset issued Jacques a written warning for “excessive absenteeism” over the preceding year. Another employee, however, received only a verbal notice (JA6282) despite having absences exceeding Jacques’ (JA6297). On September 28, Somerset issued Jacques a written notice (JA5117) for documentation errors that previously warranted only in-service training. Although Jacques reported that Patty Beck was responsible for one of those errors, Beck was not disciplined, providing a stark example of disparate treatment. On November 1, Somerset issued Jacques a written notice (JA5122) for failing to complete an incident report, which did not warrant discipline prior to the election. In contrast, two weeks earlier, Beck received only a documented verbal notice (JA5437) for failing to complete two separate incident reports.

Somerset’s suspension and ultimate discharge of Jacques in February 2011 for transcribing a physician’s order as aspirin rather than enteric-coated aspirin,

failing to transcribe it on the MAR, and failing to complete required documentation during one shift regarding a postfall patient also reflected harsher discipline than meted out to others. Jacques admitted that she had made the MAR error but questioned the protocol lapse regarding the night-nurse check, which should have caught the lapse. Somerset, however, did not discipline the night nurse for that lapse. Further Nurse Dande received only written notices for administering the incorrect aspirin for 2 days (JA6330), failing to timely change a colostomy appliance (JA6390), and failing to administer medication (JA6325). Nurse Moore received a documented verbal notice (JA5474) for not reporting clinically-significant changes in a patient and a written notice (JA5476) not reporting a patient's fall, for leaving medication at another patient's bedside, and not placing a bed/chair alarm for another patient. Subsequently, Moore received a written warning (JA6328) for a medication error, failing to transcribe a physician's order, and failing to write a discharge order. In February 2011, Moore received a final warning for failing to document treatment for a dressing and date the dressing, (JA6277), yet Somerset did not suspend or discharge her. Finally Somerset also departed from its policy (JA8;3705,4337) of segregating discipline for attendance and performance in discharging Jacques for both the performance issues and the September attendance issues. Such disparate treatment supports the Board's

finding (JA7-8) that Somerset would not have issued that discipline or discharged Jacques absent her union activities.

Somerset cites (Br. 27; JA5811) a December 2009 written notice to Jacques for improper pain assessment. As the Board found (JA2,8 n.7) the incident occurred more than a year before her discharge but was not referenced as a basis for her termination. Nor was the pain assessment referenced in her September 2010 written warning (JA5117). Likewise, Somerset claims (Br. 17) that Eileen Meyer gave Jacques a verbal warning about lateness earlier in the year, but Jacques's un rebutted testimony (JA2134-35) established that while Meyer asked her about being late, Jacques explained that she was caring for her quadriplegic mother, and Meyer simply told her to try to improve.

Moreover, Somerset's arguments regarding Jacques's performance are undermined by its continuing to assign Jacques as a charge nurse until her discharge. While Somerset asserts (Br. 53) that it did the right thing by "continuing to entrust Jacques to do her job," this argument is irreconcilable with Somerset's assertion (Br. 17) that Jacques was "another careless and dangerous nurse," and its argument (Br. 48), addressed below (pp. 56-61), that reinstatement is inappropriate. Somerset's implausible and conflicting arguments further support the finding that Somerset discharged Jacques because of her union activity.

**b. Shannon Napolitano**

In its zeal to discharge Napolitano two weeks after the election, Somerset ignored accepted nursing practices. As discussed (pp. 11-12), although Konjoh learned that Napolitano may have erroneously given a pink pill to a patient, she left it on the medication cart, despite not knowing what it was, and did not report the error. Instead, she instructed the patient to hold the pill if it was administered again and show it to her, contravening sound nursing practice. When Napolitano repeated the error, Konjoh terminated her for both the error and, incredibly, failing to ensure that the patient ingested the supplement. Although the MAR reflected that three other nurses mistakenly administered the pill, the nurses claimed they did not, but mistakenly signed the MAR. Although Konjoh disbelieved them, she did not discipline them for either the error or for falsifying the MAR. (JA20;4000-02.)

Somerset supports its discharge decision (Br. 12) based on a post-election incident in which Napolitano documented an obviously incorrect pulse-oxygen level. Somerset disciplined her, despite its preelection practice of permitting employees to correct such obvious documentation errors without discipline.

Finally, Somerset defends Napolitano's discharge with reasons not included in her termination letter. Somerset asserts (Br. 11-12) she had "serious patient care ... problems" before the election, citing a January 2010 written warning for documenting patient pain assessments at the start of her shift, instead of the end.

Napolitano's termination letter (JA5098), however, does not reference the pain-assessment practice; Konjoh discussed it with Napolitano immediately before her discharge and Napolitano and three coworkers confirmed that conducting pain assessments at the beginning of the shift was an accepted practice. Accordingly, Somerset cannot rely on it to justify its discharge decision. Likewise, Somerset references (Br.13) a September 13 attendance discipline as supporting her discharge, also not cited when it terminated Napolitano.<sup>7</sup> In short, Somerset has failed to establish that it would have disciplined or discharged Napolitano for her conduct absent her union activity.

**c. Sheena Claudio**

Substantial evidence of Somerset's disparate treatment of Claudio supports the Board's finding (JA34) that Somerset would not have so harshly disciplined or discharged Claudio absent her union activity. Five weeks after Southgate warned Claudio to "be careful because you already know what's going to happen" (JA7,16), Somerset discharged her for documentation errors that did not warrant discharge for others committing similar errors. On October 1, Somerset issued Claudio a written notice (JA5077) and suspended her for 2 days for failing to document three patients' statuses. Before the election, Somerset dealt with documentation errors primarily through training. Moreover, after the election,

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<sup>7</sup> While Somerset claims (Br.12) it issued Napolitano a verbal notice in June 2010, Napolitano denied receiving it (JA1961). The judge made no specific finding.

Somerset issued nurse Mootosamy only a first written notice (JA6363) for committing substantially-similar errors. Somerset then terminated Claudio on October 21 (JA5084), seizing on her failure to record her treatments in the TAR by shift's end, despite its preelection practice of permitting nurses to complete their entries after their shifts as Claudio attempted to do.. Moreover, the Board found (JA30), that Konjoh's "exaggeration" that Claudio never administered the treatments further harmed her credibility because Claudio's termination letter made no such claim.

Somerset claims (Br.13) that Claudio had an "extensive disciplinary history," which included a June 13 verbal notice. Claudio denied receiving it, and the copy introduced into evidence (JA5044) is unsigned by management or Claudio. Additionally, while Somerset references (Br.13) attendance issues, Claudio's termination letter (JA5084) cites only performance issues. Likewise, while Somerset claims (Br. 52) that Claudio was also terminated for insubordination when Illis asked her to stop signing the TAR Claudio's termination letter cites only Claudio's failure to properly initial the TAR.

#### **d. Valerie Wells**

The Board reasonably rejected Somerset's contention that it would have discharged Wells absent her union activity. Preelection, Wells was not disciplined during the approximately 5 years she served as staffing coordinator. (JA3 n.4)

Although Somerset asserts (Br. 19) that Illis spoke to Wells about her performance in August, there was no record of any such conversation. (JA2-3.) Immediately after the election, however, Somerset issued Wells disciplinary warnings that culminated in her termination within 8 days.

Following a 1-week vacation, during which Wells came in to vote, Illis and Konjoh disciplined Wells on her first morning back for not reconciling the schedule with changes that occurred while she was out, notwithstanding her lack of opportunity to do so. As described (pp. 14-15), the following week Somerset disciplined her three more times for scheduling issues. Despite Wells' explanation for some of the errors, including that Illis (not Wells) improperly scheduled an employee, Somerset refused to change the discipline. Somerset discharged her on September 21 (JA5252) for failing to improve. Somerset's failure to discipline Wells in the years before the election, in contrast to the rapid succession of discipline and discharge after the election, supports the Board's finding (JA35) that Somerset would not have disciplined or discharged her absent her union activity.

Somerset suggests (Br.20-21) that it had previously documented errors that Wells made as staffing coordinator. But the August 2008 performance review Somerset cites (JA5229-31) stated that Wells "perform[ed] the responsibility of staffing coordinator very well" and recommended that she receive a raise. Although Wells received two verbal notices when working as a fill-in CNA in

early 2010, Somerset consistently alleged that it terminated her for her performance as the staffing coordinator, not in her CNA position.<sup>8</sup>

**e. Lynette Tyler**

The Board reasonably found (JA35) that Somerset unlawfully accelerated Lynette Tyler's resignation date. After the election, when union-activist Tyler turned in a 2-week resignation letter, Somerset told her to leave immediately (with pay), and wrote on a personnel form that Tyler was ineligible for rehire because she "resigned with [a] bad attitude toward company." (JA15,35;5225.) Not disputing the violation, Somerset argues (Br. 54 n.5) only that Tyler suffered no harm, which even if true does not preclude enforcement of this portion of the Board's Order. *See NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-08 (1959) (explaining Congress created Board to advance public interest, not vindicate private rights).

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<sup>8</sup> Somerset argues (Br.55-57) that it would have discharged Wells based on evidence, acquired after her discharge, that she violated Somerset's technology policy. The Board did not, contrary to Somerset's claim (Br.57), reject this "after-acquired evidence defense." Rather, it deferred the matter to compliance proceedings (JA8 n.11), which will provide an opportunity to litigate whether this evidence affects Wells' entitlement to reinstatement and backpay. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (recognizing Board's "normal policy" of modifying reinstatement and backpay remedy in compliance proceeding); *accord IBEW, Local 211 v. NLRB*, 821 F.2d 206, 212 (3d Cir. 1987).

### **C. The Board Acted Within Its Broad Remedial Discretion By Issuing a Reinstatement Remedy**

Somerset challenges (Br. 43-49) the Board's order that Somerset reinstate Jacques, Napolitano, Claudio, and Wells. Somerset fails to meet the high burden required to reverse a Board remedy.

#### **1. Applicable Principles**

Section 10(c) of the Act provides that, to remedy unfair labor practices, the Board shall order the violator "to take such affirmative action including reinstatement ... as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). This remedial authority is "a broad discretionary one, subject to limited judicial review." *Quick v. NLRB*, 245 F.3d 231, 254 (3d Cir. 2001) (Board "draws on a fund of knowledge and expertise" in fashioning remedies and its choice must not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act") (internal quotation omitted). "[R]einstatement [has been] the conventional correction for discriminatory discharges" under the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

To demonstrate that the Board erred by ordering reinstatement in light of employee conduct that occurred prior to discharge, an employer must prove that the employee engaged in misconduct that would have disqualified any similarly-situated employee from continued employment. *See Marshall Durbin Poultry Co.*,

310 NLRB 68, 69-70 (1993), *enforced in pertinent part*, 39 F.3d 1312 (5th Cir. 1994). Specifically, the employer must establish that the conduct “would have provided grounds for termination based on a preexisting lawfully applied company policy and ambiguities will be resolved against the employer.” *John Cuneo, Inc.*, 298 NLRB 856, 857 n.7 (1990). As the Board explained here (JA2,8-9), the employer must demonstrate that it was not aware of the alleged misconduct *before* discharge. *See Smucker Co.*, 341 NLRB 35 (2004), *enforced mem.*, 130 Fed.Appx. 596 (3d Cir. 2005) (limiting backpay to date employer learned applicants had cheated on hiring exam). If the employer knew of the conduct prior to discharge, and did not either rely on it in discharging the employee or establish that it would have discharged the employee even absent protected activity, it cannot show that the misconduct disqualifies the employee’s reinstatement.

## **2. The Board Acted Within its Discretion by Ordering Reinstatement**

The Board’s reinstatement remedy was well within its broad remedial discretion. Consistent with *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501-02 (1978), the Board executed its “delicate responsibility” of balancing the employer’s legitimate interests in protecting the well-being of patients with employees’ organizational rights. In ordering reinstatement of union supporters discharged for conduct that did not warrant discipline before the election and did not warrant discharge of other employees afterwards, the Board struck a reasonable

balance that is not inconsistent with the Act. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 779 (1979).

The Board explained (JA8) that, other than Wells (discussed above, p. 56 n.8), Somerset did not allege that the discriminatees engaged in any misconduct prior to discharge that was unknown or that occurred after discharge. Instead, Somerset relied on asserted misconduct that the Board (JA2,8) found would not have caused their discharge absent their union activity. As discussed, the more lenient treatment afforded nurses who committed far more egregious errors confirms the Board's findings. Nurses who failed to timely change a patient's colostomy appliance, failed to properly change a dressing, falsely documented a treatment or medication, or committed a medication error received either no discipline or only written notices or warnings.

Somerset's cases (Br. 44-45) do not show that the Board's decision to reinstate the discriminatees was "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Quick*, 245 F.3d at 254. In *NLRB v. Western Clinical Laboratory, Inc.*, the Court did not decline to enforce a reinstatement order, but rather remanded the case to the Board to address record evidence which, if accepted, established that the discriminatee could not perform the job to which he was being reinstated. 571 F.2d 457, 461-62 (9th Cir. 1978). *See also Family Nursing Home & Rehabilitation Center*, 295 NLRB 923,

927-28 (1989) (refusing reinstatement based on post-discharge conduct and after-acquired evidence of patient abuse at former job and violent run-in with police)

Nor does *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (Br.48) support Somerset's arguments. The Court concluded that reinstating unlawfully-discharged individuals unlawfully in the country would "unduly trench upon explicit statutory prohibitions critical to federal immigration policy." *Id.* at 151. No fair analogy can be drawn to *Hoffman* here. The Board's reinstatement order does not trench upon any statute, or condone violation of any law. Rather, in opposing reinstatement, Somerset relies on the very conduct the Board found would not have caused discharge absent union activity, and therefore "necessarily cannot show that the misconduct would have disqualified the discriminatees from reinstatement." (JA 2.)

Finally, Somerset relies throughout its brief on evidence presented during injunction proceedings brought by the Regional Director pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j), seeking interim reinstatement of Jacques, Claudio, Napolitano, and Wells. The District Court directed reinstatement of Claudio and Napolitano but denied it for Jacques and Wells. *Lightner v. 1621 Route 22 W. Operating Co., LLC*, No. 11-2007, 2012 WL 1344731, at \*44 (D.N.J. Apr. 16, 2012). While cross-appeals of the injunction order were pending in this Court, the Board issued its Decision and Order under review here. On the Board's motion,

this Court found the district court's temporary injunction moot, and remanded the case, instructing the district court to vacate its opinion and order. *Lightner v. 1621 Route 22 West Operating Co., LLC*, 729 F.3d 235, 237-38 (3d Cir. 2013) ("this equitable rule [vacating a district court judgment when a case becomes moot on appeal] prevents a judgment, unreviewable because of mootness, from spawning any legal consequences") (quoting *Rendell v. Rumsfeld*, 484 F.3d 236, 243 (3d Cir. 2007)). The Court noted in response to Somerset's objection, that vacating the district court's decision would not "hinder [Somerset] from relying on appropriate facts in the District Court record." 729 F.3d at 238.

Consistent with that order, the Board (JA2-3) considered the "specific concerns raised by the district court" regarding Jacques and Wells, and found they did not warrant denying reinstatement. Regarding Jacques, the Board noted (JA2) that the court focused on her failure to assess a patient's pain upon admission in December 2009, but as discussed above, the Board found that Somerset did not discharge her for that incident prior to her union activity, and continued to frequently designate her as a charge nurse, undermining a claim that it believed she was a threat to patients. Regarding Wells, while accepting the importance of avoiding scheduling errors that result in staffing shortages, the Board found (JA2-3) that Somerset did not find it necessary to discipline Wells during her 5 years as staffing coordinator prior to the election, but issued a quick succession of

disciplinary notices based on purported scheduling errors after the union prevailed. Because Somerset failed to establish that it would have discharged her for those errors absent her protected activity, those errors do not warrant denial of reinstatement.

**D. Somerset Unlawfully Reduces the Hours of Per-Diem Employees**

Substantial evidence supports the Board's findings (JA8,35-36) that Somerset was unlawfully motivated when it reduced the hours of five per-diem employees and that it would not have taken this action absent their union activity.

According to the parties' stipulated election agreement (JA5015-16), part-time and per-diem employees must have worked an average of at least 4 hours per week during the 13 weeks preceding August 7, 2010, to be eligible to vote. After the Union won, Konjoh instructed Southgate not to call per-diem employees without permission, explaining that, if Somerset succeeded in challenging the election, per-diems would be ineligible to vote in a re-run election without a minimum number of work hours. Somerset immediately removed five pro-union per-diems from the schedule—many of whom had consistently worked regular schedules—then terminated them for not having enough “active” hours. Simultaneously, it hired new per-diems. Somerset's admission coupled with the timing of these actions, Somerset's departure from past scheduling practices, and

its termination of pro-union employees while hiring new per-diems, amply support the Board's finding (JA8 & n.9,36) that Somerset violated the Act.

Somerset asserts (Br.53-54) that it offered four of the five per diems full-time work.<sup>9</sup> The Board (JA3) reasonably rejected that excuse, finding that Somerset made those offers knowing that the employees had other jobs or personal situations that prevented them from accepting full-time offers.

**E. The Board Did Not Abuse Its Discretion When it Denied Somerset's Motion To Recuse Chairman Pearce**

Somerset argues (Br. 39-42) that the Board improperly denied its motion seeking Chairman Pearce's recusal on the basis that his chief counsel, Ellen Dichner, had previously represented the Union in this case. The Board denied the motion, stating (JA1 n.1) that Dichner "[took] no part in the Board's consideration of this case." Under the applicable "deferential, abuse of discretion standard," (*Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995)), the Board's decision must be upheld.

Dichner's prior representation of the Union in itself does not taint the Chairman and render his participation improper, or create an appearance of impropriety. Here, the Board expressly affirmed that she "took no part" in the Board's consideration of the case. Somerset offers no evidence to impugn the

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<sup>9</sup> Before the Board, Somerset claimed to have offered only two per diems full-time or regular part-time positions. (JA8 n.9.)

Board's representation and its baseless speculation based solely on Dichner's position provides no basis for disqualification. *Cf. NLRB v. Sun Drug Co.*, 359 F.2d 408, 413 (3d Cir. 1966) (absent evidence of misconduct, court "will accept [NLRB's] opinion as the true expression of the basis of its decision") (citing *Morgan v. United States*, 304 U.S. 1, 18 (1938)) (additional citations omitted).

Somerset's reliance (Br. 40-41) on *In re Kensington International, Ltd.*, 368 F.3d 289 (3d Cir. 2004), is misplaced. There, the judge appointed advisors to assist him in a case in which they were not disinterested. Here, no evidence calls into question the Board's express assurance that Dichner *did not* participate in these proceedings, and none can be assumed. Thus, unlike in *Kensington*, there is no basis to attach a "presumption" that Chairman Pearce is "tainted" because Dichner is his chief counsel.

**CONCLUSION**

The Board respectfully requests that this Court deny Somerset's petition for review and enforce the Board's Order in full.

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November 16, 2015

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

1621 ROUTE 22 WEST OPERATING COMPANY,  
LLC d/b/a SOMERSET VALLEY REHABILITATION  
& NURSING CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

1199 SEIU UNITED HEALTHCARE WORKERS  
EAST, NEW JERSEY REGION

Intervenor

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**CERTIFICATE OF BAR MEMBERSHIP**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Jeffrey W. Burritt certifies that he is a member in good standing of the bars of the District of Columbia and the State of Maryland. He is not required to be a member of this Court's bar because he is representing the federal government in this case.

s/ Linda Dreeben

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Dated at Washington, DC  
this 16th day of November, 2015

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 14,000 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015.2015 and is virus-free according to that program.

s/ Linda Dreeben

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/Linda Dreeben

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