

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**MERCY HOSPITAL**

**Cases 18-CA-155443**

**and**

**SEIU HEALTHCARE MINNESOTA**

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**MERCY HOSPITAL**

**Cases 18-CA-163045**

**and**

**ANGEL ROBINSON, INDIVIDUAL**

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**RESPONDENT MERCY HOSPITAL'S  
BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

FELHABER LARSON

By: John C. Hauge  
Grant T. Collins  
220 South Sixth Street, Suite 2200  
Minneapolis, MN 55402-4504  
(612) 339-6321

ATTORNEYS FOR RESPONDENT MERCY  
HOSPITAL

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## INTRODUCTION AND STATEMENT OF THE CASE<sup>1</sup>

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent Mercy Hospital ("Respondent" or "Mercy") respectfully files this memorandum in support of its cross-exceptions to the May 6, 2016 Decision of Administrative Law Judge Geoffrey Carter ("ALJ").

With respect to Case 18-CA-155443, the ALJ properly found that "[t]he Section 8(a)(5) allegations . . . should be severed from the consolidated complaint and deferred to arbitration." (ALJ-JD 24-25.) The ALJ erred, however, by refusing to defer the remaining Section 8(a)(1) allegation pursuant to the standard set forth in Babcock & Wilcox, 361 NLRB No. 132 (Dec. 15, 2014). (ALJ-JD 21.) If the refusal to defer was not in error, the ALJ correctly held that Mercy did not violate Section 8(a)(1): (1) "when [EVS Manager Charles] Stillings stated that the new positions in the mother-baby birthing center did not need to be included in the May 2015 rebid" and (2) "when Stillings asserted that Respondent could make or switch employee work assignments based on best fit (and not seniority)." (ALJ-JD 27.)<sup>2</sup> The ALJ erred, however, when he concluded that Mercy violated Section 8(a)(1) "when Stillings told [Charging Party Angel] Robinson that she could only ask questions for herself and only after coming to Stillings' office to do so." (ALJ-JD 27.)

With regard to Case 18-CA-163045, the ALJ erred by finding that Respondent violated Section 8(a)(1) when ICU Manager Karen Schulz told Robinson that she "was aware of Robinson's attendance, discipline and behavior issues, and had some major concerns because

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<sup>1</sup> Citations in this Brief will be as follows: "Tr. \_\_" to indicate the hearing transcript page; "J. Ex. \_\_" to indicate a Joint Exhibit; "R Ex. \_\_" to indicate Respondent's Exhibits; "GC Ex. \_\_" to indicate an Exhibit of the General Counsel; and "ALJ-JD \_\_" to indicate the pages of the Decision of the Administrative Law Judge.

<sup>2</sup> The General Counsel has not filed exceptions as to the ALJ's dismissal of these 8(a)(1) claims.

Stillings . . . told her that Robinson was inappropriate, rude and disrespectful, and was not a team player” and when Schulz told Robinson that “if Robinson came to the ICU, Schulz would monitor those issues (i.e., Robinson's attendance, discipline and behavior) closely and go right to corrective action if Robinson was rude, disrespectful, inappropriate, absent or tardy.” (ALJ-JD 29-30.) Even without disturbing the ALJ’s credibility determinations, the ALJ erred by finding an 8(a)(3) violation where Robinson was not, as a matter of law, constructively denied a transfer. Additionally, when the proper weight is given to the relevant evidence, it is clear that Respondent did not violate Section 8(a)(1) or 8(a)(3). (ALJ-JD 30-31.)

Respondent respectfully urges that its Cross Exceptions be granted in full, that the ALJD be reversed as set forth below.

### **QUESTIONS PRESENTED**

1. Whether the General Counsel, and his delegatee, the Regional Director for Region 18, and the Deputy Chief Administrative Law Judge denied Respondent its right to due process under the Fifth Amendment to the U.S. Constitution, 29 C.F.R. § 101.7 (Board’s Rules and Regulations), 5 U.S.C. § 554(c) (Administrative Procedure Act), and Section 10054.1 of the Board’s Case Handling Manual by issuing the Amended and Consolidated Complaint without adequately investigating the charge allegations or giving Respondent notice of or an opportunity to fully understand the factual basis of the claims made against it. (Cross-Exceptions 1, 2, 5 & 30).

2. Whether the General Counsel, and his delegatee, the Regional Director for Region 18, erred by issuing an Amended and Consolidated Complaint incorporating allegations that should properly have been deferred to arbitration (Case No. 18-CA-155443), and whether the Deputy Chief Administrative Law Judge and the National Labor Relations Board, erred by

failing to grant Respondent's pre-hearing motion to sever and defer Case No. 18-CA-155443. (Cross-Exceptions 3, 6 & 7).

3. Whether the General Counsel, and his delegatee, the Regional Director for Region 18, erred by issuing an Amended and Consolidated Complaint incorporating allegations barred by Section 10(b) of the Act. (Cross-Exception 4).

4. Whether the ALJ erred by failing to defer the allegation made in Paragraph 5(b) arising from Case 18-CA-155443. (Cross-Exceptions 11, 31).

5. Whether Respondent violated Section 8(a)(1) of the Act by telling Charging Party Angel Robinson that she was not allowed to ask questions in front of other employees at team huddle meetings. (Cross-Exceptions 12, 15, 16, 35, 36, 52, 53).

6. Whether the ALJ erred by finding Robinson was constructively denied a transfer in violation of Section 8(a)(3). (Cross-Exceptions 37, 38, 44, 45, 46, 47, 48, 49, 50, 52, 53).

7. Whether the ALJ erred in finding Respondent to have violated Section 8(a)(3) because there is no evidence that Schulz had any knowledge of any protected activity on the part of Robinson. (Cross-Exceptions 24, 29, 49, 50).

8. Whether the ALJ erred by finding that the Union presented "viable evidence" of a past practice regarding work assignments such that Mercy violated Sections 8(a)(5) and 8(d) by assigning work without first posting the assignment and awarding it to the most-senior bidder. (Cross-Exception 34).

9. Whether the ALJ erred by crediting Robinson's testimony over contrary testimony from other witnesses and contrary documentary evidence. (Cross-Exceptions 12, 15, 16, 22, 23, 24, 25, 26, 27, 28, 29, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53).

10. Whether the ALJ erred by making factual findings regarding the EVS Department that are contrary to the record evidence. (Cross-Exceptions 14, 17, 18, 19, 20, 21).

11. Whether the ALJ erred by finding that the parties good working relationship has broken down as to the disputes at issue in the Union's June 9 and June 23 grievances, and echoed in Case No. 18-CA-155443. (Cross-Exceptions 32, 33)

**ARGUMENT**  
**(PROCEDURAL CROSS-EXCEPTIONS)**

**I. CROSS-EXCEPTIONS 1, 2, 5 & 30: BY ISSUING AND PROSECUTING THE COMPLAINT, RESPONDENT WAS DENIED DUE PROCESS.**

To satisfy due process, the General Counsel, and his delegatee, the Regional Director for Region 18, are obligated “to clearly define the issues and advise an employer charged with a violation ... of the specific complaint he must meet ... [and the failure to do so] is ... to deny procedural due process of law.” Soule Glass Co. v. NLRB, 652 F.2d 1055, 1074 (1st Cir. 1981); Santa Fe Tortilla Co., 360 NLRB. No. 130, 2 n.9, 10 n.6 (June 13, 2014).

The Administrative Procedure Act, the Board's Rules and Regulations, and the Board's Casehandling Manual demand that the Complaint notify a respondent of the facts and law at issue so the respondent has a full and fair opportunity to prepare a defense. See 5 U.S.C. § 554(b)(3) (“Persons entitled to notice of an agency hearing shall be timely informed of ... the matters of fact and law asserted”); NLRB Rules & Regulations, Rule 102.15 (“The complaint shall contain ... a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed”); NLRB Casehandling Manual ¶ 10264.2 (“The allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met.”).

**A. ALLEGATIONS IN PARAGRAPHS 4 AND 11 OF THE COMPLAINT.**

Rather than provide the required level of detail, Paragraphs 5 and 11 contain vague and conclusory allegations that fail to satisfy due process requirements. (GC Ex. 1(q).) Specifically, Paragraph 5(b) alleges that Mercy’s agent (“Charles Stillings”) threatened an employee that “the employee was not allowed to ask questions of supervisors in the presence of other employees at team huddle meetings.” (Id.) Likewise, Paragraph 11 alleges that Mercy failed and refused to bargain collectively and in good faith by:

- (a) Unilaterally creating and posting new positions, and thereby modifying Article 14(F) of the parties’ collective bargaining agreement;
- (b) Unilaterally failing to post vacant positions, and thereby modifying Article 18 of the parties’ collective bargaining agreement;
- (c) Unilaterally creating and filling vacant positions by “best fit” rather than complying with Articles 14(F) and 18(A) of the parties’ collective bargaining agreement; and
- (d) Unilaterally changing employee workweek schedules of employees in the EVS Department, and thereby modifying Article 14(F) of the parties’ collective bargaining agreement.

Paragraphs 11(a)-(d) & (h)-(j) aver that some vague action took place (e.g., Mercy “created and posted new positions” and “created and filled vacant positions”) during some hazy time period (“[s]ince about late May . . .”), but fail to identify what position(s) were allegedly created or vacant, when those positions were allegedly created and/or filled, or to identify the specific position involved when Mercy’s agent allegedly dealt directly with an employee.

The General Counsel refused to clarify its allegations until ordered to do so in response to Mercy’s Motion for a Bill of Particulars. (GC Ex. 1(o).) However, the General Counsel’s belated “clarifications” underscored the fact that Region 18 did not adequately investigate the charge allegations and the General Counsel did not understand its own case. (R. Exs. 24-25.)

When asked to clarify “which vacant positions Respondent unilaterally failed to post,” the General Counsel responded by identifying “work assignments” (i.e., areas where the EVS employees clean) instead of “positions” as defined by the parties’ CBA. (*Id.*) Even during the hearing it was decidedly less-than-clear what exactly the General Counsel believed Mercy did that violated the Act. Take, for example, the General Counsel’s mid-hearing pivot to make an issue of the “funneling” process that uses a single posting for identical positions (*i.e.*, positions that were the same FTE, shift, and weekend). (Tr. 545-46; R. Ex. 26, 28-34.)

Even with the additional information in response to Mercy’s Motion for a Bill of Particulars, the General Counsel did not provide Mercy with information regarding its allegations in Paragraphs 5 and 11 sufficient to notify Mercy of the facts and law at issue, and in failing to do so, deprived Respondent of a full and fair opportunity to prepare its defense. Further, by failing to grant Respondent’s Bill of Particular’s motion in its entirety, Deputy Chief ALJ Arthur Amchan (“Judge Amchan”) also deprived Respondent a full and fair opportunity to prepare its case. Accordingly, Mercy was denied due process with respect to the claims in Paragraphs 5 and 11, and the Board should issue an order dismissing these allegations.

**B. THE GENERAL COUNSEL’S SEPARATE, UNPLED THEORY REGARDING “FUNNELING” OF MULTIPLE JOB POSTINGS.**

As part of his decision, the ALJ considered the General Counsel’s new theory that Respondent failed to comply with Article 18 of the parties’ CBA by “funneling” requisitions (i.e., using one posting for two identical requisitions and the corresponding seniority list to fill both positions). (ALJ-JD 20.) This was an error.

In Santa Fe Tortilla Co., 360 NLRB. No. 130 (June 13, 2014), the Board affirmed the ALJ’s refusal, on due process grounds, to consider three 8(a)(1) violations that were not alleged in the Complaint. The Board noted that the “the General Counsel[] fail[ed] to amend the

complaint” or otherwise “give notice” to the respondent of the claims “during the hearing.” Id. at 1 n.9. Like Santa Fe, the Complaint contains no allegations relating to “funneling,” and the General Counsel made no attempt to amend its Complaint to incorporate any such claim. (GC Ex. 1(q).) Likewise, while the record reflects that, midway through the hearing, the General Counsel attempted to make an issue out of the “funneling,” at no point did the General Counsel give notice to Respondent that it was intending to pursue an 8(a)(5) or 8(d) claim with respect to Respondent’s “funneling” practice. Indeed, testimony revealed that this practice has been in place since before 2008, so this practice was by no means new. (Tr. 582.) And, the practice complies with both the letter and spirit of Article 18 because funneling ensures that, where there are multiple, identical requisitions, the most-senior employees receive the positions.<sup>3</sup> (Tr. 659.)

Because Mercy was not afforded due process with respect to the General Counsel’s new and unpled theory regarding the “funneling” of requisitions, the Board is precluded from considering or finding merit to any of the alleged violations on the basis of this practice.

**II. CROSS-EXCEPTIONS 3, 6 & 7: JUDGE AMCHAN ERRED BY FAILING TO GRANT RESPONDENT’S PRE-HEARING MOTION TO SEVER AND DEFER CASE 18-CA-155443.**

On December 23, 2015, Mercy moved to sever and defer Case 18-CA-15443 from the Complaint. (GC Exs. 1(t)-(u).) On January 7, 2016, Judge Amchan issued an Order denying the motion because “there are factual disputes, such as whether Respondent did in fact fill new or vacant positions by means other than seniority, which are not matters that should be deferred to arbitration.” (GC Ex. 1(x).) Then, following Respondent’s Request for Special Permission to

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<sup>3</sup> It is also worth noting that the funneling process does not serve to dissuade employees from applying for positions because they believe they will not have a chance given their seniority, given the common practice of many employees to apply for positions and subsequently withdraw or decline if they turn out to be the most senior. (Tr. 342, 579; R. Ex. 22.) The application data demonstrate that often the position is awarded to an employee well down the seniority list. (R. Exs. 26-34.)

Appeal Judge Amchan’s Decision, the Board issued an order denying Respondent’s request. (See GC Ex. 1(z).)

Judge Amchan’s decision was in error because he disregarded the Board’s well-established standard for deferral of contract interpretation disputes, and instead, utilized a foreign and inapplicable standard. (GC Ex. 1(x).) The proper standard for determining whether pre-arbitral deferral of an unfair labor practice charge alleging violation of Section 8(a)(5) is appropriate was outlined by the Board in Collyer Insulated Wire, 192 NLRB 837 (1971). The standard was further modified and expanded by the Board in United Technologies Corp., 268 NLRB 557, 558-59 (1984).

It was an abuse of discretion for Judge Amchan to apply the wrong legal standard to deny Respondent’s Motion to Sever and Defer Case 18-CA-15443 from the Complaint. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (holding that a court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . .”). Under Board law, the judge is bound to apply established Board precedent. See Pathmark Stores, Inc., 342 NLRB 378 n.1 (2004); Waco, Inc., 273 NLRB 746, 749 n. 14 (1984); see also NLRB Bench Book § 13–100 “Binding Board Precedent” (October 2015). By failing to analyze and apply the proper legal standard, Judge Amchan abused his discretion, and the NLRB erred by failing to grant Respondent’s Request for Special Permission to Appeal ALJ Amchan’s decision.

### **III. CROSS-EXCEPTION 4: THE GENERAL COUNSEL ERRED BY ISSUING A COMPLAINT INCORPORATING ALLEGATIONS BARRED BY SECTION 10(b) OF THE ACT.**

Section 10(b) provides in pertinent part that “[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” The 10(b) limitations period begins to run when the charging party has “clear and

unequivocal notice,” either actual or constructive, of a violation of the Act. Leach Corp., 312 NLRB 990, 991 (1993), enf’d 54 F.3d 802 (D.C. Cir. 1995); see also Broadway Volkswagen, 342 NLRB 1244, 1246 (2004), enf’d sub nom. East Bay Automotive Council v. NLRB, 483 F.3d 628 (9th Cir. 2007). A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence. Moeller Bros. Body Shop, 306 NLRB 191, 193 (1992); see also John Morrell & Co., 304 NLRB 896, 899 (1991) (holding that the 10(b) period begins to run when “aggrieved party knows or should know that his statutory rights have been violated.”).

In this case, the General Counsel erred by issuing an Amended and Consolidated Complaint that incorporated allegations barred by Section 10(b) of the Act.

**A. ALLEGATIONS IN PARAGRAPHS 11(a)-(g) AND 14 OF THE COMPLAINT.**

Paragraphs 11(a)-(g) and 14 of the Complaint allege that Mercy violated Section 8(a)(5) by making certain unilateral changes to employee work assignments. (GC Ex. 1(q) ¶ 11(a)-(g).) While the alleged conduct took place within the limitations period, the evidence shows that Mercy’s conduct represents a continuation of long-standing practices.

The 10(b) limitations period has been recognized to bar 8(a)(5) claims such as those alleged in this matter. For example, in St. Barnabas Medical Center, 343 NLRB 1125, 1127 (2004), when an “alleged unfair labor practice may be characterized as a contract repudiation, the unfair labor practice occurs at the moment of the repudiation, and the 10(b) period begins to run at the moment the union has clear and unequivocal notice of that act” and “all subsequent failures of the respondent to honor the terms of the agreement are deemed consequences of the initial repudiation.” Id. at 1127. In St. Barnabas, the Board found that the complaint was time barred because the union had clear and unequivocal notice outside the 10(b) period that the

respondent repudiated the contract by failing to apply its terms to classifications of employees who it asserted were not members of the bargaining unit. *Id.* at 1129. Likewise, in Springfield Day Nursery, 362 NLRB No. 30 (Mar. 19, 2015), the Board concluded that the employer’s “consistent refusal to apply the contract to the disputed substitute teachers outside the 10(b) period amounted to repudiation, a completed violation of the Act, and thus was not a continuing violation.” See also A&L Underground, 302 NLRB 467, 469 (1991) (“Once a party has notice of a clear and unequivocal contract repudiation . . . a dispute is clearly drawn. Indeed, it is at the moment of that repudiation that the unfair labor practice – the refusal to bargain – fundamentally occurs . . . .”)

In this case, the Union had clear and unequivocal notice outside the 10(b) limitations period that Respondent was making “work assignment” changes without posting them on the AKN or otherwise assigning them on the basis of seniority, and that, as a matter of course, open positions and vacant assignments have been discussed in department meetings and huddles and by managers and employees on a one-on-one basis. (Tr. 89, 124-25, 227, 274, 282-83, 429, 442-45, 471; 760.) For example, substantial work assignment changes were made in October 2013 as part of the EVS reorganization that resulted in the September 23, 2013 Grievance, and ultimately the Jacobs Award and May 15, 2015 Rebid. (GC Exs. 3, 4.) ***It is undisputed that the Union did not file an unfair labor practice charge asserting a violation of Section 8(a)(5) arising from Mercy’s actions.***

Later, in December 2014, a number of work assignments were modified and others created, and work assignments were distributed without posting or consideration of seniority. (Compare R. Ex. 46 with R. Ex. 7; see also 782-83.) There is no dispute that the Union was put on notice by Mercy of the impending changes in December 2014, and there is no dispute that the

Union did not file a charge (or even a grievance). (R. Ex. 2; Tr. 71-74, 778-79.) The December 2014 work assignment changes and the award of work assignments at the discretion of the EVS Manager are identical in nature to those occurring in late May and early June 2015, which form the basis for the allegations made in Case 18-CA-155443. (Tr. 781-83.) If Mercy's actions in late May or early June violate the Act, then substantially identical actions by Mercy in September 2013 and December 2014 must also have violated the Act. If so, it was incumbent upon the Union to timely file charges within six months of becoming aware of them, not in July 2015, well after the six-month filing period lapsed. Having failed to do so, the charge allegations must be dismissed as untimely. See, e.g., Dodec, Inc., Case 12-CA-148961, at 5-7 (NLRB Div. Adv. Dec. 18, 2015) (“[T]he Union . . . received constructive notice of the Employer’s untimely contract repudiation both by the Employer’s open and obvious conduct and because it failed to exercise reasonable diligence to discover the violation.”). Again, it is undisputed that *the Union did not demand to bargain or file any unfair labor practice charge*. (Tr. 73-74, 778-780, 783.)

Since at least 2013, Mercy has modified existing work assignments at its discretion, and has awarded them as it saw fit without posting them or giving consideration to seniority. There is no question the Union was aware of Mercy's conduct in that regard and that it did not act to file a charge alleging that Mercy repudiated the CBA. Because this conduct has continued for more than three years without challenge, any claim that Mercy has violated the Act (regardless of theory) is barred by the statute of limitations.

**B. ALLEGATIONS IN PARAGRAPHS 11(h)-(j) AND 14 OF THE COMPLAINT.**

Paragraphs 11(h)-(j) and 14 of the Complaint allege that Stillings engaged in “direct dealing” in May and June 2015 by announcing the creation of new positions in the Mother-Baby Center at a huddle, by speaking with an employee about a vacant work assignment, and by

instructing employees to speak with him if they wanted to change work assignments.<sup>4</sup> (GC Ex. 1(q) ¶¶ 11(h)-(j).) Although the events alleged in the Complaint took place within the six-month limitations period, it is equally plain that Stillings' conduct was nothing more than the continuation of practices implemented by previous EVS managers both before and after Crothall, including discussing work assignments and the "switching" of work assignments with bargaining unit employees. (Tr. 759-760.) Mercy made no attempt to hide these pre-2013 practices from the Union or prevent bargaining unit members from informing the Union. (Tr. 215, 415.) If the Union did not have actual knowledge of these practices, it was willfully ignorant. See Moeller Bros. Body Shop, Inc., 306 NLRB 191 (1992).

As alleged in the Complaint, Stillings alleged direct dealing is nothing more than the continuation of practices that were implemented prior to 2013, and his continuation of these practices, by itself, is beyond the ability of the Board to find unlawful under Section 10(b).<sup>5</sup> See Int'l Assoc. of Machinists v. NLRB, 362 U.S. 411, 421 (1960) ("[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso."); see also NLRB v. MacMillan Ring-Free Oil Co., Inc., 394 F.2d 26, 33 (9th Cir. 1968) ("[I]t is impermissible under the policies embodied in section 10(b) for a finding of an unfair labor practice to be justified by primary reliance on the earlier events.").

In sum, because the allegations contained in Paragraph 11 of the Complaint are clearly barred by the statute of limitations, the General Counsel erred by issuing the Complaint.

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<sup>4</sup> At the hearing respondent *finally* learned it was Robinson to whom the alleged statement was made.

<sup>5</sup> This is also protected speech pursuant to Section 8(c).

**ARGUMENT**  
**(LEGAL CROSS-EXCEPTIONS)**

**IV. CROSS-EXCEPTIONS 11, 31: THE ALJ ERRED BY FAILING TO DEFER THE REMAINING 8(a)(1) ALLEGATION CASE 18-CA-155443.**

Respondent agrees with the ALJ that the 8(a)(1) allegations in Case 18-CA-155443 are not “inextricably related” to the contract-interpretation issues. Nevertheless, Respondent maintains that the remaining 8(a)(1) allegation in Case 18-CA-155443 (paragraph 5(b) of the Complaint) should be deferred pursuant to the parties’ CBA.<sup>6</sup>

The ALJ refused to defer the 8(a)(1) allegations in Case 18-CA-155443, finding under the Babcock & Wilcox standard that the Agreement’s “general language falls well short of explicitly authorizing an arbitrator to decide allegations that [the Hospital] violated Section 8(a)(3) or Section 8(a)(1) of the Act.” (ALJ-JD 21.) But, in Babcock itself, the Board majority noted that “contract language prohibiting retaliation for engaging in union activity . . . or authorizing the arbitrator to decide such issues” would be sufficient to show that the statutory right was incorporated into the collective-bargaining agreement. Babcock & Wilcox Construction Co., 361 NLRB No. 132, slip op. at 11 (Dec. 15, 2014); see also *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) cases*, Memorandum GC 15-02, at 3 n.10 (Feb. 10, 2015) (“GC Deferral Memo.”) (noting same). The ALJ’s conclusion that the parties’ similar language should be dismissed as “too general” mischaracterizes the Babcock & Wilcox standard.

Here, the parties’ CBA expressly prohibits retaliation against bargaining unit members because of their union (or non-union) activities: “There shall be no discrimination by the union

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<sup>6</sup> As noted above, the General Counsel did not except to the ALJ’s dismissal of the 8(a)(1) claims in paragraphs 5(a) and (c) of the Complaint. While Respondent believes those allegations should properly have been deferred along with the remaining allegations arising from Case No. 18-CA-155443, those issues are settled and not ripe for further review.

or [Mercy] against any employee because of membership or non-membership in the Union or because of the assertion of rights afforded by [the collective bargaining agreement] . . . .” (GC Ex. 2 at 2.) Any violation of this provision by Mercy is subject to arbitration pursuant to the grievance-arbitration provision set forth in Subparagraph 7(A) of the parties’ CBA. (Id. at 9-10 (emphasis added).)

Because the parties have agreed to arbitrate matters involving union membership (or non-membership) or the assertion of rights under the CBA, the remaining 8(a)(1) allegation in Case 18-CA-155443 (paragraph 5(b) of the Complaint) should be deferred to the parties’ grievance arbitration pursuant to Babcock.<sup>7</sup>

**V. CROSS-EXCEPTIONS 12, 15, 16, 35, 36, 52, 53: THE ALJ ERRED BY FINDING RESPONDENT VIOLATED SECTION 8(a)(1) BY TELLING ROBINSON THAT SHE WAS NOT ALLOWED TO ASK QUESTIONS IN FRONT OF OTHER EMPLOYEES AT TEAM HUDDLE MEETINGS.**

**A. THE ALJ APPLIED THE WRONG LEGAL STANDARD.**

Crediting Robinson’s testimony (to the exclusion of Stillings’ testimony and other record evidence), the ALJ concluded that the following exchange took place between Stillings and Robinson:

Stillings: I heard that you were inquiring about the mother-baby jobs again in the huddle. I thought I already told you that those are mother-baby jobs.

Robinson: Yes. Not just me, but other people wanted to know what exactly the job was going to be before they apply for it.

Stillings: Well, if you have questions, you can only ask for yourself and you need to come to my office and ask me.

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<sup>7</sup> To the extent the Board disagrees, this disagreement should not weigh in favor of reversing the ALJ’s decision to sever and defer the 8(a)(5) allegations. (ALJ-JD 24-25.)

(ALJ-JD 10 (citing Tr. 295-96).) In finding the statement to violate Section 8(a)(1), the ALJ concluded that Stillings’ “instruction . . . had a reasonable tendency to interfere with, restrain or coerce Robinson’s union or protected activities” because his statement “sent a message that Respondent did not welcome Robinson’s attempts to discuss employee concerns at team huddle meetings.” (ALJ-JD 27.) This conclusion is both factually suspect and legally incorrect.

Even assuming as the ALJ did that Stillings made the statement – “if you have questions, you can only ask for yourself and you need to come to my office and ask me” – there was no violation of Section 8(a)(1) because the statement does not contain a “threat of reprisal.” Indeed, the General Counsel never alleged and there was no evidence presented at the hearing to establish that Stillings threatened Robinson with any discipline or other form of reprisal for continuing to ask questions. In the absence of a threat of reprisal, Section 8(c) precludes the Board from concluding that Stillings’ statement constituted an unfair labor practice. See 29 U.S.C. § 158(c) (providing that “expressing . . . any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”).

The Board’s decision in Baker Concrete Construction, 341 NLRB 598 (2004) is instructive. In Baker, a supervisor told a bargaining unit employee during a safety meeting to “stay away all these people; because if you no stay away these people, you have trouble [*sic*].” Id. at 598. In finding that the statement did not violate Section 8(a)(1), the Board noted that the General Counsel did not allege that the statement was “an order that [the employee] stay away from ‘these people.’” Id. To the contrary, the General Counsel alleged that the employer was threatening reprisals (i.e., “trouble”) if the employee did not stay away from “these people.” Because the statement was not “an order,” the Board reasoned that the statement was not unlawful because even assuming that “these people” referred to union officials or supporters, it

was “far from clear that [the supervisor] was saying that the Respondent would be the source of that trouble” and the General Counsel failed to establish that a reasonable employee would interpret the statement as such.

Here too, the General Counsel has not alleged that Robinson was “ordered” by Stillings not to engage in concerted activities; nor is there any record evidence to that effect. Instead, the General Counsel has alleged (albeit confusingly) that Respondent “threaten[ed]” Robinson with some unstated repercussions in the event she “ask[ed] questions in the presence of other employees at team huddle meetings.” (G.C. Ex. 1(q) ¶ 5(b); see also G.C. Post-Hearing Br. at 39 (“Stillings’ statement was likely to be interpreted by the objective employee *as a threat* . . .”).)<sup>8</sup> In the absence of a threat of reprisal, Stillings’ alleged statement (even assuming it was made) is protected by Section 8(c) and therefore cannot constitute a violation of Section 8(a)(1). Accordingly, this claim fails as a matter of law and should be dismissed.<sup>9</sup>

**B. THE ALJ IGNORED PERTINENT RECORD EVIDENCE.**

Setting aside the ALJ’s (remarkable) decision to credit the testimony of Robinson over Stillings, the ALJ committed a reversible error by refusing to consider “pertinent evidence” demonstrating the absence of any unlawful threat. See Bolivar Tee’s Manufacturing Co., 334 NLRB 1145 (2001) (reversing ALJ and finding no Section 8(a)(1) violation because the ALJ “fail[ed] to consider pertinent evidence.”).

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<sup>8</sup> The Board’s analysis in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) does not apply in this case because there is no evidence (or allegation) that Stillings’ alleged statement to Robinson constituted a “policy” prohibiting EVS employees from asking questions at team huddle meetings. In fact, as demonstrated below, the record demonstrates the opposite to be true. (ALJ-JD 9 (finding that “[e]mployees may ask questions in team huddle meetings”).)

<sup>9</sup> In addition, as set forth below, the ALJ erred by crediting Robinson’s testimony over that of Stillings and other record evidence. See infra Section IX.A.-C. As such, the ALJ erred in finding Respondent to have violated Section 8(a)(1).

First, it is undisputed that, at the time of the alleged statement, construction on the Mother-Baby Center had not yet been completed and Stillings was unsure what tasks the positions would be performing. (Tr. 380-81.) Several Union witnesses acknowledged that in May and June the Mother Baby Center was under construction and Stillings had not been able to develop work assignments for that area. (Tr. 181-82, 294, 435-36.) Additionally, the evidence demonstrates that the supervisor who ran the huddle in question – Rudy Hanuman – was new to Mercy and to the health care industry and was not competent or prepared to respond to questions about work assignments. Several Union witnesses – including Cullen, Wagner, and Robinson herself – acknowledged that Hanuman was new to the department at that time and still learning about hospital operations. (Tr. 295, 373, 445, 803.) Thus, it stands to reason that Stillings would want individuals with questions about work assignments to come to him directly – rather than to a new, less experienced supervisor – since Stillings was responsible for developing the tasks for each of the new Mother-Baby position.

Second, the ALJ’s conclusion that Stillings “attempted to set limits on Robinson’s ability to ask questions” is belied by the ALJ’s own decision. Specifically, citing numerous examples in the record, the ALJ noted that “team huddle meetings generally last for 5-10 minutes, and . . . *[e]mployees may ask questions in team huddle meetings.*” (ALJ-JD 9 (emphasis added).) A reasonable employee who understands that she is able to ask questions during team huddle meetings would not feel “threatened” or “coerced” by her supervisor’s request that she bring questions about a single topic – i.e., the work assignments in the Mother-Baby Center – to the supervisor directly. See Cheney Constr., Inc., 344 NLRB 238, 239 (2005) (finding no violation of the Act because the objective facts did not prove a violation by a preponderance of the evidence); Fieldcrest Cannon, Inc., 318 NLRB 470, 490 (1995) (“[I]t is well established that the

test of interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act.”).

Moreover, while the date of the alleged exchange is not clear from the record, it must have occurred sometime between May 18 – the day the positions were posted on the AKN – and June 12. This is because the ALJ found that on June 12, “Stillings advised employees in a team huddle meeting that if they were not happy with their positions/work assignments, *they should speak to him* because he would try to move people to make them more content with their area.” (ALJ-JD 11.) Then, notwithstanding Stillings’ alleged statement prohibiting Robinson from discussing work assignments with other employees, the ALJ found that in or about mid-June, Stillings and Robinson discussed a work assignment dispute between Robinson and fellow EVS employee Patricia Wagner, and the ALJ found that Stillings instructed Robinson “to talk to Wagner about” a work assignment dispute.<sup>10</sup> (ALJ-JD 11.)

In sum, when all the relevant facts are considered, Stillings alleged comment that Robinson should come to him directly with questions about the work assignments in the Mother-Baby Center could not reasonably tend to restrain, coerce or interfere with employees’ rights under the Act. Webasto Sunroofs, Inc., 342 NLRB 1222, 1223 (2004) (citing Am. Freightways Co., 124 NLRB 146, 147 (1959)). Under this reasonable person standard, the fact that a strained interpretation of words or events may implicate Section 8(a)(1) is not enough to prove a violation of the Act. See Deutsch Co., 165 NLRB 140, 145 (1967) (refusing to find liability under Section 8(a)(1) in a case in which the Board refused to accept the General Counsel’s argument that read a threat into an otherwise unremarkable sentence spoken to employees). Accordingly, in the event

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<sup>10</sup> As noted below, the record evidence establishes that Wagner was not permanently assigned the disputed work area but rather was filling in for one day. See Section X.A., *infra*.

the Board does not defer the allegation to the parties' grievance-arbitration procedure, the Board should reject the ALJ's conclusion that Mercy violated Section 8(a)(1) of the Act and dismiss the allegation from the Complaint.

**VI. CROSS-EXCEPTIONS 37, 38, 44, 45, 46, 47, 48, 49, 50, 52, 53: THE ALJ ERRED BY FINDING ROBINSON WAS CONSTRUCTIVELY REFUSED A TRANSFER IN VIOLATION OF SECTION 8(a)(3).**

**A. THE ALJ'S FINDING OF LIABILITY UNDER THE "HOBSON'S CHOICE" THEORY IS UNTENABLE.**

Crediting Robinson's testimony in its entirety (to the exclusion of contradictory evidence in the form of testimony from two of Respondent's witnesses and corresponding documentary evidence), the ALJ concluded that Mercy subjected Robinson to a "Hobson's Choice" when ICU Manager Schulz told her: (1) that Schulz had "some major concerns" about Robinson "because Stillings . . . told her that Robinson was inappropriate, rude and disrespectful, and was not a team player," and (2) "[t]hat if Robinson came to the ICU, Schulz would monitor those issues . . . closely and go right to corrective action if Robinson was rude, disrespectful, inappropriate, absent, or tardy." (ALJ-JD 29-30.) As a result, the ALJ concluded that Respondent violated Section 8(a)(3) of the Act. Nevertheless, even assuming that Robinson's account is accurate, this claim fails as a matter of law for two independent reasons: (1) no Hobson's Choice can exist where the alleged unlawful conditions are only threatened and have not actually occurred, and (2) Robinson would not have accepted the ICU position regardless of Schulz's alleged conduct.<sup>11</sup>

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<sup>11</sup> Indeed, the nebulous legal theory advanced by the General Counsel and adopted by the ALJ – "constructive denial of a transfer request" – has *never* been recognized by the Board, and should not be recognized here. (ALJ-JD 30-31.)

**1. NO HOBSON’S CHOICE CAN EXIST WHERE THE ALLEGED UNLAWFUL CONDITIONS ARE ONLY THREATENED AND HAVE NOT ACTUALLY OCCURRED.**

The Board will decline to find a constructive discharge where an employee quits his or her employment prematurely in anticipation of a Hobson’s choice. See White-Evans Service Co., 285 NLRB 81 (1987) (“[A]lthough resigning in the face of [a Hobson’s] choice is one thing, ‘quitting in anticipation that such may take place later on is an entirely different matter.’”); see also ComGeneral Corp., 251 NLRB 653, 658 (1980) (“It is not a constructive discharge to quit in anticipation of the mere possibility that one might be discharged”). Because Robinson never actually worked for Schulz, she was never forced to choose between resigning and/or continuing to work rather than engage in protected activities. Therefore, her decision to decline was premature and cannot constitute an adverse action as a matter of law.

The ALJ rejected this argument, finding that Robinson’s did not actually have to work for Schulz in order for her to be faced with a Hobson’s Choice. (ALJ-JD 30 n.30.) This finding is contrary to settled Board law. The Board will not find a Hobson’s Choice where the alleged unlawful conditions are only threatened and have not actually occurred. The case of Central Casket Co., 225 NLRB 362 (1976) illustrates this point.

In Central Casket Co., an employer caught an employee soliciting fellow employees for the union in violation of a company no-solicitation rule. Subsequently, the employer informed the employee that such behavior could lead to his discharge and warned the employee that he would be watching him due to his improper work habits and failure to keep proper worksheets. After that day, the employee never returned to work, and after a week the employer sent the employee a letter formally discharging him. The ALJ found the facts sufficient to conclude that the employee was prompted to quit due to his fear of harassment and possible reprisals. Finally,

the ALJ determined that the employee was constructively discharged in order to upset the union's organizational campaign.

*However, the Board disagreed with the judge's findings.* With respect to the ALJ's finding that the employee quit due to fear of reprisals and harassment, the Board found no evidence that any employee had ever been subjected to harassment or reprisals for union activity. The Board also found unconvincing the argument that the employee quit because of the unlawful restriction on soliciting for the union because the employee had given the employer an unrelated reason for not returning to work (illness). The Board reasoned that even if, *arguendo*, it could accept the argument that the employee quit out of fear of harassment or reprisals, "it does not follow that an employee's quitting over a *threatened* restriction on union activity is as a matter of law a constructive discharge." The Board reasoned:

*A threat is not the equivalent of the actual imposition of unlawful conditions of employment;[] it does not in any meaningful sense render the conditions of employment so intolerable as to compel an employee to leave his job.*

Id. 363 (emphasis added; footnote omitted). Because the Board found that the employer may or may not have acted on his threat to discharge the employee, the Board found the judge's determination that the employee was constructively discharged premature. Id. at 364.

In Easter Seals Connecticut, Inc., 345 NLRB 836 (2005), an employee was given verbal and written warnings for discussing the employer's hiring decision with another employee. A few days later, the employee resigned, telling her supervisor that it was due to "the 'aggravation' she had felt over the past 3 days." The Board, agreeing with the ALJ, found that the employee's decision to resign was not a "Hobson's Choice" situation because the employee, when explaining to the employer her decision to resign, had not "indicate[d] that her decision was based on her concern that, in order to keep her job, she would be required to forgo her right to engage in

protected activity.” Although the Board found that the employer had violated the Act when it gave her the written warning, the Board found that the employee’s reason for quitting was due to hurt feelings over her perception that she was being treated unfairly, not over a “Hobson’s Choice” dilemma. As the Board stated, it would be “inappropriate to hold an employer accountable for having constructively discharged an employee under a ‘Hobson’s Choice’ analysis where the employee’s own testimony establishes that her decision to resign was not, in fact, based on any ‘Hobson’s Choice,’ ‘either/or’ dilemma but rather on some other fact altogether.” The Board also upheld the judge’s reliance on Central Casket’s holding that a threat to restrict protected activity cannot create conditions of employment “so intolerable as to compel an employee to leave his job.” Id. at 842 (quoting Central Casket, 225 NLRB at 363).

Even if one credits Robinson’s incredible testimony (as the ALJ did), here, the evidence demonstrates circumstances quite like those in Central Casket and Easter Seals because the unpleasantness allegedly experienced by Robinson was only anticipated and not realized. At most, it was a vague threat of persecution by Schulz. Thus, under settled Board law, Robinson was not subject to a Hobson’s Choice.

**2. ROBINSON WOULD NOT HAVE ACCEPTED THE ICU POSITION REGARDLESS OF SCHULZ’S ALLEGED CONDUCT.**

To be actionable, the General Counsel must establish by a preponderance of the credible evidence that alleged unlawful threats were the proximate cause of the unlawful employment action (i.e., the constructive denial of Robinson’s transfer). For example, in Easter Seals, the Board found no constructive discharge because the employee’s decision to resign “was not based on her concern that she was faced with a ‘Hobson’s choice’ dilemma, but rather was based on her hurt feelings arising from her perception that she had been treated unfairly.” 345 NLRB at 839; see also Shoppers Drug Mart, Inc., 226 NLRB 901, 916 (1976) (where constructive

discharge was analyzed under theory of intolerable working conditions, Board declined to find a violation where an employee admitted he would have quit irrespective of the employer's unlawful actions). Here, too, even assuming the statements were made by Schulz, the General Counsel has not shown that the alleged threats by ICU Manager Schulz had the effect of causing Robinson to decline the ICU position.

The undisputed record evidence reveals that Robinson declined the position because she wanted the open, full-time OR position – not because of any alleged statements by Schulz. According to Robinson's own testimony, she was looking for a full-time position wherein she primarily worked in the evenings. (Tr. 359.) The OR position, which she discussed with OR Manager Dooher *prior to* her meeting with Schulz, was a full-time position (instead of a .5 FTE position as was the ICU position) and it was "better for her family" because OR Manager Dooher told Robinson that she would work during the evenings. Further confirming Robinson's true intent is her testimony that she thought the duties of an ICU Nursing Assistant "seem[ed] like too much for one Nursing Assistant." (Tr. 315.) Robinson also expressed concern regarding the weekend scheduling because she has court ordered visitation for her son on pre-determined weekends. (Tr. 315.)

The ALJ rejected this analysis, reasoning "Robinson declined the ICU position *before* she learned from the recruiter that she was the most senior applicant for the OR position." (ALJ-JD 31 n.32.) This is factually incorrect and legally immaterial. The transcript of Robinson's telephone conversation with the recruiter reveals that she learned about the OR position before she met with Schulz and Sandberg on October 13. Specifically, Robinson told the recruiter that she "had talked to Dave Dooher . . . when [she] was in Paula Wahlberg's office and he had said that it would be mostly evening hours and that actually would work out for [Robinson]." (R. Ex.

43c.) Nevertheless, regardless of *when* Robinson declined the ICU position, the fact remains that, according to Robinson's own testimony, the OR position was more favorable because the hours were better and because it was a 1.0 FTE position (instead of a .5 FTE position).

Nor was Robinson's decision to decline the ICU position unusual. In fact, the record evidence demonstrates that Robinson applied for and subsequently declined a number of offered positions. In 2015 alone, Robinson applied for more than 50 positions. (*Id.*; R. Ex. 22.) Of those 50 applications, Robinson was the most-senior applicant for 15 positions and *declined or withdrew* from 13 of the 15 positions. (R. Ex. 22.) There is no reason to believe that her decision with regard to the ICU position was any different than any of the other 12 positions Robinson declined in 2015. Again, Robinson testified that she was looking for a full-time position, and the ICU position was only a .5 FTE position – which was actually .1 FTE *less* than her then-current position in the Family Care Unit. (*See* R. Ex. 22; Tr. 676.)

Even assuming that Robinson would have accepted the .5 FTE ICU position in October 2015 in the absence of any threats by Schulz, it is equally established by the record evidence that Robinson would still have accepted the 1.0 FTE OR position a few days later. As noted above, Robinson testified that she was looking for a full-time position wherein she primarily worked in the evenings. (Tr. 359.) The OR position offered her that opportunity. Even if she had taken the ICU position, she would have accepted and started working in the OR position before she ever performed any work in the ICU.

Thus, the undisputed evidence does not show that any alleged unlawful statements by Schulz had the effect of causing Robinson to decline the ICU position. Rather, the evidence demonstrates that Robinson declined a position she thought was “too much” and instead took a better, full-time position in the OR.

**B. UNDER THE TRADITIONAL CONSTRUCTIVE DISCHARGE STANDARD, ROBINSON'S 8(A)(3) CLAIM ALSO FAILS.**

Contrary to the ALJ's finding, even if the Board analyzes Robinson's constructive failure to transfer claim under the "traditional" constructive discharge theory, her 8(a)(3) claim fails as a matter of law. (ALJ-JD 31 n.33.) To start, as noted above, the theory of liability asserted by the General Counsel is completely without support in the law. No Board case has ever recognized this nebulous legal theory.

Even assuming such a cause of action is deemed to be analogous to the Board's constructive discharge line of cases, her claim fails because the General Counsel failed to show that Mercy: (1) established burdensome working conditions sufficient to cause Robinson to resign (or, refuse a transfer) and (2) the burden was imposed because of the employee's union activities. KRI Constructors, 290 NLRB 802, 813-14 (1988).

With respect to the first element, the Board has made clear that the standard for demonstrating a constructive discharge is very high. For example, in Comfort Inn, 314 NLRB 714 (1991), the General Counsel unsuccessfully argued that the issuance of an unjustified suspension to two pro-union employees, which resulted in both employees walking off the job, was a constructive discharge. The Board affirmed the ALJ's opinion rejecting the General Counsel's argument, which held that the argument "border[ed] upon frivolity." Id. at 717. Unlike in Comfort Inn, where the employees had actually been suspended, Robinson was *never* actually disciplined by Schulz. That is, there were no burdensome working conditions – only Robinson's speculative (and incorrect) belief that they may be established. Accordingly, even assuming the comments were made, Schulz's comments were insufficient to justify Robinson's decision not to accept the ICU position. Schulz simply told Robinson she would expect her to

comply with applicable work rules, just as Haaland and Dooher did in their meet-and-greets. (Tr. 676, 736-37.)

As to the second element, as set forth in detail below, *infra* Section VII, there is no credible evidence to establish that whatever statements Schulz made to Robinson during the October 13 meet-and-greet had anything to do with Robinson's alleged union activities. See Neptco, Inc., 346 NLRB 18, 19 (2005); see also Lasell Junior College, 230 NLRB 1076, 1076 (1977) ("Mere suspicion cannot substitute for proof of an unfair labor practice.").

Nevertheless, even assuming that both elements are met, Respondent still did not violate Section 8(a)(3) because it is undisputed that (1) Robinson did receive two attendance related corrective actions in 2015 and (2) Robinson was coached in 2013 for "insubordinate" behavior toward managers during a huddle meeting, which included Robinson crossing her arms, rolling her eyes, and loudly sighing while managers were speaking. (R. Exs. 20, 21; Tr. 289, 378.) It is also undisputed that, with regard to Robinson's attendance-related discipline, the next step in Respondent's progressive disciplinary policy was a written warning. (See id.) Schulz, like Haaland and Dooher, had every right to inform Robinson that they were aware of her previous disciplines, and that they would continue to monitor her performance. As the Board has consistently observed, "[T]he Act is a shield, not a sword, for protected activity." Bay Control Servs., Inc., 315 NLRB 30, 35 (1994). Moreover, the purpose of the Board's review is not to "assume the role of a super-personnel board and reevaluate [Respondent's] decision." United Steelworkers of Am., AFL-CIO-CLC, 341 NLRB 1137, 1145 (2004). As the Board explained, its purpose is much more limited:

We emphasize that it is not our objective to determine whether the [employer]'s choice...was the correct decision or that the [employer] used the best decision-making process. The [employer] may make its [employment] decision on any basis it chooses, good, bad, or indifferent – as long as it is not an unlawful basis. .

. . The wisdom of the employer’s decision is immaterial. We are concerned only with discerning the sincerity of the Respondent’s contention that the decision was not motivated by union animus.

Children’s Servs. Int’l, 347 NLRB 67, 70 (2006). Accordingly, the Board is not supposed to second guess the employer’s articulated reasons for its actions absent a violation of either Section 8(a)(1) or 8(a)(3) of the Act. See Wal-Mart Stores, Inc., 351 NLRB 130, 134 (2007) (the “issue . . . is not whether the Respondent acted reasonably in discharging [the employee] . . . the issue, rather, is whether the Respondent would have taken the same action, even if [the employee] had not engaged in protected activity.”).

No amount of alleged union activity should insulate Robinson from application of established attendance policies or work rules. Nor should the Board second-guess Schulz’s concern for attendance and teamwork, which are qualities Schulz deems necessary to delivering quality patient-care in the ICU. Accordingly, Paragraphs 6(a) and (b) of the Complaint are without merit, and should have been dismissed by the ALJ.

**VII. EXCEPTIONS 24, 29, 49, 50: BECAUSE THERE IS NO EVIDENCE THAT SCHULZ HAD ANY KNOWLEDGE OF ANY PROTECTED ACTIVITY ON THE PART OF ROBINSON, THE ALJ ERRED IN FINDING ANY VIOLATION OF SECTION 8(a)(3).**

Section 8(a)(3) of the Act provides that “it shall be an unfair labor practice for an employer to . . . [engage in] discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158 (a)(3). In Wright Line, 251 NLRB 1083 (1980), the NLRB adopted the causality framework set forth by the Supreme Court in Mt. Healthy City School District Board of Educ. v. Doyle, 429 U.S. 274 (1977). In doing so, the Board found that in unlawful motivation cases, “we shall first require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s

decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” Wright Line, 251 NLRB at 1089. In meeting the “motivating factor” test, the Board has required the General Counsel to establish at least three elements: (1) protected activity by the employee, (2) employer knowledge of that activity, and antiunion animus by the employer. Mesker Door, Inc., 357 NLRB No. 59 at \*2 (Aug. 24, 2011). The ultimate burden of proving a violation of Section 8(a)(3) remains with the General Counsel. Wright Line, 251 NLRB at 1089.

Here, the ALJ concluded that Respondent violated Section 8(a)(3) because “Schulz was motivated to do so at least in part by what she heard from Stillings[] about Robinson’s protected activities in the EVS department.” (ALJ-JD 30-31.) Yet, the ALJ failed to specifically identify what conduct, if any, was protected. (Id.) The ALJ could not have been referring to Robinson’s conduct in 2013, which was plainly not protected by the Act. Specifically, the evidence showed that Robinson was called into a meeting in 2013 to discuss insubordinate behavior toward managers, including crossing her arms, rolling her eyes, and loudly sighing while managers were speaking. (Tr. 289, 378.) However, that conduct cannot reasonably be considered “protected activity,” and was unknown to Schulz<sup>12</sup> (Tr. 714-15.) It is also worth noting that Robinson’s Union representative was invited to the 2013 meeting and that no grievances or charges were filed arising from it. (Tr. 290-91, 379.) Alternatively, Robinson’s alleged questions concerning the Mother-Baby positions in a late-May huddle likewise do not support a finding that Robinson was engaged in concerted activity. Nevertheless, even assuming that activity was protected, they occurred too remote in time to serve as the basis for the 8(a)(3) claim here. See Central Valley

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<sup>12</sup> This conduct is not protected by the Act. See Meyers Industries (Meyers II), 281 NLRB 882, 887 (1986) (“[T]o find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”).

Meat, 346 NLRB 1078, 1092 (2006) (“Further the timing of Diaz’s schedule change suggests Respondent was not motivated by Diaz’s union or protected concerted activity. Respondent changed Diaz’s schedule over six months after his Union activity, six months after he engaged in the strike and two months after Diaz filed the wage and hour lawsuit.”); Rockland Bamberg Print Works, Inc., 231 NLRB at 306 (1977) (employee’s discharge five months after supporting union in election too remote); see also New York Hosp. Med. Ctr. of Queens, No. 29-CA-136515 (Dec. 31, 2015) (Fish, ALJ) (“[H]ere Young’s protected activity occurred back in April of 2014, over four months from the alleged discrimination against him on August 20, 2014 and September 3, 2014. This gap in time between Young’s protected activities and the alleged discrimination against him is too remote to support an inference of a connection between the alleged discrimination and his protected conduct.”). As with Young in New York Hosp. Med. Ctr. of Queens case, the gap between Robinson’s alleged protected activity in an EVS Huddle in May 2015 is too distant in time (and attenuated in context) to be causally connected to statements made by the manager of another department in a job interview regarding that manager’s performance expectations. Given it involved action by a manager who was not even involved in the late-May huddle, it is simply implausible and lacks any evidentiary support other than the self-serving testimony of a less-than-credible witness.

Even if the five-month interval between this alleged protected activity and Schulz’s alleged discrimination were deemed sufficiently proximate, there is no evidence that Schulz had any knowledge of the alleged protected activity. Indeed, the ALJ concedes that “*it is entirely possible that Schulz was not aware of Robinson’s alleged protected activity.*” (ALJ-JD 31 n.31 (emphasis added).) The absence of such evidence, however, was disregarded because, according to the ALJ, “Stillings was certainly aware of Robinson’s [protected conduct], and Schulz relied

on Stillings when she decided to confront Robinson about her ‘behavior.’” (ALJ-JD 31 n.31.) This was an error. Here, the ALJ is imputing the alleged animus of Stillings, which is itself unproved and in doubt, and inferring that it somehow unconsciously informed Schulz’s intent and actions. The ALJ’s attempt to buttress his findings with GC Ex. 42, an email from Stillings to his superior at Crothall sent two weeks after Robinson’s meet and greet with Schulz and Sandberg, is equally misplaced. (ALJ-JD 15 n.23.) The ALJ’s finding that Schulz statements to Robinson in the October 13 meet-and-greet were informed by Stillings’ alleged animus are entirely based upon Stillings October 26 email. In doing so, the ALJ has built a house of cards that simply cannot support a finding that Respondent violated Section 8(a)(3). The email is dated two weeks after the October 13 meet-and-greet, and makes no reference to Robinson or union activities by Robinson or others. The email itself does not evidence animus, rather the ALJ had to stretch to infer that was what Stillings meant, stretch again to infer that it was about Robinson and her allegedly protected activities, stretch yet again to speculate that Stillings must have shared his animus with Schulz implicitly when he spoke to her weeks earlier prior to the meet-and-greet, and stretch yet again to speculate that Schulz’s comments to Robinson during the meet-and-greet were (a) unconsciously informed by Stillings’ uncommunicated animus, and (b) so oppressive as to unlawfully dissuade Robinson from taking the ICU position. On this evidence, and in light of the Board’s standards for finding liability under 8(a)(3), the ALJ’s tortured analysis simply cannot be affirmed, and must instead be reversed.

There is simply no evidence that Schulz was aware of any protected activity by Robinson, only that she was in corrective action for attendance and that she had some unspecified performance issues.<sup>13</sup> Even Robinson admitted she had no idea what Stillings told

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<sup>13</sup> Moreover, it completely ignores the fact that what Stillings allegedly told Schulz was in fact *true*. Robinson did have a record of attendance and conduct issues.

Schulz. (Tr. 368.) Finally, given Robinson’s past attendance and conduct issues, the fact that Schulz stressed those issues in the October 13 meeting is entirely understandable and certainly not evidence of unlawful retaliation.<sup>14</sup>

As the Board has made clear: “Mere suspicion of unlawful motivation for the [transfers] is not sufficient to constitute substantial evidence that the [transfers] resulted from improper motives.” Neptco, Inc., 346 NLRB 18, 19 (2005); see also Lasell Junior College, 230 NLRB 1076, 1076 (1977) (“Mere suspicion cannot substitute for proof of an unfair labor practice.”) Suspicion and innuendo are all that the General Counsel has; Schulz affirmatively denies that she and Stillings discussed anything other than Robinson’s attendance and performance issues. (Tr. 714-15.) As the Board explained in Shelby Liquors, 208 NLRB 859 (1974)

[W]hether or not Respondent’s reasons for the discharge “ring true,” the absence of affirmative evidence of antiunion hostility and discriminatory motivation compels the finding that a violation of Section 8(a)(3) has not been established. In the absence of any union animus and discriminatory motivation, we need not determine whether Respondent had good cause, bad cause, or no cause at all for discharging Appelbaum.

Id. at 859; see also NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956) (“Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.”); Gruma Corp., 350 NLRB 336 (2007) (holding that the General Counsel did not establish knowledge when the manager had no knowledge of the protected activity at the time he decided to suspend

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<sup>14</sup> In fact, given the nature of the work performed in the ICU, Schulz would have been remiss not to stress the importance of attendance, attitude, and teamwork, all of which are part of the standard “meet-and-greet” form used by Schulz in all such meetings. (Tr. 716-17; R. Ex. 41.)

and then discharge the employee). Here, the ALJ's decision is based entirely on inference and speculation and must be reversed.

**VIII. EXCEPTION 34: THE ALJ ERRED BY FINDING THAT THE UNION PRESENTED VIABLE EVIDENCE OF A PAST PRACTICE THAT WORK ASSIGNMENTS WERE POSTED AND AWARDED ON THE BASIS OF SENIORITY.**

The ALJ erroneously concluded that the General Counsel presented "viable evidence" of an established "past practice" in support of its Section 8(a)(5) claims. (ALJ-JD 24.) Specifically, the ALJ noted that the Union had adduced testimony that a practice existed whereby "managers often told employees the work assignment that was associated with a new job posting." (ALJ-JD 24.) This finding is contrary established Board law.

To prove the existence of a past practice, General Counsel must establish that the activity in question occurs with sufficient "regularity and frequency" during an "extended period of time" such that it "would reasonably be expected to continue." Philadelphia Coca-Cola Bottling Co., 340 NLRB 349, 353 (2003), enf'd, 112 Fed. App'x 65 (D.C. Cir. 2004); Palm Beach Metro Transportation, LLC, 357 NLRB No. 26, slip op. at 4-5 (2011); Southern New England Telephone Co., 356 NLRB No. 62 at p. 8 (2010); see also National Steel & Shipbuilding Co., 348 NLRB 320, 323 (2006), enf'd 256 Fed. App'x 360 (D.C. Cir. 2007) ("When it is alleged that an employer has unilaterally changed terms and conditions that constitute a past practice, the General Counsel must establish the existence of the past practice."); Exxon Shipping Co., 291 NLRB at 492-93 (holding that General Counsel failed to meet its burden of establishing the existence of a past practice); Whirlpool Corp., 281 NLRB 17, 26 (1986) (dismissing complaint alleging an unlawful unilateral change because the General Counsel did not meet its burden of demonstrating "an established past practice or understanding"). Unless the General Counsel first

establishes that such a practice existed, it cannot prove that there was any unlawful unilateral change.

Here, contrary to the ALJ's finding, there is no evidence sufficient to establish a past practice that EVS managers or supervisors would "promise" applicants a particular work assignment when they applied for a job posting with sufficient regularity to establish a past practice. To the contrary, both Stillings and Bauer testified that prior to and after Crothall, inquiring applicants were *not promised or assured of receiving a specific work assignment*, and employees were given work assignments only *after* being awarded the position. (Tr. 166, 260-61, 415, 520, 759-60.) Current EVS employees, including Rick Caskey and Lizzie Johnson, confirmed this practice. (Tr. 215, 415.) In addition, as the ALJ acknowledged, there is no evidence that Mercy ever included work assignment information in job postings. (ALJ-JD 24; see also Tr. 166, 260-61, 415, 520; GC Exs. 11, 29, 32; R. Ex. 8.) Whether posted manually or electronically on the AKN, consistent with the provisions of Article 18(A), EVA postings have included only information about the available classification, FTE and shift. (Id.)

Because the General Counsel failed to adduce "viable evidence" that a past practice existed requiring Respondent to post and fill work assignments by seniority, to the extent any 8(a)(5) claims are not deferred, they must be dismissed in their entirety.

**ARGUMENT**  
**(FACTUAL CROSS-EXCEPTIONS)**

**IX. CROSS-EXCEPTIONS 12, 15, 16, 22, 23, 24, 25, 26, 27, 28, 29, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53: THE ALJ ERRED BY CREDITING THE TESTIMONY OF ROBINSON OVER ALL OTHER WITNESSES AND CONTRARY DOCUMENTARY EVIDENCE.**

The ALJ's conclusions regarding Respondent's violations of Section 8(a)(1) and Section 8(a)(3) depend *entirely* upon the credibility of Robinson. (ALJ-JD 9-12, 14-18.) Specifically,

the ALJ concluded that Respondent, by its agent, Schulz, violated Section 8(a)(1) and 8(a)(3) on October 13 by telling Robinson: (1) “[t]hat she (Schulz) was aware of Robinson’s attendance, discipline and behavior issues, and had some major concerns because Stillings (on whom Schulz relied) told her that Robinson was inappropriate, rude and disrespectful, and was not a team player” and (2) “[t]hat if Robinson came to the ICU, Schulz would monitor those issues (*i.e.*, Robinson’s attendance, discipline, and behavior) closely and go right to corrective action if Robinson was rude, disrespectful, inappropriate, absent or tardy.” (ALJ-JD 29-30.) Likewise, the ALJ concluded that Respondent violated Section 8(a)(1) when Stillings told Robinson, “Well, if you have questions, you can only ask for yourself and you need to come to my office and ask me.” (ALJ-JD 10 (citing Tr. 295-96).)

As set forth above, even if the ALJ’s credibility determinations are left undisturbed, the ALJ erred in finding Respondent to have violated Section 8(a)(1) in May 2015 and Section 8(a)(3) on October 13, 2015. See Sections V., VI., VII., *supra*. A fair review of the record reveals that the ALJ erred in crediting Robinson’s testimony to the exclusion of contrary testimony of witnesses and contrary documentary evidence, and as a result, the Section 8(a)(1) and 8(a)(3) allegations should have been dismissed in their entirety.

**A. THE ALJ’S CREDIBILITY DETERMINATIONS ARE NOT ENTITLED TO SPECIAL WEIGHT.**

The Board has long held that an ALJ is in no better position than the Board to assess inherent probabilities of substantive testimony, and the Board is not bound by credibility determinations based on such assessments. In re Betances Health Unit, Inc., 283 NLRB 369, 370 (1987) (reversing credibility determinations based “on [the ALJ’s] assessment of the inherent improbability that [a particular] statement . . . was made”); S&G Concrete Co., 274 NLRB 895, 897 (1985) (rejecting credibility determinations because “the Board is just as capable as the

hearing officer of evaluating the inherent probabilities of the testimony”). Credibility determinations are entitled to deference only when they are based on “demeanor or conduct at the hearing.” Kelco Roofing, 268 NLRB 456, 456 (1983).

In Kelco, the Board reversed the ALJ’s credibility determinations because they were “not based on his observation of the witnesses’ demeanor, but, rather, on his assessment of the inherent probability of the conflicting testimony.” *Id.* This subjective evaluation of the Kelco witnesses’ respective testimony was reflected in the following illustrative passage of the ALJ’s opinion (among others):

I credit Singfield. His version is more believable and logical. Particularly since Singfield had worked for Respondent in the past, it would have been natural for Kelly to ask where Singfield had been working recently. When Singfield told Kelly that he had been working at Sanders, a firm which Kelly knew to be union, it would be perfectly natural for Kelly to ask if Singfield was now a member. Kelly’s suggestion that he simply volunteered the observation that Respondent was still non-union is unbelievable. It stands isolated and out of context, whereas Singfield’s version is natural and logical. I credit Singfield that the conversation occurred as related by him.

Id. at 458.

The ALJ’s Decision herein is plagued by the same subjective evaluation of inherent probabilities as was found to be in error in Kelco. That is, all of the ALJ’s credibility determinations are based on his assessment of the relative *likelihood* of the substantive testimony itself; the credibility determinations are not based on the witnesses’ objective demeanor and conduct at the hearing. (See, e.g., ALJ-JD 10 n.13, 15 n.23.) Nor can the ALJ “simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word ‘demeanor.’” See, e.g., In re Permaneer Corp., 214 NLRB 367, 369 (1974); see also S&G Concrete Co., 274 NLRB 895, 897 (1985) (rejecting credibility determinations despite ALJ’s “introductory reference to demeanor” because “it [was] clear that

his decision to credit [one witness over another] was not based on demeanor but on ‘the circumstance of the layoff’”).

Demeanor is commonly understood to mean an individual’s “behavior toward others” or “outward manner.” See Black’s Law Dictionary 430 (6th ed. 1990) (“demeanor” embraces facts such as “the tone of voice in which a witness’ statement is made, the hesitation or readiness with which his answers are given, the look of a witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity.”). Proper assessments of “demeanor” are based on “observing the witnesses while they testified.” Standard Drywall Products, 91 NLRB 544, 545 (1950); see also El Rancho Market, 235 NLRB 468, 470 (rejecting credibility determinations where, “although the [ALJ] referred generally to the demeanor factor, it does not appear that specific credibility resolutions were based on his observations of the witnesses’ testimonial demeanor”). Proper assessments of demeanor are reflected in the following excerpts of ALJ opinions:

- “[The witness] did not appear to have the demeanor of a person prone to anger. . . . I was impressed by [the witness’s] favorable testimonial demeanor. He appeared to be doing his best to give an accurate and truthful account of what occurred. . . . All three . . . witnesses . . . exhibited impressive testimonial demeanor coupled with extremely thoughtful, detailed recollection of the events.” Dist. Council 711, Int’l Union of Painters & Allied Trades, 351 NLRB 1139, 1145-46 (2007).
- The ALJ decided to credit certain witnesses because “they appeared . . . to be more forthright and less evasive than [other] witnesses.” In contrast, the other witnesses were “vague and unclear,” “prone to excessively emphatic responses,” and “lack of recollection.” J.J. Cassone Bakery, Inc., 350 NLRB 86, n.4 (2007).
- “[Witness A] impressed me as an honest and candid witness despite his language difficulties,” whereas “[Witness B] was evasive, hostile and inconsistent in his testimony” and exhibited an “emotional demeanor on the witness stand” that would seem to “confirm [Witness A’s] testimonial description of [Witness B’s] conduct in this case.” Mutual Maintenance Service Co., Inc., 244 NLRB 211, 213 (1979) (emphasis added).

In stark contrast to these conduct-based demeanor assessments, the ALJ in this case mentions nothing about the witnesses' relative confidence, forthrightness, evasiveness, level of detail, eye contact, body language, or general attitude on the witness stand. Instead, just as in Kelco, the ALJ's Decision reflects that the "demeanor" assessments are based on the witnesses' substantive testimony rather than on their behavior at the hearing:<sup>15</sup>

- "Stillings testified that he merely repeated Hanuman's suggestion that Robinson speak with Stillings if she had any questions about the mother-baby center work assignments. (Tr. 803.) That testimony does not ring true because if Stillings heard Hanuman tell Robinson she should present her questions to Stillings (as Stillings asserted at Tr. 802), there was no need for Stillings to repeat that basic suggestion to Robinson after the meeting. By contrast, it is *more believable* that Stillings contacted Robinson after the meeting to tell her to stop asking questions in team huddle meetings about the new positions in the mother-baby birthing center." (ALJ-JD 10 n.13 (emphasis added).)
- "I did not credit certain portions of Schulz' and Sandberg's testimony about the meet and greet interview with Robinson and about what Stillings told Schulz about Robinson. First, both Schulz and Sandberg maintained that Schulz did not tell Robinson that Stillings described her as inappropriate, rude, disrespectful and not a team player. (Tr. 694, 719.) I do not find that testimony to be credible. Schulz admitted that Stillings told her Robinson had behavior issues in the EVS department (see Tr. 722-723). Given Schulz' expectations for ICU staff, I do not *believe* that Schulz would have accepted Stillings' report without asking for information about the nature of Robinson's alleged behavior issues. Instead, *it stands to reason* that Schulz requested more detail about Robinson's behavior, and then (per her usual practice) confronted Robinson with that information in the interview. (See R. Exh. 41 (Schulz' notes from Robinson's interview, indicating that Schulz raised the issue of Robinson having received "previous discussions regarding performance and behavior"). To the extent that Sandberg attempted to support Schulz in her denial, I did not credit that testimony because it was not consistent with the evidence, and because Sandberg was at the interview (her first for a CNA position) in a supporting role, and thus deferred to Schulz on these issues. (See Tr. 693, 703; see also R. Exh. 39 (Sandberg's interview notes, which omit the fact that Schulz spoke to Robinson about prior behavior issues).) . . . ." (ALJ-JD 16 n.24 (emphasis added).)

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<sup>15</sup> In fact, as set forth below, the credibility assessments by the ALJ with respect to the key events at issue in this case are based on conclusory speculation by the ALJ and an incomprehensible misreading of the relevant testimony and record evidence. See Section IX.B.-C, *infra*. In one such example, the ALJ found the fact that Robinson's testimony was to some extent corroborated by Wagner as grounds for finding Robinson's testimony credible. (ALJ-JD 12 n.11.) Yet, he refused to apply the same reasoning to Respondent's witnesses where, contrary to Robinson's testimony, Sandberg corroborated Schulz's testimony concerning the October 13 meet-and-greet. (ALJ-JD 16 n.24.)

Because the ALJ did no more than speculatively assess the *probability* of the witnesses' testimony in each of these incidents, the ALJ's findings are not entitled to deference. Betances Health, 283 NLRB at 370; S&G Concrete, 274 NLRB at 897; Kelco Roofing, 268 NLRB at 456. That is, the Board is equally equipped to review the relevant testimony and corresponding documentation and assess whether the testimony is "believable" or "reasonable."

Moreover, while parsing the likelihood and logic of Respondent's witnesses, the ALJ completely ignored inconsistencies in Robinson's testimony. For example, the ALJ did not address the fact that Robinson was untruthful when she gave a sworn statement to Region 18 investigators claiming that work assignment information was included in pre-Crothall postings. (Tr. 371-72); See Local 435, Laborers Int'l Union of N. Am., 198 NLRB 100, 103 (1972) ("credibility seriously impaired by retractions, contradictions, and inherent inconsistencies"). The ALJ also ignored Robinson's demonstrably false testimony regarding her conversation with Stillings about two of positions in the Mother-Baby Center: Req. No. 9736 (1.0 FTE Day shift EVA position) and Req. No. 9755 (1.0 FTE Evening shift EVA position). With regard to this conversation, Robinson initially testified that she told Stillings she was interested in the *Day shift position*, but declined after he told her it was stairs and elevators. (Tr. 298-99.) Later, Robinson testified that when she discussed the Evening shift position with Decker, she was upset because the *Evening shift position* as described to Decker by Stillings did not include stairs. (Tr. 301.) In other words, Robinson was mixing up what was discussed about the Day shift position (Req. No. 9736) and Evening shift position (Req. No. 9755). And, her purported interest in the Day Shift position is odd, given that Robinson testified that she did not want to work days and the record evidence demonstrates that she turned down and/or left positions to avoid working on the day shift. (Tr. 311, 791-93).

Finally, the ALJ erred by neglecting to address Robinson’s fantastical testimony regarding her surreptitious recordings and subsequent loss of her cellphone. Specifically, Robinson admitted that she made at least three recordings: (1) her telephone call with Recruiter Angie Dery on October 19 regarding the ICU position, (2) her meet-and-greet with OR Manager Dooher on October 20, and (3) a voicemail she left for Dery on October 22 regarding the OR position. (Tr. 363-64; R. Exs. 43b, 43c.) Yet, when asked why she had not produced the recording of her meet-and-greet meeting with Dooher, Robinson initially claimed that she “switched phones” or that her phone “broke” sometime between her conversation with Dery on October 19 and her meet-and-greet with Dooher on October 22. (Tr. 364.) This is illogical, and clearly a lie. How would Robinson have the October 19 recording and October 22 recording but not the October 20 recording? And, given her inability to credibly explain the circumstances, it is possible that Robinson made other recordings that she either destroyed or refused to produce in response to Mercy’s subpoena.<sup>16</sup>

In addition to ignoring problems with Robinson’s credibility, the ALJ glossed over and/or misconstrued several undisputed facts in the record that – if properly considered – would have compelled a different result. For example, as explained below, it is undisputed that contemporaneous notes from both Schulz and Sandberg make no mention of the alleged unlawful statements to Robinson. Yet, remarkably, the ALJ concludes that the notes actually undermine the credibility of Schulz and Sandberg, while, at the same time, do nothing to detract from the credibility of Robinson (or lack thereof). This kind of “selective analysis” is improper,

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<sup>16</sup> Given her less-than-credible testimony regarding the “loss” of her cellphone and potential spoliation of other recordings that may undermine her testimony, the ALJ erred by failing to grant Respondent’s request for an adverse inference. (Tr. 499.)

especially where the inferences drawn from ignoring certain evidence are contrary to direct, un rebutted testimony. See NLRB v. Cutting, Inc., 701 F.2d 659, 665-69 (7th Cir. 1983).

**B. OCTOBER 13 MEETING.**

In crediting Robinson's testimony regarding the October 13 meeting over the testimony of Schulz and Sandberg, the ALJ erred by ignoring numerous problems with Robinson's credibility and by misconstruing the relevant evidence.

First, the ALJ failed to consider the fact that Robinson's version of events was not supported by any of the attendees of the meeting. See TKC, 340 NLRB 923, 927 (2003) (Board upheld ALJ's refusal to credit witness's testimony because it was "self-serving and uncorroborated"). That is, Robinson's testimony is expressly contradicted by Schulz (the individual who made the comments) and Sandberg, who was also present.<sup>17</sup> R & L Transport, 224 NLRB 1126, 1127 (1976) (testimony unreliable when contradicted by other witnesses).

Second, the ALJ ignored the fact that Robinson's testimony is contradicted by documentary evidence. Specifically, Schulz's and Sandberg's meeting notes confirm that none of the alleged statements were made by Schulz. (R. Ex. 39, 41.) The ALJ seemingly acknowledged this fact, but yet, remarkably, rather than using this evidence as support for Schulz's and Sandberg's version of events, the ALJ misconstrued these notes as evidence that Schulz and Sandberg were not credible. (ALJ-JD 16 n.24 (quoting R. Ex. 41).) This was an error. See, e.g., JAG Healthcare, Inc., 195 LRRM 1149, at \*64 (2013) (testimony lacked credibility because it was contradicted by documentation); see also Iroquois Foundry Sys., Inc., 327 NLRB 652, 656 (1999) (documents, not testimony, are the best evidence).

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<sup>17</sup> Schulz's and Sandberg's consistent testimony is underscored by the fact that the ALJ issued a sequestration order at the outset of the hearing. (Tr. 10-12.)

Third, contrary to the record evidence, the ALJ concluded when Schulz contacted Haaland, Robinson's manager in the ICU, Haaland informed Schulz that "she did not know much about Robinson but had not had any specific performance problems with her." (ALJ-JD 15.) According to Haaland's testimony, she was contacted by several hiring managers about Robinson (including by Schulz), and she testified that she told them the same information:

Honestly, Angel had been working for me for a very short period of time at that point. I'm not sure if she was even complete with her orientation at that point. . . . I didn't know that much about her. I hadn't had any specific performance problems with her. I really didn't know that much, *just that I had understood that she had had some performance issues in her last department, and corrective action for attendance in that department*; but I hadn't even seen her file at that point in time.

(Tr. 678-79.)

Fourth, in addition to mischaracterizing Haaland's testimony, the ALJ erred by discrediting Schulz's testimony because of perceived, nonexistent inconsistencies between her testimony and Haaland's testimony. (ALJ-JD 15, n.15.) Specifically, the ALJ discounted Schulz's testimony that Haaland, Robinson's manager in the ICU, informed her (Schulz) that Robinson: "(a) had a more recent attendance occurrence and would be receive a Level 2 verbal warning; and (b) had some issues with attitude (while in the Family Care Unit) that led to a conversation; and (c) has some disciplinary issues while she worked in the EVS department." (ALJ-JD 15 n.15.) According to the ALJ, "Haaland did not corroborate *any* of these statements." (*Id.* (emphasis added).) This was an error. As noted above, Haaland testified that she told hiring managers (including Schulz), that she "understood that [Robinson] had had some performance issues in her last department, and corrective action for attendance in that department." (Tr. 678-79.) This testimony is entirely consistent with Schulz's testimony regarding her conversation with Haaland. (Tr. 714.) Although Haaland did not specifically

mention the Level 2 discipline in her conversation with hiring managers (including Schulz), Haaland did testify that she gave Robinson a Level 2 discipline for attendance. (Tr. 676-77.) In addition, contrary to the ALJ's finding, Schulz did not testify that Haaland told her that Robinson "had some issues with attitude (while in the Family Care Unit) that led to a conversation." (ALJ-JD 15, n.15.) Instead, Schulz testified that Haaland "said that there had been some issues with attitude and there had been a conversation about attitude about her schedule *or something with the schedule.*" (Tr. 714 (emphasis added).) Again, this is not inconsistent with Haaland's testimony. Haaland testified that she recalled Robinson being upset about the Level 2 discipline and even sending Haaland an email complaining about her schedule and the ratio for which she was scheduled for days versus evenings. (Tr. 676.)

Fifth, the ALJ also failed to consider the fact that Robinson's current version of events was inconsistent with her contemporaneously-recorded statement to recruiter Angie Dery. HCA/Portsmouth Regional Hospital, 316 NLRB 919, 922 (1995) (affirming ALJ order which credited testimony of witness whose version of events was supported by "contemporaneous records"). Specifically, in her recorded telephone conversation, Robinson stated:

I ended up having to defend myself through that interview and um a lot of stuff happened in that interview that *was just downright disrespectful and inappropriate* and needless to say I have actually . . . taken action because of that interview process . . . .

(R. Ex. 43c (emphasis added).) That is, Robinson characterized the *interview* as "disrespectful" and "inappropriate." Robinson never stated that she was *called* "disrespectful" and "inappropriate," and never stated that she was threatened as a result of any alleged protected action of speaking up or asking questions while working in the EVS Department. (Id.)

Sixth, the ALJ did not address the fact that Robinson's version of events is illogical. For example, Robinson testified that Schulz told her during her interview that she was told by

Stillings in a nurse management meeting that Robinson was “inappropriate, disrespectful, rude, and not a team player.” (Tr. 368.) Robinson offered no explanation as to why Stillings would be attending a nurse management meeting and Schulz denied learning this information. (Tr. 722-23.) It is even more implausible that Stillings, who gave Robinson her requested work assignment in early June and, later, honored her request to remain a casual employee, would months later torpedo her application for a Nursing Assistant position in another department after she was already working as a Nursing Assistant in the Family Care Unit.<sup>18</sup> While the ALJ acknowledged this fact, he ignored it because he reasoned that it is “plausible” that Stillings had different conversations with the managers of the Family Care Unit (Haaland), the ICU (Schulz), and the OR (Dooher). But, this “possibility” was affirmatively contradicted by the testimony of **both** Stillings and Schulz. (Tr. 694-95, 719.) The ALJ’s finding is also entirely speculative and an inappropriate evasion of the record evidence.

Seventh, the ALJ also ignored the fact that although Robinson immediately reported the alleged events on October 13 to the Union, the Union did not file a grievance or take the position that Robinson was treated improperly. Given the Union’s admitted position of pursuing even the “stupidest” grievances against Mercy, (R. Ex. 13), one can only conclude that Robinson’s contemporaneous complaints to Moore did not include evidence of unfair labor practices.<sup>19</sup>

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<sup>18</sup> There is also no evidence that Stillings made any disparaging remarks to Michelle Haaland when she contacted him in July 2015 regarding Robinson’s application for a Nursing Assistant position in the Family Care Unit. (Tr. 675.) Indeed, Robinson interviewed for, was offered, and accepted the position. (Tr. 676.) The ALJ noted this evidence, but brushed it aside, stating: “Respondent’s argument, however, presumes that I must find that Stillings took every opportunity to act on whatever animus he held towards Robinson.” (ALJ-JD 15 n.23.) However, the ALJ’s rejection of this evidence as not relevant to the question of whether Stillings made animus-motivated disparaging statements two months later to Schulz is illogical and inconsistent with Board precedent. See, e.g., Thom Brown Shoes, Inc., 257 NLRB 264, 268 (1981) (protected conduct by discharged employee months before too remote).

<sup>19</sup> Contrary to Union President Jamie Gulley’s testimony that the Union chose to not file a grievance and rather filed the instant charge, the Union did not file the charge or include the allegations in its

Eighth, the ALJ ignored Robinson’s testimony that she believed Crothall and others were “out to get her.” (Tr. 351.) Indeed, after her interview with her current manager, Dave Doohar, Robinson alleged that he was retaliating against her because he told her that the Nursing Assistant position required a CNA certification but the position did not perform enough “certified work” to keep the certification. (Tr. 366-67; R. Exs. 14, 43b, 43c.) This revelation of Robinson’s paranoia is important, as it demonstrates she inferred bad intent to any statement she did not like or understand. That tendency necessarily reflects poorly on her credibility.

In sum, the ALJ ignored substantial evidence undermining Robinson’s credibility with respect to the October 13 meeting and discounted or ignored evidence that confirmed Respondent’s version of events. When the testimony and documentary evidence is properly weighed, neither the Section 8(a)(1) nor the 8(a)(3) claims can be sustained. Accordingly, the ALJ erred in finding merit to these claims and the Board should dismiss each of these claims.

**C. STILLINGS NEVER TOLD ROBINSON SHE WAS NOT ALLOWED TO ASK QUESTIONS OF SUPERVISORS.**

Based solely on Robinson’s testimony (and notwithstanding Stillings’ unequivocal denial and corroborating evidence) the ALJ found that Stillings told Robinson, “if you have questions, you can only ask for yourself and you need to come to my office and ask me.” (ALJ-JD 10.) Instead of the statement alleged by Robinson, Stillings testified that he spoke to Robinson after a huddle and suggested that she address questions about open assignments to him, rather than Hanuman. (Tr. 802-03.) In rejecting Stillings’ account of the exchange, the ALJ reasoned that Stillings’ testimony did not “ring true” because he was simply reiterating what Hanuman told

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outstanding charge in 18-CA-155443. (Tr. Tr. 248-49, 369; R. Ex. 14.) Rather, Ms. Robinson filed the charge as an individual.

Robinson – that she should address her questions to Stillings. (ALJ-JD 10 n.13.) This was an error.

As an initial matter, Robinson’s testimony regarding this (or any other matter) should not be credited. See Section XI.A.-B., *supra*. Moreover, the record reflects that Robinson was prone to construe otherwise innocuous statements as persecution. For example, Robinson construed OR Manager Dave Dooher’s comments regarding the CNA certification were somehow retaliatory, (Tr. 366-67), and she admitted that she believed Crothall was “out to get her.” (Tr. 351.) Thus, rather than an unlawful threat, it is more likely that Robinson simply misconstrued or misunderstood Stillings’ suggestion that she bring questions about the Mother-Baby positions to him.

Robinson’s testimony regarding Stillings’ statement also does not square with the testimony from other EVS employees (including Robinson herself) that employees frequently asked questions during huddle meetings. (Tr. 227, 288, 443.) The ALJ himself noted that “team huddle meetings generally last for 5-10 minutes, and . . . *[e]mployees may ask questions in team huddle meetings.*” (ALJ-JD 9 (emphasis added).)

In addition, contrary to the ALJ’s reasoning, the fact that Stillings simply restated Hanuman’s directive does not make Stillings testimony less “believable.” As discussed above, see Section IX.A., there is no dispute that, at the time of this conversation, Stillings was unsure of what the work assignments would look like in the under-construction Mother-Baby Center, and given Hanuman’s inexperience it made sense for Stillings to have employee questions directed to him.

In sum, there is no credible evidence that Stillings made the statement alleged by Robinson. Instead, a fair review of the relevant testimony reveals that Stillings simply told

Robinson that she should direct questions about work assignments to him (rather than the newly-hired manager) because the new manager was not knowledgeable about the assignments. Because the statement alleged by Robinson is the sole basis for the 8(a)(1) violation, the Board should amend the ALJ's findings and find that Paragraph 5(b) of the Complaint is without merit and must be dismissed.

**X. CROSS-EXCEPTIONS 14, 17, 18, 19, 20, 21: THE ALJ ERRED BY MAKING FACTUAL FINDINGS THAT ARE CONTRARY TO THE RECORD EVIDENCE.**

As part of his decision, the ALJ made several factual errors in his attempt to characterize the evidence and series of events.

First, the ALJ found that “[i]n late May 2015, Stillings notified Decker that she was the senior applicant for the evening position, and offered Decker the opportunity to take a ‘PM Turndown’ and ‘public areas’ work assignment in the EVS department (instead of a work assignment doing discharges).” (ALJ-JD 10.) However, the evidence reveals that “PM Turndown” and “Public Areas” were not work assignments. Instead, these were discrete tasks or parts of work assignments. (Tr. 118-19, 225, 434; R. Exs. 46-49.)

Second, the ALJ erroneously described how, following the rebid, Robinson came to perform the 2Heart work assignment. (ALJ-JD 11-12 n.15-16.) A fair review of the relevant record reveals that, after Marichu Harris, a 1.0 Evening Shift employee, asked for and was assigned the Project Worker II assignment,<sup>20</sup> the assignment she selected in the post-arbitration rebid, 2Heart, was unassigned. (Tr. 785-98.) Angel Robinson, another 1.0 Evening Shift employee, asked Stillings if she could perform the cleaning tasks in 2Heart, and was given that assignment. (*Id.*) Union witnesses (Robinson and Wagner) initially asserted that Stillings gave the 2Heart assignment to Wagner on a permanent basis in early June, prior to giving it to Robinson.

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<sup>20</sup> See Section XI. *infra*, for discussion regarding the Project Worker II assignment.

(Tr. 304-07, 420.) However, the far more credible evidence demonstrates that consistent with well-established department practice Wagner (who held a Relief assignment at the time) was given the 2Heart assignment on an interim basis to fill in for the incumbent (Marichu Harris) while she was on vacation. The interim nature of Wagner's 2Heart assignment is further demonstrated by the fact that she only worked the assignment one day (June 15, 2015). It was worked by another Relief employee (Mary Philp) the next day, and Robinson took it over on a permanent basis on June 16, 2015. (Tr. 421-22, 795-98; R. Ex. 50.)

Third, the ALJ erroneously found that "Johnson requested two different work assignments on the day shift," but "Respondent . . . gave the work assignments to employees who had less seniority than Johnson." (ALJ-JD 12.) This finding was in error and resulted from the ALJ conflating a "position" (*i.e.*, FTE, shift, and weekend) with a "work assignment" (*i.e.*, the tasks performed by the employee on a daily basis). In this case, Johnson was already a 1.0 FTE day shift employee. (Tr. 410.) The two positions (not work assignments) were both 1.0 FTE day shift positions – *i.e.*, the same position Johnson already had. (Tr. 411.) Thus, the two 1.0 FTE day shift positions (again, not work assignments) were given to two employees who were currently .5 FTE employees. (Tr. 411.)

Fourth, the ALJ erroneously concluded that "Crothall proposed to: . . . change some EVS employee duties to better fit the Crothall model." (ALJ-JD 4.) This finding is contrary to the record evidence because there is no "Crothall model." Crothall did not alter or adjust the nature of the work being performed by EVS employees. Both prior to and after Crothall took over management of the EVS at Mercy, discrete work assignments have been delineated in a set of Job Duty Lists. (Tr. 121; GC Ex. 1(u) (Giboney Aff. ¶ 3).) Crothall reviewed and modified work assignments to enhance efficiency and balance the amount of work done by employees

with different assignments, but did not change the actual work performed. (Tr. 286, 771, 853.) The actual work performed by EVAs in those areas has always been essentially the same. (Tr. 54, 649, 853.) The EVAs all clean the various areas of the Hospital using the same cleaning products and equipment. (Tr. 54, 649, 853.)

**XI. CROSS-EXCEPTIONS 32, 33: THE ALJ ERRED BY FINDING THAT THE PARTIES OTHERWISE GOOD WORKING RELATIONSHIP HAS BROKEN DOWN AS TO THE ALLEGATIONS IN CASE 18-CA-155443.**

In his opinion, the ALJ found that, “apart from the dispute in this case,” the parties have a “long and productive bargaining relationship” and “generally have a good working relationship that often allows them to resolve disputes amicably.” (ALJ-JD 21.) The qualification interposed by the ALJ was an error because the parties “good working relationship” has continued even during the current dispute.

Specifically, the parties held Step 1 and Step 2 meetings regarding the Union’s June 9, 2015 grievance (“June 9 Grievance”). In fact, during this time, Mercy was made aware of a second (unfiled) grievance, dated June 23, 2015, which objected to Stillings giving the full-time Project Worker II assignment to Harris without first posting it for bid by seniority. (Tr. 48, 81-83, 168-69; GC Ex. 9.)<sup>21</sup> Respondent’s investigation of the complained of circumstances revealed a contract administration oversight by Respondent and the Union related to Stillings’ assignment of the Project Worker II work assignment. (Tr. 619-20.) Specifically, in Appendix C of the CBA, the parties agreed to post permanent Project Worker assignments and award them

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<sup>21</sup> Moore admitted at the hearing that the grievance was not actually filed by the Union. (Tr. 257.) Moore claimed the Union chose not to file the grievance because it believed it would be futile to do so, presumably because Respondent denied the June 9 Grievance. (*Id.*) Whether that explanation is real or completely made up, which seems likely, it is absurd as a matter of law. See Local 435, Laborers Int’l Union of N. Am., 198 NLRB at 103 (1972) (“[C]redibility seriously impaired by retractions, contradictions, and inherent inconsistencies”). Simply put, a contractual grievance procedure anticipating binding arbitration cannot be deemed “broken” merely because one party to the contract denied a grievance in good faith at Step 1 of the grievance procedure.

on the basis of seniority. (GC Ex. 2 at 111.) In mid-October, Mercy informed Moore of the oversight and proposed that the parties agree to post and fill the position as required under Appendix C. (Tr. 81-83, 619-20.) The Union agreed that the Project Worker II assignment should be posted, but wanted to wait until the instant litigation is completed. (Id.) Thereafter, Mercy went ahead and posted the Project Worker II assignment as required by Appendix C, and awarded it to the most senior bidder. (Tr. 668.)

With respect to the June 9 Grievance, the undisputed record shows that Union and Respondent, through their respective outside counsel, continued to discuss resolution of the matter in a series of phone calls running from late July 2015 through late October. (Tr. 622; GC Ex. 1(u) (Francis Aff. ¶ 16).) Eventually, after Region 18 decided to issue Complaint, Union counsel notified Respondent's counsel that the Union was no longer interested in pursuing the June 9 Grievance to arbitration. However, the Union has not withdrawn the grievance. (GC Ex. 1(u) (Hauge Aff. ¶ 2).)

Moreover, from January 1, 2013 to December 2015, **83** grievances were filed by the Union and/or members of the bargaining unit at Mercy, including **17** grievances filed since May 1, 2015. (GC Ex. 1(u) (Francis Aff. ¶ 16).) **Twenty-seven** of those 83 grievances were settled by the parties; **21** were appealed to arbitration by the SEIU, and 1 was arbitrated. (Id.) Of those 21, **6** were appealed to arbitration after the Union's June 9 Grievance was filed, including the June 9 Grievance itself, which was appealed to arbitration on September 2, and a discharge grievance filed on behalf of a Mercy employee that was appealed to arbitration on December 2, 2015. (Id.)

Thus, the undisputed record reveals that there is no fissure in the parties' relationship even as to the June 9 Grievance – at least not before one was manufactured by Region 18 and the General Counsel.

## CONCLUSION

For the foregoing reasons, Mercy respectfully submits that the record evidence and applicable law establish that the ALJ erred by refusing to defer the remaining Section 8(a)(1) allegation in Case 18-CA-155443. Accordingly, Mercy requests that the Board grant its Cross-Exceptions and issue an Order requiring deferring this allegation (paragraph 5(b) of the Complaint) to the parties' grievance arbitration process pursuant to Babcock & Wilcox, 361 NLRB No. 132 (Dec. 15, 2014).

With respect to the allegations in Case 18-CA-163045, Mercy respectfully submits that the record evidence and applicable law establish that it did not violate Section 8(a)(3) or (1) when Robinson met with Schulz and Sandberg regarding the ICU position and subsequently offered her the position. Accordingly, Mercy requests that the Board issue an Order dismissing the remainder of the Complaint in its entirety and with prejudice.

Dated: July 1, 2016.

FELHABER LARSON

*/s/ John C. Hauge*

John C. Hauge  
Grant T. Collins  
220 South Sixth Street, Suite 2200  
Minneapolis, Minnesota 55402  
(612) 339-6321

ATTORNEYS FOR RESPONDENT MERCY  
HOSPITAL

**STATEMENT OF SERVICE**

This is to certify that, on July 1, 2016, I caused the following documents to be filed electronically with the National Labor Relations Board E-Filing System:

**Respondent Mercy Hospital's  
Brief In Support Of Its Cross-Exceptions**

I further certify that on the same date, I served these documents upon the following party representatives via e-mail:

Deborah Prokopf, Esq.  
Cummins & Cummins, LLP  
1245 International Centre  
920 Second Avenue South  
Minneapolis, MN 55402  
Email: deborah@cummins-law.com

Justin Cummins, Esq.  
Cummins & Cummins, LLP  
1245 International Centre  
920 Second Avenue South  
Minneapolis, MN 55402  
Email: justin@cummins-law.com

Jamie Gulley, President  
SEIU Healthcare Minnesota  
345 Randolph Avenue, Suite 100  
Saint Paul, MN 55102  
Email: Jamie.Gulley@seiuhealthcaremn.org

Ms. Rachael Simon-Miller  
Field Attorney  
National Labor Relations Board – Region 18  
Federal Office Building  
212 3rd Avenue S, Suite 200  
Minneapolis, MN 55401  
E-mail: rachael.simon-miller@nlrb.gov

Sandra Francis  
Allina Health Systems, Labor Relations  
Mail Route 10705  
2925 Chicago Avenue  
Minneapolis, MN 55440  
E-mail: Sandra.Francis@allina.com

Ms. Kaitlin Kelly  
Field Attorney  
National Labor Relations Board – Region 18  
Federal Office Building  
212 3rd Avenue S, Suite 200  
Minneapolis, MN 55401  
E-mail: kaitlin.kelly@nlrb.gov

Angel Marie Robinson  
7163 – 207th Ave NW  
Elk River, MN 55330-8451.  
Email: Angelrobinson1979@gmail.com

Marlin O. Osthus  
Regional Director  
National Labor Relations Board-Region 18  
Federal Office Building  
212 3rd Avenue S, Suite 200  
Minneapolis, MN 55401  
Email: Marlin.Osthus@nlrb.gov

Mr. Ashok C. Bokde  
Supervisory Attorney  
National Labor Relations Board – Region 18  
Federal Office Building  
212 3rd Avenue S, Suite 200  
Minneapolis, MN 55401  
E-mail: Ashok.Bokde@nlrb.gov

Dated: July 1, 2016.

FELHABER LARSON

*/s/ Grant T. Collins*

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John C. Hauge  
Grant T. Collins  
220 South Sixth Street, Suite 2200  
Minneapolis, Minnesota 55402  
(612) 339-6321

ATTORNEYS FOR RESPONDENT MERCY  
HOSPITAL