

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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MERCY HOSPITAL

and

SERVICE EMPLOYEES INTERNATIONAL UNION  
HEALTHCARE MINNESOTA

Case 18-CA-155443

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MERCY HOSPITAL

and

ANGEL MARIE ROBINSON, AN INDIVIDUAL

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Case 18-CA-163045

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GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S CROSS-EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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## I. PROCEDURAL BACKGROUND

These related cases were heard by Administrative Law Judge Geoffrey Carter (“the judge”) in Minneapolis, Minnesota on February 9, 10, 11, and 12, 2016, on charges filed by SEIU Healthcare Minnesota (“the Union”) against Mercy Hospital (“Respondent”). The judge concluded, in a decision issued May 6, 2016, that Respondent violated Section 8(a)(1) and (3) of the Act, while dismissing other Section 8(a)(1) allegations. The judge, however, deferred the Section 8(a)(5) allegations in Case 18-CA-155443 to the parties’ grievance arbitration process.

General Counsel filed timely Exceptions and a Brief in Support of Exceptions on June 3, 2016, which are limited to the judge’s decision regarding the deferral of the Section 8(a)(5) allegations. On July 1, 2016 Respondent filed an Answering Brief to the General Counsel’s Exceptions and Cross-Exceptions to the Decision of the Administrative Law Judge, along with a Brief in Support.<sup>1</sup> With this Answering Brief, General Counsel requests that the Board reject Respondent’s Cross-Exceptions in their entirety.

## II. ARGUMENT

### A. Respondent’s Procedural Cross-Exceptions Should be Dismissed

#### 1. *Respondent’s Claim That it was Denied Due Process*

Respondent asserts that the Regional Director denied Respondent due process of law by including paragraphs in the Consolidated Complaint that “contain vague and conclusory allegations that fail to satisfy due process requirements.” (CEX at 5.) Specifically, Respondent

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<sup>1</sup> Herein referred to as “Cross-Exceptions.” Throughout this Answering Brief, the following references will be used in citations: “CEX at \_\_\_” for the Respondent’s Brief in Support of Cross-Exceptions; “GC Brief at \_\_\_” for the General Counsel’s Brief in Support of Exceptions; “Reply at \_\_\_” for the General Counsel’s Reply Brief; “R. Brief” for Respondent’s Answering Brief; “JD” for the Administrative Law Judge’s Decision; and “Exh.” to refer to the parties’ trial exhibits.

points to Consolidated Complaint paragraphs 5 and 11, which include various 8(a)(1) and (5) allegations.<sup>2</sup>

As Respondent admits in its brief, it already raised these same objections in the form of a Motion for a Bill of Particulars, filed on November 5, 2015. (GC Exh. 1(k).) Deputy Chief Administrative Law Judge Amchan ruled on Respondent's Motion on November 20, 2015, largely denying the Motion, except as follows: "Respondent also seeks to require the General Counsel to identify the new positions it allegedly created in the mother-baby birthing center and those vacant positions Respondent alleged failed to unilaterally post. In this instance, I find the complaint is not sufficiently clear and GRANT the motion. The General Counsel is thus ordered to specify what new positions were allegedly unilaterally created in the mother-baby birthing center and which vacant positions Respondent unilaterally failed to post." (GC Exh. 1(o).)

Pursuant to Judge Amchan's Order, the General Counsel promptly submitted to Respondent additional information regarding these allegations on December 1, 2015. (R. Exh. 24.) In addition, when the General Counsel discovered additional evidence during trial preparation, General Counsel sent supplemental information to Respondent again on February 1, 2016. (R. Exh. 25.)

Though Respondent now claims that these clarifications were not enough to put it on notice of the allegations, this suggestion is belied by the arguments made in Respondent's lengthy Memorandum of Law submitted on December 23, 2015 in support of its Motion to Sever and Defer. (GC Exh. 1(u).) Many of the arguments that Respondent sets forth in that Memorandum are repeated in Respondent's post-trial filings. Indeed, it seems that the Respondent was well-informed of the complaint allegations as of December 2015, as it appears

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<sup>2</sup> At various places in the Respondent's Brief in Support of Cross-Exceptions, it appears that Respondent interchanges Consolidated Complaint paragraphs 4 and 5.

the addition of the trial record did not change Respondent's defense. Respondent's due process cross-exceptions are without merit and should be dismissed.<sup>3</sup>

2. *The Allegations in the Consolidated Complaint are Not Time-Barred*

Respondent next argues that the Consolidated Complaint incorporated allegations barred by Section 10(b) of the Act. (CEX at 9.) While the General Counsel has already addressed these assertions in its Reply to Respondent's Answering Brief (Reply at 6-8), it is worth emphasizing that these allegations are clearly not time-barred for three reasons. First, the Union had no notice of the changes that Respondent made in work assignments without posting or assigning them on the basis of seniority prior to the commencement of the 10(b) period. Respondent admits that these change were relatively rare and even Respondent admits that it did not notify the Union of all of the changes, and, with one exception, the Union was not aware of those changes.<sup>4</sup>

According to well-settled Board law, where there is no "clear and unequivocal notice" of a violation of the Act, there is no Section 10(b) bar. See, e.g., *Leach Corp.*, 312 NLRB 990, 991 (1993). Second, contrary to the Respondent's assertions, the Union did challenge Respondent's conduct in the form of the September 2013 grievance, which was pending for approximately eighteen months before the grievance was resolved in the March 2015 arbitration award. (Tr. 38, 40; GC Exh. 3, 4.) Certainly the Union's grievance did not signify its assent to Respondent's conduct. Third, and finally, the conduct alleged as violative occurred after the May 2015 rebid,

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<sup>3</sup> Respondent argues that Judge Amchan abused his discretion by applying the wrong legal standard to deny Respondent's Motion to Sever and Defer Case 18-CA-155443. (CEX at 8.) Respondent's arguments in this regard have already been considered and rejected by the Board. Respondent's filed a Request for Special Permission to Appeal the Judge's Order on January 12, 2016. (GC Exh. 1(z).) The Board, in an Order issued on February 9, denied Respondent's request for special permission to appeal, finding that Respondent failed to establish that the judge abused his discretion in denying the motion.

<sup>4</sup> According to Stillings' own testimony, he gave out work assignments without posting them for bidding just four times in 2013 and 2014, while the Union's 2013 grievance was pending. (Tr. 781, 782, 783.) Stillings also testified that the Union was not notified of these four occurrences. (Tr. 838.) Even Respondent's own Answering Brief notes that the hospital notified the Union of changes only once - in December 2014. (R. Brief at 12.)

well within the Section 10(b) period. For these reasons, the Board should reject Respondent's claims that any of the complaint allegations are time-barred under the Act.

**B. Respondent's Legal Cross-Exceptions are Not Persuasive**

*1. The Section 8(a)(1) Allegation Concerning Stillings' Statement to Robinson Is Inextricably Intertwined with other Section 8(a)(1) and (3) Allegations and Should not be Deferred*

Respondent asserts that deferral is appropriate for the Section 8(a)(1) allegation in paragraph 5(b) of the Consolidated Complaint. (CEX at 13.) This complaint paragraph references the threat made by manager Charles Stillings to employee Angel Robinson, an 8(a)(3) discriminatee. Specifically, this paragraph alleges that Stillings threatened Robinson by telling her that she was not allowed to ask questions of supervisors in the presence of other employees at team huddle meetings. This threat is one piece of the animus evidence relied upon by the General Counsel and the judge in establishing that Robinson was ultimately discriminated against because of her attempts to enforce the contract or because of her protected activities. Thus, deferral of this allegation is inappropriate not only for the reasons stated by the judge, but also because this allegation is inextricably linked with the Section 8(a)(1) and (3) allegations in Case 18-CA-163045, for which deferral was not sought.<sup>5</sup> See *Windstream Corp*, 352 NLRB 44, fn. 1 (2008)(stating that the Board will decline deferral in cases where "an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought.")

The judge correctly concluded that Robinson engaged in protected activity by asking questions at team huddle meetings. (JD 30:18-20.) Shortly after that protected activity, and as alleged in complaint paragraph 5(b), Stillings tracked Robinson down and questioned her about

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<sup>5</sup> As enunciated in the General Counsel's Brief in Support of Exceptions, it is the position of the General Counsel that none of the allegations in case 18-CA-155443 should have been deferred.

her protected activity and told her that she could only ask questions for herself and only after coming to Stillings' office to do so. (JD 27:17-20.) This allegation is inextricably intertwined with the latter 8(a)(1) and (3) allegations surrounding Robinson's subsequent attempt to transfer to the ICU department. In fact, the judge makes this connection in his decision, where he notes, that "each of [Schulz'] statements put Robinson on notice that Robinson essentially would come to the ICU with a negative mark on her record based on Stillings' report," and "since Stillings' negative assessment of Robinson was based (at least in part) on Robinson's protected concerted and union activities during EVS department team huddle meetings, and since Schulz emphasized that she was relying on what she had been told by Stillings, Schulz' remarks to Robinson were unlawful." (JD 30:15-21.) For these reasons, the Section 8(a)(1) allegation in Consolidated Complaint paragraph 5(b) is not appropriate for deferral and Respondent's related cross-exceptions should be rejected.

*2. The Judge Properly Determined That Respondent Violated Section 8(a)(1) when Stillings Threatened Robinson that She Could Only Ask Questions For Herself and Only After Coming to Stillings' Office to Do So*

Respondent then asserts that the judge was incorrect in concluding that Stillings violated Section 8(a)(1) of the Act by limiting Angel Robinson's ability to speak in team huddle meetings. (CEX at 15.) The judge, according to Respondent, applied the wrong legal standard and ignored pertinent record evidence. Neither of Respondent's assertions is convincing and the Board should reject these cross-exceptions.

The Legal Standard:

In his decision, the judge enunciates the well-established test for evaluating whether an employer's statements or conduct violates Section 8(a)(1), which is to decide whether an employer's statements or conduct have a reasonable tendency to interfere with , restrain or

coerce union or protected activities. As the judge notes, the employer's subjective motive for its action is irrelevant. (JD 26:13-18.)

Respondent in its Cross-Exceptions argues that there is no violation of Section 8(a)(1) here because Stillings' statement does not contain a "threat of reprisal." (CEX at 15.) Respondent cites *Baker Concrete Construction*, 341 NLRB 598 (2004), where the Board found no Section 8(a)(1) violation where a supervisor told a unit employee to "stay away all these people; because if you no stay away these people, you have trouble." *Id.* at 598. Contrary to Respondent's representations, the Board in *Baker Concrete* did not rest its decision on whether the allegation was pled as a threat or not, but instead decided that statement was too vague in that it was not clear that "these people" were union officials or supporters, or that the Respondent would be the source of the "trouble." *Id.* at 598.

The rationales employed by the Board in *Baker* are inapplicable to the facts at hand, as Stillings' remarks to Angel Robinson contained no such ambiguity. As the judge properly found, Stillings and Robinson discussed the Mother-Baby Center jobs in a team huddle in late May 2015 and Robinson asked why those jobs were not included in the May 15 rebid. Stillings replied that they did not have to be included. (JD 26:27-30.) Then, when Robinson later asked supervisor Rudy Hanuman additional questions about the Mother-Baby Center jobs in another team huddle meeting, Stillings contacted Robinson and said, "I heard you were inquiring about the mother-baby jobs again in the huddle. I thought I already told you that those are the mother-baby jobs." When Robinson said that she and other employees wanted to know what the job was going to be before applying for it, Stillings responded by saying, "well, if you have questions, you can only ask for yourself and you need to come to my office and ask me." (JD 26:33-38.)

Applying the traditional Section 8(a)(1) test, the judge correctly concluded that Respondent violated the Act by telling Robinson that she could only ask questions for herself, and only in Stillings' office, noting that, by this statement, Respondent "attempted to set limits on Robinson's ability to ask questions about terms and conditions of employment not only for herself, but for other employees." (JD 27:19-21.) In so doing, the judge reasoned, "Stillings sent a message that Respondent did not welcome Robinson's attempts to discuss employee concerns at team huddle meetings, and unlawfully made a statement that had a reasonable tendency to interfere with, restrain, or coerce Robinson's union or protected activities. (JD 27:21-24.)

The Record Evidence:

Respondent next attempts to recast the facts of the instant case to create a scenario in which Stillings' statements would not coerce a reasonable employee. (CEX at 16-19.)

Respondent is unsuccessful in this endeavor.

At the outset, Respondent asserts that because the Mother-Baby Center was not yet completed,<sup>6</sup> and because Rudy Hanuman was a new supervisor, Stillings' statement to Robinson was not violative. In reality, these facts are totally irrelevant to the question of whether a reasonable employee would feel coerced by Stillings' statements. (CEX at 17.) There is no evidence that Stillings tied his comments to either of these facts. He did not, for example, say that Robinson should come and talk to him because the Mother-Baby Center wasn't open and

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<sup>6</sup> Contrary to Respondent's representations, the employee witnesses did not testify that Stillings had not been able to develop work assignments for the Mother-Baby Center because it was not yet open. (CEX at 17.) This is what Stillings told the employees—and what he testified to at trial—but it is apparently not true. In fact, Angel Robinson testified that at the time of the rebid, the EVS employees were cleaning the new Mother-Baby Center as they finished construction. (Tr. 294.) The record also shows that Stillings offered work assignments in the Mother-Baby Center to Rick Caskey, Elona Decker, and Karen Cullen in late May or early June 2015, just days after the rebid and weeks before the Mother-Baby Center would open. (Tr. 213, 218, 225.) In addition, Respondent's records indicate that Stillings knew of these assignments as early as March 31, 2015, when Stillings requested the new positions associated with those assignments (see req #9734, 9736, 9755. (GC Exh. 37, p. 23.)

Hanuman was inexperienced.<sup>7</sup> Instead, as the judge found, Stillings told Robinson that she could only ask questions on her own behalf, and only in his office.

Respondent then suggests that, because employees are generally free to ask questions in the team huddle meetings, a reasonable employee would not feel coerced by Stillings' statement essentially telling Robinson that she could not ask questions in the team huddle meetings. (CEX at 17.) To the contrary, by telling Robinson that she no longer has the right to ask questions of supervisors in team huddle meetings—a right which other employees have—Stillings' statement is *all the more coercive*, and indicates Stillings' clear animus against Robinson and her practice of asking questions about terms and conditions of employment during huddle meetings.

Respondent concludes by asserting that, when all of the facts are considered, Stillings' statement would not reasonably tend to coerce employees. Interestingly, Respondent cites *Webasto Sunroofs, Inc.*, 342 NLRB 1222 (2004) to support this proposition.<sup>8</sup> (CEX at 18.) Yet, upon closer examination, *Webasto Sunroofs* bolsters the view of the judge and the General Counsel. In *Webasto Sunroofs, Inc.*, the Board found unlawful an employer's policy provision entitled, "Accepting NO for an answer," which stated that "colleagues will not try to negotiate policies and decisions" and "colleagues will understand that 'no means no' and will drop issues even when they don't get the answer that they want." *Id.* at 1223. Concluding that the provision and the subsequent explanation of the provision to employees violated Section 8(a)(1), the Board

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<sup>7</sup> The judge credits Robinson's testimony regarding this conversation over Stillings'. (JD 10, fn. 13.)

<sup>8</sup> Respondent also cites *Deutsch Company*, 165 NLRB 140, 145 (1967). In that case, the Board affirmed a judge's conclusion that a letter sent to employees did not contain unlawful threats of reprisals. Apparently, the complaint in this case did not specifically point to the alleged unlawful statements, but only to a letter. The judge concluded that the only part of the letter that could support such a contention is the section stating, "for almost two years the Steelworkers union has been outside our gates. Now they have bamboozled several short-time misguided employees of Deutsch to act as their agents within our gates." The judge concludes that "it would require a rather strained construction to conclude that by the use of said word ["short-time"], Respondent intended to and did reasonably convey the impression that the employees to which it refereed would only be employed for a short time because of their union activities." *Id.* at 145. Again, this case does not apply to the instant facts, where Stillings' statement to Robinson was clear and explicit, and required no interpretation at all.

notes that “the Respondent’s prohibition on employees’ speaking as a group to management and questioning management policies would serve as a roadblock to classic concerted activity.” *Id.* at 1223.

Similarly, Stillings’ statement to Robinson served as a prohibition on her ability to ask questions about terms and conditions of employment in the presence of other employees, at the team huddle meetings. As in *Webasto Sunroofs*, Stillings’ reprimands serve as a roadblock to Robinson’s classic concerted activity. For the above-described reasons, Respondent’s Cross-Exceptions on this point are without merit and should be rejected.

3. *The Judge Correctly Found that Respondent Constructively Denied Robinson a Transfer in Violation of Section 8(a)(3)*

The judge properly found that Respondent constructively denied Robinson’s request to transfer to the ICU department, in violation of Section 8(a)(3) of the Act. In fact, the judge concluded that Respondent violated Section 8(a)(3) under either the Hobson’s Choice theory or the traditional constructive discharge theory.<sup>9</sup> In reaching this conclusion, the judge determined that Respondent, through ICU manager Schulz, issued a series of threats to Angel Robinson in the meet-and-greet interview because of Robinson’s protected or union activity. Through Schulz’s conduct at the meet-and-greet, the judge found that she “put Robinson on notice that Robinson would come to the ICU with a negative mark on her record based on Stillings’ report to Schulz, and as a result would face close monitoring and swift discipline by Schulz.” (JD 30: 16-19.)

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<sup>9</sup> The judge concluded that he would also find a violation under the traditional constructive discharge theory because Respondent “deliberately informed Robinson that she would face unbearable working conditions because of her history of engaging in protected concerted activities while in the EVS department. . . Respondent knew, or should have known, that the prospect of working under such adverse conditions would induce Robinson to decline the opportunity to transfer to the ICU.” (JD 31, fn. 33.)

Respondent asserts that the judge erred in finding that the hospital violated Section 8(a)(3) by subjecting Robinson to a Hobson's Choice because, according to Respondent, no Hobson's Choice can exist where the alleged unlawful conditions are only threatened and have not actually occurred. (CEX at 20.) Alternatively, Respondent argues there is no violation because Robinson would not have accepted the ICU position regardless of Schulz's alleged conduct. (CEX at 19.) Both of Respondent's arguments fail, however, and the judge's findings should be sustained for the reasons explained below.

The Legal Standard:

First, Respondent's analysis of the constructive discharge case law ignores the critical difference between scenario where an employee already has a job and decides to quit when faced with a Hobson's Choice, and the facts in the instant case, where the employee does not yet have the job and must decide whether to accept it. It makes sense that the Board will not find an unlawful constructive discharge where, as in *Central Casket*, a case cited by Respondent, an employee has a job and quits the job prematurely, before any Hobson's Choice or intolerable working conditions are actually imposed. 225 NLRB 362 (1974). Likewise, it stands to reason that the Board will not find that an employee actually faced a Hobson's Choice where, as in *Easter Seals*, another case cited by Respondent, "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. 345 NLRB 836, 839 (2005).

The facts of the instant case are readily distinguishable from those in *Central Casket* and *Easter Seals*. Employee Robinson did not yet have the ICU job but was forced to make a Hobson's Choice, as the judge found, "between accepting a transfer to the ICU (and thereby also accepting the adverse working conditions that Schulz threatened to impose), or declining the

transfer and working elsewhere in the hospital (but in so doing, foregoing her right to the transfer as the most senior applicant). (JD 30, fn. 30.) There is nothing premature about Robinson's decision to decline the transfer – at the time the job was offered she faced the Hobson's Choice.

Additionally, there is no doubt as to why Robinson turned down the transfer to ICU. Both Robinson's testimony at trial and the recording Robinson made of her phone call with Angie Dery show that she refused the job because she could never work for someone like that. (JD 30:6-9; Tr. 321; R. Exh. 43(c).) Thus, Respondent's claim that "*the undisputed record evidence* reveals that Robinson declined the position because she wanted the open, full-time OR position" is simply not supported by the record, was rejected by the judge, and should be dismissed by the Board. (CEX at 23; JD 31, fn. 32.)

#### The Record Evidence:

Respondent next argues that the judge erred in concluding that Respondent violated Section 8(a)(3) because he failed to identify any of Robinson's protected activity and, even assuming that protected activity occurred, that activity was too remote in time. (CEX at 28.) Respondent further asserts that there could be no Section 8(a)(3) violation because "there is no evidence that Schulz was aware of any protected activity by Robinson." (CEX at 30.) These arguments deserve short shrift by the Board.

The judge did, in fact, find that Robinson engaged in protected activity in the team huddle meetings. (JD 9:25-30; 10:15-16; 30:18-21, fn. 31;). Though the protected conduct occurred up to five months before the October 2015 meet-and-greet in the ICU department, the remoteness in time does not diminish the connection between Robinson's protected conduct and the 8(a)(3) violation. When the opportunity came for Stillings to pass along his unfavorable review of Robinson to Schulz (at the time Robinson was applying for the job in the ICU),

Stillings took that opportunity even though it was several months after the protected activity occurred. Additionally, this issue must be considered against the backdrop of Respondent's continuing refusal to post and award vacant work assignments, consistent with the contract, the arbitrator's award, and the past practice. Robinson's protected activity in the team huddles was to ask questions about Respondent's failures in this regard.

As to Respondent's claim that Schulz was not aware of the protected activity, the judge acknowledges this may be true, but "that possibility does not matter because Stillings was certainly aware that Robinson's conduct in the team huddle meetings was protected by the Act, and Schulz relied on Stillings when she decided to confront Robinson about her "behavior." (JD 31, fn. 31.) The judge found that Schulz's interview of Robinson was tainted by her reliance on Stillings to identify concerns about Robinson's transfer to the ICU. *Id.* For these reasons, Respondent's Cross-Exceptions concerning the Section 8(a)(3) violation should be dismissed.

#### *4. The Union's Past Practice Evidence is More Than Viable*

Respondent complains that the judge's conclusion that the General Counsel and the Union presented "viable evidence" of an established past practice is "contrary to established Board law." (CEX at 32.) Here, Respondent's rationale, including blatant mischaracterizations of the record evidence, should be rejected.

Several long-time EVS employees testified credibly about Respondent's past practice: all vacancies, including vacant work assignments, were posted for bidding and filled in seniority order. (Reply at 3-4; GC Brief at 10-12; Tr. 126, 282-83, 394, 416). Each time that an EVS employee left a job – for any reason – that job was posted on the department's bulletin board for

seven days and employees were allowed to bid on it.<sup>10</sup> (Tr. 125-126, 205, 281-282, 415-16.) In so doing, Respondent's past practice was to apply Articles 14(F) and 18 to all vacancies in the EVS department—including vacant work assignments—so that all vacancies were posted and awarded in seniority order.<sup>11</sup> (Tr. 126, 268, 282-83, 416.)

Moreover, the evidence shows that this practice occurred with such regularity that employees expected this past practice to continue after the May 2015 re-bid. After the rebid, EVS employees applied on the online Allina Knowledge Network ("AKN") thinking that they were applying for a different work assignment or job, and they were confused when Stillings told them that they were applying for positions, not assignments. (GC Exh. 59, 67.)

Given the above, not only is the General Counsel's past practice evidence "viable," it is essentially unrebutted by Respondent's witnesses. Respondent witnesses, including Stillings, Watson, and the recruiters, could not directly rebut General Counsel's evidence, as they testified that they had no knowledge of the past practice in the EVS department, explaining that they had not ever seen the pre-Crothall EVS job postings before and were unaware of how jobs or work assignments were posted and awarded within the EVS department prior to Crothall's arrival. (Tr. 542, 577, 643, 810; GC Exh. 11, 29.) Only Shirley Bauer, a former EVS supervisor, testified directly on the practice prior to Crothall's arrival and her testimony was uncorroborated by any Respondent witnesses, and is directly disputed by each of the employees who testified

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<sup>10</sup> During the time that Allina managed EVS, the paper job posting included lines where interested employees could sign their names. (Tr. 123, GC Exh. 11, 29, 32.) General Counsel does not contend that work assignments were listed on the face of job posting (GC Brief at 15-16; GC Exh. 11, 29, 32.) Instead, the General Counsel argues that work assignments were always associated with a vacancy. In other words, any time a job was posted, the employees knew the assignment that went with that vacancy and then bid on that vacancy in seniority order.

<sup>11</sup> Despite Respondent's attempts to distinguish positions from jobs or assignments, the record is replete with evidence that, in the EVS department, the terms job, assignment, position have been used interchangeably for years. (Tr. 56, 233, 374-76, 408-10, 447; U Exh. 12; GC Exh. 37, 55, 68.)

about this. (Tr. 755.) For these reasons, Respondent's cross-exceptions regarding the viability of the General Counsel's past practice evidence should be rejected.

### **C. Respondent's Factual Cross-Exceptions Should be Dismissed**

#### *1. The Judge's Credibility Determinations are Sound and Should not be Disturbed*

It is the Board's policy not to overrule a judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces the Board that they are incorrect. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 363 (3<sup>rd</sup> Cir. 1951). Here, the record evidence supports the judge's sound credibility determinations.

Respondent attempts to point out inconsistencies in Robinson's testimony, but comes up short. (CEX at 38.) For example, Respondent's suggestion that Robinson was "untruthful" in her affidavit to Region 18 by "claiming that work assignment information was included in pre-Crothall postings" is patently ridiculous. In the very same trial testimony cited by Respondent, one can see how Respondent's counsel is attempting to manufacture a "gotcha moment" regarding the job postings, yet Robinson explains, "I said that the assignments would state the FTE's, the shift..." (Tr. 371-72.) As noted in General Counsel's Reply Brief, it has never been the position of the witnesses, the Union, or the General Counsel that work assignments were included on the face of the postings. (Reply at 4.) As Robinson's testimony and the record evidence clearly shows, any discrepancies between the affidavit and the trial testimony reflects a *difference in terminology*, not an instance of Robinson lying under oath, as Respondent unfortunately insinuates.

Next, Respondent asserts that Robinson's testimony regarding her conversations with Stillings about the two open positions in the Mother-Baby Center is "demonstrably false" and that the judge ignored this fact in his decision. (CEX at 38.) Again, this is simply not the case, and Respondent's use of such strident language when referring to these facts borders on reckless.

Robinson testified credibly about this conversation with Stillings, and Robinson's version of events was bolstered by the testimony of EVS employee Elona Decker. (Tr.225, 298-99; JD 10:23-33; 11:1-5.) Though Stillings and Robinson may disagree regarding what was said in that conversation, this does not make Robinson's testimony demonstrably false. In fact, this is likely not the case, given the number of times that the judge found Robinson more credible than Stillings.

Finally, Respondent attempts to manufacture a smoking gun because Robinson could not produce the audio recording of the meet-and-greet interview with Dave Dooher. (CEX at 39.) Though Respondent implies that Robinson is deliberately hiding evidence, in reality, the fact that Robinson was not able to produce the recording of her meet-and-greet conversation with Dave Dooher, is simply irrelevant to any credibility concerns regarding Robinson because no alleged unlawful conduct occurred during that conversation, which explains why that recording was not part of the Region's case file.

The October 13 Meeting:

Contrary to Respondent's strained arguments, the judge made detailed credibility resolutions concerning the testimony as to the October 13 meeting, and the rationale employed by the judge, who largely credits Robinson, stands up to scrutiny. (JD fns. 22, 23 24, 25.)

At trial, Schulz and Sandberg generally denied that Schulz made the offending remarks to Angel Robinson during the meet-and-greet. However, in addition to Robinson's credible testimony regarding these conversations, Respondent's evidence suggests that the unlawful comments were, in fact, made. For example, the audio recording of Robinson's conversation with recruiter Angie Dery supports Robinson's account of events. (R Exh. 43(a),43 (c).) In

addition, Sandberg's notes from the meeting indicate that Schulz indeed told Robinson that they would "monitor [her] closely." (Tr. 700; R. Exh. 39.)

At times during their testimony, Schulz and Sandberg contradicted themselves, one another, and other witnesses. For example, Schulz testified that Haaland told her that Robinson had "issues with attitude." (Tr. 714.) Haaland, on the other hand, did not mention "attitude" in her testimony and said that she simply told Schulz that Angel had been with her a short period of time and she didn't know much about her, and did not have any specific performance problems with her, though she understood that in her prior department she had performance issues and corrective action for attendance, but she hadn't even seen Angel's file. (Tr. 678.)

Though Schulz at first testified that Stillings told her in general terms only about Angel's past attendance, performance, and disciplinary action, Schulz later testified on cross-examination that Stillings told her that Angel also had issues with behavior. (Tr. 723.) On cross-examination by the Union's attorney, Schulz contradicted her earlier testimony that Angel told Schulz that she had FMLA. (Tr. 719.) When later asked if was understandable for an employee to respond in a negative way when being accused of FMLA absences, Schulz responded, "I was not aware of any FMLA." (Tr. 730.) In conflict with Robinson and Schulz's earlier testimony, Sandberg asserted that Angel never said she was covered by FMLA. (Tr. 702.)

In light of Schulz and Sandberg's sometimes inconsistent statements and the documentary evidence supporting Angel Robinson's credible version of events, the judge correctly concluded that Robinson's testimony regarding the events of October 13 should be credited over those of Respondent's witnesses. As a result of the judge's painstaking analysis of witness testimony and other evidence, the judge agreed that Robinson was to be credited over the other witnesses. (JD fn. 16, 22, 23; 24, 25.)

## *2. The Judge's Factual Findings are Supported by the Record Evidence*

Respondent continues by arguing the judge erred by making factual findings contrary to the record evidence. Here, Respondent presents arguments that are detailed and irrelevant to an almost absurd degree, and yet still are incorrect:

First Respondent objects to the judge's finding that Stillings offered employee Decker a "PM Turndown" and "public areas" work assignment, arguing that these were discrete tasks or parts of work assignments. (CEX at 46.) The judge's finding is sound, however, as exemplified by the testimony of Decker. (Tr. 221; JD 10:26-31.) The fact of the matter is that the employees refer to the work assignment as "PM Turndown" or "Public Areas," regardless of the way the employer labels the assignment.

Second, Respondent asserts that the judge erroneously described how Robinson came to perform the 2 Heart work assignment. (CEX at 46.) Respondent seems unable to accept the fact that the judge fully—and carefully—credited the testimony of Robinson and Wagner over that of Stillings. (JD 11-12, fn.16.) It is not surprising that the judge found the employees to be more believable than Stillings, who was corrected by Respondent's attorney when testifying on this point. The attorney told Stillings "no" when Stillings incorrectly testified that Wagner obtained the Basement assignment in the rebid. (Tr. 797.)

Third, Respondent excepts to the judge's finding that employee Lizzie Johnson requested two work assignments on the day shift, but Respondent gave the assignments to employees with less seniority. (CEX at 47.) Here, Respondent argues that this finding is the result of the judge conflating a "position" with a "work assignment." Yet the record evidence demonstrates that, in fact, the past practice is to use these terms interchangeably. For example, like the judge, Lizzie Johnson—long time EVS employee uses these terms interchangeably, and this rings true for the testimony of all of the other EVS employees. (Tr. 56, 233, 374-76, 408-10, 447; U Exh. 12; GC

Exh. 37, 55, 68.) Respondent is now drawing a false distinction between these terms, which is not only contrary to the parties' past practice, but also to the record evidence in this case.

*3. The Judge's Finding that the Parties' Relationship has Broken Down as to the Allegations in Case 18-CA-155443 is Supported by the Record Evidence*

The judge concluded that “apart from the dispute in this case, the Union and Respondent have enjoyed a good working relationship.” (JD 5:22-23.) Respondent objects to this conclusion and argues that the parties have a “good working relationship” that has continued even during the current dispute. (CEX at 48.) In support of this assertion, Respondent presents general data on the total number of grievances at Mercy Hospital and the number of those that were settled or arbitrated, suggesting that these numbers show that “there is no fissure in the parties' relationship.”

Respondent's representations—which look at Mercy Hospital as a whole—again miss the dynamics at play in the EVS department since Crothall took over. As noted in the General Counsel's Brief in Support of Exceptions and Reply Brief, since Crothall Healthcare assumed management of the department in 2013, there has been instability and disagreement in the department, and a complete stalemate when it comes to the role that seniority plays in posting and awarding vacancies. (Reply at 6; GC Brief at 5-6.) In fact, at trial, Union representative Roger Moore and Respondent's Human Resources Director Nancy Watson testified that, while they are able to work together to resolve other issues, the parties have been at odds over the dispute at the heart of this case, and this dispute has been ongoing for more than two years. (Tr. 110, 257, 622, 635.) Under these circumstances, the judge's finding that the parties' relationship has broken down as to the issues in this case is well supported and Respondent's cross-exceptions should be dismissed.

### **III. CONCLUSION**

For the reasons stated above, General Counsel respectfully requests that the Board reject Respondent's Cross-Exceptions in their entirety.

Dated: August 12, 2016

Respectfully submitted,

          /s/ Rachael M. Simon-Miller            
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## CERTIFICATE OF SERVICE

The undersigned certifies that copies of the General Counsel's Answering Brief to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge were served by electronic mail on the 12<sup>th</sup> day of August, 2016, on the following parties:

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