

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

BHC NORTHWEST PSYCHIATRIC
HOSPITAL, LLC d/b/a BROOKE GLEN
BEHAVIOR HOSPITAL,

Employer,
and

Case Nos. 04-CA-164465
04-CA-174166

BROOKE GLEN NURSES ASSOCIATION,
PENNSYLVANIA ASSOCIATION OF
STAFF NURSES AND ALLIED PROFESSIONALS,

Petitioner.

RESPONDENT’S ANSWERING BRIEF TO CHARGING PARTY’S EXCEPTIONS

Respondent, BHC Northwest Psychiatric Hospital, LLC d/b/a Brooke Glen Behavior Hospital (“Hospital”), submits this answering brief opposing the exceptions filed by Charging Party, Brooke Glen Nurses Association, Pennsylvania Association of Staff Nurses and Allied Professionals (“PASNAP”).

I. STATEMENT OF CASE

This case was heard by Chief Administrative Law Judge, Robert Giannasi (hereinafter, “the Chief Judge”) on August 18, 2016. On October 5, 2016, the Chief Judge issued his Decision and Order (hereinafter “the ALJD”) in which he found that Counsel for the General Counsel (1) failed to prove that Respondent violated Section 8(a)(5) or 8(a)(1) of the National Labor Relations Act (“the Act”) by cancelling a bargaining session with PASNAP on November 10, 2015 and (2) failed to prove that Respondent violated Section 8(a) (3) or 8(a)(1) of the Act by discharging Elisa DiGiacamo for engaging in misconduct on November 12, 2015. Accordingly, the Chief Judge dismissed the Consolidated Complaint in its entirety.

On November 16, 2016, the Charging Party filed 43 exceptions to the Chief Judge's Decision and Order.¹ Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the "Board"), Respondent submits this Answering Brief in response to Charging Party's unfounded exceptions. The record evidence and cited authority fully support the Chief Judge's evidentiary rulings and credibility determinations, as well as his conclusions that Respondent did not violate the Act by either cancelling its bargaining session with PASNAP or discharging Elisa DiGiacamo for engaging in misconduct.

II. ISSUES AND RECOMMENDATIONS

1. Did the Chief Judge correctly conclude that General Counsel failed to prove that Respondent violated Sections 8(a)(5) or 8(a)(1) of the Act by cancelling a bargaining session with the Charging Party on November 10, 2015 because the Charging Party brought members of another union to the bargaining session as observers?

Yes. The Chief Judge correctly concluded that General Counsel failed to prove that Respondent did not violate Sections 8(a)(5) or 8(a)(1) the Act by cancelling the November 10, 2015 bargaining session. He further correctly concluded that even if Respondent violated the Act, which it did not, there is no need for a remedial order for that violation.

2. Did the Chief Judge correctly conclude that General Counsel failed to prove that Respondent violated Section 8(a)(3) or 8(a)(1) of the Act by discharging Elisa DiGiacamo for engaging in unprovoked misconduct on November 12, 2015?

Yes. The Chief Judge correctly concluded that General Counsel failed to prove that Respondent violated the Sections 8(a)(3) or 8(a)(5) of the Act under either the *Wright Line* or *Atlantic Steel* tests established by the Board.

¹ To the extent not specifically addressed elsewhere in this Answering Brief, it is Respondent's position that the Charging Party's 43 exceptions are without merit and have no bearing on the Chief Judge's ultimate conclusions that Respondent did not violate the Act.

III. GENERAL BACKGROUND

Respondent, Brooke Glen Behavioral Hospital, located in Fort Washington, Pennsylvania, is a 146-bed behavioral health facility serving both adolescent and adults patients in need of care for mental illness or behavioral disorders in an acute inpatient setting. ALJD at 2, Tr. at 19, 146-47. There are currently two unions representing distinct groups of the Hospital's employees. The Charging Party, PASNAP, represents about 85 to 90 registered nurses at the facility. ALJD at 2. Approximately 120 mental health technicians are represented by Teamsters Local 107 ("Teamsters"). ALJD at 3. The last collective bargaining agreement ("CBA") between the Hospital and PASNAP expired in September 2014, and the parties remained in the process of negotiating for a successor agreement in November 2015. ALJD at 2; Tr. at 24, 101-103; GC-5.

Elisa DiGiacamo was employed as a registered nurse at the Hospital. ALJD at 2-3. In November 2015, she reported directly to the Interim Assistant Director of Nursing Autumn DeShields, ALJD at 6. The Interim Director of Nursing in November 2015 was Mary Mullen. Ms. Mullen did not attend any bargaining sessions with PASNAP as of November 2015; nor was she involved with "any other activity that had her in adverse position vis-a-vis the Union or DiGiacamo." ALJD at 12. In fact, in September 2015, approximately two months prior to DiGiacamo's discharge, Ms. Mullen adjusted a grievance regarding DiGiacamo, in DiGiacamo's favor. ALJD at 12, footnote 17.

IV. THE CHIEF JUDGE CORRECTLY CONCLUDED THAT GENERAL COUNSEL FAILED TO PROVE THAT RESPONDENT VIOLATED THE ACT BY CANCELLING A BARGAINING SESSION WITH THE CHARGING PARTY ON NOVEMBER 10, 2015.

As the Hospital was negotiating for a successor contract with PASNAP, it was doing the same with the Teamsters. ALJD at 3. In the late summer or early fall of 2015, the mental health technicians represented by the Teamsters expressed an interest in affiliating with the Charging Party. ALJD at 3. Thereafter, PASNAP actively sought to organize the mental health technicians under PASNAP's representation. ALJD at 3.. As a part of this effort, PASNAP brought the mental health technicians to its bargaining sessions with the Hospital as witnesses on November 10 and 11, 2015. ALJD at 3-4. The Chief Judge made the following findings of fact with respect to these bargaining sessions:

On November 10, 2015, the Union and the Respondent met for a bargaining session at the Hilton Hotel in Fort Washington. Union Staff Representative headed the Union's bargaining team which included DiGiacamo. Respondent's bargaining team was headed by its attorney, Frank Kurtz, and included Laura Nolet, Respondent's Human Resource Director, Jennie Smith, Vice President of Labor Relations for the corporate owner of Respondent, UHS, and Autumn DeShields, who was, at the time (Tr. 185), acting or interim Assistant Director of Nursing. Tr. 106. DiGiacamo, brought several Mental Health Technicians to the November 10 meeting. Attorney Kurtz objected to the presence, at the bargaining session, of "Teamsters", referring to the mental health technicians. Zoda said that the technicians were "*here as witnesses to what's happening at the table with us.*" Tr. 107. In response to Kurtz's objection, however, Zoda suggested that he would agree to remove the technicians if Respondent would cease mandatory meetings with the Teamsters in which, as he described them, Respondent misrepresented what was happening during the Union's bargaining with Respondent. Respondent rejected that proposal and the Respondent's bargaining team left the meeting. Tr. 109-110.

It is unclear whether another bargaining session for the next day, November 11, was previously scheduled, but the parties did meet on that day, at the same location. The Union again brought the technician observers, but Respondent met and bargained with the Union, even though the technicians were present. Tr. 110. According to the Union's bargaining notes, the parties met from 10:44 am to 3:59 pm, discussing several substantive issues. G.C. Exh. 11. . . .

ALJD at 3-4.

A. **The Charging Party Had No Statutory Right to Insist on the Presence at Observers Who Were not Part of the Bargaining Committee and Who Were Not Present to Assist with Negotiations, and Respondent Did Not Violate the Act by Cancelling the November 10, 2015 Bargaining Session Rather than Bargain in the Presence of the Observers.**

In his decision, the Chief Judge correctly found that the technicians were “not members of the Union’s bargaining team”. ALJD at 9. To the contrary, he found that they were merely invited as observers in furtherance Union’s ongoing efforts to organize the technicians. ALJD at 9. More specifically, the Chief Judge correctly found that “Zoda’s testimony makes clear that he wanted the mental technicians to observe the bargaining in order to counter Respondent’s apparent argument that the PASNAP was not a good choice for the technicians because of its conduct in its bargaining for the nurses”. ALJD at 9. In other words, the Union wanted the technicians to observe bargaining *not* to assist the Union with its bargaining efforts at the table, but rather to assist with its unrelated efforts to organize the technicians.

Given the fact that PASNAP invited the technicians to observe at negotiations as part of its organizing campaign, not to assist with bargaining, the cases cited by the Union in its brief in support of its exceptions are inapposite. In the cases cited by the Charging Party, unlike the present case, the unions brought to the table individuals who were there to be part of the bargaining committee and assist with negotiations *See e.g., Dilene Answering Service*, 257 NLRB 284, 291 (1981) (employees were present as “*part of the committee*” to observe “*and assist . . . in negotiations*”). The facts in the instant case are entirely distinguishable – and are much more analogous to the facts discussed in *Canterbury Villa of Alliance*, 32 NLRB AMR 59, 32 NLRB Advice Mem. Rep. 59, 2004 WL 6016856), where the Union sought to open its bargaining sessions to non-bargaining committee members. It was specifically found in *Canterbury Villa*

that the Section 7 right of employees to designate and be represented by representatives of its own choosing was not implicated by bringing non-bargaining committee members to the table, and the factual scenario in *Dilene Answering Service*, supra. was expressly distinguished:

The Board has developed two distinct analytical frameworks to resolve questions over who may attend collective bargaining sessions. The first derives from the statutory right of each party to designate their own collective-bargaining representative. *The second does not concern the designation of a bargaining representative, but instead addresses whether a party's insistence on the presence of someone outside the bargaining committee is a mandatory or permissive subject of bargaining.* The Board has not specifically addressed whether a union may lawfully insist that its entire membership be allowed to attend, and merely observe, collective-bargaining negotiations. However, *we conclude that the Union's on member-observers did not implicate its statutory right to designate its bargaining committee, but was an unlawful insistence on a permissive subject of bargaining.*

The right of employees to designate and to be represented by representatives of their own choosing is a basic policy and fundamental right guaranteed employees by Section 7 of the Act. Thus, each party to the collective bargaining process generally has the right to choose whomever it wants to represent it in formal labor negotiations, and the other party has a correlative duty to negotiate with the appointed agents. For example, it is well established that a union may include “outsiders” on its bargaining team. An employer objecting to a union's choice of bargaining representative bears the heavy burden of showing that the selected representative would present a “clear and present danger” to the collective bargaining process or create such ill will that bargaining would be impossible or futile.

This case is unlike situations where an employer refuses to deal with designated members of a union's negotiating team. For example, in *Dilene Answering Service*, the employer refused to negotiate with the union so long as four employees were present, claiming they were only observers and not true union representatives. In finding that the employer violated 8(a)(5), the fact that the union told the employer that the employees were part of the union committee and would participate in negotiations “should have foreclosed any further inquiry by [the employer].” In contrast, here the Union informed the Employer at the outset of negotiations that its negotiating committee would consist of four and five specific unit employees. *When additional Union members arrived unannounced at three different bargaining sessions, the Union told the Employer that all Union members were entitled to observe negotiations. The Union never attempted to alter the composition of its pre-identified bargaining team. Nor did it explain to the Employer how the additional Union members attending negotiating sessions would be assisting in bargaining rather than as mere observers. Thus, the broad*

Section 7 right of employees to designate and to be represented by representatives of their own choosing at formal labor negotiations is not at issue here.

Id. at *3 (emphasis added) (footnotes omitted). Like the observers in *Canterbury Villa*, the observers whom the Charging Party invited to the parties' November 10th bargaining session were *not* invited as part of the bargaining team or to otherwise assist in negotiations. Rather, as the Chief Judge concluded and as Mr. Zoda's testimony made clear, they were present for reasons related to the Charging Party's campaign to organize the technicians. For this reason alone, the Charging party had no statutory right to have the observers present at bargaining, and Respondent did not violate the Act by cancelling the November 10th bargaining session rather than bargain in their presence.

B. The ALJ Correctly Found that the Cancellation of the November 10th Bargaining Session Did Not Give Rise to the Level of an Unfair Labor Practice and That No Need for a Remedial Order Exists.

The Chief Judge correctly concluded that regardless of whether Respondent's refusal to bargain in the presence of the observers at the November 10th bargaining session met the standard for a "proper refusal" to meet, the cancellation of the of that session "did not give rise to the level of an unfair labor practice within the meaning of the Act." ALJD at 9. In doing so, the Chief Judge correctly reasoned that the November 10th cancellation was "mooted" by Respondent's good faith acceptance of the presence of the observers at a full day of bargaining the very next day. The Chief Judge further concluded that even if Respondent's cancellation could be viewed as a technical violation of the Act, there is no need for a remedial order for that violation, given the fact that the parties' have continued to bargain without any other violations on the part of Respondent; as well as the fact that is it highly unlikely that any similar scenario would occur in the future since the Charging Party's campaign to organize the technicians has ceased.

The Charging Party's exceptions to the Chief Judge's conclusions set forth above are entirely without merit. Indeed, the Charging Party has not cited to one case where a cancellation of a single bargaining session, which was cured by a meeting the very next day, was found to be an unfair labor practice and/or resulted in the imposition of a remedial order. In contrast, Board precedent clearly supports the Chief's Judge's reasoning. For example, in *International Powder Metallurgy Co.*, 134 NLRB 1605 (1961), the employer's representative refused to go forward with the first day of negotiations because a recently-terminated employee was participating as a member of the union's bargaining committee. Once informed that the refusal was likely unlawful, the employer fully participated in bargaining the next day. The judge, affirmed by the Board, decided to dismiss the complaint allegation based on the one-day incident "in deference to the principle, *de minimus no curat lex.*" The judge noted that, under the circumstances, neither a finding of a violation, nor a remedial order would serve any purpose. *Int'l Powder Metallurgy Co.*, 134 NLRB at 1612-13. *See also Meyer's Bakeries, Inc.*, 2006 WL 1358752 (NLRB Div. of Judges May 12, 2006)(stating "[i]n light of the fact that there is no evidence of any other dilatory tactics or attempts to delay bargaining, it appears that Ledbetter's cancellation of the one bargaining session had a *de minimus* impact upon the overall bargaining and did not significantly preclude effective bargaining. Accordingly, I do not find that Southern refused to meet and bargain with the BCTGM Local 111 as alleged in the complaint.").

Like the one day cancellation on *Int'l Powder Metallurgy Co.*, *supra.*, Respondent's one day cancellation of the November 10th bargaining session had a *de minimus* impact on bargaining. Thus, the Chief Judge correctly found that the Respondent did not commit a violation of the Act by cancelling the November 10, 2015 bargaining session and that, even if a technical violation occurred, there is no need for a remedial order.

V. **THE CHIEF JUDGE CORRECTLY CONCLUDED THAT RESPONDENT DID NOT VIOLATE THE ACT BY DISCHARGING DIGIACAMO**

Both Autumn DeShields and Elisa DiGiacamo testified regarding the events of November 12th, which ultimately led to DiGiacamo's discharge. To the extent that DiGiacamo's testimony differed from DeShields, the Chief Judge credited Deshields, whose testimony was corroborated by her contemporaneous statement and the statement of Maurice Washington, and who impressed the Chief Judge as a reliable witness with a truthful demeanor. ALJD at 7. In contrast, as noted throughout his opinion, the Chief Judge did not find DiGiacamo to be a reliable witness. ALJD at 7-8. In fact, the Chief Judge found DiGiacamo's testimony to be "implausible, self-serving, post-hoc rationalizing, and fabricated". ALJD at 7, footnote 9. Based on the above referenced credibility determinations and the record evidence as a whole, the Chief Judge made the following findings regarding the events of November 12th which ultimately led to DiGiacamo's discharge:

On the afternoon of November 12, DeShields conducted a tour of Respondent's Hospital for managers and staff, including mental health technicians, from Friends Hospital. The purpose of the tour, which was prearranged sometime before, was to give the Friends Hospital people a view of what was being done at Respondent's facility and to exchange views of best practices from a management standpoint. There were about five Friends representatives on the tour, including Maurice Washington, the Chief Nursing Officer and Chief Operating Officer at Friends, with whom DeShields had a professional relationship with when she worked at Friends before coming to Respondent's Hospital.

At one point during the tour, the participants, led by DeShields, came to the adolescent unit where DiGiacamo was on duty at the nurses' station. The adolescent unit has some 18 beds and treats children from age 13 to 18. When the visitors and DeShields entered the unit, they were met by screaming or yelling by DiGiacamo. She pointed to them and wanted to know who the visitors were and why they and DeShields were there. There was a patient lounge adjacent to and within view of the nurses' station where DiGiacamo was sitting. Present in the lounge at the time was an adolescent patient who, DiGiacamo admitted, could have heard her yelling. DiGiacamo testified that she knew that the visitors were from Friends; she apparently objected to their presence because of that and

because, about a year and a half before, she and a Union official had tried to handbill on behalf of the Union at Friends, but were prevented from getting “inside the door”.

DeShields, to whom DiGiacamo reported to as an employee, was embarrassed by DiGiacamo’s conduct and did not respond. Receiving no response from her initial remarks, DiGiacamo again asked what the visitors were doing at the hospital, asked one particular visitor how many orientations he needed, and pointed out sarcastically, here’s the hallway, here’s the wall. As a result of DiGiacamo’s conduct and the visitor’s reaction to it, DeShields decided to sidetrack the visit to the adolescent unit and the group left and went elsewhere. As the visitors were leaving the unit, DiGiacamo asked, “Does this mean I get to tour Friends?”

Sometime later that afternoon, the tour group was in a hallway when DiGiacamo approached the group. She asked why she could not take a tour of Friends. She said, “I did not get this kind of hospitality when I visited Friends. I got kicked out in like ten minutes.” DeShields testified that she had no idea what DiGiacamo was talking about.

After the tour, DeShields and the visitors discussed the results of the tour, including DiGiacamo’s conduct, in a conference room at the hospital. Still later, at the end of the workday and after the conclusion of the tour, the Friends group was in the Respondent’s parking lot talking with DeShields before leaving the hospital premises. DiGiacamo was also leaving, apparently to go to her car and drive home. She approached the group, addressed Washington and asked if he was going to work at Respondent’s hospital. He said, “possibly.” Then DiGiacamo said “good” and, pointing to DeShields, stated “this one don’t do shit, she ain’t shit. She walks around here with the air of – the ADON title doesn’t do shit. As DiGiacamo was leaving the group to go to her car, she made this statement: “I’m going to get you the fuck out of here.” Tr. 96-97.

ALJD at 6-7.

Mary Mullen, Respondent’s Interim Director of Nursing from August 2015 to February 2016, testified regarding the decision to discharge DiGiacamo. The Chief Judge found Ms. Mullen to be a credible witness, describing her testimony as “direct and forthright, the product of a truthful demeanor.” ALJD at 8, footnote 11. He further noted that her testimony “survived vigorous cross-examination.” ALJD at 8, footnote 11. To the extent there were differences between Mullen’s and DiGiacamo’s testimony, the Chief Judge credited Mullen, again noting

that he found DiGiacamo's testimony to be "generally unreliable". ALJD at 8, footnote 11.

Based on the above-referenced credibility determinations and the record evidence as a whole, the ALJD made the following findings of fact regarding the decision to discharge DiGiacamo:

The following Monday, November 16, 2016, Interim Director of Nursing, Mary Mullen, and [Laura] Nolet met with DiGiacamo and presented her with a summary of the reports of DeShields and Washington about her conduct on November 12. They asked for and received DiGiacamo's response. Therefore, Mullen alone made the final decision to discharge DiGiacamo, who was presented with a written notice to that effect. The notice described her misconduct and stated that it constituted a violation of specific portions of Respondent's Conduct and Work Rules. Mullen, who did not attend bargaining sessions on behalf of Respondent and did not participate in any of Respondent's opposition campaign against the Union (Tr. 149-50, 167-170), credibly testified that her decision was not only based on DiGiacamo's unprofessional conduct and the violation of Respondent's policy, but also because DiGiacamo did not acknowledge her misconduct. That, Mullen, testified, made it difficult to trust DiGiacamo's future conduct in the presence of patients and families. Tr. 164.

ALJD at 8.

A. **The Chief Judge Correctly Concluded that Respondent Did Not Violate the Act under a *Wright Line* Analysis.**

Under the Board's well established *Wright Line* test, the General Counsel had the initial burden of showing that Respondent's discharge of DiGiacamo was motivated by her union or other protected activity. ALJD at 11. If the General Counsel met that initial burden, the burden would shift to Respondent to show that it would have taken the same action even absent the employee's protected activity.

After considering all the record evidence, the Chief Judge correctly concluded that the General Counsel did not meet the initial burden under the *Wright Line* test. More specifically, he concluded that there simply was "no credible evidence that could reasonably lead to the inference that DiGiacamo's discharge was motivated by her union or protected activity", and that the "real motivating factor" for the discharge was "an independent set of circumstances

completely divorced from any union or other protected activity- her unprovoked misconduct that interfered with a legitimate tour group on the afternoon of November 12th.” ALJD at 12.

Notably, in reaching this conclusion, the Chief Judge credited the testimony of Mullen, whom he found to be “the sole decision maker regarding the decision to discharge DiGiacamo”. He found that “Ms. Mullen credibly testified that her decision to discharge DiGiacamo was based on her unprofessional conduct – as well as the fact that DiGiacamo did not acknowledge her misconduct.” As noted above, the Chief Judge found Mullen’s testimony to be “direct and forthright” and the “product of a truthful demeanor”, and further found that it survived a “vigorous cross examination”. ALJD at 8 at footnote 12. He further noted that “there is no evidence that Mullen, who alone made the decision to discharge DiGiacamo, was a participant either in bargaining or any other activity that had her in an adverse position vis-à-vis the Union.” ALJD at 12. He also noted that Mullen “had no problems with DiGiacamo” and, in fact, was “sympathetic to DiGiacamo prior to the incidents involving the tour group, as shown by Mullen adjusting a grievance in her favor in September of 2015.” ALJD at 12, footnote 17.

The Chief Judge also correctly reasoned that, even if the General Counsel had met the initial burden of proving unlawful motivation, the Respondent proved persuasively that it would have discharged DiGiacamo even in the absence of her protected activity because of her serious misconduct on November 12th. In doing so, he recounted the egregiousness of DiGiacamo’s misconduct, and concluded that it was “thus reasonable for Mullen to determine, *as she did*, that DiGiacamo’s misconduct - which in her view was not even acknowledged - made her a bad risk for future interactions with patients and families.” ALJD at 13 (emphasis added).

The Charging Party’s exceptions to the Chief Judge’s conclusions are entirely off the mark. First, the Charging Party claims that the Chief Judge applied the “wrong standard” in

reaching his conclusion that the General Counsel did not meet the initial burden under *Wright Line*. This simply is not the case. As explained above, the Chief Judge engaged in a straightforward analysis as to whether DiGiacamo's union or other protected activity was a motivating factor in the decision to discharge DiGiacamo. In doing so, he found that there was no credible evidence to support an inference that DiGiacamo's union activity was a motivating factor, and that the real motivating factor was her serious misconduct. As explained above, his determination was largely based on the credibility of Mullen's testimony and it is well settled that the Board's established policy is not to overrule an Administrative Law Judge's resolutions with respect to credibility unless there is a compelling reason to do so. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951).²

Moreover, even if the General Counsel did not meet the initial burden under *Wright Line*, which he did not, the Chief Judge correctly concluded that "Respondent would have discharged DiGiacamo even in the absence of her protected activity because of her serious misconduct on November 12". Tr. at 13. Indeed, for many of the same reasons that the Chief Judge concluded that General Counsel did not meet the initial burden under *Wright Line*, which are outlined above, Respondent met its burden of showing that it would have discharged DiGiacamo even in

² The Charging Party also points to other record evidence, such as evidence of disparate treatment, stray comments, and the language in the termination notice, as evidence that Respondent failed to meet its burden of proving that it would have made the decision to discharge DiGiacamo regardless of her union activity. As a preliminary matter, none of the record evidence relied upon by the Union is significant or relevant enough to cast doubt on Mullen's testimony that she discharged DiGiacamo for her unprovoked, unprofessional and profane misconduct on November 12th. More importantly, however, is that the Chief Judge found Mullen's testimony regarding the basis for her decision to be credible *notwithstanding* any of the record evidence relied on by the Union, a determination which was based on his observations of the demeanor of Mullen as well as the other circumstances discussed above. No basis whatsoever exists in this case for the Board to overrule the credibility determinations of the Chief Judge.

the absence or her protected activity. The Charging Party attempts to mischaracterize the Chief Judge's analysis as one in which he determined whether Respondent reasonably "could have" made the same decision in the absence of DiGiacamo's union activity. In doing so, the Union conveniently ignores the Chief Judge's conclusions regarding the "real motivating factor" for the discharge decision, which are described above, as well as his specific findings regarding Mullen's "credible testimony" regarding the basis for her decision to discharge DiGiacamo. Indeed, while the Chief Judge did note that Mullen's determinations were reasonable, he also expressly concluded that "*she did*", in fact, make such determinations regarding the decision to discharge DiGiacamo. AJLD at 13. Thus, the Charging Party's claim that the Chief Judge misapplied the law simply has no merit.

For all of the reasons above, the Charging Party's exceptions to the Chief Judge's determination that Respondent did not violate the Act under a *Wright Line* analysis have no merit.

B. The Chief Judge Correctly Concluded that Respondent Did Not Violate the Act under an *Atlantic Steel* Analysis.

As the Chief Judge correctly noted in his decision, "*Atlantic Steel* applies when an employer defends a disciplinary action based on employee misconduct that is part of the res gestae of the employee's protected activity". ALJD at 4 (citing *Public Service Company of New Mexico*, 364 NLRB No. 86, Slip Opinion 7 (2016)). The Chief Judge concluded that DiGiacamo's conduct on November 12th, which included her unprovoked disruption of the tour, as well "insults that she hurled at DeShields, which she falsely tied to staffing levels", did not involve protected activity. ALJD at 14, 14 at footnote 19. The Chief Judge further concluded that, "at best, DiGiacamo's testimony shows that in her mind she perceived the tour as somehow

related to her union activity”, but that “protected activity must be based on objective fact, not subjective perceptions of the party or witness making the claim”. ALJD at 14.

Relying on *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1099 (2011), the Charging Party excepts to the Chief Judge’s findings, and argues that an employee’s protected concerted activity “remains protected” even if the employee’s belief as to the employer’s conduct was mistaken. The Charging party further argues that DiGiacamo’s misconduct was protected because “DiGiacamo had a good faith belief that the Friends tour was a tactic employed by Respondent to intimidate the techs she was organizing by parading their threatened replacements in front of them, and her actions were meant to protest and counter that tactic.”³ The fatal flaw in the Union’s argument however, is that - regardless of DiGiacamo’s purported fears about the purpose of the tour - DiGiacamo never mentioned these asserted fears at any time during the tour or during the altercation in the parking lot. Thus, there simply was no “protected activity to “remain protected” regardless of DiGiacamo’s unspoken purported “good faith beliefs”. Indeed, the Chief Judge recognized this flaw in the Charging Party’s logic in his decision, and concluded that this argument was “completely off the mark”, reasoning:

DiGiacamo also testified that, in her mind and based on other conversations with other employees, she feared that the purpose of the tour was a preparation to use Friends employees as strike breakers in the event of a strike by PASNAP. (Tr. 49-50). There is, of course, no evidence that this was the purpose of the tour. ***Indeed, DiGiacamo never even mentioned this asserted fear of hers to DeShields or anyone else during the tour*** so it is difficult to make anything of the above testimony. Thus, the General Counsel’s attempt to show that DiGiacamo

³ The Charging Party excepts to the Judge’s evidentiary rulings purportedly excluding evidence demonstrating that the true purpose of the tour was a labor related tactic. The judge’s evidentiary rulings were proper and it also should be noted that the Chief Judge did, in fact, allow DiGiacamo to testify regarding her perceptions regarding the tour, based on what the techs allegedly had told her. Tr. at 49-50. More importantly, the purported “true purpose” of the tour is largely irrelevant because, as discussed above DiGiacamo’s never mentioned this purported true purpose -- or her purported related fears -- at any time when engaging in her misconduct.

was engaged in protected activity by referring to her asserted subjective fear of strike breaking preparations is completely off the mark.

ALJD at 6, footnote 8.

In other words, this is not a case where DiGiacamo actually *expressed* her perceived fears regarding the purpose of the tour while engaging in her misconduct, but was mistaken about the purpose of the tour. Rather, she never mentioned her fears at all while engaging in her misconduct -- she simply disrupted the tour and insulted DiGiacamo, which makes her perceived fears entirely irrelevant. Given the above facts, the Charging Party's reliance on *Crowne Plaza LaGuardia, supra.*, is entirely misplaced. In that case, the actual conduct at issue included statements which "directly concerned terms and conditions of employment" and therefore constituted protected activity. *Id.* at 1099. The Board simply reasoned in *Crowne Plaza LaGuardia* that the fact that the employees were mistaken about the facts related to their protected statements did not cause these otherwise protected statements to lose their protection. This reasoning is entirely different than the Charging Party's misguided theory - which appears to be that an employee's unspoken perceptions can somehow turn unprotected misconduct into protected activity. For this reason, the Charging Party's exception to the Chief Judge's finding that DiGiacamo did not engage in protected activity must be rejected.

Likewise, the Board must reject the Charging Party's exceptions to the Chief Judge's conclusion that DiGiacamo's activity was sufficiently egregious as to be removed from the Act's protections. As explained below, the Chief Judge correctly applied the four factors which are used to determine whether such conduct is sufficiently egregious under an *Atlantic Steel* analysis, and the Union's arguments to the contrary are misplaced.

With respect to the first factor, the place of discussion, the Chief Judge specifically found that DiGiacamo was “yelling or screaming” at her nurses’ station and that an adolescent patient was in a lounge nearby when she did so. ALJD at 6. Indeed, as DiGiacamo admitted at the hearing, this patient could have heard her. ALJD at 6. There also is no dispute that the adolescent patients who are treated at the Hospital suffer from severe mental illnesses. The Charging Party’s argument that that Respondent was required to actually “prove” that DiGiacamo’s yelling or screaming interfered with patient care is entirely misplaced, unsupported, and demeaning to the Hospital’s mission and its patients. Likewise is the Charging Party’s attempt to compare DiGiacamo’s yelling or screaming at the nurses’ station, in the presence a mentally ill adolescent patient, with the comments at issue in *Crowne Plaza, supra*, and *Goya Foods of Florida*, 347 NLRB 1118, whic1134 (2006). In those cases, comments were made in front of “customers” in retail settings – not in front of a mentally ill adolescent patient in a behavioral health hospital. As the Charging Party is well aware, no such comparison of the two settings can be made.

With respect to the second factor, the subject of the comments, the Charging Party’s argument that DiGiacamo’s comments were protected should be rejected for the reasons set forth above. As explained above, regardless of whether DiGiacamo subjectively viewed herself as engaging in a protest, she made no comments whatsoever which could be remotely construed as a protest. Rather, she simply disrupted the tour and insulted her supervisor.

With respect to the third factor, the nature of the conduct, the Charging Party attempts to downplay DiGiacamo’s conduct, focusing solely on her use of profanity. The Charging Party virtually ignores the critical facts that DiGiacamo yelled or screamed in the presence of a patient while at the nurses station, interfering with a tour of visitors, and then proceeded hurl insults at

her supervisor in front of the visiting tour group, in the parking lot, culminating with a threat to “get her the fuck out of here”. Such conduct is sufficiently egregious to lose protection of the Act, and the Charging Party has cited to no comparable cases demonstrating the contrary.

With respect to the fourth and final factor, whether the conduct provoked by an unfair labor practice, there is no evidence or finding that the Hospital has engaged in *any* unfair labor practice whatsoever. ALJD at 6-7. Indeed, while Ms. DiGiacamo may have been personally displeased with the Hospital’s labor relations efforts leading up to her discharge, the Hospital’s conduct has been entirely lawful at all times, and the Charging Party has no basis whatsoever for arguing she was provoked by an unfair labor practice.

Given the above, the Chief Judge correctly concluded that DiGiacamo’s misconduct on November 12 did not constitute protected activity under an *Atlantic Steel* and, even if it did, such conduct was sufficiently egregious to lose the protection of the Act.

VI. CONCLUSION

For all of the reasons above, the Charging Party did not meet its burden of proving that the Hospital violated the Act and the Charging Party’s exceptions to the Chief Judge’s decision dismissing the Consolidated Complaint must be rejected.

Respectfully submitted,

Diane Apa Hauser

Diane Apa Hauser, Esquire
Paisner-Litvin, LLP
30 Rock Hill Road
Bala Cynwyd, PA 19004

December 14, 2016

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing **RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS** was served via electronic mail upon the following:

Jonathan Walters, Markowitz & Richman, Attorney for Charging Party,
jwalters@markowitzandrighman.com

David Rodriguez, Counsel for General Counsel, david.rodriguez@nlrb.gov

Respectfully submitted,

Diane Apa Hauser

Diane Apa Hauser, Esquire
Paisner-Litvin, LLP
30 Rock Hill Road
Bala Cynwyd, PA 19004

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