

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

BNC NORTHWEST PSYCHIATRIC
HOSPITAL, LLC d/b/a BROOKE GLEN
BEHAVIORAL HOSPITAL,

Respondent

and

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

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

Charging Party

CHARGING PARTY’S REPLY BRIEF TO RESPONDENT’S ANSWERING BRIEF

Pursuant to 29 CFR § 102.46(h), Brooke Glen Nurses Association/Pennsylvania Association of Staff Nurses and Allied Professionals (“Union” or “Charging Party”) files this reply brief to the answering brief of Brooke Glen Behavioral Hospital (“Respondent”).

I. Introduction

As explicated more fully in the Union’s exceptions to the decision of the Administrative Law Judge (“ALJ”) and the accompanying supporting brief, the complaint at issue alleges that the Respondent violated the Act in two ways: first, by conditioning bargaining on the absence of certain employees whom the Union brought to negotiations, in violation of Sections 8(a)(5) and (1); and, second, by discharging Registered Nurse Elisa DiGiacomo (“DiGiacomo”) because she engaged in activity protected by the Act, in violation of Sections 8(a)(3) and (1). The Respondent filed an answering brief opposing the Union’s exceptions (“Answering Brief”).

The Answering Brief misstates the holdings of Board decisions, treats non-precedential authority as if it bound the Board, and makes arguments that the Board has rejected. More

specifically, with regard to the unlawful bargaining condition claim, the Respondent relies on a non-precedential memorandum from the Office of the General Counsel's Division of Advice ("Advice") while failing to mention the memorandum's origin. The Answering Brief goes on to outright misstate the Board's holding in *International Powder Metallurgy Co.*, 134 NLRB 1605 (1961), asserting that the Board adopted a portion of the Trial Examiner's decision in that matter that, in reality, the Board modified.

With regard to the portion of the complaint alleging that the Respondent discharged DiGiacomo because of her protected activity, the Respondent asserts that the ALJ "credited" the testimony of a Respondent manager about the Respondent's motivation for discharging DiGiacomo, and that this "credibility" determination conclusively established the Respondent's motivation so as to be dispositive of whether the Respondent violated the Act. However, the Board has long held that an administrative law judge's decision to "credit" an employer's testimony regarding the employer's motivation for taking an adverse action against an employee does not determine that motivation. Instead, the Board considers all of the evidence and makes a determination as to the ultimate issue of motive itself.

Finally, the Answering Brief claims that DiGiacomo's conduct toward the tour group on November 12, 2015—for which she was discharged—was not protected by the Act because, in the Respondent's view, DiGiacomo was insufficiently specific in explaining how her conduct related to Union concerns. This argument, too, has long been rejected by the Board, which holds that specificity and articulation are not the touchstones of union or protected concerted activity. Instead, the Board asks whether, on the totality of the circumstances, the employee's conduct related to union or concerted concerns.

II. Argument

A. The Respondent's Refusal To Bargain So Long As Certain Employees Were Present

1. The Answering Brief Relies on a Non-Precedential Advice Memorandum

The Answering Brief asserts that the mental health technicians (“MHTs”) whom the Union brought to the November 10, 2015 bargaining session “were *not* invited as part of the bargaining team or to otherwise assist in negotiations” and, therefore, the Respondent did not violate the Act by refusing to bargain so long as they were present. (Ans.Br. at 7.) To support this conclusion, the Respondent relies on a memorandum prepared by Advice in the case of *Canterbury Villa of Alliance*, 32 NLRB AMR 59 (2004). The Respondent did not mention in its Answering Brief that *Canterbury Villa* was an Advice memorandum, instead placing it on equal footing with the Board’s decision in *Dilene Answering Service*, 257 NLRB 284 (1981). (Ans.Br. at 5.) “Contrary to Respondent, an ‘Advice Memorandum’ from the General Counsel is not precedential authority binding upon the Board.” *Fun Strides, Inc.*, 250 NLRB 520, 520 fn. 1 (1980), *enf. denied on other grounds*, 686 F.2d 659 (9th Cir. 1981). Therefore, Advice’s analysis in *Canterbury Villa* does not bind the Board.

2. The Answering Brief Claims That the Board Adopted a Portion of a Trial Examiner’s Decision That the Board Actually Modified

The Respondent further argues that, even if the Respondent’s conditioning bargaining on the absence of MHTs violated the Act, the Respondent did not commit an unfair labor practice because it did not protest the presence of MHTs at bargaining the next day, and, even if it did commit an unfair labor practice, the Board should impose no remedy. According to the Respondent, “Board precedent clearly supports” these alternative conclusions. (Ans.Br. at 8.)

The “Board precedent” referred to is *International Powder Metallurgy Co.*, 134 NLRB 1605 (1961).

In *International Powder*, the complaint alleged that the employer violated Sections 8(a)(5) and (1) of the Act in a variety of ways, including by refusing to proceed with a scheduled bargaining session because an individual no longer employed by the Respondent was present. *Id.* at 1606-07. The employer was quickly informed by a Board agent that its actions were unlawful and stopped refusing to bargain. *Ibid.* The Trial Examiner dismissed the portion of the complaint relating to the refusal to bargain because the union brought the non-employee “on the ground, not of isolation, but in deference to the principle, *de minimis no curat lex.*” *Id.* at 1613.

The Respondent claims the portion of the Trial Examiner’s¹ Intermediate Report relating to the refusal to bargain in the presence of the non-employee was “affirmed by the Board.” (Ans.Br. at 8.) This is not true. The Board modified this part of the Trial Examiner’s decision.

The Board “adopt[ed] the findings, conclusions, and recommendations of the Trial Examiner, *except as modified herein.*” *Id.* at 1605 (emphasis added). Modifying the Trial Examiner’s Report with regard to the refusal to bargain in the presence of the non-employee and on another occasion because the employees filed a decertification petition, the Board stated that although “[i]t is true that the Respondent...corrected its position, and that these incidents had no permanent impact on the negotiations...they were symptomatic of the Respondent’s attitude and in line with the Respondent’s other conduct showing rejection of the principles of collective bargaining,” *id.* at 1607, ultimately holding that “the foregoing practices”—a reference to all of the numerous practices discussed in the opinion, which included the refusals to proceed with

¹ The Respondent mistakenly refers to the Trial Examiner as the “judge.” (Ans.Br. at 8.)

bargaining sessions—“of the Respondent plainly demonstrate that it did not bargain with the Union in good faith,” *id.* at 1608.

Thus, the Respondent misstated the holding of *International Powder*, claiming the Board adopted a portion of the Trial Examiner’s decision that it actually modified. *International Powder* lends no support to the Respondent’s position. The *International Powder* Board did not consider whether the employer would have violated the Act if the corrected refusals to proceed with bargaining sessions were its only offense, rendering *International Powder* inapposite to the present matter. However, if it bears any relevance to the present case at all, it supports the Union’s position, in that the Board deemed an employer’s refusal to proceed with bargaining that was rescinded when challenged as contributing to a finding that the employer violated Sections 8(a)(5) and (1).

B. The Respondent’s Discharge of DiGiacomo

1. The Answering Brief Incorrectly Treats the ALJ’s “Crediting” of a Manager’s Testimony Regarding the Reason for DiGiacomo’s Discharge as Dispositive of the Employer’s Motivation

With regard to whether the Respondent had an unlawful motive in discharging DiGiacomo, the Respondent argues that the ALJ found Respondent manager Mary Mullen’s testimony “regarding the basis for her decision” to discharge DiGiacomo to be “credible,” that Mullen’s proffered reason was lawful, and that this definitively establishes that the Respondent’s motive for discharging DiGiacomo was lawful under *Wright Line*, unless the Board is prepared to overturn the ALJ’s credibility resolutions. (Ans.Br. at 12-14.) However, the Board has long rejected this argument. As the Board explained in *Charles Batchelder Company, Inc.*, 250 NLRB 89, 89-90 (1980), *enfd. in part and denied in part* 646 F.2d 33 (2nd Cir. 1981):

The Administrative Law Judge credited Respondent's explanation for the discharge of Fleming and, on the basis of such credibility finding, concluded that Fleming was

properly discharged solely for making “a threat of bodily harm ...to an employee who had expressed his preference to refrain from union activity.” However, the question of motivation where an alleged unlawful discharge is involved is not one to be answered by crediting or discrediting a respondent's professed reason for the discharge, and thus we cannot accept every credibility finding by a trier of fact as dispositive of that issue. Rather, that question is one to be resolved, by a determination based on consideration and weighing of all the relevant evidence. Consequently, we are not faced here with the task of determining whether the various circumstances surrounding Fleming's discharge are sufficient to upset the Administrative Law Judge's credibility finding that Respondent's witnesses were testifying truthfully when they stated Fleming was discharged for his threat to Emanuelle. Instead, we must decide whether those circumstances support the conclusion urged on us by the General Counsel that Fleming was discharged for unlawful reasons, rather than for the lawful reasons advanced by Respondent. Having carefully considered the various relevant factors, we find that the Administrative Law Judge erred in his conclusion concerning Fleming, for substantial record evidence compels the finding that Respondent seized on the alleged threat and also Fleming's absenteeism to rid itself of one of the two leading union activists in the plant.

Accord, e.g., Westinghouse Elec. Corp., 277 NLRB 136, 137 fn. 5 (1985) (“We accept the judge's credited findings of fact concerning the circumstances surrounding Singletary's discharge. We need not a fortiori accept the judge's “credibility” assessment of witnesses' veracity on the ultimate question of the Respondent's motivation.”); *Desert Toyota*, 346 NLRB 132, 135 (2005) *petition for review denied* 265 Fed.Appx. 547 (9th Cir. 2008) (“We disagree with our dissenting colleague to the extent she argues that the judge's finding of an unfair labor practice for disciplining Pranske can only be reversed if we overturn the judge's credibility finding regarding Casucci's testimony as to his motivation for the discipline...the Board has appropriately held that the ultimate issue in a case of this nature—the Respondent's motivation for disciplining Pranske—is to be resolved based on all record evidence taken as a whole.”).

Here, to the extent the ALJ “credited” Mullen’s testimony as to the Respondent’s reason for discharging DiGiacomo, this does not resolve the “ultimate question of the Respondent’s motivation.” *Westinghouse, supra* at 137 fn. 5. Instead, the Board resolves such questions

“based on all record evidence taken as a whole.” *Desert Toyota, supra* at 135. As explained in the Union’s brief in support of its exceptions, the record evidence taken as a whole here persuasively demonstrates that the Respondent discharged DiGiacomo because of her union activity.

One other portion of this section of the Answering Brief warrants a reply. The Respondent dismisses the Union’s reliance on what the Respondent calls “stray comments” to prove unlawful motive. (Ans.Br. at 13 fn. 3.) The “stray comments” to which the Respondent refers are a Respondent manager telling DiGiacomo that she was being surveilled by the Respondent and was a “target” because of her union activity. (ALJD at 11, ¶29 fn. 16; Tr. 27.) “Where an employer’s representatives have announced an intent to discharge or otherwise retaliate against an employee for engaging in protected activity, the Board has before it ‘especially persuasive evidence’ that a subsequent discharge of the employee is unlawfully motivated.” *Overnite Transportation Co.*, 343 NLRB 1431, 1436-37 (2004) (quoting *Turnbull Cone Baking Co. of Tennessee v. NLRB*, 778 F.2d 292, 197 (6th Cir. 1985) *cert. denied* 476 U.S. 1159 (1986)). Here, the Respondent’s representative announced that the Respondent was “target[ing]” DiGiacomo because of her Union activity, and the Respondent subsequently discharged her. What the Respondent characterizes as “stray comments” are in fact “especially persuasive evidence that [Respondent’s discharge of DiGiacomo] is unlawfully motivated.”²

Ibid.

² The ALJ concluded that this announcement of the Respondent’s intent to retaliate against DiGiacomo for her Union activity “was too remote and attenuated to show that union or protected activity was a motivating factor in DiGiacomo’s discharge.” (ALJD at 11, ¶ 29 fn. 16.) The ALJ’s conclusion is contrary to *Overnite, supra*. There, the Board found the statements of a supervisor who was no longer a manager with the employer at the time of the discharge made years before the discharge occurred “especially persuasive evidence” that the discharge was unlawfully motivated. *Id.* at 1436-37, 1465. Similarly, the assertion by Respondent’s manager

2. **The Answering Brief Incorrectly Claims That DiGiacomo’s Actions Were Not Protected Because DiGiacomo Was Insufficiently Specific Regarding How Her Protest Related To Union Concerns**

According to the Respondent, “the fatal flaw in the Union’s argument [that the Respondent violated the Act pursuant to *Atlantic Steel*, 245 NLRB 814 (1979)]...is that...DiGiacomo never mentioned these asserted fears at any time during the tour or during the alteration in the parking lot,” and, therefore, “there simply was no ‘protected activity [sic] to ‘remain protected’” (Ans.Br. at 15.) Here, once again, the Respondent proffers an argument that the Board has long rejected.

“Specificity and/or articulation are not the touchstone of union or protected concerted activity. Rather, the issue to be addressed is the question of whether or not the comments are related to concerted or union interests.” *Springfield Library & Museum*, 238 NLRB 1673, 1673 (1979); accord, *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1100, 1104, 1104 fn. 15 (2000) (“The nexus between the activity and working conditions must be gleaned from the totality of the circumstances.”) (quoting *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995)); see also *Valley Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007), *enfd.* 358 Fed.Appx. 783 (9th Cir. 2009). In the present case, “the issue to be addressed is the question of whether or not the comments are related to concerted or union interests,” *Springfield, supra* at 1673, based on “the totality of the circumstances,” *Senior Citizens, supra* at 1104 fn. 15. Contrary to Respondent, the issue is *not* whether DiGiacomo was adequately “specifi[c]” and “articulat[e]” regarding how her protest related to such interests. *Springfield, supra* at 1673.

here, although made over a year prior to the discharge by a manager not directly involved in the discharge, still constitutes “especially persuasive evidence” of unlawful motive. *Ibid.*

The totality of the circumstances demonstrates a relation between DiGiacomo’s conduct and concerted or union interests. Thus, in bargaining on November 11, 2015—the day before DiGiacomo’s confrontation with the tour group—DiGiacomo protested the Respondent’s use of an anti-Union consultant among the MHTs, claiming that the consultant was adversely affecting morale and that the presence of outsiders on the adolescent unit without proper identification raised safety concerns. (ALJD at 4, ¶¶11-18; GC 8 and 10.) At that same bargaining session, DiGiacomo “engaged in a fairly intense debate about staffing and morale at the hospital” with Autumn DeShields (“DeShields”), with DiGiacomo protesting that DeShields “was not doing anything” (ALJD at 4, ¶¶ 4-9). DeShields conceded at hearing that she participated in the Respondent’s anti-Union campaign among the MHTs, accompanying the anti-Union consultant to as many as 20 meetings with MHTs at the hospital. (Tr. 38, 40, 42, 45, 46, 59, 200, 205, 206.) Moreover, Union chief negotiator Bill Zoda (“Zoda”) echoed DiGiacomo’s comments at the November 11 negotiation, expressing concern about “people walking around an adolescent unit” who may forbidden from being around adolescents. (GC 8 and 10.) In short, on November 11, both DiGiacomo and the Union protested the Respondent bringing unidentified visitors into the adolescent unit as part of its anti-Union drive, claiming that this activity harmed morale and safety. DiGiacomo specifically complained about DeShields’ role in this anti-Union activity.

Against this backdrop, DeShields appeared the following morning on the adolescent unit unannounced and accompanied by a group of unidentified visitors—the exact activity complained of by DiGiacomo and Zoda at the negotiating session the day before. By demanding to know who the visitors were and what their purpose was, DiGiacomo was continuing the protest that she and Zoda had initiated at bargaining the day before. Receiving no response and recognizing one of the visitors as a Friends Hospital MHT, DiGiacomo sarcastically asked how

many orientations he needed—comments intended to show the group that DiGiacomo knew their true purpose for touring the unit, which DiGiacomo believed was to parade the Respondent’s MHTs’ replacements in front of them. In a similar vein, DiGiacomo asked whether she could now organize at Friends—*i.e.*, in light of the fact that Friends employees were permitted to fight the Union’s organizing drive at the Respondent. In sum, on the “totality of the circumstances”—the correct standard—it is clear that DiGiacomo was objecting to a perceived anti-Union intimidation tactic and attempting to limit its effectiveness, the latest of many such tactics which the Union had very recently complained affected morale and safety. *Senior Citizens, supra* at 1104 fn. 15. Thus, DiGiacomo’s conduct “related to concerted or union interests” and was therefore protected. *Springfield, supra* at 1673. The Answering Brief’s claim that DiGiacomo’s conduct was not protected because she was insufficiently articulate about exactly how her protest related to Union concerns is contrary to well-settled Board precedent.

III. Conclusion

For the foregoing reasons, the Union’s exceptions to the ALJ’s decision should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark Kaltenbach, hereby certify that I served the Charging Party's Reply Brief on the following by electronic mail on December 28, 2016 in the above-captioned matter:

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