UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEK ARDEN, LLC D/B/A ARDEN POST ACUTE REHAB and SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED LONG TERM CARE WORKERS	Cases 20-CA-156352 20-CA-156362 20-CA-156378 20-CA-156408 20-CA-157363 20-RC-154840

RESPONDENT/EMPLOYER'S MOTION FOR RECONSIDERATION OF THE BOARD'S JULY 25, 2017 DECISION AND ORDER

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I. INTRODUCTION

Under Section 102.48(c)(1) of the Board's Rules and Regulations, Respondent/Employer MEK Arden, LLC d/b/a Arden Post Acute Rehab ("Arden") respectfully moves the Board to reconsider its July 25, 2017 Decision and Order ("D&O") in this matter, which is reported at 365 NLRB No. 109. Arden respectfully submits the D&O contains the following material errors:

1. The two-Member Board majority materially erred in reversing the findings and conclusions of the Administrative Law Judge ("ALJ") and in departing from longstanding Board precedent in holding that Arden solicited employee grievances and impliedly promised to remedy them in violation of Section 8(a)(1) of the Act.

2. The Board materially erred in upholding the ALJ's credibility resolutions, which were predicated upon the erroneous and improper presumption that the witnesses called by General Counsel and the Charging Party/Petitioner were particularly reliable and their credibility enhanced because they were current employees of Arden.

Therefore, Arden requests that the Board grant this Motion for Reconsideration, sustain Arden's Exceptions to the ALJ's decision, deny General Counsel's Cross-Exceptions, dismiss the Complaint in its entirety, overrule the Petitioner's objections, and certify the election result.

II. ARGUMENT

A. THE BOARD MAJORITY MATERIALLY ERRED IN HOLDING THAT ARDEN SOLICITED EMPLOYEE GRIEVANCES AND IMPLIEDLY PROMISED TO REMEDY THEM IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

The ALJ correctly found that Markus Mettler, President/Chief Operations Officer of Healthcare Management Services, LLC ("HMS"), which operates Arden's facility, did not solicit employee grievances or impliedly promise to remedy them. However, in response to General Counsel's Cross-Exceptions, Board Members Pearce and McFerran, with Chairman Miscimarra

dissenting, reversed the ALJ and found a Section 8(a)(1) violation. The Board Majority's findings and conclusions are materially erroneous.

1. No Grievance Solicitation Occurred

First, General Counsel's Exceptions and supporting argument were based on CNA Marlene Anderson's version of her pre-petition June 24, 2015 conversation with Mettler outside the facility.[1] However, the ALJ credited Mettler's testimony over Anderson's (365 NLRB No. 109, pp. 6, 16), and General Counsel did not except to these findings. Moreover, the substantial record evidence and the ALJ's reasoning support his decision to credit Mettler over Anderson.

Second, based on Mettler's testimony, the ALJ further correctly found that Mettler, by merely asking Anderson "how things were going" did not solicit any grievances. 365 NLRB No. 109, p. 16. For example, Mettler did not ask Anderson what were her issues, problems, or concerns. He simply greeted her. As Chairman Miscimarra stated in his dissent in the D&O, "how are things going" is a familiar, commonplace greeting. 365 NLRB No. 109, n.2. *See also Best Plumbing Supply,* 310 NLRB 143, 148 (1993) (No violation where warehouse manager asked employees what was going on, whether something was wrong, and whether they wanted to talk about it, after which they voiced their complaints).

Third, as the ALJ found (365 NLRB No. 109, pp. 6, 16, n.62), Mettler, who was visiting the facility to personally thank the staff and celebrate a better than expected annual State survey, also spoke with non-bargaining unit employees earlier in the day and asked them the same question, thereby evidencing the purpose of his innocuous greeting was not union motivated.

Fourth, Anderson, unsolicited, had already raised her complaint about Arden's Interim DON to the facility's Interim Administrator the week before Mettler's visit, and the Interim

[1] All dates refer to 2015, except as otherwise indicated.

Administrator conveyed this complaint to Mettler along with workplace concerns raised by non-bargaining unit employees. 365 NLRB No. 109, pp. 6, 16. Therefore, Mettler was not soliciting Anderson's complaints; she had initiated the subject by raising her complaint to management before any knowledge of union organizing activity or the Union's election petition. *See Flex-N-Gate Texas,* 358 NLRB 622, 628 (2012) (Employer did not solicit employee grievances where employee approached management with his work complaints); *MacDonald Machinery Co.,* 335 NLRB 319, 320 (2001) (Board dismissed solicitation of grievances allegation where employees raised work concerns to management before onset of union campaign).

Contrary to the Board Majority's misplaced reliance (365 NLRB No. 109, p. 3) on *Maple Grove Health Center,* 330 NLRB 775 (2000), these facts and the case law underscore that no "inference of illegality" may be drawn from Mettler's conversation with Anderson. Unlike *Maple Grove,* no grievance solicitation occurred here.

2. No Implied Promise to Remedy Employee Grievances Occurred

The Board Majority further materially erred in reversing the ALJ and concluding Mettler's innocuous comment that he would "look into" Anderson's complaint about the Interim DON was an implied promise to remedy her unsolicited concern. As the ALJ found and Chairman Miscimarra agreed (365 NLRB No. 109, n.2, p. 16), Mettler's statement merely was "a natural human response" and not a promise to remedy a solicited grievance "that impresses upon employees the notion that union representation is unnecessary." *Johnson Technology, Inc.,* 345 NLRB 762, 764 (2005). Mettler made no promise to fix, improve, or remedy anything. His response to Anderson was entirely consistent with his past practice of simply listening to employees when they bring up their concerns to him and not promising to make any changes or improvements. 365 NLRB No. 109, pp. 6, 16.

The Board Majority's reliance on *Reliance Electric Co.,* 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972), and *Mandalay Bay Resort & Casino,* 355 NLRB 529 (2010), is misplaced. In *Reliance Electric*, the employer admittedly held employee meetings for the *specific* purpose of soliciting and adjusting employee grievances in response to a union organizing campaign. Similarly, in *Mandalay Bay Resort & Casino,* the employer conducted employee meetings shortly before the election for the *express*ly articulated purpose of soliciting and addressing employee problems and concerns. 355 NLRB at 529. That did not occur here.

Therefore, the Board should grant this Motion for Reconsideration and find that Mettler neither unlawfully solicited employee grievances nor impliedly promised to remedy them and adopt the ALJ's dismissal of this Section 8(a)(1) allegation.

B. THE BOARD MATERIALLY ERRED IN UPHOLDING THE ALJ'S CREDIBILITY RESOLUTIONS SUPPORTING HIS FINDINGS OF SECTION 8(a)(1) VIOLATIONS AND OBJECTIONABLE CONDUCT ON WHICH HE AND THE BOARD RELIED TO OVERTURN THE ELECTION

In finding that Arden engaged in certain Section 8(a)(1) violations and objectionable conduct on which the ALJ recommended that the representation election should be set aside, he made credibility determinations based upon *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978), and *Gateway Transportation Co.,* 193 NLRB 47, 48 (1971), in which the Board held that current employees who testify contrary to their employer are "particularly reliable" because they are testifying "against their pecuniary interest." *Gold Standard, supra,* 234 NLRB at 619 (The "testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken.") The Board should grant this Motion for Reconsideration because the premise upon which *Gold Standard* relies is completely flawed and a totally unreliable indicator of credibility. The *Gold Standard* presumption also was inappropriately applied in this case.

1. The *Gold Standard* Presumption Is a Completely Unreliable Indicator of Credibility and Inappropriately Applied in This Case

The ALJ, in crediting the four employee witnesses called by General Counsel and the Charging Party/Petitioner (CNAs Anderson, Camila Holcomb, and Danielle Dangerfield, and laundry/housekeeping employee Angela Snipes), where he found either Section 8(a)(1) violations or objectionable conduct, relied on their status as current employees in finding that, under the *Gold Standard* presumption, their credibility was "enhanced" and their testimony was "particularly reliable." (365 NLRB No. 109, pp. 6, 7, 12, 24) However, the mere fact a current employee testifies adversely to his or her employer is an unreliable indicator of credibility in many occasions. The Board needs to revisit this evidentiary presumption and limit *Gold Standard*'s application to situations where it is shown the witness has no interest in the outcome of the litigation or is reasonably likely to have no fear of testifying against his or her employer.

Employees who are union supporters believe they are acting in favor of their pecuniary interest by supporting a union and therefore have a definite interest or incentive to offer testimony supporting the unionizing effort. Moreover, employees who are openly actively union supporters clearly do not fear retaliation by their employer for engaging in subsequent testimonial activity against their employer's interest. *Gold Standard*'s blanket credibility rule fails to recognize these realities. Instead, it broadly and without any reasonable basis presumes all current employees are disinterested in the outcome of litigation against their employer and fear retaliation if they testify against their employer.

The Board, on many prior occasions, has properly recognized the common-sense concept that a witness' interest in the outcome of litigation should be considered when making credibility determinations. *See, e.g., Superior Travel Service, Inc.*, 342 NLRB 570 fn. 8 (2004) (finding witness credible in part because she had no apparent interest or bias in the outcome of the

litigation); *A. A. Superior Ambulance Service,* 263 NLRB 499, 501 (1982) ("I have also considered the positions held by the various witnesses and their possible interest in the outcome of the litigation"); *Pacific Aggregates, Inc.,* 231 NLRB 214, 216 (1977) (testimony from a witness with an interest in the outcome of litigation was less credible than the testimony from a neutral witness); *American Guild of Variety Artists,* 163 NLRB 457, 465 (1967) (discrediting testimony in part because the witnesses had an interest in the outcome of the litigation).

In *Gold Standard,* however, the Board failed to limit its holding to instances where it is shown a current employee testifying against the employer is disinterested in the outcome of the case. This omission has improperly allowed the Board and ALJs to apply the *Gold Standard* presumption where, as here, witnesses have an obvious interest in the outcome of the litigation.

Additionally, *Gold Standard* fails to recognize that Section 8(a)(4) of the Act protects employees from retaliation by an employer for their testimony in a Board proceeding, including offering the ability to obtain reinstatement, backpay, and other meaningful remedies. As such, employees have effective legal recourse if they are retaliated against and, therefore, are not acting against their pecuniary interest by testifying against their current employer.

Gold Standard also fails to recognize that, in certain circumstances, such as during a robust job market with low unemployment rates or in certain industries, there is a strong demand for employees such as CNAs or other long-term care industry employees with certain skill sets. In particular, the job market in a large city like Sacramento is extremely robust and CNAs and other skilled nursing facility employees are in high demand. Therefore, Anderson, Holcomb, Dangerfield, and Snipes, who were very open and active union supporters during the election campaign, were more likely to take the calculated risk and fabricate their testimony to support the Petitioner's effort to overturn the election, knowing they could easily find another job.

The ALJ's and Board's failure to recognize these economic and industrial realities and limit the holding in *Gold Standard* and its application in this case clearly is materially erroneous and requires reconsideration. For openly active union supporters during the election campaign, like these four employees, whose testimony advanced General Counsel's and the Petitioner's effort to set aside the election, their status as current employees should have been completely disregarded when it came time to make credibility determinations.

These employees had nothing to fear from testifying against Arden's interest at the time of the hearing, and every incentive to support General Counsel's and Petitioner's effort to get the adverse election result overturned. It is wholly unreasonable to presume their status as current employees weighed heavily in favor of and "enhanced" their credibility, as the ALJ found.

The *Gold Standard* premise is terribly flawed and should be overruled or, at least in this case, completely disregarded. The Board should grant this Motion for Reconsideration, reverse the ALJ's credibility determinations in favor of these four employees, dismiss the Section 8(a)(1) allegations he deemed meritorious, overrule the objections, and certify the election result.

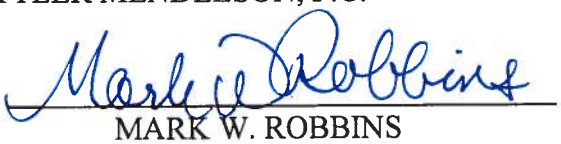
III. CONCLUSION

Arden submits the Board should grant this Motion for Reconsideration, dismiss the Complaint in its entirety, overrule the Petitioner's objections, and certify the election result.

Dated: August 29, 2017

Respectfully submitted,

MARK W. ROBBINS, ESQ.
LITTLER MENDELSON, P.C.

By 
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CERTIFICATE OF SERVICE

I hereby certify that, on August 29, 2017, I e-filed the attached Respondent/Employer's Motion for Reconsideration with the NLRB's Office of the Executive Secretary on the NLRB's E-Filing system, and served a copy of this Answering Brief by electronic mail upon the following:

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