

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

In the Matter of:

NATIONAL NURSES ORGANIZING
COMMITTEE/NATIONAL NURSES
UNITED (NNOC/NNU), AFL-CIO,

Charging Party,

and

HOLY CROSS HEALTH, INC., d/b/a
HOLY CROSS HOSPITAL,

Respondent.

Cases: 05-CA-182154
05-CA-187452

**ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. PRELIMINARY STATEMENT

Pursuant to Section 102.46(b) of the Board’s Rules and Regulations, National Nurses Organizing Committee/National Nurses United (NNOC/NNU) (“Charging Party” or the “Union”), herewith files its answering brief to the exceptions filed by Holy Cross Health, Inc., d/b/a Holy Cross Hospital, (“Respondent,” “Holy Cross,” the “Hospital” or the “Employer”) to the Administrative Law Judge’s (the “ALJ”) Decision (“Decision”), JD-58-17, in Cases 05-CA-182154 and 05-CA-187452.

The ALJ correctly found that Holy Cross violated Section 8(a)(1) of the Act by maintaining facially unlawful policies and engaging in other acts that interfere with employees’ Section 7 rights. Respondent does not even attempt to argue that the policies are facially lawful, instead asserting the inapposite argument that no Registered Nurses (“RNs” or “nurses”) were disciplined under the policies. Respondent offers a hodgepodge of other justifications—including the existence of an email forum allowing Holy Cross employees to email all other employees in which the union has been discussed—that in no manner privilege its facially unlawful policies.

In addition, the ALJ properly concluded that that Respondent: threatened RNs with loss of benefits and more onerous working conditions if they select Charging Party as their collective-bargaining representative; coercively interrogated RNs about their union sympathies; coercively interfered with RNs engaged in union and/or protected concerted activity; engaged in surveillance and/or the impression of surveillance of RNs engaged in union and/or protected concerted activity; and instructed RNs that they were prohibited from discussing the Union while on Respondent’s premises.¹

¹ These findings are but a few examples of Holy Cross’s scorched earth campaign against pro-Union nurses, which have been the subject of other Unfair Labor Practice charges against the Hospital. In

Accordingly, Charging Party respectfully requests the Board to affirm the ALJ's findings and conclusions *in toto* that the Respondent has violated the Act, and to adopt the recommended Order.

II. PROCEDURAL BACKGROUND

The charge in Case 05-CA-182154 was filed by Charging Party on August 12, 2016. The charge in Case 05-CA-187452 was filed by the Charging Party on October 31, 2016. Both charges allege violations of Section 8(a)(1) of the National Labor Relations Act (the "Act"). On February 27, 2017, the General Counsel issued a Consolidated Complaint. A trial was held in Baltimore, Maryland on May 18, 19, and 23, 2017 before ALJ Michael A. Rosas. The parties filed their post-hearing briefs on July 11, 2017, and on July 21, 2017, the ALJ issued his Decision affirming every allegation in the Complaint.²

III. STATEMENT OF FACTS

The Employer operates an acute care hospital in Silver Spring, Maryland, and employs about 1,300 RNs. The Union began to organize the Employer's RNs after nurses at the hospital reached out seeking representation earlier in the year. Tr. 52:1-9.³ The Employer learned of the

resolving one of these charges, Holy Cross agreed to reinstate with back pay a pro-Union nurse leader whom it had callously terminated in front of her family. Case No. 05-CA-197700. Another charge containing multiple allegations, including retaliation for testifying in the hearing in this case, is pending before the Region. Case No. 05-CA-201470.

² Respondent argues that, in emailing the parties that the "decision is essentially completed" four business days after submission of the parties' briefs, the ALJ "rush[ed] to judgment," which led to multiple factual and legal errors. R Br. 1. To the extent this unsupported questioning of the ALJ's competence merits a response, the Union finds no authority requiring an ALJ to wait a minimum number of days before filing a decision. In fact, the ALJ had more time to review the transcript and exhibits than is typical, given that he granted the parties' joint request for an additional 14 days to file their briefs. Tr. 522:16-17. In any case, the Decision thoroughly cites the transcript, the exhibits and the parties' post-hearing briefs throughout, and any factual errors were de minimis and would not affect the findings and conclusions.

³ "Tr. ___" refers to the page(s) and line number(s) of the transcript of the hearing in this matter. "ALJD ___" refers to the page(s) and line number(s) of the ALJ Decision in this matter. "R Br. ___" refers to the

Union campaign in late June 2016. J Exh. 1.

As the Union campaign started to gain momentum, however, the Employer responded with an ever-more aggressive antiunion campaign to prevent the RNs from enjoying their Section 7 right to select the Union as their collective bargaining representative. *See, e.g.*, Tr. 171:15-23. The Employer hired an antiunion consultation firm, Yessin and Associates, and has since undertaken an intense campaign to intimidate RNs and prevent RN-to-RN dialogue about the organizing campaign. *Id.*; Tr. 56:8-12.

The Complaint alleges, and the ALJ found, that the Employer: has promulgated, maintained and enforced unlawful solicitation and distribution rules; threatened a loss of benefits and more onerous working conditions if RNs choose the union; coercively interrogated RNs regarding their support of the Union; coercively interfered with RNs engaged in union and/or protected concerted activity; and engaged in surveillance and/or created an impression of surveillance of RNs' union activity.

A. Solicitation and Distribution Policy and Memorandum

The Employer has maintained a policy titled “Holy Cross Health: Solicitation and Distribution” approved by Interim Chief HR and Integrity Officer/Educational Development Matthew Lukasiak on June 8, 2016 (“Policy”). GC Exh. 2. The Policy sets out rules for solicitation and distribution on owned—or properties under the control of—the health system. *Id.* at 1.

The definition of “solicitation” in the Terms section of the Policy includes “promoting,

page(s) of Respondent’s Brief in Support of its Exceptions. “J Exh. 1” refers to Joint Exhibit 1, which is the only joint exhibit. “GC Exh. ___” refers to General Counsel’s exhibits in this matter. “R Exh. ___” refers to Respondent’s exhibits.

encouraging, or discouraging participation, support, or membership in any organization; or promoting of a doctrine or belief.” *Id.* at 2. The definition of “distribution of literature” includes “electronic matter for the purpose of, or as an aid to, solicitation.” *Id.* And the definition of “immediate Patient care areas” includes “corridors [; and] . . . elevators and stairways used by or to transport patients.” *Id.*

The Policy provides that “[t]he health system prohibits the solicitation and distribution of literature to patients or visitors at any time by unauthorized persons.” *Id.* at 3. The Policy continues: “[t]he health system also prohibits solicitation through the use of the health system’s electronic communication systems to colleagues or non-employees.” *Id.*

In a follow-up memorandum sent by Holy Cross management to all RNs on October 7, 2016 regarding “Solicitation in Nursing Units” (“Memo”), the Employer defined “immediate patient care areas” to include the following locations: “elevators and stairways used by or to transport patients.” GC Exh. 3. The Memo states that “[n]urses opposed to or in support of the union may leave literature for pick up as long as it is a non-work or patient care area where Holy Cross allows solicitations and/or distributing personal materials.” *Id.* It further states that “discussion while either nurse is on work time (not off duty and not on break) or with a nurse who is performing her duties – charting, speaking with other caregivers, family – in the patient’s room, or speaking to physicians” is not permitted on the unit. *Id.* And “[d]iscussion in a patient room or elsewhere on the unit where patients are or can be present – such as corridors where patients wait or treatment rooms” is not permitted on the unit. *Id.*

There is no indication from the record evidence that the Employer has rescinded either the Policy or the Memo.

In addition, Marianne Wysong, RN, testified at trial that unlawful portions of the Policy

and Memo have been enforced by Holy Cross management. She was specifically instructed by a manager that the Policy and Memo prohibited RN discussions about the Union “at the nurses’ station, in the hallways, in any patient care area . . . [and] [i]f we did talk about the Union, it had to be in the parking lot, off Holy Cross grounds, off the clock, and that it could not be during working hours.” Tr. 330:21-25; 331:1-25; 333:2-6. Other incidents of enforcement of the Policy and Memo, including by Holy Cross security officers, are discussed *infra*.

B. July 20, 2016, Meeting between NICU Director Cynthia Hawley and Susannah Reed-McCullough, RN

On July 20, 2016, Neonatal Intensive Care Unit (NICU) Director Cynthia Hawley instructed Union supporter Susannah Reed-McCullough, RN, to meet with Hawley in her office. Tr. 118:2-20. At that time, Hawley was her immediate supervisor. Tr. 118:21-23. Hawley immediately began discussing the Union, and told Reed-McCullough that “she was aware that there were nurses who had been called at home and harassed, and that if [Reed-McCullough] were ever to feel harassed, that [she] should let [Hawley] know.” Tr. 120:4-14. Hawley told Reed-McCullough that the current self-scheduling policy could change if there was a union, requiring rotator nurses to wait 15 years instead of the current eight before being allowed to come off the rotator schedule and go to straight days or straight nights. Tr. 121:1-8. Hawley also told Reed-McCullough that, with a union, “nurses may not be able to meet with [Hawley] directly anymore, that there would have to be like a third party present.” Tr. 121:8-10. In addition, Hawley told Reed-McCullough that, with a union, the “current FMLA policy, which [Hawley] considers very generous, could be subject to change.” Tr. 121:11-13.

Hawley was aware at the time she told these things to Reed-McCullough that Reed-McCullough preferred to work day shift, Tr. 123:3-9, and that she has used FMLA for herself and her family. Tr. 122:8-18.

C. August 6, 2016, Incident with Holy Cross NIC Calling Security Officers on RNs attempting to Speak to Other RNs about the Union

On August 6, 2016, RNs Suzanne Mintz and Jeaneen Scott were making off-duty rounds in the hospital seeking to speak with nurses about the Union organizing effort. Tr. 57:21-25; 58:2-11. Both were known Union supporters to the Employer, as Mintz had abruptly left a management-organized meeting about the Union in front of several senior managers on July 28, 2016, Tr. 56:1-25, and Scott had informed her manager Cynthia Hawley of her support for the Union on July 22, 2016, Tr. 256:13-21; 258:8-17.

On August 6, the two RNs went to the fifth floor and sat in the waiting area of the Surgery Department unit, where they met with RN Aieun Grace Yu. Tr. 63:21-25; 64:1-2; GC Exh. 4 (surveillance video) at 00:23, video 1. After Yu went back on the unit to attempt to get someone to talk with the two RNs about the Union, Tr. 64:1-5, another RN from the sixth floor with whom the two had previously met, Ester, came and spoke with the two about the Union. Tr. 64:16-24; GC Exh. 4 at 00:28, video 2.

After Ester left, Mintz and Scott noticed that NIC Dwight Lyles was looking at them; soon after that, two security officers approached the two RNs from the elevator after speaking with Lyles and the unit secretary or “HUC,” and a third security officer also approached the two RNs. Tr. 65:24-25; 66:1-20; 449:17-18; GC Exh. 4 at 6:15-8:08, video 2. The security officers are agents of Holy Cross. J Exh. 1. The security officers informed Mintz and Scott that they were responding to a “disturbance on the unit” and took the names of the two RNs. Tr. 66:21-25; 67:1-14. The officers were responding to a call from Lyles about the two, after the administrative coordinator instructed Lyles to call security. Tr. 450:9-10; 460:9-14. Lyles recognized Scott, Tr. 452:8-12, and suspected that the two RNs were coming to the unit to discuss the Union. Tr. 15-22.

Meanwhile, the security officers had come onto the unit and told Yu that they were going to report her to the nursing coordinator, and wrote down her name. Tr. 68:18-25; 69:1-6; 136:6-14. Lyles also told Yu that he had called security and that “Union people [could not] come to the unit talking about the Union while [Yu was] working.” Tr. 135:21-25.

An August 6, 2016 Hospital Safety Report from Holy Cross Security Officer Daniel Webster confirms that the security officers were responding to “off-duty employees suspected of trying to recruit working nurses to Union” and that Lyles reported that the “two plain clothed employees are trying to recruit for the Union.” GC Exh. 18. The Report also states that Security Officer Lawrence Hawkins witnessed three to four nurses huddled together on the unit, and in response to overhearing them say “I want to see what they are offering,” he asked the nurses “what are they offering”? *Id.* Hawkins also stated that “he saw [Mintz and Scott] leave when they saw him.” *Id.* And in testimony, Hawkins acknowledged that Security Officers Webster and Varnado were “responding to a call about a union meeting, and [Hawkins] also just happened to be walking past, overheard the nurses laughing about they wanted to listen in on or take part in or just hear out the Union to see what they had to offer, and so [Hawkins] said, yeah I want to hear too.” Tr. 501:9-16.

D. September 16, 2016, Incident in which Holy Cross Managers Took and Disseminated Photos of RNs

On September 16, 2016, a group of about 16 RNs were delivering a pro-Union poster to the CEO of Holy Cross, Dr. Coots, and a pro-Union flyer was made containing a photo of the nurses with the poster. GC Exh. 8 (flyer); Tr. 150:2-18; 151:5-24. The flyer was distributed to nurses via email that same day. Tr. 151:25; 152:1-5. Vera Ngezem, RN, was among the approximately 16 nurses pictured in the flyer in front of a statue outside the hospital of Saint Joseph, the patron saint of workers. GC Exh. 8; Tr. 153:9-16.

Soon after the group photo was taken for the flyer, Ngezem noticed that there was a group of nurses about 10 feet away taking pictures from behind a window of the pro-Union nurses whom had just posed for the photo for the flyer. Tr. 156:9-25. Ngezem saw about five people taking pictures with their phones, of the approximately 10 that were standing there behind the window. Tr. 157:1-6. Ngezem was scared when she saw that the people behind the window were taking pictures of them. Tr. 158:17-19. One of those individuals was Ngezem's NIC, Jolly Joseph, who took three photos of the group of pro-Union nurses. Tr. 368:22-25; GC Exhs. 13, 14, 15; R Exh. 15. Joseph was in a management training with approximately 20 NICs and other managers in attendance. Tr. 382:12-16. Joseph then texted the photos to her director, Mariamma Ninan. Tr. 370:19-25; GC Exh. 16; R Exh. 16. In the text exchange between Joseph and Ninan, Joseph wrote "Gisele, Vera, Jessy Nina all were there," with Ninan responding "I see, so we were correct about Gisele!" and Joseph replying "Yep." GC Exh. 16; R Exh. 16. Joseph was aware of the Union campaign at the time she took the pictures. Tr. 373:17-19. All attendees in the management meeting were lined up against the window looking out at the pro-Union group of RNs, and other managers were taking pictures from the room, in addition to Joseph. Tr. 389:1-4; 390:3-13.

The photos were further disseminated to and among managers, with many comments regarding the Union activity of the approximately 16 pro-Union nurses that day. GC Exh. 17; R Exhs. 16-22. For example, NICs Roberta Patishnock, Francine Crum, and Stan Akisah, who were all in the September 16 management meeting with Joseph, Tr. 384:9-25; 385:1-13, wrote and/or received from other managers various texts such as "union organizers"; "Thank you Stan. This is a desperate attempt to get people to sign their cards"; and "Am in the meeting and Nina, the ring leader, looks like she's got a large petition. I sent this to [interim President] Judith

Rogers.” GC Exh. 17; R. Exhs. 17-23; Tr. 54:24-25.

E. Meeting between Acute Care and Surgery Director Mariamma Ninan and RN Vera Ngezem on September 21, 2016

On September 21, 2016, after her night shift which began the evening of September 20, Acute Care and Surgery Director Mariamma Ninan called Vera Ngezem, RN, and told her to come to Ninan’s office for a meeting. Tr. 160:5-25; 161:1-2. Ninan told Ngezem that if the Union came in, Ninan could no longer write income verification letters for nurses, like the one she wrote for Ngezem to assist her in qualifying for a mortgage. GC Exh. 21 (income verification letter from Ninan); Tr. 162:6-9; 164:16-25; 165:1-9; 202:5-25; 203:1-25; 204:1-25. Ninan also told Ngezem that if the Union came in, Ngezem would not be able to choose her schedules as freely. Tr. 162:9-15. Ninan knew that flexibility was important to Ngezem, Tr. 165:10-25; 166:1-9.

Ninan told Ngezem that, with the Union, if a more experienced nurse from a different unit wanted to, that nurse could take Ngezem’s job, which would cause Ngezem to be laid off. Tr. 163:12-14. Ninan also stated that she worked in a union hospital for 10 years and that it was horrible. Tr. 162:16-19. As an example, Ninan claimed that in the union hospital, she was unable to get approval of her long-requested vacation because a more senior nurse requested the same dates, even after Ninan’s request. Tr. 162:19-25; 163:1-11.

Ngezem was very upset about what Ninan told her, and felt lied to; she therefore called and subsequently wrote Union organizer Mansi Kathuria an email explaining what Ninan told her and asking Kathuria whether it was true. GC Exh. 9 (email); Tr. 166:10-25; 167:1-3, 18-24; 168:8-25. On the phone call, Kathuria reassured Ngezem that the things Ninan said about the Union were not true. Tr. 352:7-20.

F. October 19, 2016, Incident between Holy Cross Security Officer Lawrence Hawkins and Pro-Union RNs

On October 19, 2016, RNs Suzanne Mintz, Nina Scott, and Jessie Norris, known Union supporters to management, were standing together just outside the hospital cafeteria, an area completely separate from any unit where patients might be present, and were approached by Security Guard Lawrence Hawkins who admittedly asked them if they were talking about the Union. Tr. 82:2-23; 83:14-16; 289:17-20; 290:2-3; 500:5-12. According to Mintz, Hawkins said “it’s illegal to talk about the Union anywhere in the Hospital and that [Hawkins] was told that or informed of that from a paper from downstairs and that [the nurses] were not to be talking about the Union at all in the Hospital.” Tr. 83:18-22; 289:23-25; 290:1. Scott pointed out that what Hawkins was telling them was illegal, at which point Hawkins backed away. Tr. 83:23-25. No other topic of conversation was discussed as off-limits on hospital property. Hawkins filed a report of the incident with his supervisor. Tr. 19-23. Hawkins was wearing his security uniform, like other Holy Cross security officers, at the time of the incident. Tr. 290:10-21.

IV. ARGUMENT

The ALJ correctly concluded that Holy Cross has violated Section 8(a)(1) of the Act in numerous ways that interfere with employees’ Section 7 rights. In particular, the Employer: has promulgated and maintained facially unlawful solicitation and distribution rules; threatened RNs with loss of benefits and more onerous working conditions if they select the Union; coercively interrogated RNs about their union sympathies; coercively interfered with RNs engaged in union and/or protected concerted activity; engaged in surveillance and/or the impression of surveillance of RNs engaged in union and/or protected concerted activity; and instructed RNs that they were prohibited from discussing the Union while on Holy Cross’s premises. Indeed, Union activity was known by the Employer at least as of late June 2016, and—while unnecessary to establish

these Section 8(a)(1) violations—antiunion animus on the part of the Employer is abundant in light of the vigorous antiunion campaign run by the Employer.⁴

This brief addresses Respondent’s arguments in the order presented in Respondent’s Brief in Support of Exceptions (the “Brief”).

A. The ALJ Correctly Concluded that the Employer Promulgated and Has Maintained Facially Unlawful Solicitation and Distribution Policies.

The ALJ properly found that portions of both the June 8, 2016 Solicitation and Distribution Policy (“Policy”) and the October 7, 2016 Memo to RNs (“Memo”) are unlawful on their face. As the Decision correctly states, “it is ‘axiomatic’ that merely maintaining an overly-broad or ambiguous rule violates the Act,” ALJD 14:19-21 (quoting *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000)), and “the absence of evidence of enforcement of an unlawful rule does not preclude the finding of a violation or the issuance of a remedial order” ALJD 14:17-19 (quoting *J.C. Penney Co.*, 266 NLRB 1223, 1224-25 (1983)). Respondent continues to push its inapposite argument that it did not violate the Act because it did not consistently enforce the Policy or Memo. This argument, however, is unavailing, as Holy Cross violated the Act simply by promulgating and maintaining the Policy and Memo.

Indeed, Holy Cross conveniently ignores the *Beverly Health* and *J.C. Penney* decisions

⁴ Again, while not needed to find that Holy Cross violated Section 8(a)(1) of the Act, the record displays a plethora of antiunion animus that further informs the coerciveness of the Employer’s conduct. The Board has repeatedly held that employer conduct during an antiunion campaign, which does not violate the Act, may nonetheless establish evidence of antiunion animus. *See, e.g., Sunrise Health Care Corp.*, 334 NLRB 903, 903 (2001) (“Board law permits the use of evidence of an employer’s election campaign in order to show animus in an unfair labor practice trial The judge’s finding directly contravenes well-established Board precedent holding that while protected speech, such as an employer’s expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer.”); *Holo-Krome Co.*, 293 NLRB 594 (1989). Multiple one-on-one and captive audience meetings are described herein, which further establish the Employer’s antiunion animus.

and others like them in its Brief, instead asserting that “clarifying” a rule after the fact—or declining to enforce the rule—would somehow absolve it from liability for initially promulgating and maintaining the unlawfully overbroad and ambiguous rule. In essence, the Employer’s assertion that “we don’t enforce the rules so what the rules say doesn’t matter” begs the question: why has Holy Cross declined to rescind the rules? The answer is self-evident—the Hospital maintains the rules to impose a climate of fear, anti-union animus and open hostility towards nurses brave enough to exercise their Section 7 rights, all in violation of Section 8(a)(1) of the Act.

1. The ALJ Correctly Concluded that the Definition of “Solicitation” is Unlawfully Overbroad and Vague on its Face, and There Is No Need to Inquire Further.

The Employer argues that the ALJ “ignored the uncontradicted evidence that the Hospital permitted discussion about the Union.” R Br. 22. This assertion, even if true (which it is not, as revealed in the record), would not undermine the ALJ’s finding that the definition of “solicitation” was facially unlawful in the Policy and Memo.

Holy Cross does not even attempt to argue that the policies are facially lawful, and essentially acknowledges the illegality of the definition of “solicitation” in writing in its Brief that “[e]ven if a policy is found to be unlawful on its face because it is ambiguous or overbroad, an employer may rebut the presumption” *Id.* Despite the Hospital’s unsupported contention, there is no way to “rebut” a facially unlawful rule—it either is or is not lawful. The Hospital clouds the issue, making various red herring arguments including that no nurse was disciplined under the policies, and certain nurses understood that Union talk was permitted in all

areas and at all times as long as it does not interfere with patient care. R Br. 6, 23, 28.⁵ These arguments are unconvincing, and in no way undermine the ALJ’s finding.

As the Board is well aware, the general test applied to workplace rules is articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In that case, the Board held that “an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights.” *Id.* at 646 (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). The Board must give the rule a reasonable reading, refrain from reading particular phrases in isolation, and not presume improper interference with employee rights. *Id.*

The inquiry begins with the issue of whether the rule explicitly restricts activities protected by Section 7. *Id.* If so, the rule is unlawful. *Id.* For example, a ban on solicitation that is not by its terms limited to working time is an explicit restriction. *Id.* at 646, n.5. A rule that does not explicitly restrict protected activities, however, is also unlawful if but one of the following is satisfied: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. Whenever a rule is ambiguous, the Board will construe it against the drafter, and the existence of lawful provisions does not cure an unlawful rule. *First Transit, Inc.*, 360 NLRB 619, 629 (2014) (striking down as “patently ambiguous” employer’s rule prohibiting discourteous or inappropriate behavior).

Moreover, employees unquestionably enjoy the right under Section 7 to engage in union solicitation and distribution in the workplace absent any justification for limitation of that right to

⁵ Of note, there is nothing in the record proving that no nurse was disciplined under the unlawful policies. Moreover, nurses *did* testify that they understood the policies to prohibit Union talk anywhere in the hospital. *See* testimony of Jeaneen Scott, Tr. 274:8-14; 278:8-13; and Marianne Wysong, Tr. 330:21-25; 331:1-25; 333:2-6.

maintain production or discipline. *See, e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803, n.10 (1945); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646, 654-55; *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk*, 138 NLRB 615 (1962).

Here, the Policy and Memo issued by Holy Cross go far beyond what is lawful, both in their definitions and in the actual rules precluding protected Section 7 activities. There is no question that the portions of these documents described in the Statement of Facts, when read together with the documents in their entirety, would reasonably tend to chill nurses—and have in fact chilled them—in the exercise of their Section 7 rights. There is, therefore, no need to proceed further in the analysis, as the rules are facial violations of Section 8(a)(1).

If, however, the Board were to disagree with the ALJ’s findings and decline to find the rules facially unlawful and proceed in its analysis, the definition of “solicitation” in the Policy includes “promoting, encouraging, or discouraging participation, support, or membership in any organization; or promoting of a doctrine or belief.” GC 2 at 2. Notwithstanding the other aspects of the definition of solicitation that necessarily involve requesting an individual to take a specific action in response, “encouraging” participation, support, or membership in an organization could very reasonably be interpreted to mean simply talking to a coworker to try to change her mind and convince her to support the Union. *See generally Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). This, when read in context of the Policy as a whole, makes the definition overbroad.

The subsequent Memo only compounds the violations of Section 8(a)(1) of the Act. In addition to provisions of the Memo being unlawful as reasonably interpreted by a nurse, including the prohibition of “solicitation or discussion while either nurse is on work time” and “solicitation or discussion in a patient room or elsewhere on the unit where patients are or can be

present,” the Memo was also unquestionably promulgated in response to Union activity. GC Exh. 3. Either of these, standing alone, would make the Memo unlawful. *See Lutheran Heritage Village-Livonia*, 343 NLRB at 647. Indeed, the Memo begins “[r]ecently, we have had nurses from some units visiting other units to meet with nurses.” GC Exh. 3. It continues in the second paragraph that the Memo is a review of rules regarding solicitation, which “includes solicitation . . . in favor of or against a union and discussion about wages, hours and conditions of employment.” *Id.* The Hospital does not, and cannot, claim that the Memo was not promulgated in response to Union activities, therefore proving the Memo violates Section 8(a)(1).

Holy Cross claims that it has a “legitimate business purpose” behind the Policy and Memo: to prevent disruption of patient care. R Br. 24 (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)). As articulated by the ALJ, however, *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), and its progeny, which the Supreme Court decided after *Great Dane*, provide precisely the business justification/employee rights balancing test for solicitation in acute health facilities: the Respondent must carry the burden of demonstrating, by the preponderance of the evidence, why a restrictive ban is necessary to avoid a disruption of patient care. ALJD 18 at n.45 (citing 442 U.S. at 781).

In any case, the Hospital’s claimed “business purpose” is belied by the uncontroverted testimony that the Hospital permits all sorts of non-work related discussions in working areas and on working time. Taking the Hospital at its word that it permits Union discussions at all times and in all areas and that nurses understood this to be the case, one can conclude that the Hospital in fact has *no* legitimate business purpose in the rules found unlawful by the ALJ. Otherwise, the Hospital would assert that it enforces the rules in order to protect this claimed

business interest.⁶ For this reason, it is illogical that the Hospital argues that the Board should decline to apply the rule in *Con-Agra Foods, Inc.*, 361 NLRB No. 113, slip op. at 3 (2014) (finding unlawful an employer prohibition against union “discussions”—which the employer claimed were covered under its “no solicitation policy”—as employees would reasonably construe this rule to prohibit protected Section 7 activity).

Regardless, though, Holy Cross’s Brief fails to account for two points: 1) the unknown number of nurses who could have been chilled in engaging in Section 7 activities because of the Policy and Memo, and 2) any “clarification” of the Policy or Memo did not happen until months later. As for the first point, unless the Hospital called as witnesses all 1,300 nurses working at the facility, it cannot credibly assert that *no* nurse was dissuaded from discussing the Union. The testimony of a handful of nurses at trial, and emails showing that thirteen nurses “openly discussed the union,”⁷ R Br. 8, certainly do not account for the other over 1,280 nurses who remained silent in this matter, many of whom were likely intimidated by the Policy and Memo. As for the second point, even if the Hospital “clarified” the Policy—to the extent such “clarification” was ever made (which the Union disputes)—this did not occur until months after the Policy was implemented. Throughout those months, at least, nurses were unquestionably

⁶ Again, the Union does not concede that the Hospital did not discriminatorily enforce the non-solicitation and non-discussion rules with respect to Union solicitation and discussion, as the record reveals otherwise. *See* testimony of Jeanee Scott, Tr. 274:8-14; 278:8-13; and Marianne Wysong, Tr. 330:21-25; 331:1-25; 333:2-6. As explained by the ALJ, an employer violates Section 8(a)(1) when it permits employees to discuss nonwork-related subjects during working time, but simultaneously prohibits discussion of union-related matters. ALJD 14:35-38 (citing *Jensen Enterprises*, 339 NLRB 877, 878 (2003); *Frazier Industrial Co.*, 328 NLRB 717, 717 (1999)).

⁷ Not all emails in the “discussions” were in favor of the union.

misled and thus chilled in engaging in Section 7 activities.⁸

In its Brief, Holy Cross incoherently argues, for the first time, that the Board's standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) should be abandoned "in this case." R Br. 25. While the Board cannot "abandon" a test as applied to a single case,⁹ to the extent Holy Cross argues that the Board should overturn the thirteen-year-old *Lutheran Heritage* standard that has been unanimously approved by courts of appeals and applied by Democrat and Republican-majority Boards, the Union opposes this argument, and asserts that, at any rate, this case is not an appropriate vehicle to challenge the standard.

Holy Cross seems to argue that a "balancing test" articulated in Chairman Miscimarra's dissent in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), should be controlling law, thus overturning *Lutheran Heritage*. R Br. 25. In his dissent, Chairman Miscimarra writes that "a *facially neutral* [emphasis added] work requirement should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity." *Id.* Further clarifying this, he writes, "I use the term 'facially neutral' to describe policies, rules and handbook

⁸ In a footnote, Holy Cross excepts to the ALJ's conclusion that its failure to define "unauthorized persons" created a chilling effect on employees. R Br. 23 at n.10. It reasons that there is evidence that the Hospital allowed off-duty nurses to come to the Hospital to engage in union activities. Nevertheless, whether this is true, there is certainly evidence that Holy Cross used its security guards to intimidate and prevent from engaging in protected activities off-duty nurses Jeaneen Scott and Susanne Mintz. *See* argument, *infra*. In the same footnote, the Hospital also excepts to the ALJ's finding that the policy sent a message to employees that they needed to seek pre-authorization from the Hospital prior to soliciting non-employees, claiming that there is no evidence that supports this. To the extent that either of these are arguments in support of these exceptions, the Union asserts that the ALJ's Decision on these issues should be affirmed for the reasons articulated in the Decision. ALJD 15:25-39; 16:1-11.

Notably, the Hospital does *not* except to the ALJ's finding that the October Memo violated the Act in stating that "[n]urses opposed or in support of the union may leave literature for pick up as long as it is a non-work or patient care area *where Holy Cross allows solicitations* and/or distributing personal materials." ALJD 16:13-29 (emphasis added).

⁹ The Board can decline to apply a test to a case, or distinguish the facts, but Holy Cross does not argue for that here.

provisions that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity.” *Id.* at n.3 (Miscimarra, dissenting). Here, however, the ALJ has already determined—and Holy Cross has essentially conceded—that the provisions of the Policy and Memo are not facially neutral, but rather facially *unlawful*. Moreover, at least the Memo was adopted in response to NLRA-protected activity, and the record reflects that both the Policy and Memo have been applied to restrict NLRA-protected activity. Therefore, these are not “facially neutral” policies as defined by the Chairman, and the facts of this case thus do not lend themselves to a sweeping doctrinal change to the Board’s employer rules test.

If, however, the Board chooses to use this case to reconsider *Lutheran Heritage*, the Union opposes the Board’s abandonment of the longstanding test for the reasons articulated by the *Beaumont Hospital* majority. *Id.*; see also *Verizon Wireless*, 365 NLRB No. 38, at n.3 (2017) (reaffirming *Lutheran Heritage* standard). Furthermore, the test invited by Chairman Miscimarra is confusing, and would render useless countless Board and circuit court decisions applying *Lutheran Heritage* that have helped clarify the tipping point between lawful and unlawful employer rules, for employers and employees alike. Miscimarra’s proposed test may not survive court scrutiny, which would lead to lesser, not greater, certainty.

Notwithstanding this, if the Board determines the “balancing test” articulated by Chairman Miscimarra’s dissent in *Beaumont Hospital* should replace the *Lutheran Heritage* test, the facts here are readily distinguished from those in *Beaumont Hospital*. In that case, the employer maintained facially neutral rules that prohibited employees from engaging in conduct that “impedes harmonious interactions and relationships” and from making “negative or disparaging comments about the . . . professional capabilities of an employee or physician to

employees, physicians, patients, or visitors.” 363 NLRB No. 162. In contrast, the rules here, as explained *supra*, are much more explicit in limiting Section 7 activities, even referring directly to the Union. They are certainly not akin to the *Beaumont Hospital* facially neutral promotions of “harmonious interactions” and prohibitions on “disparaging comments” about staff.

Furthermore, as argued *supra*, Holy Cross cannot credibly claim a legitimate business justification in maintaining its rules, while simultaneously asserting that it does not enforce the rules. In other words, if Holy Cross truly had a business justification for these rules of “preventing any interference with patient care,” *it would not deny that it enforces the rules*. In arguing that it has not enforced the rules, Holy Cross shows there is no business justification in maintaining them. Therefore, even under Chairman Miscimarra’s proposed “balancing test,” the Hospital’s nominal business justification does not outweigh the rules’ adverse impact on Section 7 rights.

For all these reasons, then, the Board should affirm the ALJ’s finding that the definition of “solicitation” is overbroad and facially unlawful.

2. The Board should Affirm the ALJ’s Conclusion that the Hospital’s Policy Prohibited Nurses from Using the Hospital’s Email System to Engage in Protected Activities.

Once again, Holy Cross argues that it did not *really* mean what it said in the Policy prohibiting solicitations “through the use of the health system’s [email].” GC Exh. 2. This argument once again fails here.

Rules prohibiting nonworking time solicitation or distribution regarding protected Section 7 activities via an employer’s email system are presumptively unlawful. In *Purple Communications*, 361 NLRB No. 126 (2014), the Board concluded that an employer that gives its employees access to its email system must presumptively permit the employees to use the

email system for statutorily protected communications during nonworking time. *See also UPMC*, 362 NLRB No. 191, slip op. at 3 (2015) (extending *Purple Communications* to hospital employees). An employer can rebut the presumption by showing that special circumstances make its restrictions necessary to maintain production and discipline.

Given the Policy’s definition of “solicitation,” the Policy facially prohibits nurses from using Holy Cross’s email system (which nurses have the ability to use otherwise), to distribute Union literature or otherwise solicit for, or even discuss, the Union, even on nonworking time. The Employer does not dispute this. And the Employer has not asserted that special circumstances make this rule necessary to maintain production and discipline.

Instead, Holy Cross argues that, because thirteen nurses (out of 1,300) used the email list to advocate for or against the Union, it not only shows that nurses were not intimidated from using the email system to support the Union but also that the Policy was not enforced. R Br. 27-29. The Hospital also asserts that Chief Nursing Officer Celia Guarino emailed all nurses “clarifying the rule and inviting nurses to use the email system to communicate about the Union.” *Id.* at 28. These are red herring arguments—the violation here rests on the Employer’s promulgation, maintenance and refusal to rescind the unlawful portion of the Policy.

The Hospital once again conveniently ignores controlling authority, *J.C. Penney Co.*, 266 NLRB 1223 (1983), in which the Board found a violation where an employer did not communicate to employees the elimination of an unlawful rule: “it is well established that the mere maintenance of such a rule serves to inhibit employees from engaging in otherwise protected organizational activity, and, therefore, the absence of evidence of enforcement of a rule does not preclude the finding of a violation.” *Id.* at 1224-25. And while at least referencing *Ichikoh Manufacturing Inc.*, 312 NLRB 1022 (1993), the Hospital cannot credibly assert that “it

has clearly communicated to all the unit employees to whom the presumptively invalid rule was disseminated that the rule did not mean what it said.” *Id.* at 1022. The Guarino email certainly did not clearly rescind the unlawful email policy, nor did the October Memo. And that thirteen of 1,300 nurses and certain managers used the email system to advocate for or against the Union certainly does not prove that no nurse was chilled in using the email system to advocate for the Union,¹⁰ let alone that the Hospital clearly communicated a rescission of the unlawful email rule articulated in the Policy.

For these reasons, then, the Board should affirm the ALJ’s finding that the Hospital’s Policy unlawfully prohibited nurses from using the Hospital’s email system to engage in Section 7 activities.¹¹

3. The Board should Affirm the ALJ’s Conclusion that the Rules Defining “Immediate Patient Care Areas” are Overbroad.

The ALJ properly concluded that the Employer violated Section 8(a)(1) of the Act by promulgating and maintaining the Policy and Memo with overbroad definitions of “immediate patient care areas.”

The Board has held that “[p]rohibitions of lawful nonwork time solicitation and

¹⁰ There is no way to know how many employees were chilled in using the email system for Union activities and/or protected concerted activities, due to the Policy and the antiunion environment the Employer has otherwise created.

¹¹ While Holy Cross does not argue that the Board should abandon the *Purple Communications* rule (and the Union opposes abandoning the rule), the Hospital’s email rule is unlawful even under the former rule on electronic communications articulated in *Register-Guard*, 351 NLRB 1110 (2007). As noted in the ALJ’s Decision, and from the hearing testimony, there is ample evidence that the employer discriminatorily enforced the non-solicitation rule, permitting non-Union solicitations and discussions, but not Union ones. ALJD 5:10-17, n.11; testimony of Mintz, Tr. 85; Reed-McCullough, Tr. 127; Scott, Tr. 274:8-14, 278:8-13, 291-96; Wysong, Tr. 330:21-25, 331:1-25, 333:2-6. In addition, the Hospital terminated a nurse who used the email system to rebut a manager’s anti-Union email, which is the subject of a pending Unfair Labor Practice charge, Case No. 05-CA-201470.

distribution in areas other than immediate care areas, even with respect to areas that may be accessible to patients, are presumptively unlawful.” *Baptist Med. Ctr.*, 338 NLRB 346, 357 (2002), citing *Brockton Hospital*, 333 NLRB 1367, 1368 (2001).

In the healthcare setting, the employer maintains the burden of showing that rules restricting the time and place of employee activity outside “immediate patient care areas” are justified by patient care considerations. *NLRB v. Southern Maryland Hosp. Ctr.*, 916 F.2d 932, 935 (4th Cir. 1990). In other words, the employer must show that the banned solicitation or distribution adversely affects patient care. *Id.*

As defined by the Board, “immediate patient care areas” have been described as “patients’ rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas.” *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 209 (2007) (citing *St. John’s Hosp.*, 222 NLRB 1150 (1976), *enfd.* in part 557 F.2d 1368 (10th Cir. 1977)).

In its Brief, the Hospital asserts that the ALJ erred in determining that including “corridors, stairways and elevators used by or to transport patients” in its definition of “immediate patient care areas” was overbroad. R Br. 29-30. Notably, however, the Hospital does *not* except to the ALJ’s finding that the Policy and Memo were unlawfully overbroad because they included in their definitions of “immediate patient care areas” lounges, waiting areas, sitting rooms, and “[areas] on the unit where patients are or can be present.” ALJD 18:6-10. On this basis alone, the ALJ’s finding should be affirmed that the definitions of “immediate patient care areas” are overbroad, at least as to these areas.¹²

¹² There is one more reason, not articulated by the ALJ, to find overbroad the definitions of “immediate patient care areas.” In *Baptist Medical Center*, an ALJ found overbroad an employer’s rule limiting solicitation and distribution, and therefore found the employer’s rule to be presumptively unlawful. 338 NLRB at 357-58. Specifically, the ALJ found the rule to be vague and ambiguous because it “specifically

Notwithstanding this, the Hospital begs a reading of the Policy and Memo that distorts the plain language of the documents, in an attempt to show that the inclusion of “corridors . . . ; elevators and stairways used by or to transport patients” in the definitions of “immediate patient care areas” does not make the definitions unlawfully overbroad. Br. 29-30; GC Exhs. 2, 3. Holy Cross asserts that these definitions should be read to mean that *only while patients are undergoing treatment in these areas* should the areas be considered “immediate patient care areas.” This is not what the Policy says; a reasonable reading of the words is that elevators and stairways used by patients *at any time* are immediate patient care areas. In fact, the Hospital’s own citation to the record establishes that patients have been spotted in elevators, Tr. 105:11-13, which would automatically render elevators immediate patient care areas under the Employer’s definition.¹³

The Board, however, has generally not viewed hallways and elevators as patient care areas. *Baptist Medical Center*, 338 NLRB 346, 357 (2002). And there is nothing in the record that indicates nurses are performing patient care in elevators or stairwells. Likewise, the Hospital exaggerates the importance of patients ambulating through the corridors, as somehow this would

lists areas to which the solicitation and distribution ban applies” but “there is nothing in the rule itself, or elsewhere in the record, to suggest that the list was to be all-inclusive, that is, intended to exclude any area not mentioned therein.”

Here, in the list of prohibited areas, the rules include areas that are generally not viewed as patient care areas such as “hallways, elevators, patient/public lounges, and office areas.” *Id.* at 357. An employee, therefore, could reasonably interpret the rule to include other non-patient-care areas not listed but that patients could access. *Id.* And, as previously stated, a rule is unlawful when “employees would reasonably construe the language of the rule to prohibit Section 7 activity” *See, e.g., The NLS Group*, 352 NLRB 744, 745 (2008). The Policy or the Memo, however, do not suggest that the lists are all-inclusive. Therefore, reasonable employees would interpret this definition in the Memo to also prohibit solicitation in other nonpatient care areas like lobbies, waiting areas, and entrances.

¹³ Notably, Suzanne Mintz, RN, has never seen a single patient in the stairwell. Tr. 105:14-19.

make corridors immediate patient care areas. Following this logic, the entire hospital—including the gift shop, front lobby and cafeteria—would be an immediate patient care area because patients under care also ambulate through those areas.

Furthermore, Holy Cross does not attempt to justify the portion of the October Memo which prohibits “[d]iscussion in a patient room or elsewhere on the unit where patients are or can be present – *such as corridors where patients wait* or treatment rooms.” *Id.* Again, a logical reading of this portion of the Memo prohibits Union discussion in corridors *at any time*, since patients have at some point waited in a corridor. This is also an unlawful expansion of “immediate patient care areas” in which nurses are prohibited from engaging in Section 7 activities.

For these reasons, then, the Board should affirm the ALJ’s conclusion that the rules defining “immediate patient care areas” are overbroad, in violation of the Act.

B. The ALJ Properly Found that NICU Director Cynthia Hawley Unlawfully Threatened Loss of Benefits and More Onerous Working Conditions, and Coercively Interrogated RN Susannah Reed-McCullough.

The Employer, on July 20, 2016, violated Section 8(a)(1) of the Act by threatening loss of benefits and more onerous working conditions, and coercively interrogated RN Susannah Reed-McCullough regarding her union sympathies.

1. The Record Evidence Supports the ALJ’s Finding that Cynthia Hawley Threatened Susannah Reed-McCullough with Loss of Benefits and More Onerous Working Conditions.

On July 20, 2016, NICU Director Cynthia Hawley unlawfully threatened Union supporter Susannah Reed-McCullough, RN. Specifically, Hawley, Reed-McCullough’s immediate supervisor at the time, Tr. 118:21-23, required her to meet with Hawley in Hawley’s office. Tr. 118:2-20. In that meeting, Hawley told her that if the nurses unionized, the current self-

scheduling policy could change, requiring rotator nurses to wait 15 years instead of the current 8 before being allowed to come off the rotator schedule and go to straight days or straight nights. Tr. 121:1-8. Hawley also told her that, should the Union succeed, “nurses may not be able to meet with [Hawley] directly anymore, that there would have to be like a third party present.” Tr. 121:8-10. In addition, Hawley told Reed-McCullough that “our current FMLA policy, which [Hawley] considers very generous, could be subject to change” if the Union came in Tr. 121:11-13.

The Employer argues in its Brief that the ALJ erred in finding that—because Hawley did not reference the collective-bargaining process—Holy Cross threatened Reed-McCullough with loss of benefits and more onerous working conditions. Holy Cross’s argument attempts to cloud the Board’s black letter law on this subject: “[A] statement that the presence of a union *could* deteriorate employment conditions, e.g., ‘it *could* get much worse,’ is also unlawful absent a reference to the collective-bargaining process.” *Novelis Corp.*, 364 NLRB No. 101 (2016) (emphasis added) (quoting *Metro One Loss Prevention Service Group*, 356 NLRB 89, 89 (2010)).

Perhaps this is why Respondent relegates to the end of the section in its Brief the unconvincing argument that the standard articulated in *Novelis* standard does not apply here. Respondent’s Brief asserts that the supervisors in *Novelis* said that employees *would* suffer more onerous working conditions, distinguishing this from Hawley’s statement that Reed-McCullough *could* lose benefits. Br. 34. Respondent mischaracterizes the *Novelis* decision—the supervisors did use the word “could.” For example, one supervisor said, “[s]ay the Union comes in . . . I *could* always go to another schedule. And if things aren’t very busy we *could* lay off one of the shifts” *Id.* (emphasis added). And speaking of schedule flexibility, another supervisor said,

“[w]e would certainly endorse the changes that *could* come with a union, but we don’t want that for you.” *Id.* (emphasis added).

Respondent’s attempts at distinguishing *Metro One* and *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995), likewise fail. In *Metro One*, the Board contrasted cases in which the employer made reference to the collective-bargaining process, writing that, “[i]nstead, without any context, [the employer] stated that [the employee’s] particular working conditions *could* deteriorate if the organizing drive was successful.” *Metro One*, 356 NLRB at 89 (emphasis added) (contrasting *Jefferson Smurfit Corp.*, 325 NLRB 280, n.3 (1998) (benefits “could go either way” as a result of collective bargaining); *Telex Communications*, 294 NLRB 1136, 1140 (1989) (bargaining was a “give-and-take situation”); *Pilliod of Mississippi*, 275 NLRB 799, 800 (1985) (employer did not have to give anything in negotiations and employees might lose benefits)). Contrary to Holy Cross’s contention, the Board in *Metro One* did not list three other “factors”¹⁴ to determine if the employer’s statements were illegal, but instead clearly held that—because the supervisor “made no reference to the nature of the collective-bargaining process,”— “[t]he import of [the supervisor’s] message would have been unmistakable” *Id.* This is also the case here, where Hawley’s message to Reed-McCullough was an unmistakable threat, given that she failed to reference the collective bargaining process.

And in *Allegheny Ludlum*, nowhere did the Board state that using the word “could” would have cured an otherwise unlawful threat using the word “would,” as Holy Cross implies.¹⁵

¹⁴ The “three factors” that Holy Cross claims the Board weighed are not factors, but simply facts unique to that case. R Br. 32.

¹⁵ In any case, the CEO in *Allegheny Ludlum* did say “things *could* change if the Union came in” and “some flexibility *could* be changed.” *Allegheny Ludlum.*, 320 NLRB at 493 (emphasis added).

320 NLRB 484. Neither did the Board rule in that case that an employer must know of an employee's union support in order to make a statement unlawful under Section 8(a)(1). It is thus irrelevant that Respondent disputes Hawley's knowledge of Reed-McCullough's Union support during the July 20 meeting. Respondent's argument to the contrary defies logic; according to this, an employer would never be guilty of conveying unlawful threats so long as it limited its transmission of the threats to employees who did not openly support the union.

The threats were particularly egregious here because Hawley was aware at the time she told these things to Reed-McCullough that Reed-McCullough preferred to work the day shift, Tr. 123:3-9, and that she has used FMLA for herself and her family, Tr. 122:8-18. Indeed, Hawley made these threats, which she knew were of high significance to Reed-McCullough given her family needs, to dissuade her from voting for the Union.

For these reasons, the ALJ's finding should stand that Hawley's statements constituted unlawful threats.

2. The Record Evidence Supports the ALJ's Finding that Cynthia Hawley Coercively Interrogated Susannah Reed-McCullough.

Coercive questioning or interrogation of employees about their union sentiments is unlawful. *See N.L.R.B. v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965-66 (4th Cir. 1985). In determining coerciveness, the Fourth Circuit considers a variety of factors including the history of employer hostility to the union, the nature of information sought, the identity of the questioner, and the place and method of the questioning. *Id.* (citing *Winchester Spinning Corp. v. NLRB*, 402 F.2d 299, 302-303 and n.1 (4th Cir.1968)).

Here, Hawley told Reed-McCullough in the July 20 meeting that "she was aware that there were nurses who had been called at home and harassed, and that if [Reed-McCullough] were ever to feel harassed, that [Reed-McCullough] should let [Hawley] know." Tr. 120:4-14.

The history of Holy Cross's hostility to the Union is apparent through its vigorous antiunion campaign. The information sought was regarding so-called Union "harassment," which is quite provocative. Combined with Hawley's role as Reed-McCullough's immediate supervisor, along with her questioning in her office in a required meeting, it is apparent that Hawley's instruction to Reed-McCullough that she notify Hawley if she "ever feel[s] harassed" by the Union was an unlawfully coercive interrogation.

Holy Cross does not even attempt to argue in its Brief that the ALJ erred in finding that Hawley's statement had the natural tendency to solicit a response which reveals or discloses union sympathies, in violation of Section 8(a)(1). ALJD 22:7-15 (citing *Jefferson Apparel Co.*, 248 NLRB 555, 560 (1980)). On this basis alone, the ALJ's finding should stand, as responding to Hawley's request that Reed-McCullough inform her of any "harassment" would reveal Reed-McCullough's union sympathies.

In any case, Holy Cross distorts the facts in attempting to distinguish the other Board decision cited in the ALJD, *Tawas Indus., Inc.*, 336 NLRB 318 (2001). Despite the Hospital's assertion, Hawley did not explicitly state that union *representatives* were harassing nurses, but simply stated that "nurses had been called at home and harassed." Therefore, a nurse would have reasonably understood Hawley's statement as a request to report both union representatives *and* pro-union employees, which would have the "dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities." ALJD 22:4-7 (quoting *Tawas Indus.*, 336 NLRB at 322-23).

For these reasons, the Board should also affirm the ALJ's finding that Hawley coercively interrogated Reed-McCullough.

C. The Board should Affirm the ALJ's Finding that on August 6, 2016, a Holy Cross NIC and Security Guards Coercively Interfered with RNs Engaged in Union and Protected Concerted Activities.

The ALJ correctly concluded that, on August 6, 2016, Holy Cross—through its agents NIC Dwight Lyles and Security Officers Hawkins, Webster, and Varnado—coercively interfered with RNs Suzanne Mintz, Jeaneen Scott, and Aieun Grace Yu engaging in union and protected concerted activities, in violation of Section 8(a)(1).

In fact, the Employer admits, through Officer Webster's Hospital Safety Report, and testimony from Lyles, Webster, and Hawkins, that the security officers were called to the waiting area of the Fifth Floor South Tower in response to Union activities. GC Exh. 18; Tr. 460:15-22; 493:6-14.

The Employer argues in its Brief that the ALJ's finding should be overturned, and attempts to distinguish the case cited by the ALJ, *Aqua-Aston Hospitality*, 365 NLRB No. 53 (2017). Unfortunately for Holy Cross, even if the facts in *Aqua-Aston* were distinguished (which they are not), the Board has also held in other instances with similar facts that health care employers, by their security guards, unlawfully interfered with employees' Section 7 rights. *Sunrise Healthcare Corp.*, 320 NLRB 510, 516 (1995) (ruling that health care employer violated Section 8(a)(1) when guard stationed at entrance gate confronted employees engaged in protected activities, recorded information about those employees, and successfully prevented them from speaking with union organizer); *Clear Lake Hosp.* 223 NLRB 1, 8 (1976) (hospital's use of security personnel to arrest and remove union organizers in presence of several employees had adverse consequences to union organizing and thus violated Section 8(a)(1)). In any case, the facts here are not distinguished from those in *Aqua-Aston Hospitality*, 365 NLRB No. 53 (2017), in which the employer's security officer unlawfully prohibited off-duty employees from

disseminating information about the union on the employer's premises.

The record is replete with evidence of Holy Cross security guards and NIC Dwight Lyles—both admitted agents of Holy Cross, J Exh. 1—coercively interfering with the RNs' Section 7 rights on August 6.

Both Mintz and Scott were well-known Union supporters, Tr. 56:1-25; 256:13-21; 258:8-17, and were rounding the hospital while off-duty to talk with other nurses about the Union, Tr. 58:2-4. The surveillance video shows the officers approaching the nurses in the waiting area multiple times, until they left. GC Exh. 4. And testimony from Yu reveals that Lyles told her that “Union people cannot come to the unit talking about the Union while [Yu was] working.” Tr. 135:21-25. Indeed, Yu was surprised and concerned about the Employer's overzealous response to Mintz and Scott's presence. *See id.*

Moreover, the Employer responded with overwhelming force, sending two security officers—a third of the officers on duty that day, Tr. 497:3-7—to intimidate and coerce the RNs. In comparison, Susannah Reed-McCullough testified at trial that only one security officer responded to an incident in the NICU when parents and a large group of people became aggressive towards her when she tried to explain that they could not all be visiting a flu-positive baby in isolation due to infection control policies. Tr. 127:15-25; 128:1-20. The Employer's response to the truly dangerous situation described by Reed-McCullough demonstrates the unnecessary and intentionally intimidating show of force by the Employer on August 6.

In addition, as shown in the Hospital Safety Report and through his own testimony, Security Officer Lawrence Hawkins witnessed the three to four nurses huddled together on the unit discussing the Union, and in response to overhearing them say “I want to see what they are offering,” he asked the nurses “what are they offering”? GC Exh. 18; Tr. 501:9-16. There cannot

be a clearer example of coercive interference with Section 7 activities than Hawkins's interrogation of the group of nurses regarding what the Union was "offering."

Holy Cross makes the incredible argument that, because Mintz and Scott did not immediately leave the waiting area or the hospital, it shows they were not intimidated by the Hospital's show of force, which somehow justifies the security guards' interventions. R Br. 36-38.¹⁶ Moreover, the Hospital implies that, to be unlawful, a security guard must threaten employees with trespass or arrest, *id.*, and that, because the Hospital did not "review[] or use[] the report," their actions were lawful, *id.* at 37. Notably, however, Holy Cross cites no authority for any of these propositions. Again, like their argument on the Policy and Memo addressed *supra*, Holy Cross tries to argue it cured unlawful actions with post-action activity (or inactivity); there is no way, however, to cure these violations except with the remedies recommended in the ALJD.

Regardless, the Hospital does not dispute that the security incident reports accurately state that Holy Cross sent this show of force to respond to union activities, which is all that is required to affirm the ALJ's conclusion that the Hospital violated the Act.¹⁷

For the above reasons, the Board should affirm the ALJ's finding that the Employer

¹⁶ The Hospital, in a footnote, appears to also except to the ALJ's finding that NIC Dwight Lyles coercively interfered with the nurses' protected activities because Lyles had reason to call security. R Br. 36 n.15. There is, however, no evidence in the record that Mintz and Scott were interfering with patient care or wrongfully entered a unit. Moreover, Lyles testified that he knew Scott was an employee, Tr. 452:8-12, and the Hospital does not except to the ALJ's finding that an administrative email confirms that Lyles called security in direct response to the suspected union activity, and because he intended to interfere with it. ALJD 20:26-27. Therefore, the Board should affirm the ALJ's finding here.

¹⁷ To this end, despite the Hospital's contention, there was no need for General Counsel to call a witness to testify to Officer Hawkins's statement "I want to see what they're offering," as Officer Webster's uncontradicted incident report quoting Hawkins speaks for itself, and the Employer did not object to its introduction into evidence.

coercively interfered with RNs' Section 7 activities on August 6, 2016.

D. The Board Should Affirm the ALJ's Finding that, on September 16, 2016, Holy Cross Managers Engaged in Surveillance and Created the Impression of Surveillance of RNs by Taking and Disseminating Photos of RNs Engaged in Protected Concerted Activities.

When employees openly engage in union activity on an employer's premises, employer representatives may not engage in surveillance of Section 7 activity or do anything "out of the ordinary" to keep union activity under watch. *See, e.g., NLRB v. Southern Maryland Hosp. Ctr.*, 916 F.2d 932, 938 (4th Cir. 1990); *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Electro-Voice, Inc.*, 320 NLRB 1094 (1996); *Broadway*, 267 NLRB 385, 399-402 (1983). "[I]f the observation goes beyond casual and becomes unduly intrusive a violation occurs." *Kenworth Truck*, 327 NLRB 497, 501 (1999).

Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming*, 345 NLRB 585, 586 (2005). The same set of circumstances may amount to unlawful surveillance as well as an unlawful attempt to create the impression of surveillance. *Seton Co.*, 332 NLRB 979, 981 (2000). The rationale for this rule "is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999), (quoting *Flexsteel Industries*, 311 NLRB 257 (1993)).

Although it is true that an employer's mere observation of union activities that are conducted in public does not violate Section 8(a)(1) of the Act, Board and applicable circuit court law does not authorize an employer to use cameras to enhance its identification of those who are lawfully engaging in protected Section 7 conduct. *Fairfax Hosp.*, 310 NLRB 299, 310

(1993), enfd. 14 F.3d 594 (4th Cir. 1993), cert. denied, 512 U.S. 1205 (1994).

The record evidence shows that Holy Cross—through NIC Jolly Joseph and other managers present at the September 16 management meeting—photographed the pro-Union RNs who were engaged in a Union activity and/or protected concerted activity in taking a group photo with a poster for Holy Cross CEO Coots as part of a Union delegation. Moreover, RN Vera Ngezem and NIC Jolly Joseph’s testimony reveal that Holy Cross managers also created the impression of surveillance when Ngezem noticed that about five of the managers lined up at the window were taking photographs of them, and Joseph admitted that all those in attendance at the meeting were lined up at the window watching the group of pro-Union RNs. Tr. 156:9-25; 157:4-6; 390:3-13. The managers were close to the pro-Union nurses (about 10 feet away), Tr. 156:24-25, and also simultaneously engaged in other coercive behavior in creating the impression of surveillance; both of these are indicia of coercion. *Aladdin Gaming*, 345 NLRB at 586.

The evidence further shows that the managers disseminated the photographs among themselves, and that those managers used the photos to enhance their ability to identify those nurses that were part of the Union activity. For example, in the text exchange between Joseph and Director Mariamma Ninan referencing the photos, Joseph wrote “Gisele, Vera, Jessy Nina all were there,” with Ninan responding “I see, so we were correct about Gisele!” and Joseph replying “Yep.” GC Exh. 16; R Exh. 16. Managers made other comments regarding the Union activity in the text exchanges with the photos, and one manager even sent the photos to interim President Judith Rogers. GC Exh. 17; R. Exhs. 17-23; Tr. 54:24-25.

Holy Cross seems to argue in its Exceptions to the ALJ’s Decision that its conduct was lawful under a Third Circuit decision, *U.S. Steel Corp. v. N.L.R.B.*, 682 F.2d 98, 101 (3d Cir.

1982). Even if this Third Circuit holding were controlling here (which it is not), there is nothing in the ALJ's decision that contravenes the Third Circuit's requirement of "case by case decision-making." *Id.* The ALJ here conducted such a fact-intensive analysis, and, contrary to the Hospital's contention, did not state that any photography of union activities is a per se violation of the Act. ALJD 23-24. Instead, the ALJ properly applied the well-settled Board standard that, absent security justifications, photography of protected activities is presumptively unlawful. *Id.* at 23 (citing *Alle-Kiski Medical Center*, 339 NLRB 361, 364-65 (2003); *Fairfax Hospital*, 310 NLRB 299, 310 (1993)).¹⁸ The ALJ's Decision is not a "blind application of the rule barring employer photographs of union activity," R Br. 40, as the ALJ explicitly considered all the Employer's arguments, including that the Union published a photograph of the same nurses on a flyer that was disseminated throughout the facility. ALJD 23-24.

Moreover, the ALJ's quotation of *Fairfax Hospital* was completely appropriate here, as Joseph herself testified that a professional photographer took a photograph of the nurses. Tr. 368:1-2. "[T]he fact that pictures were also taken by the media and even by a friend of one of the participants who invited him to take the pictures, makes no difference." *Fairfax Hosp.*, 310 NLRB at 310. In attempting to distinguish *Fairfax Hospital*, Holy Cross makes the inapposite argument that the "very nurses themselves – not the media or friends – took these pictures," R Br. 40. This is untrue—a Union-approved photographer, not the nurses, took the photograph of the nurses in front of the statue of Saint Joseph. In any case, disseminating the photograph in a flyer throughout the hospital has nothing to do with the Employer's admitted surveillance of the

¹⁸ To the extent that Respondent vaguely suggests—in a single sentence—that this longstanding Board standard should be overturned, the Union disagrees and, in any case, asserts that this case does not contain the facts needed to reconsider such a well-settled doctrine that employers, unions and employees have relied on for decades. R Br. 39.

nurses through photographing the nurses, as articulated in *Fairfax Hospital*. Therefore, neither the fact that a photograph of the nurses appeared on the pro-Union flyer, or Holy Cross's argument that the nurses were not intimidated by the NICs' photo-taking,¹⁹ is relevant to whether the Employer violated Section 8(a)(1).

Given this, the Board should affirm the ALJ's finding that Holy Cross unlawfully engaged in surveillance and created the impression of surveillance on September 16.

E. The Board should Affirm the ALJ's Conclusion that on September 21, 2016, Acute Care and Surgery Director Mariamma Ninan Threatened RN Vera Ngezem with Loss of Benefits and More Onerous Working Conditions if the Nurses Vote for the Union.

On September 21, 2016, Director Mariamma Ninan made very specific threats to Vera Ngezem, RN, that, if the RNs chose the Union: Ninan could no longer write mortgage income verification letters for nurses; Ngezem would not be able to choose her schedules as freely; and that if a more experienced nurse from a different unit wanted to, that nurse could take Ngezem's job, which would cause Ngezem to be laid off.

These statements, taken together, constituted threats of loss of benefits and more onerous working conditions if the RNs vote for the Union. Ninan knew that the mortgage income verification letter was very helpful to Ngezem. Ninan also knew that schedule flexibility was very important to Ngezem, due to her family needs. A nurse would reasonably interpret these statements, especially the threat of layoff, as real threats meant to coerce her to vote against the Union, especially given the context of these threats—in a required meeting with Ninan, who was Ngezem's supervisor.

¹⁹ Contradicting Holy Cross, Vera Ngezem testified that she was scared by the NICs taking their picture. Tr. 158:17-19.

The particularly egregious nature of these threats was further demonstrated by Ngezem's communication to Union organizer Mansi Kathuria, expressing how upset Ngezem was to about what Ninan told her, even feeling like she had been lied to. GC Exh. 9; Tr. 166:10-25; 167:1-3,18-24; 168:8-25.

Ngezem's contemporaneous email to Kathuria regarding Ninan's statements provides Ngezem with additional credibility that is lacking for Ninan. Regardless, the ALJ correctly found that, except for the income verification letters, the two testified quite consistently with each other. ALJD 12:13-23, n.40.²⁰

In its Brief, the Hospital makes the identical argument discussed in Part B(1), *supra*, that the ALJ erred in finding that Ninan's statements were unlawful because she omitted any reference to the collective-bargaining process. R Br. 42-44. Under either Ngezem's or Ninan's rendition of the facts, for the reasons articulated in Part B(1), *supra*, the ALJ's Decision should be affirmed under the applicable standard articulated in *Metro One Loss Prevention Service Group*, 356 NLRB 89 (2010), as reaffirmed by *Novelis Corp.*, 364 NLRB No. 101 (2016): "A statement that the presence of a union could deteriorate employment conditions, e.g., 'it could get much worse,' is also unlawful absent a reference to the collective-bargaining process."

Ninan stated that Ngezem "will not have flexibility of scheduling" and Ninan "would not" be able to provide future employment verification letters. Tr. 162:7-15. These statements are clearly unlawful threats.

Moreover, Ngezem's credible testimony shows that Ninan did not reference the collective-bargaining process. Even according to Ninan's recounting of the meeting, in which

²⁰ The Hospital argues in its Brief that the Board should overturn the ALJ's crediting Ngezem's testimony. R Br. 45. The Hospital provides no rationale for this.

she used the words “could” or “may,” she did not reference the collective-bargaining process. Her statements “[i]f there was ever a contract,” “if we ever have a contract” and “if there is a contract” do not reference the collective-bargaining process under any reasonable interpretation. R Br. 43 (quoting Tr. 406:17-21; 406:25-407:4; 409:13-17; 431:2-4). Saying the word “contract” is certainly not an adequate reference to the collective-bargaining process, as contemplated by the Board. *See Jefferson Smurfit Corp.*, 325 NLRB 280, n.3 (1998) (finding sufficient an employer statement that benefits “could go either way” as a result of collective bargaining); *accord Telex Communications*, 294 NLRB 1136, 1140 (1989) (bargaining was a “give-and-take situation”); *Pilliod of Mississippi*, 275 NLRB 799, 800 (1985) (employer did not have to give anything in negotiations and employees might lose benefits).

In contrast to Ninan’s statements, Fact Sheet 10 *does* reference the collective-bargaining process (“[t]here are no guarantees: . . . [y]ou could wind up with more, the same, or less than you have now Collective bargaining is a one-size fits all approach.” R Br. 44 (quoting R Exh. 24). Holy Cross, however, admittedly distributed the flyer on September 19, two days prior to Ngezem’s September 21 meeting with Ninan. *Id.* Therefore, the language of the Fact Sheet has nothing to do with what Ninan said, and in any case, a reasonable nurse would believe what her supervisor orally told her regarding her specific circumstance over a generic “Fact Sheet.”

For these reasons, the Board should affirm the ALJ’s conclusion that, on September 21, Ninan unlawfully threatened Ngezem with loss of benefits and more onerous working conditions if the nurses voted for the Union, in violation of Section 8(a)(1) of the Act.

F. The Board Should Affirm the ALJ’s Conclusion that on October 19, Holy Cross Security Officer Hawkins Coercively Interrogated RNs about their Union Sympathies and Instructed them that they Were Prohibited from Discussing the Union in the Hospital.

As explained in Part B(2), *supra*, coercive questioning or interrogation of employees

about their union sentiments is unlawful, and in determining coerciveness, the Fourth Circuit considers a variety of factors including the history of employer hostility to the union, the nature of information sought, the identity of the questioner, and the place and method of the questioning. *N.L.R.B. v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965-66 (4th Cir. 1985).

It is undisputed even by the Employer that, on October 19, 2016, Security Officer Lawrence Hawkins interrogated RNs Suzanne Mintz, Nina Scott, and Jessie Norris in asking them if they were talking about the Union. This coercive interrogation alone is sufficient to find a Section 8(a)(1) violation of the Act, especially in light of the history of Holy Cross's hostility to the Union, the previous intimidating incidents with security officers experienced by Mintz and Scott, and the non-patient-care location where the questioning occurred (outside the cafeteria). Indeed, Scott's response that what Hawkins was asking them was illegal, was accurate.

Both Mintz and Scott credibly testified that Hawkins continued: "it's illegal to talk about the Union anywhere in the Hospital and that [Hawkins] was told that or informed of that from a paper from downstairs and that [nurses] were not to be talking about the Union at all in the Hospital." Tr. 83:18-22; 289:23-25; 290:1. This is clearly an unlawful and coercive statement, which interfered with the nurses' protected Section 7 activities, as correctly stated by the ALJ. ALJD 21:25-30 (citing *Saint. John's Health Center*, 357 NLRB 2078, 2096 (2011) (finding that security guards acting under direct authority from upper management violated Section 8(a)(1) by threatening to have employees charged with trespassing for distributing prounion literature)).

In its Brief, Holy Cross splits hairs in a failed attempt to distinguish *Saint John's Health Center*, arguing that Hawkins did not threaten to charge anyone with trespass, but ignoring that he said "it's illegal," which trespass is. R Br 45. Again, Holy Cross claims that the fact that the nurses did not disperse somehow makes Hawkins's statement lawful. It does not. Hawkins just

so happened to threaten three of the most outspoken nurses in the Hospital who were familiar with their Section 7 rights and were previously targeted by the Hospital through its security officers. Their rightful indignation at such an illegal action in no way justifies the action.

The Hospital's argument that the ALJ improperly referenced Hawkins's intent to stop any Union discussion also fails. The case cited by Holy Cross, *Cannon Electric Company*, 151 NLRB 1465, 1468-69 n. 6 (1965), certainly does not negate the ALJ's finding; Hawkins's intent only further supports what would otherwise be an objectively illegal statement.

Regarding management direction of Hawkins, Holy Cross appears to make the unsupported argument that Hawkins may have acted outside the scope of his agency. As articulated, *supra*, an employer may be held liable for unfair labor practices committed by security guards acting in their official capacity. *Saint Johns Health Center*, 357 NLRB at 2096 (citing *Opryland Hotel*, 323 NLRB 723 fn. 3 (1997); *Bakersfield Memorial Hospital*, 315 NLRB 596 (1994); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989)). Here, there is no evidence that Hawkins was not acting under direct authority from management. Hawkins was acting in his official capacity, admittedly wearing a Holy Cross security uniform, Tr. 486:5-24, and filing a report for the Employer, as is part of his job description, GC Exh. 20.

For these reasons, then, the ALJ should affirm the ALJ's conclusion that the Employer violated Section 8(a)(1) through the actions of Security Officer Hawkins on October 19.

G. Any Factual Errors in the ALJ's Decision were De Minimis, and Do Not Call into Question His Findings and Conclusions.

The Hospital, in a desperate attempt to gain any leverage, resorts to nit-picking in claiming that the ALJ made nine "factual errors." Two of the alleged "errors" were minor misspellings of names. R Br. 48-49. One related to a single accidental and non-material reference to Mintz instead of Scott, and another was a single accidental and non-material reference to

August 6 instead of September 15. Another so called error notes that the Decision incorrectly states that Guarino distributed the fact sheets by fax; this was in no way a material error.

One alleged “error” wholly mischaracterizes the referenced portion of ALJ’s Decision. Despite the Hospital’s contention, the ALJ did not state that Mintz and Scott declined to go onto the unit on August 6, but instead wrote that they declined to be escorted to the medicine room. ALJD 9:14-17. In any case, Scott and Mintz barely entered the unit, with Scott testifying that they “started to go into the unit, and just inside the doors we decided that it was not a good idea.” Tr. 264:12-17.

Another “error” was not an error at all, with the Hospital taking out of context a quotation in the Decision. In this instance, the ALJ did not state that NIC Michelle Jones’s statement to Wysong that “the Hospital had always taken care of her and a union was unnecessary” was evidence of “department supervisors” enforcing aspects of the Hospital’s solicitation and distribution policy. ALJD 5:23-32. The two matters happened to fall within the same paragraph of the Decision, but no where in that paragraph does the ALJ draw the conclusion that the Hospital claims he did.

The Hospital again mischaracterizes the Decision when taking a portion of a sentence out of context to argue that the ALJ erred in calling in-unit hallways “general public access areas.” Here is the complete sentence referenced in the exception: “Once a non-Hospital employee (such as a patient or a visitor) is admitted onto a unit, the in-unit hallways connecting patient rooms and areas surrounding the nursing stations are also thought of as general public-access areas.” ALJD 3:4-6. This sentence in no way implies that one need not be “badged-in” to a unit, and the Decision does not contradict itself in the way the Hospital alleges. Regardless, the ALJ’s assertion is supported by Mintz’s credited testimony that “everybody” uses the hallways. Tr.

49:11.

In fact, the Hospital shows its own carelessness in citing one so-called error in the decision. In alleging a minor and non-material error in which the Decision apparently refers to the 5 South and 5 East units instead of the 5 East and 5 West units, Holy Cross cites to the jurisdiction section of the Decision in which the ALJ finds that the Employer is engaged in commerce within the meaning of the Act. R Br. 49 (citing ALJD 2:23-25).

For these reasons, to the extent some “errors” existed in the Decision, they were de minimis and not material, and certainly do not call into question any of the ALJ’s findings and conclusions, which were solidly based in the record and on good law.

V. CONCLUSION

For all of the above reasons, Charging Party respectfully urges the Board to wholly affirm the ALJ’s findings and conclusions that Respondent has violated Section 8(a)(1) of the Act.

DATED: September 15, 2017

Respectfully submitted,

NATIONAL NURSES ORGANIZING COMMITTEE/
NATIONAL NURSES UNITED (NNOC/NNU)
LEGAL DEPARTMENT

/s/ Jonathan F. Harris

Jonathan F. Harris

Registered In-House Counsel for Charging Party

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 155 Grand, Oakland, California 94612.

On the date below, I served a true copy of the following document:

**ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

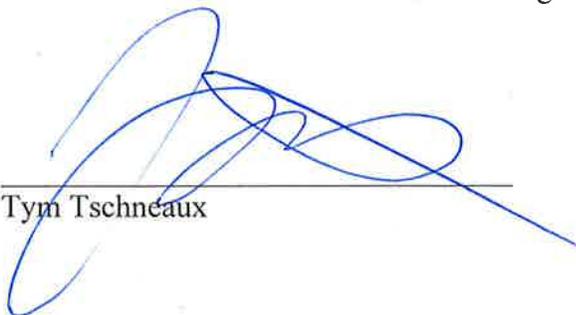
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: September 15, 2017



Tym Tschneaux