

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

HOLY CROSS HEALTH D/B/A
HOLY CROSS HOSPITAL

and

Case(s): 05-CA-182154
05-CA-187452

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

ANSWERING BRIEF OF THE GENERAL COUNSEL

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A. INTRODUCTION

The General Counsel's allegations against Holy Cross Health D/B/A Holy Cross Hospital ("Respondent" or "the Hospital") occurred between June and October 2016.¹ As evidenced by the Administrative Law Judge's ("ALJ") expeditious decision, the allegations are not difficult to analyze and involve straight forward concepts. However, Respondent construes the ALJ's decisive rulings against it as indicating impropriety, and impugns the ALJ by accusing him of failing to review the record evidence and parties' briefs. To support its accusations, Respondent refers to an e-mail dated July 17, 2017, from the ALJ to the parties sent in response to counsel for the General Counsel's motion charging Respondent with repeatedly misrepresenting record evidence, stating that the ALJ was nearing completion of his decision four days after the parties' briefs. But Respondent ignores two obvious responses to its accusations: (1) the ALJ had since May 23, 2017, the last day of hearing, to consider the record evidence and legal principals applicable to the allegations; and (2) that the overwhelming preponderance of the evidence supports the ALJ's factual and legal findings identified in his decision.

In short, the facts are as such; in June, Respondent discovered that a group of nurses were engaged in an organizing campaign on behalf of the National Nurses Organizing Committee/National Nurses United (NNOC/NNU), AFL-CIO, ("the Union"). After learning of the nurses' campaign, the hospital responded rapidly with an aggressive and often times unlawful counter campaign.

In its effort to battle the nurses' campaign, the hospital rallied its forces including upper-management, Nurses-In-Charge ("NICs"), security officers, and anti-union

¹ Unless otherwise stated, all dates are in 2016.

consultants.² Like dutiful soldiers, each rank has acted zealously on behalf of Respondent. However, whether out of zeal or ignorance, individuals within these groups have frequently overstepped the mark by employing unlawful rules, interference, interrogations, threats, and surveillance. In doing so, Respondent has created an atmosphere of confusion and intimidation stifling nurses' protected activities.

In June, Respondent kicked off its counter-attack by issuing a solicitation and distribution policy so unlawfully broad, that when reasonably read, one would think it is an infraction of hospital policy to hold and discuss a belief or doctrine of any kind. And if employees dare to speak to each other, they better not do so if a patient's shadow ever touched a wall or floor on that part of the hospital. The Board has long held that areas included in the hospital's definition of immediate patient care areas, such as nursing stations, corridors, elevators, and stairwells, are not presumptive patient care areas. Respondent has not established these areas as patient care areas. In fact, record evidence establishes that Respondent is more than willing to utilize these areas to further goals besides patient care, such as when anti-union consultants need to show propaganda videos to working nurses during working time. If Respondent's June solicitation and distribution policy was not broad or unlawful enough, on October 7, the hospital issued an augmented solicitation policy with new unlawful provisions.

Another weapon in the hospital's arsenal is one-on-one meetings between supervisor and nurse. In July and September, during one-on-one meetings, Respondent coercively threatened nurses with more onerous working conditions and loss of benefits if the hospital's nurses voted in the Union. In each of these meetings, Respondent, to

² Respondent admits the hospital's NICs are supervisors as defined in the Act. (Jx1)

maximize effectiveness, exploited personal vulnerabilities of nurses without referencing or discussing the give-and-take of collective-bargaining negotiations.

Respondent's use of uniformed security officers is severely chilling to nurses' protected-concerted activities. In August, in the view of a group of nurses on the acute care unit, Respondent, by security officers, questioned pro-union nurses and tracked their movements. When one of the officers overheard a group of nurses express an interest in the Union, he effectively scattered them like mice, quelling any opportunity the group had to speak with union supporters on that day. In October, the same officer attempted to prohibit discussions about the Union anywhere and at any time in the hospital.³

Also in September, several NICs engaged in overt surveillance by photographing a group of nurses' protected-concerted activities. The NICs' photographs and commentary spread so quickly through hospital management that by the time some of nurses shared a union flyer with their picture in it, their union support was old news.

Respondent's defenses all share the common denominator that even though Respondent indisputably engaged in most of the conduct found by the ALJ to be unlawful, the nurses are not taking it too seriously, so the Board shouldn't either. For instance, in response to the allegation that Respondent's solicitation and distribution policy unlawfully prohibits the use of its electronic communication systems, Respondent admits as much, but some nurses ignored it without consequence, so no harm no foul. Of course, Respondent omits that it has not rescinded or corrected its policies, and conveniently leaves out that over one thousand nurses have not used its e-mail system to express their views and are likely self-regulating due to Respondent's facially invalid

³ Respondent admits its security officers are its agents as defined in Section 2(13) of the Act.

policy. Another example is Respondent's defense to allegations of surveillance.

Respondent's defense is that a group of NICs took pictures and quickly distributed the information to supervisors and management, but some of the nurses in the photos smiled at the picture takers, so no harm, no foul. But there is significant harm.

The harm to the nurses is that because of the violations committed by Respondent alleged in the Consolidated Complaint and Notice of Hearing, and amendments, and subsequently found by the ALJ, employees are chilled from engaging in protected-concerted activities by self-regulating their communications out of fear of the solicitation and distribution policies, by stifling their discussions about the Union at nursing stations for fear of reprisal as indicated in the policies, by refusing to speak with known union supporters out of fear of being watched by NICs or hospital security, or by being threatened with more onerous working conditions should they have the audacity to vote in the Union.

As explained below, the ALJ's decision is overwhelmingly supported by the record evidence and is consistent with well-established Board precedent, while Respondent's exceptions are contrary to both. The counsel for the General Counsel respectfully urges the Board to overrule Respondent's exceptions, and to adopt the recommended decisions and orders of the ALJ. To assist the Board in making these determinations; this brief presents the allegations chronologically, with the facts relevant to the specific allegation, immediately followed by the legal argument for the allegation.

B. BACKGROUND FACTS

Respondent did not file exceptions to the ALJ's factual findings identified in sections A, C, and D of the ALJ's decision. To summarize those findings, Respondent is

a hospital located in Silver Spring, Maryland. (ALJD: 2, 21-22)(1: 43, Mintz)⁴ The hospital operates in a single building with multiple towers often referred to as the new tower or the old hospital. (ALJD: 2, 35-36)(*Id.* at 45.) The hospital employs 5,600 people, 1,300 of which are registered nurses (“RN”). (ALJD: 2, 33-34)(1: 39, Silvestri)

In late January or early February, a group of nurses, primarily from the Neonatal Intensive Care Unit (“NICU”), motivated by concerns for staffing levels and patient safety, approached the Union about representing the nurses for the purpose of collective-bargaining. (ALJD: 6, 3-8)(1: 52, Mintz)(1: 118, Reed-McCullough)(2: 256, Scott) After their initial contacts with the Union, the NICU nurses began to speak with other nurses about the Union, hold informational meetings at the Union’s offices distribute and solicit authorization cards, and distribute informational flyers about the Union. (ALJD: 6, 10-13)(*Id.*) From the onset, Suzanne Mintz and Jeaneen “Nina” Scott, NICU RNs, were active in the union campaign. *Id.*

Respondent had knowledge of the nurses’ union campaign in June. (ALJD: 6, 33)(Jx1) However, hospital management did not make public statements regarding the union campaign until late July. (1: 59, Mintz) Before management’s public statements concerning the Union, on July 22, Scott informed Cynthia Hawley, Director of the NICU, that she was involved in the union campaign at the hospital.⁵ (ALJD: 8, 33-35) Scott told Hawley that her involvement was nothing personal against Hawley, but Hawley said Scott’s involvement felt personal. (*Id.*)(2: 257, 258, Scott)

On July 28, Judith Rogers, President, Celia Guarino, Chief Nursing Officer, Nancy Nagle, Director of Women’s and Children’s Services, and Hawley, held a meeting

⁴ Citations to the ALJ’s decision take the form of, ALJD, page(s), line(s). Transcript citations take the form of volume, page(s), and witness name.

⁵ On or about July 20, hospital management began to distributed “fact sheets” in the NICU. (1: 57, Mintz)(1: 121, Reed-McCullough). Fact sheets are hospital distributed anti-union leaflets. (1: 85, Mintz)

with approximately 15 NICU nurses. (ALJD: 7, 1-10)(1: 54, Mintz)(2: 259, Scott) After discussing various issues pertinent to the NICU, Rogers told the nurses she was aware of ongoing organizing on behalf of the Union, and opined that it was not necessary for the nurses to have a union. (*Id.*)(1: 55, Mintz) In response to Rodgers' comments about the Union, Mintz stood up in plain view of hospital management and walked out of the meeting. (*Id.*)(1: 56, Mintz)(2: 262, Scott) Shortly after Mintz exited the room, Scott told the attendees she did not think it was fair for Rogers to use the meeting to discuss the Union. (*Id.*)(2: 262, Scott)

Prior to its July 28 meeting, hospital management issued a solicitation and distribution policy to its nurses in June. (GCx2)

C. The ALJ's Conclusions that Several Provisions of Respondent's June and October Solicitation and Distribution Policies Violate Section 8(a)(1) Are Fully Supported by Record Evidence and Extant Board Law⁶

I. UNCHALLENGED FINDINGS AND CONCLUSIONS THAT RESPONDENT HAS WAIVED

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board, any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.

II. FACTS

Respondent does not specifically except to any of the ALJ's factual findings pertaining to Respondent's June and October solicitation and distribution policies identified in sections II, (B) through (D), of the ALJ's decision. (ALJD: 3-8). Therefore, the facts are those identified by the ALJ.

⁶ Respondent's exceptions 1-9.

The facts identified below are included to provide more detail regarding the portions of Respondent's June and October solicitation policies that counsel for the General Counsel argues, and the ALJ agrees, are unlawful, and to provide evidence in direct contrast to several of Respondent's factual distortions and misrepresentations in its Brief In Support of Its Exceptions.⁷

a. June Solicitation and Distribution Policy

On or about June 8, Respondent issued a solicitation and distribution policy to all hospital employees. (ALJD: 3-4,28-25)(Jx1)(GCx2)(2: 274, Scott) Page 3 of the policy states:⁸

Holy Cross Health does not allow colleagues to solicit colleagues, patients, or visitors at any time in immediate patient care areas or during working time (including the working time of either the colleague soliciting or being solicited). Colleagues may not distribute literature during their working time or to any colleagues who are on working time. Colleagues may not distribute literature at any time in working areas or immediate patient care areas. The health system prohibits the solicitation and distribution of literature to patients or visitors at any time ***by unauthorized persons.***

The health system also prohibits solicitation through the use of the health system's electronic communication systems to colleagues or non-employees. Electronic communication systems include e-mail, telephone and voicemail communications or the public address system.

Nothing in these guidelines prohibits employees from discussing terms and conditions of employment, including talking about your job responsibilities, wages, and hours. (GCx2)

Respondent's policy warns employees that violations of the policy may result in disciplinary action including termination. (ALJD: 5-6, 35-9)(GCx2)

⁷ Citations to Respondent's Brief In Support Of Its Exceptions take the form, Res. Brf., page number(s).

⁸ The italicized and bolded portions of the solicitation and distribution policy are those portions alleged to be unlawful in the Consolidated Complaint and Notice of Hearing. (GCx1-k)

b. Solicitation and Distribution Policy Definitions

Page 2 of Respondent's solicitation and distribution policy is a definitions page containing the following definitions:

- Solicitation is: approaching a person for the purpose of: offering or persuading individuals to purchase a product or service; collecting or contributing funds; ***promoting, encouraging, or discouraging participation, support, or membership in any organization; or promoting of a doctrine or belief.***
- Distribution of Literature is: distribution, delivery, or posting of any written, printed, or ***electronic matter for the purpose of, or as an aid to, solicitation.***
- Immediate Patient Care Areas: The following are immediate patient care areas: patient rooms; patient units; patient lounges and waiting areas; operating rooms; patient treatment or therapy areas; ***nursing stations; corridors,*** sitting rooms, and other areas frequented by patients and visitors for treatment, therapy, consultation with physicians or family members; ***elevators and stairways used by or to transport patients.*** (ALJD: 3-4, 28-6)(GCx2)

c. Respondent's Electronic Communication Systems

Respondent's solicitation and distribution policy prohibits the use of Respondent's e-mail system to discuss the union campaign, among other topics, during non-work time. (GCx2) Despite the prohibition, a few nurses have used Respondent's e-mail system to discuss the union campaign.⁹ (Resx1) None of the nurses identified in Respondent Exhibit 1 that used Respondent's e-mail system to express views about the Union testified during the hearing, so there is no record evidence regarding Respondent's discipline or lack of discipline to those nurses for violations of its policy.

⁹ Most of the e-mails contained in Resx1 were sent by the hospital's management, such as Guarino, Director of Nursing. (Resx1)

Respondent has never clarified or rescinded its policy regarding the use of its e-mail system to discuss the Union, and the policy is currently in place and effective at the Hospital.¹⁰ (ALJD: 4, fn. 8)

d. Immediate Patient Care Areas

At issue in the present case is Respondent's inclusion of nursing stations, corridors, stairwells, and elevators as immediate patient care areas. Respondent offered no evidence regarding its use of any of these areas. Considering the size of the hospital and the number of units within the hospital, there is a dearth of evidence in the record regarding the total number of units, or what actually occurs on or within the units' nursing stations, corridors, stairwells, and elevators. There is little evidence regarding the frequency or infrequency in which patients are in any of these areas, or how frequently patients receive anything resembling patient care in these areas. The only record evidence regarding the disputed areas comes from counsel for the General Counsel's witnesses. Their testimony sheds a dim light on the NICU, mother/baby, and acute care units.

The NICU shares the third floor of the old hospital with the labor and delivery and high risk perinatal units. (1: 45, Mintz) Nothing is known of the labor and delivery

¹⁰ Respondent argues that an e-mail dated March 17, 2017, by Guarino, clarified Respondent's policy prohibiting employees from using its electronic communication systems, by explaining that the Hospital has allowed discussion about the Union over the Hospital's e-mail system. (Res. Brf.: 8) Respondent's argument should be rejected because Respondent did not meet the factors of repudiating its unlawful conduct identified in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). First, Respondent in no way communicated with its employees regarding its prohibition on employees using its electronic communication systems between June 2016 and March 17, 2017, so its alleged clarification was untimely. Second, Respondent did not provide adequate publication of its alleged repudiation. Respondent had the chance to clearly and officially clarify or rescind its policy in October 2016, when it issued its second policy on solicitation, but remained silent on the matter of its electronic communication systems. It would be easy for Respondent to officially retract, rescind, or modify its policy and distribute the modification to its employees, but has never done so. The Hospital acknowledges that by March 17, 2017, many of its nurses were no longer reading e-mails about the Union, and therefore, would have missed Guarino's alleged clarification of the Hospital's prohibitions on employees using its electronic communication systems. (Res. Brf: 8)

or high risk perinatal units. Both elevators and stairwells lead to the third floor NICU. *Id.* at 49. The NICU is locked and requires a badge to access the unit. *Id.* Once on the unit, a long corridor used by patient families, visitors, and medical staff, traverses the unit with rooms on both sides. *Id.* The NICU nursing station is on the left side of the corridor. *Id.* at 47, 48.

The station is an open area with a counter height desk partially around the station. *Id.* at 48. Located on the desk are computers, telephones, fax machines, and binders with policies and procedures. *Id.* NICU nurses frequently congregate at the nursing station. (1: 86, Mintz)(2: 294, Scott) While at the station, nurses speak with each other about any number of topics including controversial topics such as politics and religion. *Id.* There is no record evidence that Respondent has ever disciplined employees for their non-work discussions at the nursing station. As part of Respondent's counter-campaign, it has left stacks of "fact sheets" for distribution at the NICU nursing station in view of anyone passing through the corridor. (1: 85, Mintz)(1: 127, Reed-McCullough)(2: 291, 293 Scott)

Further down the NICU corridor, beyond the nursing station, are four patient rooms referred to as pods where babies are grouped and treated. (1: 48-49, Mintz) Scott testified that on August 7, while working in one of the patient pods, the unit charge nurse announced through the phone intercoms located in the pods that Dr. Yancy Phillips, Chief Quality Officer, was on the unit to discuss the Union with nurses. (ALJD: 7, 20-33)(2: 273, Scott) When Scott finished treating her patients, she noticed Dr. Phillips speaking about the Union at the nursing station with a working nurse in the presence of the unit charge nurse. (2: 274, Scott) Scott approached Dr. Phillips and the nurse and explained that according to the hospital's solicitation and distribution policy

it was not appropriate for them to discuss the Union at the nursing station on the clock. *Id.* at 274.

There is no evidence that a NICU patient has ever received treatment or patient care at the nursing station, in a corridor, in an elevator, or in a stairwell.

Regarding mother/baby unit, Marianne Wysong, RN, is the only source for record evidence. Wysong testified that in September, Michelle Jones, NIC, told nurses at the nursing station that the hospital's solicitation and distribution policy prevents nurses from speaking about the Union at the nursing station, in hallways, and in any area the hospital determines to be a patient care area.¹¹ (ALJD: 5, 19-29)(2: 330-331, Wysong) Jones further instructed the nurses that if they spoke about the Union, they could only do so in the parking lot, or off hospital grounds, off the clock, and during non-working hours. *Id.* at 333. Then, shortly after announcing the hospital's solicitation and distribution policies to the nurses, Jones contravened hospital policy by telling Wysong, at the nursing station, that she does not think the nurses need the Union at the hospital.¹² *Id.* at 335, 336. In December, on the mother/baby unit, Heather Smith, former Vice President of Operations, announced to the mother/baby nurses that the hospital was going to implement security cameras at the nursing station. *Id.* at 337. Wysong responded stating that she thought nursing stations were patient care areas. *Id.* at 338. Smith responded by rhetorically asking if nurses take care of patients at the nursing station, and then answered her own question saying, no, you do not take care of

¹¹ Wysong's testimony directly contradicts Respondent claims that, "the General Counsel failed to present any evidence that any nurse was hesitant or restricted from discussing the Union when it did not interfere with patient care." (Res. Brf: 7)

¹² Respondent elicited testimony from Wysong that she has discussed the Union at the nursing station without discipline. However, Wysong did not testify that hospital management, including NICs, have heard or are aware of Wysong's discussions. (2: 345, Wysong)

patients at the nursing station. *Id.* Two weeks later, security camera bubbles appeared on the ceiling in the mother/baby unit beside the nursing station.¹³ *Id.* at 336, 337.

The acute care unit also has a nursing station and corridors. (1: 170, Ngezem) The only significant record evidence regarding the acute care unit nursing station is that the Union is frequently discussed by hospital management, and anti-union consultants, at the station. *Id.* at 170-173. Acute care nurses hold regular “huddles” at the station.¹⁴ *Id.* at 163, 164. Before the union campaign, huddles were five minute meetings, but since the campaign, huddles last approximately 20 minutes in which Miriamma Ninan, Director of Acute Care, regularly speaks against the Union to nurses at the nursing station. *Id.* at 163, 164, 205. Vera Ngezem, Acute Care RN, testified that she has witnessed Ninan pass out “fact sheets” to nurses at the nursing station. *Id.* at 170.

Both Wysong and Ngezem testified regarding the regular appearance of Yessin Firm associates on their units. (ALJD: 7-8, 35-4)(1: 171-182, Ngezem)(2: 338-340, Wysong) The Yessin Firm are anti-union consultants hired by the hospital. *Id.* Yessin Firm associates are granted access to locked units for the purpose of discussing the Union with working nurses at the nursing station or in corridors, or showing anti-union videos to working nurses at the nursing station. *Id.* Wysong testified that the videos are loud and disruptive and shown at the nursing station while visitors and patients are passing in the unit’s hallways. (2: 340, Wysong)

The only other record evidence regarding a hospital unit concerns the hospital’s Operating Room unit (“OR”). Nothing is known about the OR’s nursing station, corridors, stairwells, or elevators. What is known is OR management’s hostile

¹³ If nursing stations are in fact patient care areas, HIPAA concerns would likely prevent the hospital from placing cameras in the area.

¹⁴ “Huddles” are meetings attended by nurses, NICs, etc. at shift change to discuss important developments on the prior shifts. (1: 163, Ngezem)

enforcement of its solicitation and distribution policy is response to protected-activity. In March 2017, Scott visited the OR nurses' lounge to discuss the Union with OR nurses on break.¹⁵ (ALJD: 5, 34-40)(2: 317, Scott) While Scott was in the lounge, Allison Sheedy, OR Nursing Director, stormed into the lounge screaming at Scott that Scott had no right to be in break room to discuss the Union. *Id.* at 318. Sheedy threatened to call hospital security on Scott in front of several OR nurses. *Id.* In response to Sheedy's hostile response, Scott filed a complaint with the hospital's Human Resources office. *Id.* at 319.¹⁶

e. October 7 Memorandum on Solicitation

On October 7, Guarino, sent an e-mail and memorandum to hospital nurses with the subject line: Rules regarding solicitation, stating,¹⁷

Recently, we have had nurses from some units visiting other units to meet with nurses. We are not aware of the subjects of the discussions, and we do not want this information. However, we are concerned that this activity not interfere with patient care or the actual work nurses and other employees on the unit.

This memo is our attempt to review our rules regarding solicitation and other similar activity on the nursing units at Holy Cross Hospital. This includes solicitation for any cause, including in favor of or against a union and discussion about wages, hours and conditions of employment.

You have a right protected by law to solicit other nurses in favor of or against a union. You have a right to engage in discussions about work, work conditions and other aspects of our workplace here at Holy Cross. However, there are limits to when and where solicitation and these discussions can occur.

¹⁵ Because so much of the record testimony concerned the concerted actions of nurses Mintz and Scott, the ALJ understandably interchanged Mints for Scott concerning Scott's incident on March 21, 2017, in the Operating Room lounge. Scott is the nurse that was chased out of the lounge for attempting to speak with nurses on their breaks about the Union. (ALJD: 5, 34-40)(2: 317, Scott)

¹⁶ Again, Scott's testimony directly contradicts Respondent claim that, "the General Counsel failed to present any evidence that any nurse was hesitant or restricted from discussing the Union when it did not interfere with patient care." (Res. Brf: 7)

¹⁷ The italicized and bolded portions of the solicitation and distribution policy are those portions alleged to be unlawful in the Consolidated Complaint and Notice of Hearing. (GCx1-k)

To be clear, here are examples of when and where solicitation can take place, and the limitations:

1. Permitted on the Unit:

- Both nurses are off duty or on break, and in non-patient care areas (defined below).
- Off duty/on break nurse from outside the unit to wait in waiting areas to meet with a nurse (unless patients are receiving care or being triaged in the waiting area).
- Nurse from outside the unit asking whether another nurse is on shift or to look at an assignment board as long as patient ID information is not on the board. It is also permitted for a non-unit nurse on break to walk through the unit and to make arrangements with a nurse to meet when that nurse is on break.
- *Nurses 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.***

2. Not Permitted on the Unit:

- Solicitation or ***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 patients room, or speaking to physicians.***
- Solicitation or discussion which interferes with “direct patient care” – If the unit nurse who is the object of the conversation is, for example, delivering or administering medications, talking to a patient or family, transporting a patient, clearing a room, charting or taking calls – that nurse is doing direct patient care.
- Solicitation or ***discussion 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. (See definition of immediate patient care areas below.)***

Immediate Patient Care Areas include:

- Patient Rooms
- Patient Treatment or Therapy Areas
- Areas on unit that are adjacent to patient rooms (where patients can hear our conversations)
- Patient Lounges
- Waiting areas where patients are usually present, such as the ED waiting area
- Operating Rooms
- ***Nursing Stations***

- Hallways/Corridors on the units – if a patient is present in hallway (for example, patients walk in hallways for rehabilitation or exercise, being transported, etc.), then it is a patient care area.
- ***Elevators and Stairways used by or to transport patients***

The purpose of Holy Cross Health policy is to protect the privacy of our patients and prevent interference with the delivery of patient care.

Nothing in this message is intended to restrict any nurse's right to discuss terms and conditions of employment, and/or to solicit for or against a union.

The two of us and Matt Lukasiak are happy to answer any further questions. (ALJD: 4-5, 26-9)(GCx3)

Undisputed record evidence is that nurses have previously been permitted to solicit on behalf of non-union related causes. (ALJD: 5, 10-17)(2: 294, Scott)

Respondent's October solicitation policy is silent regarding Respondent's prohibitions on employees' use of its electronic communications systems.

III. ARGUMENTS

Respondent excepts to the ALJ's determinations that the provisions in Respondent's June and October solicitation and distribution policies, identified in the Complaint and Notice of Hearing, violate Section 8(a)(1) of the Act.

a. The Record, and Extant Board Law, Supports the ALJ's Conclusions that Several Provisions of Respondent's June and October Solicitation and Distribution Policies Are Facially Unlawful

For the clear and convincing reasons articulated in the ALJ's decision, the ALJ correctly concluded that the identified provisions of Respondent's June and October solicitation and distribution policies are unlawful. The Board should continue to follow its long-standing precedents, and adopt the ALJ's decisions and orders regarding the unlawful portions of Respondent's solicitation and distribution policies.

D. The ALJ's Conclusions that Respondent, by Cynthia Hawley, Unlawfully Threatened Susannah Reed-McCullough With More Onerous Working Conditions, and Interrogated Her, on July 20, Is Supported By the Record Evidence¹⁸

I. FACTS

Regarding the July 20 meeting between Hawley and Reed-McCullough, Respondent accepts the vast majority of the ALJ's factual findings identified in sections D(1), B(1)(a), B(3)(a) of the ALJ's decision. (ALJD: pgs. 8, 19, 21, 22). Some of the relevant, unchallenged, factual findings include:

- On July 20, supervisor Cynthia Hawley asked to meet with Susanna Reed-McCullough. Before walking into Hawley's office around the end of her shift, Reed-McCullough sent text updates to union representatives and to coworkers notifying them that her supervisor had asked to speak with her. During the meeting, Hawley mentioned that the Hospital administration knew that some nurses were in contact with union representatives. Hawley said that she wanted Reed-McCullough to be informed before she made a decision about the Union, and that some nurses had been called at home and harassed. Hawley also said that if anything like that were to happen to Reed-McCullough, she should let Hawley know. (ALJD: 8, 6-15)
- However, according to Hawley, the presence of a union might limit employee access to management by requiring that union representatives be present for such meetings. There might also be changes to the Hospital's generous leave and flexible-schedule customs and practices. Specifically, Hawley compared the current NICU policy – which allowed nurses who were hired as shift rotators to work straight nights or straight days after only 8 years – with the general hospital policy, which required 15 years of work before a nurse could switch to straight shifts. Hawley said that, because unions like things to be equal “across the board,” the policy could shift to 15 years for the NICU too. Hawley then handed Reed-McCullough a fact sheet. At no time did Hawley explain that any possible changes to working conditions would be the result of a collective bargaining process between Hospital and union representatives, or even mention the collective bargaining process at all. The fact sheet that Hawley handed to Reed-McCullough also did not mention the collective-bargaining process. After the meeting, Reed-McCullough passed along Hawley's comments to coworkers. (ALJD: 8, 18-31)

¹⁸ Respondent's exceptions 10-12.

- During the meeting, Hawley told Reed-McCullough that the presence of a union might limit employee access to management and might worsen the NICU's FMLA and flexibility policies, because unions like to equalize things "across the board." (ALJD: 19, 19-22)
- During this conversation, Hawley was aware that flexibility leave policies were particularly important to Reed-McCullough, as Hawley had approved Reed-McCullough's day-shift contract. Hawley was also aware that Reed-McCullough had used FMLA for her own family. (ALJD: 19, 25-27.)
- After the meeting, Reed-McCullough passed along Hawley's comments to coworkers. (ALJD: 8, 30-31)
- Contrary to Respondent's contention in its brief, Reed-McCullough's testimony made no mention of Hawley bringing up negotiations during their conversation. (ALJD: 8, fn. 26)
- Reed-McCullough was not intimidated by Hawley's remarks. However, she credibly testified that the flexibility and day work shifts afforded her by Hawley's NICU schedules were extremely important to her for childcare reasons. (ALJD: 8, fn. 27)

Respondent's only factual exception concerns the ALJ's finding that Hawley knew Reed-McCullough was a union supporter at the time of their meeting.¹⁹ However, the record evidence supports the ALJ's finding. First, Respondent admits it had knowledge of nurses' union activities in late June. Then, Reed-McCullough testified that she was active in the organizing campaign at the hospital since January or February by speaking with nurses about the Union, and during that time Hawley was her supervisor. (Tr. 1: 117-118). Finally, Given Hawley's targeting of Reed-McCullough for an interview and her subsequent statements during their meeting that hospital administrators were aware that nurses had contacted the Union, the ALJ properly inferred that Hawley was aware of Reed-McCullough's support for the Union at the time of their July 20

¹⁹ Respondent's exception 11.

meeting.²⁰ If Respondent sought to avoid this factual finding it could have called Hawley as a witness, but failed to do so.²¹ Regardless of the ALJ's findings concerning Hawley's knowledge of Reed-McCullough's support for the Union at the time of their July 20 meeting, there is no impact on the ALJ's legal conclusions that Respondent, by Hawley, unlawfully threatened Reed-McCullough with more onerous working conditions and loss of benefits, and interrogated her about union activity.

II. ARGUMENT

a. The ALJ's Conclusion that Respondent, by Cynthia Hawley, Unlawfully Threatened Reed-McCullough With More Onerous Working Conditions and Loss of Benefits on July 20 Is Supported By the Record Evidence and Extant Board Law

Respondent attacks the ALJ's legal conclusion that Hawley's undisputed statements to Reed-McCullough were threats of more onerous working conditions and loss of benefits in violation of Section 8(a)(1) of the Act. In order to make its argument, Respondent distorts several factual and legal findings of the Board.

i. Legal Framework and Analysis

It is well settled that Section 8(c) of the Act provides: "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains

²⁰ Respondent improperly impugns the ALJ by stating, "It is obvious that the ALJ confused Ms. Reed-McCullough with Ms. Scott who testified that she told Ms. Hawley that she supported the Union in July 2016." (Res. Brf: 32) Respondent is blatantly trying to sow confusion regarding the clear facts of July 20. Scott testified that on July 22, two days after the July 20 meeting, she personally told Hawley that she supported the Union. (Tr. 2: 256, Scott) The ALJ in no way relied on Scott's testimony in his determination that Hawley knew about Reed-McCullough's support for the Union at the time of their July 20 meeting. The ALJ was not confused.

²¹ Respondent misrepresents record testimony for the purposes of arguing that Hawley was unavailable for the hearing due to her use of leave. (Res. Brf.: 10) The specific transcript citation relied on by Respondent is Reed-McCullough testifying that she thinks Hawley is still in the position as a supervisor, but has not been at the hospital for months. (Tr. 1: 117, Reed-McCullough) There is no testimony in the record that Hawley was unavailable to testify during the hearing.

no threat of reprisal or force or promise of benefit.” A threat of more onerous working conditions is unlawful. *Liberty House Nursing Homes*, 245 NLRB 1194, 1999 (1979). Similarly, a statement that the presence of a union could deteriorate employment conditions, e.g., “it could get much worse,” is unlawful absent a reference to the collective-bargaining process. *Metro One Loss Prevention Service Group*, 356 NLRB 89, 89 (2010). Statements that employees would lose their flexible work schedules constituted threats of more onerous working conditions when those threats omitted any reference to the collective-bargaining process. *Novelis Corp.*, 364 NLRB No. 101 (2016), citing *Allegheny Ludlum Corp.*, 320 NLRB 484, 484 (1995) (telling employees they will lose flexibility in working conditions if they bring in the union constitutes an unlawful threat of a loss of benefits); cf. *Tri-Cast, Inc.* 274 NLRB 377 (1985) (statements by employers to employees indicating a change in a relationship if employees opt for union representation are permissible if unaccompanied by threats).

Respondent, by presenting the possibility of lost benefits or more onerous working conditions without referencing or describing the collective-bargaining process, or the give and take of collective-bargaining negotiations, violated Section 8(a)(1) of the Act. At the time of their July 20 meeting, Hawley was clearly aware that Reed-McCullough had certain needs regarding work scheduling and benefits, and that she utilized self-scheduling and FMLA in order to address her familial obligations. In an attempt to exploit Reed-McCullough’s personal vulnerabilities, Hawley threatened that union representation could affect Reed-McCullough’s ability to manage her work/life balance by adversely impacting her self scheduling, FMLA, and direct communications with management. At no time did Hawley describe the collective-bargaining process or the give-and-take of negotiations to provide context for the possible changes.

Primarily, Respondent argues that the ALJ's legal conclusions are incorrect because the ALJ wrongfully creates a condition precedent requiring reference to the collective-bargaining process. In order to make this argument, Respondent distorts the Board's factual and legal conclusions in *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010). In *Metro One Loss Prevention Services Group*, the Board determined that a respondent's statement that, "you need to be grateful for the number of years that [you] have been working with Metro and for [your] pay rate. It could be worse; it could get much worse in the event the Union comes in," was unlawful because the statement conveyed that an employee would be jeopardizing working conditions by supporting a union. *Id.* at 89. Further, the Board stated that without referencing the collective-bargaining process to provide context in which working conditions could possibly deteriorate, respondent unlawfully threatened more onerous working conditions and loss of benefits. *Id.*

The ALJ correctly concluded the facts of the instant case are like those in *Metro One Loss Prevention Service Group*. Hawley's statements to Reed-McCullough that supporting the union could interfere with her ability to speak with management, deteriorate her FMLA and schedule flexibility, without referencing the collective-bargaining process, conveys to Reed-McCullough that supporting the union would be jeopardizing her working conditions.

For the reasons articulated by the ALJ in his decision, and in this answering brief, the Board should affirm the ALJ's legal conclusions that Respondent violated Section 8(a)(1) of the Act by threatening Reed-McCullough with more onerous working conditions and loss of benefits if nurses supported the Union, and order Respondent to comply with the ALJ's order and decision.

b. The Record and Extant Board law Supports the ALJ's Conclusion that Hawley unlawfully interrogated Reed-McCullough in violation of Section 8(a)(1)

i. Legal Framework and Analysis

“An employer is free to communicate to his employees any of his general views about unionism...so long as the communications do not contain a threat of reprisal or force or promise of benefit.” *Tawas Industries, Inc.*, 336 NLRB 318, 321 (2001), citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Board has frequently found unlawful employer’s statements encouraging employees who feel harassed or pressured in the course of union solicitations to report the incident to management. *Id.* at 322. These statements violate Section 8(a)(1) “because they have the potential 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.” *Id.* Moreover, though remarks may not be framed in the customary interrogative form, where a remark has the natural tendency to solicit a response which reveals or discloses union sympathies, those remarks violate Section 8(a)(1). See *Jefferson Apparel Co.*, 248 NLRB 555 (1980).

Hawley’s statement to Reed-McCullough that Hawley was aware that nurses had been called at home and harassed, and that if Reed-McCullough ever felt harassed she should let her know, is a clandestine interrogation which violates Section 8(a)(1). Hawley’s statement naturally solicits a response and placed a tremendous pressure on Reed-McCullough to reveal any number of her or her fellow nurses’ union activities, or sympathies concerning the Union, as identified in *Tawas Industries Inc.* 336 NLRB at 321. Moreover, Hawley’s statement communicates to Reed-McCullough, a union supporter, that the hospital is investigating an undefined interpretation of “harassment”

within the Union's campaign, which logically would discourage a union supporter like Reed-McCullough from supporting or acting on behalf of the Union for fear of allegedly harassing employees.

Respondent's sole argument against the ALJ's conclusion that Respondent unlawfully interrogated Reed-McCullough is, "Ms. Hawley encouraged Ms. Reed-McCullough to notify her if union representatives, not employees, were harassing her."²² Respondent again attempts to distort the facts to its advantage. There is no record evidence that Hawley limited her statement to union representatives. Hawley's statement is as the ALJ found it, and Hawley's statement encourages Reed-McCullough to identify other employees who support the Union.

For the reasons identified by the ALJ, Hawley's statement to Reed-McCullough that she should let Hawley know if she ever felt harassed is an unlawful interrogation which violates Section 8(a)(1) of the Act.

E. The ALJ's Legal Conclusions that Respondent, by Dwight Lyles, and Security Officers, Interfered With Nurses Protected-Concerted Activities Are All Overwhelmingly Supported By the Record Evidence
²³

I. FACTS

Respondent does not specifically except to any of the ALJ's factual findings regarding nurses' Mintz' and Scott's protected-concerted activities on August 6. The facts are as follows:

Prior to August 6, Mintz and Scott regularly approached and solicited nurses in other units. (ALJD: 9, 4-5) On August 6, NICU nurses Mintz and Scott, while off-duty,

²² (Res. Brf.: 34).

²³ Respondent's exceptions 13-16.

went to the hospital at approximately 3:00 p.m. to speak with nurses from several units about the Union.²⁴ (ALJD: 9, 4-7)(1: 57, 58, 67, Mintz)(2: 262, Scott)

Upon arriving at the hospital, Mintz and Scott took an elevator to the sixth floor oncology unit. (ALJD: 9, 7-8)(1: 58, 59, Mintz)(2: 262, Scott) On the sixth floor, they went to the oncology unit front desk and spoke with the unit HUC.²⁵ *Id.* They asked the HUC if they could speak with an oncology nurse named Esther. *Id.* After a short wait, Esther came off the oncology unit and spoke briefly with Mintz and Scott near the sixth-floor elevators.²⁶ (ALJD: 9, 8-9)(1: 61, Mintz)((2: 263, Scott) Mintz and Scott thanked Esther for her Union support and encouraged her to speak with other nurses on the oncology unit about the Union. (1: 60, 61, Mintz) Esther told Mintz and Scott she would catch up with them later and returned to her unit. (ALJD: 9, 9-10)(2: 263, Scott) After Esther returned to her unit, Mintz and Scott took the stairwell down to fifth floor acute care. (ALJD: 9, 12-13)(1: 61, Mintz)(2: 263, Scott)

The hospital's fifth and sixth floor have the same floor plan, so after arriving on the fifth floor, Mintz and Scott went directly to the acute care front desk and asked the HUC if they could speak with Grace Yu, acute care nurse.²⁷ (ALJD: 9, 12-14)(1: 61, 62, Mintz)(2: 264, Scott) The HUC informed them Yu was currently busy. (2, 62, Mintz)(2: 264, Scott) Mintz and Scott told the HUC they did not want to disturb Yu and would wait until Yu's break to speak with her. *Id.* The acute care HUC opened the unit doors

²⁴ Mintz and Scott wore casual clothes and hospital badges to the hospital. (ALJD: 9, 6-7)(1: 67, Mintz)(GCx18)

²⁵ HUC is a unit secretary. (1: 48, Mintz)

²⁶ Mintz estimates their conversation on the sixth floor was two minutes. (1: 61, Mintz)

²⁷ Full name is Aieun Grace Yu. (1: 131, Yu)

for Mintz and Scott, and permitted them to wait for Yu on the acute care unit.²⁸ *Id.*

Mintz and Scott walked onto the unit but quickly realized they would rather wait outside the unit in the waiting area, and informed the HUC they would wait for Yu in the sitting area. *Id.*

At 3:20 p.m., Mintz and Scott left the unit and sat in the lobby area across from the acute care front desk and fifth-floor elevators. (ALJD: 9, 15-17)(1: 63, Mintz)(2: 264, Scott)(Resx32: 3:20:53 EST) Mintz and Scott were the only people sitting in the waiting area. (Resx32) From the sitting area, both Mintz and Scott could see the acute care front desk and unit activity behind the desk. (1: 63, Mintz)(2: 265, Scott) Inside the unit, Dwight Lyles, the unit's NIC, then came out to the HUC area. (ALJD: 9, 19-20) While seated, both Mintz and Scott noticed Lyles looking at them from the front desk. Scott saw Lyles pick up a phone and turn his back to her and Mintz. (1: 65, 66, Mintz)(2: 265, Scott)

From the front desk, Lyles noticed Mintz and Scott calmly sitting in the waiting area and found it alarming.²⁹ (ALJD: 9, 20)(2: 449, 459, Lyles) Though Lyles recognized Scott as a hospital nurse, he asked the HUC about Scott and Mintz.³⁰ (ALJD: 9, 21-22)(2: 449, Lyles) The HUC informed Lyles that Mintz and Scott requested to speak with Yu. (2: 449, 452, Lyles) Knowing Mintz and Scott wanted to speak to Yu, and suspicious that they were engaged in union activities, Lyles called Carrie Weakland,

²⁸ Respondent attempts to depict nurses Mintz and Scott as striving to access the locked acute care unit to speak with on-duty nurses. (Res. Brf.: 12) Respondent's recitation misrepresents the facts. The record evidence is that the HUC asked Mintz and Scott to wait for nurse Yu on the unit, and unlocked the door for them. Mintz and Scott, after accessing the unit, quickly determined that they would rather wait in the lobby waiting area. (2, 62, Mintz)(2: 264, Scott)

²⁹ Lyles testified he has seen others sitting in the waiting area on other occasions. (2: 461, Lyles)

³⁰ Respondent expounds a theory unsupported by the record evidence that Mintz and Scott, while waiting in the lobby area, suddenly checked their security badges to ensure they were in compliance with what they understood to be the Hospital's policy on solicitation. Noticeably, Respondent did not offer any citations for its representation because there is no evidence to this effect.

Administrative Coordinator. (ALJD: 9, 23-24)(2: 450, 460, Lyles) Lyles told Weakland he suspected Mintz and Scott were in the sitting area to discuss the Union with nurses on his unit.³¹ *Id.* So, Weakland instructed Lyles to call hospital security. (ALJD: 9, 24-25) *Id.* Lyles then called hospital security and told the dispatcher that he suspected Mintz and Scott were engaged in union activities and trying to recruit his staff for the Union. (ALJD: 9, 25-26)(2: 451, 461, 468, Lyles)(GCx18)

At 3:23 p.m., after Lyles called security, Yu left the unit to speak with Mintz and Scott in the waiting area. (ALJD: 9, 28-30)(2: 461, Lyles)(1: 134, Yu)(Resx32: 3:23:19 EST) Mintz and Yu hugged and then spoke for approximately one minute. (ALJD: 9, 30-31)(1: 63, 64, Mintz)(1: 134, Yu)(Resx32: 3:24:01 EST). Mintz asked Yu if there was anyone from Yu's unit that would speak with them about the Union. (ALJD: 9, 31-32)(1: 63, 64, Mintz)(1: 134, 135, Yu) Yu said she would see if a co-worker named Nene would be willing to speak with Mintz and Scott, then Yu returned to her unit. (ALJD: 9, 33) *Id.*

Back on the unit, Yu searched for Nene. (1: 135, Yu) While Yu was looking for Nene, Lyles found Yu and confronted her about her conversation with Mintz and Scott, and whether she knew the nurses that were looking for her. (ALJD: 9, 35-36)(1: 135, Yu)(2: 456, Lyles) Lyles told Yu that he called hospital security on the nurses. (ALJD: 9, 37)(1: 135, Yu) Yu asked Lyles why he called security and Lyles responded union

³¹ Respondent states, "Mr. Lyles called the administrative coordinator Carrie Weakland and then security to notify them that off-duty nurses were attempting to pull on on-duty off duty nurses off the unit and away from her patients. Tr. 450: 9-25." (Res. Br.: 12) Respondent again contorts the facts to its advantage. There is no record evidence that Lyles told Weakland or security that his concern was off-duty nurses attempting to pull on-duty nurses away from patients. Lyles' exact testimony in the section of the record cited by Respondent is, "That there were a couple of people on my unit. They had asked to speak to one of the nurses on my floor, and then I called security to describe that same event." Lyles later clarified his testimony regarding his conversation with Weakland explaining that he told Weakland that he thought the off-duty nurses were on his unit to discuss the Union with nurses. (Tr.: 2, 460, Lyles)

advocates were not permitted to solicit employees during work time.³² (ALJD: 9, 38-39) *Id.* Then, Lyles asked Yu if she previously spoke to her supervisor about the Union and Yu informed Lyles that she had. (ALJD: 9, 39-40) *Id.*

At 3:34 p.m. Esther, the oncology nurse from the sixth floor, came to the fifth floor and spoke with Mintz and Scott for approximately six minutes. (ALJD: 9, 41-42)(1: 64, 79, Mintz)(2: 266, Scott)(Resx32: 3:34 EST) The three nurses discussed ongoing issues on the oncology unit and obtaining authorization cards. (ALJD: 9, 43-44)(1: 65, Mintz)(2: 266, 267, Scott) While Mintz and Scott were speaking with Esther, security officers Webster and Varnado exited the fifth floor elevators, looked at the nurses, and walked onto the unit. (ALJD: 10, 1-2)(2: 266, 267)(Resx32) Officer Webster went onto the acute care unit to speak with Lyles. (ALJD: 10, 3-4)(2: 477, Webster) Lyles told Webster he believed the two off duty nurses were trying to recruit his staff to the Union.³³ (ALJD: 10, 4-6) (*Id.*) Officers Webster and Varnado left the unit and approached Mintz and Scott who were still sitting in the waiting area. (ALJD: 10, 8-10)(1: 66, Mintz)(2: 268, Scott)(2: 477, Webster)(GCx18)(Resx32) A third officer, Officer

³² There is no record evidence that Yu, or other nurses, are not permitted to have a quick discussions with visitors that call on them. Nor is there record evidence that Yu and other nurses are not permitted a break. Moreover, Respondent concedes that off-duty nurses may attempt to speak with on-duty nurses about the union. In its brief, Respondent states, "After August 6, no one from Hospital management counseled, disciplined, or even spoke to Ms. Mintz, Ms. Scott, or Ms. Yu about the incident. Ms. Mintz and Ms. Scott did not file any complaint with the Hospital concerning this incident; nor did they ask for any clarification of the whether the Hospital permitted them to visit nurses on other nurses. There was no question because Ms. Scott and Ms. Mintz knew that they could take those actions and they testified that they continued to visit with nurses on other units while they were off duty after August 6." (Res. Brf: 15) Respondent is attempting to raise confusion to avoid liability for its actions. It attempts to create a narrative about off-duty nurses interfering with patient care, and then says it's proper for off-duty nurses to speak with on-duty nurses.

³³ Respondent again tries to create a narrative that Lyles' was concerned about Mintz and Scott interfering with on-duty nurses and patient care stating, "Mr. Lyles responded that off-duty nurses were speaking to his on duty nurses about Nurses." (Res. Br.: 13) The record testimony by Webster is, "He said that there are two individuals that were, he believed, were off-duty nurses trying to recruit his staff to the Union. (2: 477, Webster)

Hawkins, joined Webster and Varnado as they were going to speak with Mintz and Scott. (ALJD: 10, 2-3)(1: 66, 67, Mintz)(2: 479, Webster)(GCx18)(Resx32)

At 3:41 p.m., Webster told Mintz and Scott that he received a call that there was a disturbance on the unit. (1: 65, 66, Mintz)(2: 268, Scott)(2: 477, 478, Webster)(GCx18)(Resx32) Mintz responded asking Webster why he was asking them about a disturbance when the unit was behind the locked doors. (1: 66, 67, Mintz) Scott said they were not in a patient care area. (2: 268, Scott) During their conversation, all three officers stood around the two seated nurses. (ALJD: 10, 9-10)(Resx32) Then the officers returned to the unit. *Id.*

Webster later returned to Mintz and Scott and asked for their names. (ALJD: 10, 12-13)(1: 66, 67, Mintz)(2: 268, Scott)(2: 478, Webster)(GCx18)(Resx32) Mintz asked why Webster needed their names and Webster explained that whenever he is called for a disturbance, he has to write an incident report. (ALJD: 10, 14) *Id.* Both Mintz and Scott provided Webster their names. (ALJD: 10, 13)(*Id.*) Webster then went back onto the acute care unit to speak with Lyles. (ALJD: 10, 17)(2: 457, Lyles)(2: 478, Webster)(GCx18)

On the unit, Webster told Lyles he wanted to speak to the nurse that Mintz and Scott asked to speak with. (ALJD: 10, 17-18)(2: 457, Lyles)(2: 478, 487, Webster) Lyles got Yu and marched her to where Webster was standing. (2: 488, Webster) Webster recorded Yu's name by either asking for it or from Yu's name badge. (1: 136, Yu)(GCx18) Webster told Lyles and Yu that he was going to report the matter to the nursing coordinator.³⁴ (ALJD: 10, 19-21)(1: 136, Yu)

³⁴ Webster testified that he questioned Yu if she knew Mintz and Scott. (2: 478, Webster) While Yu did not testify to this interaction with Webster, it's perfectly plausible that if Yu in fact denied knowing Mintz

While Officer Hawkins was on the acute care unit, he saw three or four nurses huddled together. (ALJD: 10, 7-9)(2: 501, Hawkins)(GCx18) Hawkins overheard the nurses say they wanted to hear what the pro-union nurses had to offer. *Id.* Hawkins approached the nurses and asked them, “what are they offering?” *Id.* The nurses dispersed after Hawkins confronted them. (GCx18)

Mintz and Scott saw the officers leave the fifth floor by stairwell. (1: 67, Mintz) They remained seated in the waiting area because they were waiting to speak to Yu or her colleague, Nene. (1: 67, 68, Mintz)(2: 269, Scott) At 3:49 p.m., Yu sent Mintz a text message asking if she could call Mintz.³⁵ (ALJD: 10, 29-3)(1: 68, Mintz)(GCx5) Yu called Mintz and told her that the officer told Yu that he was going to report the incident to the nursing coordinator, and the nurse she was going to send out was too frightened, and so were other nurses.³⁶ (ALJD: 10, 33-34)(1: 69, Mintz)(2: 270, Scott) Mintz told Scott that Yu and her colleague were too scared to speak with them. (1: 69, Mintz)(2: 269, 270, Scott) Knowing that neither Yu nor her colleagues were going to speak with Mintz and Scott, they jumped at the first chance to leave the fifth floor when an elevator opened.³⁷ (ALJD: 10, 36)(1: 69, Mintz)(2: 270, Scott)

Mintz and Scott went to the hospital coffee shop to decide what to do next. (ALJD: 10, 37)(1: 69, Mintz)(2: 270, Scott) They intended to go to the OR waiting area to speak with nurses about the Union. (1: 70, Mintz)(2: 271, Scott) However, while in

and Scott she did so because she was intimidated by being questioned by a security officer in the presence of her supervisor about her protected-concerted activities.

³⁵ At 3:50:26 p.m., Resx32 clearly shows Mintz take a phone call. Mintz’ phone call ends at 3:51:36 p.m.. (Resx32)

³⁶ GCx5 is the August 6 text message exchange between Mintz and Yu. The exchange includes a message from Mintz to Yu at 5:59 p.m. which states, “Thanks grace. So sorry about today. You are amazing. Thank you! Is nene willing to meet with us? We can do it outside of the hospital. Just let me know. Thank you, grace!” (GCx5)

³⁷ Resx32 confirms that at 3:53:02 p.m. Mintz jumped out of her chair to get on the first elevator door that opened.

the coffee shop, Mintz and Scott noticed one of the officers that had just questioned them looking at them. (ALJD: 10, 40-41)(1: 70, Mintz)(2: 270, Scott) Both Mintz and Scott testified they decided to go home rather than go to the OR because they felt they were being followed by security and were intimidated. (1: 70, Mintz)(2: 271, Scott)

Officer Webster typed an incident report shortly after he left the fifth-floor.³⁸ (ALJD: 10, 22-23)(2: 480, 489, Webster)(GCx18) The title of the report is: Off-Duty Employees Suspected of Trying to Recruit Other Working Nurses to The Union. (ALJD: 10, 23)(GCx18) Webster's incident report states:

...On August 6, 2016 around 1539 hours Control Dispatcher Officer Joseph asked me (Officer Webster) for a landline. When I contacted the Control Center Officer Joseph informed me that Administrative Coordinator Carrie Weakland called and informed him that there are Union Representatives speaking to Nurses on the Fifth Floor South Tower. After getting off the phone Officer Varnado and myself responded to the Fifth Floor South Tower. When I arrived I saw two plain clothed employees sitting down in the waiting area speaking to a Nurse. I continued on to the Nursing Station and spoke with Charge Nurse Dwight Lyles. He stated that he believes the two plain clothed employees are trying to recruit for the Union because they are coming to the desk asking to speak to his Nursing Staff and does not know why Nurses from NICU would be on his Unit wanting to speak to his staff.

After speaking to Charge Nurse Dwight I went and spoke to the two individuals I informed them I received a call about suspicious activity on the unit and asked why they are here and where they worked. They stated they are NICU employees and are here to speak to some nurses they know on the Unit. They both had on HCH employee badges identifying them as Nina Scott and Suzanne(No last name on the her Badge). I then went and spoke again with Charge Nurse Dwight and he stated that they requested to speak to RN Areun Yu. Officer Varnado and myself spoke to RN Areun and she stated she does not know who these ladies are.

While Officer Hawkins was walking around the Unit, he witnessed three to four nurses huddled together and overheard

³⁸ Webster testified that it is important for him to be as accurate as possible in incident reports. (2: 489, Webster)

them say “I want to see what they are offering”. He then approached the Nurses and asked them “What are they offering”. After confronting them the Nurses ignored him and dispersed. Officer Hawkins then stated right after speaking to the Nurses he saw the two NICU nurses leave when they saw him.

I then went on and checked the CCTVCameras to see how long the two nurses were on the unit and how many people they spoke to and if they visited any other units. The two nurses took the ramp stairs to go the fifth floor at 1513 hours and arrived on the fifth floor at 1518 hours. Then at 1523 hours they started to speak to RN Areun Yu who stated earlier that she did not know who the two individuals were. They stopped speaking at 1524 hours. At 1534 hours they spoke to a second nurse who we were not able to identify. They stopped speaking at 1541 hours which is when we (Security) arrived on the unit. The two individuals then left the unit and the hospital at 1551 hours.

I checked with NICU and both Nurses were not scheduled to work today and they identified the one nurse that we did not know the last name of as Suzanne Mintz. Administrative Coordinator Carrie and Security Director Hollowel were both briefed on this incident. I have attached a picture of both individuals walking to the Fifth Floor. No more to report at this time. (GCx18)

Webster’s incident report states he briefed “Coordinator Carrie” of the incident.

(GCx18) As Webster told Yu, at 4:42 p.m. on August 6, Carrie Weakland,

Administrative Coordinator, sent Guarino and Rogers an e-mail stating,

Good afternoon,
I just wanted to pass along an FYI:
I got a call from Dwight on 5SAC today stating that he believed he had union people on his unit in plain clothes, and asked that security come speak with them. I spoke with security to address. Security responded and reported that these are the people who we believe were handing out cards for the union: Nina Scott and Suzanne Mintz, both are NICU RN’s and were in the common area on 5S. Both had hospital ID’s on and in plain clothes. Security approached and they said they were here to visit some RN’s, specifically, they requested to speak with Areun Yu. They left after the security spoke with them. Kim Elliot, AOC is aware. (GCx19)

II. ARGUMENT

a. The ALJ's Conclusion That Respondent, by Dwight Lyles, Violated Section 8(a)(1) of the Act by Calling Hospital Security on Nurses Engaged in Protected-Concerted Activities Is Supported By the Record Evidence and Extant Board Law³⁹

i. Legal Framework and Analysis

It is well settled that an employer violates Section 8(a)(1) of the Act if its conduct “may reasonably be said to have a tendency to interfere with the free exercise of employee rights.” *Unbelievable, Inc. d/b/a Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997), *enf'd.* in part 118 F. 3d 795 (1997). The Board has held an employer’s use of its security forces as an instrument to impede the self-organization of its employees violates Section 8(a)(1) of the Act. *Clear Lake Hosp.* 223 NLRB 1, 8 (1976) (respondent’s use of security personnel to arrest and remove union organizers in the presence of several employees had adverse consequences to union organizing and thus violated Section 8(a)(1)), see also *Sunrise Healthcare Corp.*, 320 NLRB 510, 516, (1995).

Lyles used hospital security as an instrument to prevent off-duty nurses Mintz and Scott from speaking with nurses about the Union. Therefore, Respondent, by Lyles, violated Section 8(a)(1) of the Act by interfering with Mintz’ and Scotts’ protected-concerted activities.

By Lyles’ own admission, he only called hospital security because he was alarmed that pro-union nurses were attempting to recruit acute care nurses to the Union. There is no evidence or suggestion that Lyles’ believed Mintz or Scott were engaged in misconduct or violation of hospital policies. He called security in an effort to stop the

³⁹ While Respondent did not specifically except to the ALJ’s legal conclusion regarding Lyles’ interference with nurses’ protected-concerted activities in Respondent’s Exceptions To The Decision Of The Administrative Law Judge, it did footnote its exception, in its Brief In Support of Its Exceptions, to the ALJ’s conclusion that the Hospital, by Lyles, violated the Act by calling security officers to respond to nurses’ union activities. (Res. Brf: fn. 15)

nurses' organizing efforts, and successfully did so by chilling nurses from speaking with Mintz and Scott.

By using hospital security to impede employees' lawful organizing activities, the Respondent, through Lyles, coercively interfered with Mintz, Scott, and Yu's protected union activities, in violation of Section 8(a)(1) of the Act. The Board should affirm the ALJ's decision regarding Lyles' interference with nurses' protected concerted-activities.

b. The ALJ's Determinations that Respondent, by its Security Officers, Coercively Interfered with Nurses Protected-Concerted Activities by Recording Their Names, Stating that the Matter Would be Taken to the Nursing Coordinator, and Quelling Nurses Interest, Is Supported By Extant Board Law

i. Legal Framework and Analysis

The ALJ properly relied on the Board's holdings in *Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach and Hotel Renew*, 365 NLRB No. 53, slip op. at 1 (2017) (finding that the employer's security officer unlawfully prohibited off-duty employees from distributing union leaflets in the employer's hotel), for his determination that Respondent's security officers coercively interfered with nurses' protected-concerted activities by confronting nurses Mintz, Scott, and Yu, who were engaged in lawful organizing activities.

In response to Lyles' unlawful interference with the nurses' protected-concerted activities, the security officers wrote down the name of every nurse involved in organizing, and threatened Yu that security would notify her boss, and then followed through on the threat. After the nurses' encounter with Hospital security, other nurses

were too frightened to leave the unit to speak with Mintz and Scott, and then Scott and Mintz were too intimidated to continue their activities to the Operating Room.⁴⁰

Also, Officer Hawkins' interference with 5 South Acute nurses interested in speaking with Mintz and Scott, violates Section 8(a)(1) of the Act.

By interfering with the lawful organizing activities of Mintz, Scott, and Yu, the Respondent, through its security officers, violated Section 8(a)(1) the Act. The Board should adopt the ALJ's factual and legal conclusions, and enforce his orders.

F. The ALJ's Conclusions that Respondent, by Jolly Joseph, and other NICs, Surveilled Nurses' Union Activities, and Created the Impression of Surveillance, Are Overwhelmingly Supported by the Record Evidence ⁴¹

Respondent excepts to the ALJ's legal conclusions that the undisputed facts regarding Jolly Joseph's, and other unidentified NICs', pictures of nurses engaged in union activities, and subsequent distribution of these pictures to upper-level management, was a violation of Section 8(a)(1) of the Act.

I. FACTS

Respondent does not except to any of the ALJ's factual findings identified in section D(3) of the ALJ's decision. Therefore, the facts are those identified in the ALJ's decision. Though Respondent does not specifically except to the ALJ's credibility determination regarding Joseph in its Exceptions to the Decision of the Administrative Law Judge, it does argue in its Brief in Support of its Exceptions that the ALJ

⁴⁰ Respondent argues that Scott was not really intimidated because she did not lodge a complaint with the Hospital's human resource department. However, Respondent overlooks Scott's testimony that she told Dr. Yancey Phillips, Chief Quality Officer, about the August 6 incident with the Hospital's security officers, on August 7. (ALJD: 7, 25-34)(2: 271-73, 278, Scott)

⁴¹ Respondent's exception 17.

improperly discredited Joseph.⁴² Specifically, Respondent argues against the ALJ's credibility finding that:

- Joseph was not credible when she testified that she was unaware of Ngezem's union support. Joseph was also not credible when she testified that she did not know why the Union nurses were posing for a picture. Joseph took 2-3 pictures of the nurses and then texted those pictures to Ninan, along with the captions "look at the activity in front of the saint near parking lot, send barbra" and "Gisele, [Ngezem], Jessy, [Scott] all were there." Ninan responded, "[i]s[sic] Gisele and [Ngezem] there?" Joseph confirmed that Gisele and Ngezem were in the picture: "4th and 5th person." Ninan replied, "I see, so we were correct about Gisele!" Joseph responded, "Yep." In later testimony, both Joseph and Ninan confirmed that Ninan's "so we were correct" statement was, in fact, a reference to the Union.⁴³ (ALJD: 12, fn. 36)

II. ARGUMENT

a. The ALJ Correctly Concluded that Joseph's, And Unidentified NICs', Picture Taking of Nurses Engaged In Union Activity, Without a Legitimate Justification, Violates Section 8(a)(1) of the Act

i. Legal Framework and Analysis

It is well settled that mere observance of protected concerted activity in an open setting generally does not arise to the level of surveillance. *Days Inn Management Co.*, 306 NLRB 92, fn. 3 (1992). When an employer's surveillance activity constitutes more than "mere observation," the Board has found a violation of the Act. See *Gupta Permold Corp.*, 289 NLRB 1234 fn. 2 (1988); *Baddour*, 281 NLRB 546, 548 (1986), enfd. 848

⁴² (Res. Brf: 42)

⁴³ The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3rd Cir. 1951). The ALJ correctly discredited Joseph's absurd version of why she took her pictures of the nurses' union activities for the reasons identified in his decision, and the following reasons: first, Joseph's text exchanges with Ninan overwhelming proves Joseph knew union activity was occurring outside the window due to the participants involved, such as Ngezem and Nina Scott, and took the pictures to record the activity for other directors and supervisors to have their own records of the event. (GCx16) Second, the other NICs that sent Joseph's pictures to supervisors appeared to have known that the nurses were engaged in union activity. (Resx17-21) Third, the fact that several NICs felt equally compelled to grab their phones to record the same lingering group of nurses leaves no doubt that they were all knowingly photographing union activity. *Id.* Finally, looking at the pictures in CGx13, 14, and 15, there is nothing particularly interesting or beautiful of a small group of nurses' backs or nurses smoking cigarettes that demands a picture.

F.2d 193 (6th Cir. 1988). The Board has long held that absent a proper justification, photographing employees engaged in protected-concerted activities violates the Act because it has a tendency to intimidate because such pictorial recordkeeping tends to create fear among employees of future reprisals. *F.W. Woolworth*, 310 NLRB 1197 (1993), citing *Waco, Inc.*, 273 NLRB 746, 747 (1984), see also *National Steel and Shipbuilding Co.*, 324 NLRB 499 (1997), citing *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). The Board has attributed “little weight” to employer defenses that employees publicized their own protected activities. *United States Steel Corp.*, 255 NLRB 1338, 1339 (1981).

Respondent concedes that the ALJ properly concluded, based on current Board law, that Joseph and other NICs unlawfully surveilled, and created the impression of surveillance, of nurses’ union activities.⁴⁴ However, Respondent believes the Board’s clear and informed precedent is too rigid, and should be replaced with a vague totality of the circumstances test. Respondent doesn’t have the facts, so it argues the law.

It is undisputed that Respondent, by Joseph and unidentified NICs, went above mere observation by eagerly pulling out their phones to capture the nurses’ union activities so that upper-level management could be aware of the participants. Respondent offers no credible justification for the NICs’ pictures of the pro-union nurses. There is no assertion or evidence that the pro-union nurses were engaged in any sort of misconduct. Joseph and the other NICs had no idea the pro-union nurses were going to later distribute a flyer including the picture of the pro-union nurses around the

⁴⁴ (Res. Brf: 41)

statue, and if they had knowledge the nurses intended to publicize their activities, their knowledge would be irrelevant.⁴⁵

The ALJ correctly concluded based on the Board's long established precedent, that Respondent, by Joseph and other unidentified NICs, went beyond mere observation without a legitimate justification, and therefore violated Section 8(a)(1) of the Act. The Board should affirm the ALJ's decisions and orders.

G. The ALJ's Factual Findings and Legal Conclusions Regarding Miriamma Ninan's Unlawful Threats of More Onerous Working Conditions and Loss of Benefits to Vera Ngezem On September 21 Are Supported By the Record Evidence and Extant Board Law ⁴⁶

Respondent excepts to the ALJ's legal conclusions that on September 21, Respondent, by Miriamma Ninan, unlawfully threatened Ngezem with more onerous working conditions, loss of benefits, and changes to working conditions if the Union represented the nurses. For its legal challenges, Respondent primarily relies on several challenges to the ALJ's credibility and factual findings: (1) that the ALJ improperly credited Ngezem's testimony regarding the September 21 meeting over Ninan's version; and (2) that the ALJ incorrectly concluded that Ninan had not mentioned or described the collective-bargaining process during her September 21 meeting with Ngezem.

The Facts section below includes portions of counsel for the General Counsel's post-hearing brief arguing that the ALJ should credit Ngezem over Ninan in order to aid

⁴⁵ In furtherance of its arguments, Respondent makes several factual mischaracterizations. First, Respondent claims Joseph and other NICs took the same picture as the one later distributed by the nurses, this is false. (Res. Brf: 40) Joseph's pictures were taken of the nurses after certain nurses had posed around the St. Joseph statue. Second, Respondent claims the nurses were smiling and waving at the picture takers. (Res. Brf. 17, 41) This statement is partially true, but several of the nurses were not smiling, and several seemed unaware that Respondent was surreptitiously taking their photograph. Third, Respondent claims no one was intimidated by Respondent's photos. Ngezem herself testified that she was frightened to learn people were taking her picture. (1: 158, Ngezem) Fourth, Joseph specifically testified that she was unaware that the nurses were going to later distribute their photo. (2: 367, 368, Joseph)

⁴⁶ Respondent's exceptions 18-21.

the Board with making the same credibility and factual findings as those made by the ALJ in his decision.

I. Unchallenged Findings Relevant To the ALJ's Determination

- On the morning of September 21, Ninan called Ngezem into her office to convey her position about the Union. Ninan proceeded to warn Ngezem that if the Union came in, a lot of things would change. For instance, Ninan said she would not be able to provide any more employment verification letter and may reduce the flexibility previously afforded to Ngezem with respect to vacations and schedules, which could impact Ngezem's continuing education. (ALJD: 12, 13-15)
- Ninan then shared stories of unionized nurses who were unable to get vacation time because of seniority. (ALJD: 12, 18-19)
- Further, Ninan warned that if the nurses unionized, more experienced nurses could bump less experienced nurses—such as Ngezem—from their jobs. (ALJD: 12, 19-20)
- Ninan essentially confirmed Ngezem's credible testimony regarding Ninan's statements, except with respect to the employment verification letters, which Ninan did not recall discussing... (ALJD: 12, fn. 40)
- Ninan also testified that she had approached other employees, who had personal reasons for working a particular set schedule, to inform them that the Union may bring adverse changes: "I have been talking with employees who had personal reasons to work only Saturdays or only works [sic] certain choice of days because they are in school. They would say I can only work Tuesdays and Thursdays because I have classes. So we've been very flexible with scheduling to accommodate school. And so – and there are employees who be taking, working only weekends and being off on weekday so they can care for their elderly parents or sick children. And knowing who those employees are, I have approached them to let them know that if we have a contract, that may change." (ALJD: 12, fn. 40)
- Additionally, during this conversation, Ninan was aware that scheduling flexibility was particularly important to Ngezem, due to Ngezem's family needs. (ALJD: 20, 3-4)

II. FACTS

On September 21, five days after Joseph and Ninan exchanged pictures and text-messages concerning Ngezem's involvement in the Union's September 16 activities,

Ninan met with Ngezem to discuss the Union in Ninan's office. (ALJD: 12, 13-14)(1: 161, Ngezem)

At the beginning of their meeting, Ninan told Ngezem she wanted her to have more information about the Union. (*Id.*)(1: 162, Ngezem) Ninan told Ngezem a lot of things **would** change if the Union came to the hospital. (ALJD: pgs. 12, 15)(1:162, Ngezem)(GCx9) For instance, Ninan said she cannot write income verification letters for nurses if a union were in the hospital.⁴⁷ (ALJD: 12, 15-16)(1: 162, Ngezem) Then, Ninan told Ngezem that going back to school would be difficult for Ngezem if a union came into the hospital because she would not have schedule flexibility any longer. (ALJD: 12, 16-17)(1: 162, Ngezem)(2: 406, 407, Ninan)

During the meeting, Ninan shared a personal anecdote regarding the difficulties of vacation scheduling and availability for nurses in unionized hospitals. (ALJD: 12, 18-19)(1: 162, Ngezem)(2: 407, Ninan) Ninan told Ngezem about a time when Ninan was unable to take leave or vacation on a certain date despite her early request because a nurse with more seniority desired the same dates as Ninan. *Id.* (1: 162, 163, Ngezem)(2: 407, Ninan) Finally, Ninan told Ngezem that a more senior nurse from a different unit could take her job if the more experienced nurse wanted Ngezem's job. (ALJD: 12, 19-20)(1: 163, Ngezem) Ngezem didn't speak during the meeting. (ALJD: 12, 23)

Ngezem's shift ended shortly after meeting with Ninan. (1: 166, Ngezem) She left the hospital and from her car called Mansi Kathuria, Union Organizer, because Ninan's statements about the Union troubled her. (ALJD: 13, 1-3)(1: 166, Ngezem)(2: 350, 352, Kathuria) Ngezem told Kathuria that Ninan said that if the Union came to the hospital

⁴⁷ In April, Ninan personally drafted an income verification letter for Ngezem identifying that Ngezem makes a shift differential so that Ngezem could obtain a mortgage. (GCx21)

Ngezem would lose schedule flexibility, verification letters, and possibly her job if a more senior nurse from a different floor wanted her job. (1: 166, Ngezem)(2: 351, 352, Kathuria) Kathuria explained to Ngezem that Ninan's statements were not true and that Ngezem would still be able to obtain verification letters and keep her schedule flexibility. (ALJD: 13, 5-9)(1: 167, Ngezem)(2: 352, Kathuria) Kathuria advised Ngezem to draft a written version documenting the date and content of Ngezem's conversation with Ninan. (ALJD: 13, 8-9)(1: 168, Ngezem)(2: 352, Kathuria) On September 27, Ngezem sent an e-mail to Kathuria stating,

Hi Mansi

On Wednesday September 21, 2016, our DON for fifth floor Mariamma Ninan called me to come to her office without informing me of the reason. I told her I was still giving report. She then said ok I should come when I am done. When I finished I went to her office and sat down. She started talking to me about the union. She said with the union, she will not be able to (help) write letters for others such as the letter she wrote for me when I was buying my house to verify my income. She also said with the union, she will not be able to let us /me work certain days. For example, if I didn't want to work on Saturdays whether it is because of school or church or another job, she will not be able to give us that. Also she gave examples of her distant family/friend who works at children's hospital how she -was not able to get her vacation in June because the union only allows vacation by seniority. She also gave several examples of herself 10yrs ago when she use to work at a place that was unionized. She said if a nurse from a different unit (who has been there longer than I have) wanted my job, she could come and get my job which will cause me to get laid off. Mind you she said she worked there for 11yrs..." (GCx9)

Compared to Ngezem's memory of her September 21 meeting with Ninan, Ninan's memory of the conversation is not as sound. In response to Respondent counsel's question, "what, if any, occasion did you have on September 21 to meet with Ms. Ngezem," Ninan responded, "Yes, I have – I remember *vaguely* meeting with her in my office." (emphasis added) (2: 406, Ninan) Ninan repeatedly testified that her

memory of the conversation was vague. (2: 407, 408, Ninan) Conversely, Ngezem's testimony regarding the September 21 meeting with Ninan was firm and resolute.

Ngezem's unwavering testimony is perfectly captured during an exchange with

Respondent counsel during Ngezem's cross-examination:

- Respondent's counsel: So your testimony in response to questions from Mr. Keough was that Ms. Ninan said that you might not be able to get verification letters done.
- Ngezem: Not might. She would not be able to.
- Respondent's counsel: She would not.
- Ngezem: yes.
- Respondent's counsel: So it wasn't a might.
- Ngezem: It wasn't a might, no.
- Respondent's counsel: You're sure that she said there's no way you're going to get it?
- Ngezem: Very sure.
- Respondent's counsel: Very sure.
- Ngezem: Yes. (1: 200, Ngezem)

Throughout the hearing, Ninan was ably assisted in recalling her conversation with Ngezem with the help of Respondent counsel's leading questions. For instance, after Ninan testified, "I am not able to remember any other conversation at this time. Sorry," Respondent counsel ably assisted asking, "What, if any, conversation did you have, discussion did you have in this conversation about income verification letters?⁴⁸ (2: 408, Ninan) Ninan's response deftly captures Respondent counsel's effective aid when Ninan replied, "Income –oh..."⁴⁹ (2: 408, Ninan)

In many respects, Ngezem's and Ninan's recollection of their September 21 meeting is consistent. Both agree that Ninan discussed the Union within the context of

⁴⁸ Respondent's leading questions continued to occur despite the ALJ sustaining counsel for the General Counsel's leading objection shortly before Respondent counsel successfully led Ninan's testimony. (2: 407, Ninan)

⁴⁹ Another example of Respondent counsel's egregious leading questions is when Ninan again stated that she could not remember anything else from her September 21 conversation with Ngezem. Respondent counsel again leads Ninan by asking, "What, if any, conversations did you have – what, if any, discussions did you have in this conversation with Ms. Ngezem about working on Saturdays?" (2: 409, 410, Ninan)

change regarding scheduling, vacations, and income verification. The main difference in their recollections appears to be that Ngezem's recollection of Ninan's statements were presented as eventualities, with Ninan telling Ngezem what would happen if the Union represented the nurses, versus Ninan's recollection that she made her statements in the context of saying the changes were possibilities if there was a union contract. There is no record testimony that Ninan discussed or explained the collective bargaining process, or the give-and-take of negotiations in referring to changes to Ngezem's working conditions.⁵⁰ Nor is there record evidence that Ninan at any point during her September 21 meeting with Ngezem referred to or offered objective evidence of the eventual or possible changes to scheduling, vacation, income verifications, or job security.⁵¹

III. ARGUMENT

a. The ALJ Properly Credited Ngezem's Testimony Over Ninan's Regarding Their September 21 Meeting

Respondent states, "The ALJ failed to provide any basis for his credibility determination regarding why he credited Ms. Ngezem's testimony instead of Ms. Ninan's testimony with respect to whether Ms. Ninan said terms and conditions of

⁵⁰ Respondent makes two arguments that Ninan discussed the collective bargaining process. First, Respondent argues that Ninan communicated that benefits could change in the collective bargaining process by distributing Fact Sheet 10. (Res. Brf.: 19, 44) Respondent once again distorts the facts to make its argument. Resx24 is a fact sheet dated September 19. The fact sheet does discuss and provide some explanation of the collective-bargaining process. However, Respondent did not question Ngezem or Ninan about Resx24. There is no record evidence that Ninan has any personal knowledge of Resx24, or that Resx24 was presented or discussed before, during, or after the September 21 meeting between Ngezem and Ninan. As it stands, Resx24 is a document in the record without explanation. Second, Respondent clings to a small portion of Ninan's testimony that she did not testify to on direct, but rather slipped in during her cross-examination that states, "If there was ever a contract by the Union, there may be possibility of changing that self-scheduling to what contract may be negotiated. That could include every other weekend." Ninan's testimony came after she repeatedly testified that all she said was, "if there was a contract," and Ninan's statement only references self-scheduling.

⁵¹ Respondent questioned Ngezem regarding Resx23, a fact sheet dated September 6, 2016. (1: 187, Ngezem) Respondent did not question Ninan about Resx23. The fact sheet does not describe or explain the collective-bargaining process. Ngezem testified that at some point in September, during shift huddle, Ninan mentioned Resx23. Ngezem was not asked what Ninan said about the fact sheet.

employment **may** change with a union contract or that they **would** change.”⁵²

(emphasis in original) While the ALJ did not explicitly state in his decision that he was crediting Ngezem’s testimony over Ninan’s regarding their September 21 meeting, he in effect did credit Ngezem that most of Ninan’s threatened changes were presented as eventualities and not possibilities, and for good reason.

i. Legal Framework and Analysis

The Board’s established policy is not to overrule an ALJ’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). The clear preponderance of the evidence overwhelmingly supports the ALJ’s credibility findings, and the Board should affirm the ALJ’s credibility resolutions.

Ngezem firmly testified that Ninan threatened most of the changes as eventualities if the Union represented the nurses as the hospital. Additionally, Ngezem made contemporaneous statements to the Union organizer concerning Ninan’s statements of eventual changes. As opposed to Ninan’s testimony that her recollection of her September 21 meeting with Ngezem is vague and imperfect. Clearly, the preponderance of the relevant evidence supports the ALJ’s credibility determination that Ngezem’s testimony is more reliable than Ninan’s

⁵² (Res. Brf: 21)

b. The ALJ's Legal Conclusion That Respondent Unlawfully Threatened Ngezem on September 21 with More Onerous Working Conditions and Loss of Benefits Is Supported By the Record Evidence

i. Legal Framework and Analysis

Statements to employees of more onerous working conditions presented as either eventualities or possibilities are violations of the Act if such statements are made without reference to the collective-bargaining process. See *Novelis Corp.*, 364 NLRB No. 101 (2016), citing *Liberty House Nursing Homes*, 245 NLRB 1194, 1999 (1979), and *Metro One Loss Prevention Service Group*, 356 NLRB No. 20, slip op. at 1 (2010).

Ninan's statements to Ngezem that if the Union represented the nurses, Ngezem would lose: schedule flexibility, income verification letters, vacation scheduling flexibility, and possibly her job, without any discussion of the collective-bargaining process, or objective evidence of such changes, are all violations of Section 8(a)(1) of the Act.

There is no record testimony by Ngezem or Ninan that they discussed the give-and-take of the collective-bargaining process on September 21 or at any other time. At best for Respondent, Ninan just absent mindedly repeated the phrase, "if there was a contract." However, this statement falls far short of describing the collective-bargaining process. Crediting Ngezem, all of Ninan's statements regarding more onerous working conditions (with the exception of the possibility that a more senior nurse from another floor may take her job) were made to Ngezem as eventualities if the nurses brought in a union.

Therefore, the Board should affirm the ALJ's legal conclusions that Ninan's statements to Ngezem that a Union would be detrimental to: schedule flexibility,

vacation scheduling flexibility, income verification letters, and her continued employment, are all violations of Section 8(a)(1) of the Act, and order Respondent to comply with ALJ's orders.

H. The ALJ's Legal Conclusions That Respondent, By Officer Hawkins, Unlawfully Interfere with and Interrogated Nurses In Violation of Section 8(a)(1) of the Act Is Immensely Supported By the Record Evidence ⁵³

I. FACTS

Respondent does not appear to except to any of the factual findings relevant to Officer Hawkins' encounter with several nurses on October 19 identified in section D(5) of his decision.⁵⁴ Therefore, the facts are as follows:

- As Mintz and Scott were leaving the Hospital cafeteria on October 19, they ran into another nurse, Jessie Norris, and stopped to talk with her on the hospital landing. The landing is a central, public-use are within the building. The landing is not a patient area and is used by everybody in the Hospital, including staff, families, patients, and visitors. (ALJD: 13, 13-16)
- As the nurses chatted about a number of things – including oncology, the Union, organizing, and their children, security officer Hawkins approached, in uniform, and asked if they were talking about the Union. The nurses asked why he wanted to know. Hawkins said that there was a memorandum from management stating that it was illegal to talk about the Union in this Hospital. Scott replied that it was actually illegal for Hawkins to be asking the nurses about the Union. The nurses asked for Hawkins' name, which he provided. Hawkins then left the landing and generated an incident report for his supervisor. The entire interaction lasted a few minutes. (ALJD: 13, 18-25)

⁵³ Respondent's exceptions 22-23.

⁵⁴ Though Respondent does not specifically challenge the ALJ's credibility determination regarding Hawkins' encounter with several nurses on October 19, it does appear to question the ALJ's credibility determination identified in fn. 42 of the ALJ's decision, which states, "I relied on the credible and consistent testimony of Scott and Mintz regarding this incident. (Tr. 82-84, 288-290.) Hawkins testified that he merely asked whether the nurses were having a union meeting and then thanked them and told them to have a nice day. However, Hawkins' version was not credible because he already knew from management's instructions that discussion about the Union was permitted in non-patient treatment areas. Yet Hawkins still found it necessary to ask whether the nurses were discussing the Union. Moreover, the unexplained failure to produce Hawkins' written report of the incident further detracted from the weight to be given to Hawkins' testimony. (Tr. 499-502)" The Board should affirm the ALJ's credibility determination for the reasons identified in his footnote. The preponderance of the evidence in no way supports a reversal of the ALJ's credibility determination regarding Hawkins' encounter with nurses on October 19.

II. ARGUMENT

a. The ALJ's Legal Conclusion that Respondent Coercively Interfered with Nurses' Union Activities Is Supported By the Record Evidence and Extant Law

i. Legal Framework and Analysis

The ALJ properly relied on the Board's holding in *St. John's Health Center*, 357 NLRB 2078, 2096 (2011) (security guards violated Section 8(a)(1) by threatening to have employees charged with trespassing for distributing prounion literature) for his determination that the Hospital security guard unlawfully interfered with the nurses' protected-concerted activities by threatening them that their protected-activities were unlawful.

Respondent admits Hawkins was its agent on October 19.⁵⁵ Hawkins' attempt to curtail nurses' protected-concerted activities by erroneously threatening them with the illegality of their discussion on Hospital premises is certainly akin to security guards threatening employees that they are unlawfully trespassing. By doing so, Respondent coercively interfered with the nurses' protected-concerted activities in violation of Section 8(a)(1) of the Act. The Board should easily affirm the ALJ's decision and order.

b. The ALJ's Determination that Respondent, by Officer Hawkins, Unlawfully Interrogated Nurses Regarding Their Protected-Concerted Activities is Overwhelmingly Supported by the Record Evidence

i. Legal Framework and Analysis

Respondent offers no argument against the ALJ's legal conclusion that Officer Hawkins unlawfully interrogated the three nurses about their protected-concerted

⁵⁵ Respondent attempts to distinguish *St. John's Health Center* from the instant case on the basis that in *St. John's Health Center*, management directly instructed the security guards to threaten employees. However, this fact is insignificant because Respondent admits Hawkins was its agent on October 19, and offered no evidence or argument that Hawkins acted outside the scope of his agency. (Jx1)

activity on October 19. The Board has held that the legality of an interrogation must be viewed in the context of all circumstances and whether the questioning would reasonably tend to coerce the employee such that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Center*, 330 NLRB 935, 940 (2000), citing *Bourne v. NLRB*, 332 F. 2d 47, 48 (1964). The Board looks to five factors: (1) the background; (2) the nature of the information sought; (3) the identity and rank of the questioner; (4) place and method of the interrogation; and (5) the truthfulness of the reply. *Id.* at 391.

As the ALJ concluded,

“Applying the Bourne factors, first, the truthfulness of the nurses’ response cannot be assessed. Instead, of answering the question, the nurses angrily turned their backs on Hawkins and informed him, correctly, that his question was unlawful. Second, Hawkins specifically asked the nurses if they were discussing the Union, a protected Section 7 right. Third, the questioner was a uniformed security office who had previously been involved with a union-related security incident also involving Mintz and Scott. Fourth, the incident took place in the open, public-use landing, where the nurses had been speaking feely to on another prior to Hawkins’ intervention. Fifth, the Hospital had, at this point, committed a number of prior unfair labor practices as to this union campaign, at least one in which involved Hawkins himself.” (ALJD: 22, 29-39)

Respondent does not contest the ALJ’s application of the *Bourne* factors identified above because there is no contest. For the reasons stated by the ALJ in his decision, the Board should affirm the ALJ’s determination that Respondent, by Officer Hawkins, on October 19, unlawfully interrogated nurses about their protected-concerted activities.

I. CONCLUSION

As argued above, the Board should overrule Respondent’s exceptions, and adopt the recommended decision and order of the ALJ , because the clear preponderance of

the record evidence supports the ALJ's credibility, factual, and legal conclusions identified in his decision. Respondent's exceptions are nothing more than a continuation of its obstruction of the nurses' unionization efforts.

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CERTIFICATE OF SERVICE

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