

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COMMUNITY HEALTH SERVICES,
INC.

and

AMERICAN FEDERATION OF
TEACHERS, AFT CONNECTICUT,
AFL-CIO

Case No. 01-CA-191633

**CORRECTED BRIEF ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL
TO THE ADMINISTRATIVE LAW JUDGE**

Before: Elizabeth Tafe, Administrative Law Judge

Respectfully submitted,

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I. PREFACE

This case is about an employee, Dirgni Baker, who was suspended with pay and then fired by Respondent in January 2017. Even though Baker was a member of a newly-certified bargaining unit, Respondent failed to bargain with her Union before her suspension and termination, as required by *Total Security Management*, 364 NLRB No. 106 (Aug. 26, 2016). In its answer and at the hearing, Respondent argued that it had no duty to bargain prior to Baker's suspension because she was suspended with pay. Respondent also claimed that it satisfied its bargaining obligation by meeting with Baker and her Union representative prior to her termination, and by offering to bargain with the Union after Baker's termination. Respondent also argued that it fired Baker because of a pattern of misconduct in the workplace, and that Baker's termination was therefore "for cause" under § 10(c) of the Act. Finally, Respondent claimed that Baker failed to make an adequate search for work after her termination.

The record revealed, however, that Respondent's above claims are without merit. Rather, Respondent failed and refused to bargain in any sense with the Union regarding Baker's discharge. The record also revealed that although Baker's Union rep attempted to bargain with Respondent prior to Baker's discharge, Respondent refused to engage with the Union in good faith. The record further revealed that Respondent ignored the Union's attempt to bargain with Respondent after Baker's termination. Contrary to Respondent's claim that it fired Baker for cause, the record revealed the Baker was fired following a trivial disagreement with a coworker, and that Baker's supposed pattern of misconduct was little more than a dubious paper trail manufactured by her Nurse Manager. Finally, the record revealed that Baker made a diligent search for work, and

that reinstatement and back pay is the appropriate remedy to restore the status quo and to make Baker whole for her loss of the right to be effectively represented by her Union.

II. STATEMENT OF THE CASE

AFT Connecticut (the “Union”) filed the charge in this matter on January 23, 2017. As amended by the Union on May 31, 2017, the charge alleged that Community Health Services, Inc. (“Respondent” or “CHS”) failed and refused to bargain in good faith with the Union before placing Dirgni Baker on administrative leave and terminating her employment. (GC-1(c).)¹ An Order Consolidating Cases, Consolidated Complaint, Compliance Specification and Notice of Hearing (the “Complaint”) in this case issued on July 27, 2017. (GC-1(e).)² The Complaint alleged, *inter alia*, that Respondent violated Section 8(a)(1) and (5) by failing to bargain with the Union concerning the suspension and discharge of Dirgni Baker. Respondent filed an Answer on August 8, 2017. (GC-1(g).) By order dated October 12, 2017, another charge that had been consolidated with the present case, 01-CA-190632, was severed and withdrawn from the Complaint. (GC-1(h).) Respondent filed a motion to Respondent filed an Amended Answer on November 2, 2017. (GC-1(j).)

The case was tried in Hartford, Connecticut on November 9, 13, 14 and December 14, 2017 before Administrative Law Judge Elizabeth Tafe. At hearing, Counsel for the General Counsel moved to amend the Complaint to correct a typo in

¹ References to the transcript are designated as (Tr. ____), to General Counsel’s Exhibits as (GC- ____), to Respondent’s Exhibits as (R- ____), and to the Joint Exhibits as (JT-__), followed by the appropriate page numbers.

² A compliance specification was consolidated with the Complaint in accordance with guidance from the Office of the General Counsel’s Division of Operations Management. See OM 17-14.

paragraph 23(a). Respondent, while denying the allegation, did not oppose the motion to amend the Complaint. (Tr. 8.) The parties also offered several stipulations that were entered into the record as a joint exhibit. (JT-1.) Pursuant to Section 102.42 of the Board's Rules and Regulation, Counsel for the General Counsel respectfully submits this brief in support of the Complaint allegations.

III. THE ISSUES

- 1) Did Respondent's placing of Dirgni Baker on paid administrative leave on January 3, 2017 require pre-imposition bargaining under *Total Security Management*?
- 2) Did Respondent discharge Dirgni Baker on January 18, 2017 without fulfilling its pre-imposition bargaining obligation under *Total Security Management*?
- 3) Should Dirgni Baker be reinstated as a remedy for Respondent's conduct?
 - a) Did Respondent fire Dirgni Baker "for cause" within the meaning of §10(c) of the National Labor Relations Act?
 - b) Did Respondent's conduct after Baker's discharge render reinstatement inappropriate?
- 4) What amount of back pay, if any, should Respondent pay to Baker as a remedy?
 - a) How should Baker's back pay be calculated?
 - b) Did Dirgni Baker fail to make an adequate search for employment?

IV. FACTS

A. Background & the Parties

Respondent Community Health Services, Inc., is a federally qualified health center that provides primary health care in Hartford, Connecticut and the surrounding areas. Respondent operates a medical center located at 500 Albany Avenue, Hartford, CT (the “Facility”), where it provides medical services for many uninsured and underinsured patients (Tr. 269.) Respondent has five departments: Adult Medicine, Pediatric, Adolescent, Women’s Health, and Behavioral Health. (Tr. 269.) Adult Medicine is the largest of the five, providing primary care, a diabetes clinic, and an asthma clinic. (Id.) Respondent employs nurse practitioners, physician’s assistants, doctors, and other professionals, collectively referred to as “providers,” who prescribe and oversee the medical care provided at Respondent’s facility. (Tr. 270.) Respondent also employs nurses who, with input or direction from providers, provide medical education and care to patients. (Tr. 270.) Additionally, Respondent employs a number of medical assistants (“MAs”), who assist providers by bringing patients from the waiting areas to the patient care areas (typically, examination rooms), and obtaining patients’ height, weight, vital statistics and other preliminary medical information before the patients are seen by their respective providers. As one witness described it, “the medical assistant would tee up the patient for the provider, prior to the provider coming in” (Tr. 270; see also, GC-16 (job description)). Medical assistants are typically assigned to a specific provider at a time. (Tr. 386.) For about the past eight years, MA Supervisor Joan Ashman has been the immediate supervisor for the medical assistants in the Adult Medicine department. (Tr. 484.) In May 2015, Anne Howley became the Nurse Manager

for the Adult Medicine department. (Tr. 267.) Since that time, Ashman has reported directly to Howley. (Tr. 271.) Genea Bell is Respondent's Chief Legal and Human Resources Officer. (Tr. 62.) Dr. Maurico Montezuma is Respondent's clinical director of Adult Medicine. (Tr. 62.)

The Union represents two bargaining units of employees at Respondent's facility. The older of the two units consists of the providers, who had a collective-bargaining agreement prior to the events of this case. More recently, in July 2016, the Union was certified as the bargaining representative for a bargaining unit including Respondent's medical assistants (the "Unit").³ The parties began negotiations shortly after certification, but did not reach an initial collective-bargaining agreement until August 2017. The parties stipulated that prior to that collective-bargaining agreement, Respondent maintained a discretionary disciplinary policy within the meaning of *Total Security Management*. (JT-1 at ¶ 1.) Until July 2017, Ole Hermanson was a Field Representative for the Union, responsible for servicing the Unit on the Union's behalf, and was the Union's lead negotiator in contract negotiations with Respondent. (Tr. 14.)⁴

Dirgni Baker was employed by Respondent as a full-time medical assistant in its Adult Medicine department at the Facility. A mother of six, Baker previously worked in

³ The bargaining unit description reads as follows:

All full time and regular part-time Dental Assistants and Medical Assistants employed at the Employer's 500 Albany Ave., Hartford, Connecticut facility; but excluding all other employees, Medical Assistant Receptionists, Dental Assistant Receptionists, Doctors, Clinicians, Clerical and other non -professionals, and guards, professional employees, and supervisors as defined in the Act.

(GC-3.)

⁴ Hermanson no longer works for the Union, He is presently the Director of Strategic Campaigns for the Massachusetts Nurses Association. (Tr. 14.)

clerical customer service positions at Bank of America and American Airlines. After about 10 years of working in clerical and customer service positions, Baker transitioned to working in the medical field. (Tr. 202-03.) She obtained her medical assistant's diploma from Branford Hall, and began working for Respondent as a medical assistant on October 14, 2013, under Joan Ashman's supervision. (Tr. 204-05, 209.) In February 2014, Baker received her initial "Performance Appraisal," in which she scored an 89/100 for "Interpersonal Relationships" and 90/100 for "Adherence to Policy." (GC-17 at 2, 3.) In her December 2014 "Employee Performance Evaluation," one of the Supervisor Comments noted "Dirgni communicates well with others. This has been an area of great growth. She is more engaged with the staff and has shown great teamwork." (GC-18 at 4.)⁵ Aside from two attendance-related write-ups, Baker had no disciplinary history prior to May 2015. However, after assuming the Nurse Manager position in May 2015, Anne Howley began issuing disciplines to Baker.⁶ In October 2016, Howley sought to have Baker fired, but for reasons that remain unclear, she did not succeed. On January 3, 2017, Baker was placed on paid administrative leave for alleged rudeness to a coworker. Baker was fired on January 18, 2017.

B. Baker's Suspension on January 3, 2017

On January 3, 2017, Baker was sent home before the end of her shift and was suspended, with pay, pending disciplinary investigation.⁷ In the afternoon of January 3, Dr. Salehi, the physician (or "provider") to whom Baker had been assigned, approached

⁵ This was the most recently completed evaluation in Baker's personnel file.

⁶ Specifically, Baker received warnings dated July 15, October 1, 2015, and March 11, 2016, which will be discussed in further detail below.

⁷ Unless otherwise noted, all dates hereafter are in 2017.

Baker about a patient who had been scheduled for an appointment at 4:30 pm that day. (Tr. 224-25.) Salehi told Baker that the appointment was an error of some kind, and that the time from 4:30 to 5:00 pm was supposed to have been scheduled as “administrative time” for Salehi. (Tr. at 227.) “Administrative time” is work time in a provider’s schedule when no patients are to be scheduled. (Tr. 107.) Instead of seeing patients, providers use administrative time to take care of tasks such as completing paperwork and calling labs to obtain test results. Unsurprisingly, the scheduling of administrative time has been a frequent topic of discussions, and even a “point of contention,” among Respondent’s providers and management for some time. (Tr. 455.) In fact, Dr. Salehi specifically told Baker that she had previously discussed the issue with Dr. Montezuma. (Tr. 225, 227.) Several witnesses testified that Salehi was upset or frustrated (or both) over this purported error in her schedule. (Tr. 230-31, 467, 718, 719.) Dr. Salehi asked Baker to have the 4:30 pm patient rescheduled. (Tr. 225, 227.) This was not an unusual request, as Baker had done this for Salehi previously, and medical assistants regularly assist providers with the scheduling and rescheduling of patients. (Tr. 225, 466.) Accordingly, Baker went to the walk-in reception area to discuss the issue with the receptionist, Alexandra Santiago. (Tr. 228.)⁸

Upon reaching the reception area, Baker explained Salehi’s request to Santiago, who, according to Baker, responded by saying something like “Oh no, not again.” (Tr. 228.) At that point, Kylie O’Donnell and Kim Tran, Respondent’s Business Improvement Quality Coordinators, were walking nearby. (Tr. 454.) O’Donnell and Tran were both

⁸ The Adult Medicine department has two reception areas – one for walk-ins, the other for scheduled patients. (Tr. 202.) The walk-in reception area is an office space located across a hallway from the business improvement quality coordinators’ office. (R-4.) It is set-off from a patient waiting area, and is enclosed in glass. (Tr. 512-13.)

responsible for scheduling, among other things. (Tr. 451-52.) When Santiago asked for their assistance, O'Donnell went over to help while Tran continued on to her destination. (Tr. 228, 454.) Baker and Santiago told O'Donnell that Dr. Salehi was upset that a patient had been scheduled for 4:30, and that she needed the patient moved to make room for her admin time. (Tr. 229, 454-55.) O'Donnell replied that there was nothing wrong with the schedule, that Salehi's "admin time" was not scheduled until 5:00 pm, and that the patient could not be moved. (Tr. 229, 455-56.)

At that point, Baker left the reception area and informed Dr. Salehi that O'Donnell had told her that the patient could not be moved, and that Salehi only had 30 minutes for admin time. (Tr. 229) Dr. Salehi disagreed with this, and told Baker that she was going to go speak with O'Donnell. (Id.) Baker and Salehi then went to the reception area together. Upon reaching the reception area, Baker called out to O'Donnell by her first name. According to Baker:

So just as I badge in, I said Kylie. She said what? I said -- I held my chest. I said my, that's not how you answer. Yes isn't the answer⁹ and what is a question. I said here's Dr. Salehi. Explain to her what you just told me.

She turned and she said to doctor, what? And from there I said okay ladies, I'm going in the back. You proceed with what you're doing, explaining to Dr. Salehi. And I went back in the back.

(Tr. 229, lines 16-23.) In her testimony, Kylie O'Donnell provided a somewhat different account of the interaction. According to O'Donnell:

So, at that point we were -- I was talking to Alex when they came in, and that's when I said, what's up? Thinking Dirgni had gone and talked to Dr.

⁹ The "isn't" in the transcript appears to be a typo. Baker most likely testified that she said "Yes is the answer and what is a question," which would make more sense in this context. Accordingly, Counsel for the General Counsel moves to correct the transcript at page 229, line 18, accordingly.

Salehi about whatever had happened or whatever I had said. And she had said, don't say what to me. That's not a yes. And I said, okay. Well, what's going on? Like, what -- how can I help you further, kind of.

(Tr. 456, lines 11-16.) In her testimony, O'Donnell characterized Baker's tone as "demanding," but O'Donnell did not claim that Baker raised her voice, or yelled, or cursed, or used insulting or derogatory language. (Tr. 456.) It bears noting that this fleeting and unremarkable exchange constituted Respondent's justification for suspending and firing Baker.

Baker left Salehi, O'Donnell, and Santiago discussing the issue, and went to attend to some mail that she needed to send out. (Tr. 231.) According to O'Donnell, Salehi insisted that O'Donnell move the patient and claimed that she had an email from Dr. Montezuma regarding a schedule change, but O'Donnell refused to change the patient's appointment until Salehi forwarded a copy of Montezuma's email to her. (Tr. 457, 468.) According to O'Donnell, the patient did not show for the appointment, "so it was a pointless argument." (Tr. 458.) O'Donnell never received Dr. Montezuma's email from Dr. Salehi. (Tr. 468.)

After her conversation with Dr. Salehi ended, O'Donnell felt "frustrated" and "took a lap around the department" to cool down. (Tr. 458.) As O'Donnell explained at the hearing:

Q: Um-hum. And why did you do that?

A: As a cool off. I do it a lot for -- if I'm frustrated for a second, I need a minute to think instead of stewing in my office I'll take a little bit of a lap and try to talk it out.

Q: And what made you frustrated?

A: The whole interaction made me very frustrated. Just -- yeah.

Q: Was Ms. Baker's comment part of that?

A: Yeah, it was. It's just the tone and the insistence that like you need to do what I'm telling you to do because I'm telling you to do it.

Q: Okay. And that was the tone Ms. Baker had. Did Dr. Salehi have the same tone?

A: It was a similar tone.

(Tr. 458-59, lines 16-4.)

After taking her lap(s), O'Donnell returned to her office, where she encountered Nurse Manager Anne Howley, who observed that O'Donnell was upset and asked her what was wrong. (Tr. 459.) At first, O'Donnell said that nothing was wrong, but Howley pressed the question. (Id.) O'Donnell then told Howley about her conversation with Baker and Dr. Salehi. (Tr. 459-60, 470.) Howley asked O'Donnell "to write out the incident in as much detail as I could." (Tr. 460.) After speaking with Howley, O'Donnell went to look for the email that Dr. Salehi had mentioned.

Howley also spoke with Alex Santiago that afternoon. According to Howley, Santiago told her "That when they – she put a patient on Dr. Salehi's schedule, and the next thing you know Dirgni came out and was inquiring why there was a patient on Dr. Salehi's schedule." (Tr. 314.) This testimony, however, is inconsistent with Santiago's testimony that she did not recall any patient on Dr. Salehi's schedule that day, and that she did not recall any conversation about such a patient. (Tr. 495-96, 500-01.)

According to Howley, Santiago said that Baker had been rude in, or in front of, the reception area, in front of patients, family members, and other staff (Tr. 314.)

Howley also spoke to Kim Tran that afternoon. Tran did not testify in these proceedings, and by all accounts, she was not present for any of the conversation

between Baker and O'Donnell. (Tr. 576.)¹⁰ Nevertheless, Howley asked Tran to provide a write-up of the incident, (Tr. 705.)

Howley also had a "brief conversation" with Dr. Salehi on the afternoon of January 3. (Tr. 717.) Salehi did not testify at the hearing, but according to Howley, she and Salehi discussed Salehi's administrative time scheduling issue, and Salehi was both frustrated and upset about the schedule. (Tr. 717-19.) Howley could not recall, however, whether she asked Salehi about Baker's conduct or discussed Baker with Salehi at all. (Tr. 365, 718-19.) Despite the fact that both O'Donnell and Baker recalled Salehi being present at the time of Baker's interaction with O'Donnell, Howley did not ask Salehi to provide any kind of statement. (Tr. 342.)

Howley spoke with Baker later that afternoon. (Tr. 314.) Baker explained to Howley what had happened. (Tr. 314.) Baker denied being rude to O'Donnell. (Tr. 315.) According to Howley, "I said you are consistently unprofessional. Your demeanor, your tone, it is unacceptable." (Tr. 315.) At the end of the conversation, Howley told Baker to clock out, go home, and not to come back until she had heard from Howley or human resources. (Tr. 315.) Howley made the decision to send Baker home before reporting the incident to, or consulting with, Genea Bell or Human Resources. (Tr. 368-69.) Interestingly, there is no evidence that Howley asked Baker whether any patients or family had been present for her interaction with O'Donnell. Baker punched out, left the facility, and went home. She was placed on administrative leave, with pay.

After sending Baker home, Howley spoke with Genea Bell. According to Howley, Bell was upset when she learned that Howley had sent Baker home. (Tr. 371.)

¹⁰ As O'Donnell testified: "[Tran] wasn't there for the incident. So I wouldn't think she would submit anything." (Tr. 576.)

C. Events January 4-10, 2017

Between January 4 and 10, Anne Howley set about building her case to fire Baker by obtaining—and revising—“statements” from O’Donnell, Tran, and Santiago.

At 8:50 am on January 4, Tran sent an email to Anne Howley with an attachment: a word document purporting to describe the events of January 3. (GC-39.)¹¹ Five minutes later, O’Donnell—who shared an office with Tran at the time—also sent an email to Howley with a word document attached that purported to be a description of O’Donnell’s interaction with Baker. (Tr. 569; GC-24.) Later that day, at 3:33 pm, Santiago emailed to Howley a document purporting to be Santiago’s recollection of Baker’s interaction with O’Donnell. (GC-29.)

Neither O’Donnell’s nor Tran’s write-ups contained any reference to patients or family members being present at the time of Baker’s alleged misconduct. Apparently, this was a problem for Howley: at 7:27 am on January 5, Howley sent an email to O’Donnell asking that she add a reference to patients and family members:

Hi Kylie,

Can you please just add in the beginning of your write up that there were patients and family members in the reception area, that this unprofessional conversation / dialogue occurred in front of them.

Call / see me if you have any questions and thank you again.

Annie

¹¹ As the email trail in GC-39 indicates, Tran sent an email to Howley at 5:30 pm the previous day with an attachment that Howley had been unable to open. (Tr. 706.) As neither Respondent nor Counsel for the General Counsel were able to open that attachment, it cannot be verified that both attachments were identical.

(GC-25.)¹² In response, O'Donnell dutifully emailed Howley a revised draft, containing the requested allegation, at 12:43 pm on January 6. Specifically, the first sentence of the first paragraph of O'Donnell's original (January 4) draft stated:

I was called over to the walk in reception side by Alex S.

(GC-24 at 2.) In O'Donnell's second draft, however, that sentence was changed to read:

I was called over to the walk in reception area, where patients were waiting, and stood off to the side of Alex S.

(GC-26 at 2.) Similarly, the first sentence of the fourth paragraph of O'Donnell's original draft read as follows:

Dirgni came back into the reception area and said "Kylie." to which I responded questioningly "What?" as I turned to face her.

(GC-24 at 2.) But in O'Donnell's second draft, that sentence was changed to:

Dirgni came back into the reception area and was standing in the open doorway of the walk in reception area and said "Kylie." to which I responded questioningly "What?" as I turned to face her.

(GC-26 at 2.)

Tran made similar changes to her write-up. The January 4 version of Tran's write up made no reference to patients or family members. However, at 12:42 pm on January 6—just one minute before O'Donnell sent her revised draft to Howley—Tran also sent Howley a revised draft of her own. Specifically, the first sentence of Tran's January 4 draft read:

Kylie and I left our meeting with the Adult Medicine Leadership Team a little bit after 3:40 pm and walked into our office.

¹² Respondent did not initially provide these emails, and the attached drafts, at the opening of the hearing, despite the fact that those documents were clearly responsive to the pre-trial subpoena served on Respondent. (See GC-23; Tr. at 445-449, 553-554.)

(GC-39 at 2.) However, in Tran's January 6th version, the first sentence was changed to read:

Kylie and I left our meeting with the Adult Medicine Leadership Team a little bit after 3:40 pm and as we walked to our office, I noticed that there were patients and family members in the reception area.

(GC-40 at 2.) Moreover, Tran added a new concluding sentence in her second draft.

Tran's first draft ended with:

I looked on for another second and noticed that Alex was starting to turn to talk to Kylie and Dirgni's body language and demeanor was still very stern and unwelcoming.

(GC-39.) However, Tran's second draft added an entirely new concluding sentence, which not only added another reference to patients but also accused Dirgni Baker of unprofessional conduct *even though Tran had not actually heard Baker say anything*:

I looked on for another second and noticed that Alex was starting to turn to talk to Kylie and Dirgni's body language and demeanor was still very stern and unwelcoming. I thought it was not good that that [sic] this unprofessional interaction occurred in front of the patients, but this was not the first time, so I just made a note that this occurred.

(GC-40 at 2.)

O'Donnell testified that the reference to the presence of patients was a "relevant" and "significant" fact. (Tr. 589.) Howley testified that the presence of patients and family members was a significant fact. (Tr. 337.) When questioned about why she asked O'Donnell to add references to patients and families, Howley provided an implausible explanation: that O'Donnell had first mentioned the presence of patients and family when orally relating the incident to Howley, but that O'Donnell was so "visibly shook up" by the altercation that she may have forgotten to include that detail in her original six-paragraph, 494-word write up that she submitted a day after the incident. (Tr. 686-87

LL. 23-1) Unsurprisingly, O'Donnell did not offer this explanation in her testimony. When asked if she had noticed any other omissions from O'Donnell's early draft, Howley testified: "Her tone, Dirgni's tone and demeanor. And that she was unprofessional." (Tr. 689, lines 13-14.)¹³

When asked about the revisions to Tran's write up, Howley testified that she had a similar conversation with Tran as she had with O'Donnell about signing the document, but that she could not recall whether she spoke to Tran about including a reference to patients and family members in her write-up. (Tr. 706-07, 710.) Notably, the addition of language about "this unprofessional interaction" to Tran's second draft is similar to Howley's testimony that O'Donnell had omitted information about Baker's tone, demeanor, and "lack of professionalism." (Tr. 686-87, 690.) Yet, Howley testified that she did not believe that she had asked Tran to add the new last sentence to her January 6th draft, but suggestively noted that Tran and O'Donnell shared an office and she is not privy to every conversation between O'Donnell and Tran. (Tr. 711.) But interestingly, O'Donnell testified that she did not discuss the January 3 incident with Tran at length and that she did not think that Tran had provided a statement about the incident to Respondent because "[Tran] wasn't there for the incident. So I wouldn't think she would submit anything." (Tr. 570-71, 576.) In other words, neither Howley nor O'Donnell admitted to speaking with Tran about revising her write-up, but it is obvious that at least one of them—if not both of them—did just that.

Nevertheless, there was still more editing to do that day. After sending her January 6 draft to Howley, O'Donnell reviewed it with Howley in Howley's office, on

¹³ See also, Tr. 690, lines 13-14: "Her tone and demeanor. Her lack of professionalism. The signature. Being in front of patients and family members."

Howley's computer. (Tr. 576-77.)¹⁴ O'Donnell was present in Howley's office when Howley added a signature line and a submission date. (Tr. 585-86.) Specifically, Howley typed "Submitted: 1/3/2017" and "Kylie O'Donnell" at the bottom of to the bottom of the document. (Id.) Howley then emailed the document to Genea Bell at 12:51 pm—just eight minutes after having received O'Donnell's second draft. (GC-30.) Of course, by no definition of "submitted" could one reasonably conclude that O'Donnell's write-up had been submitted on January 3: O'Donnell had submitted nothing prior to January 4, and her write-up received "significant" changes on January 6. (Tr. 589) Thus, the actual words on the document on which Howley typed "Submitted: 1/3/2017" had not been submitted to anyone until January 6, 2017. On the stand, O'Donnell strained to avoid the mere acknowledgement that the "submitted" date was incorrect, at one point attributing the date's accuracy to a matter of "perspective," and then later claiming that she was focused on other priorities at work at the time. (Tr. 587-91.) Howley testified that she believed that she typed the wrong "submitted" date because she went by the date that was typed at the top of the document: "1.3.2017." (Tr. 698.) If true—that Howley's backdating of O'Donnell's write up was merely inadvertent—this would be a surprising admission of clerical sloppiness from any registered nurse practiced in the exactitude of documenting medical records.

Howley made a similar change to Tran's write-up on January 6. After receiving Tran's revised draft at 12:42 pm (GC-40), Howley added "Kim Tran 1/3/2017" at the bottom of the document before emailing it to Genea Bell at 12:46 pm. (Compare GC-40

¹⁴ O'Donnell could not recall what prompted her to go to Howley's office after sending the email, nor did O'Donnell recall when she went to Howley's office, until shown the closeness of the timestamps on the emails. (Id.)

at 2 to GC-41 at 2.) As noted above, Howley testified that she had a similar conversation with Tran as she had with O'Donnell about signing the document, but that she could not recall whether she spoke to Tran about including a reference to patients and family members in her write up. (Tr. 706-07, 710.)

D. The January 10, 2017 Meeting

After being suspended, Baker called her Union rep, Ole Hermanson, and told him what had happened, and that she had been asked to provide a statement. (Tr. 18.) After speaking with Baker, Hermanson called Genea Bell and told her that he would be Baker's *Weingarten* representative, and that he wanted to be present for any investigatory interview. (Tr. 19.)¹⁵ Hermanson and Baker eventually scheduled an interview with Bell for January 10, 2017.

In advance of the meeting, on January 9, Genea Bell sent two emails to Howley. In the first email, Bell wrote that she was drafting an Employee Warning Notice based on the statements that Howley had provided, and requested that Howley herself provide an account of how the incident came to her attention (as the Notice was being drafted from Howley's perspective). (GC-31.) The second email requested information about Baker's prior disciplines, as well as documents regarding an October 2016 incident for which Baker had not been issued any discipline. (GC-31.) Howley did not respond to these emails until January 13, after Bell's meeting with Baker and Hermanson. (GC-32; GC-33; GC-34.)

On January 10, Hermanson and Baker met with Bell so that Bell could interview Baker about the January 3 incident. (Tr. 19.) At the beginning of the meeting, Baker

¹⁵ Hermanson testified that he made this call because he had been, on previous occasions, less-than-satisfied with Respondent's efforts to comply with its *Weingarten* obligations.

provided a written statement regarding January 3. (Tr. 20; GC-4.) Baker also provided her account orally, and Bell asked her some questions. (Tr. 21.) Bell took notes on her laptop during the meeting, but did not show her notes to either Hermanson or Baker at the time. (Tr. 22.) Neither Bell's notes, nor any witness' testimony, indicated that Bell asked Baker if any patients or family were present near the reception area during Baker's interaction with O'Donnell that day. After her interview lasted about 30 or 40 minutes, Baker left the room, and Hermanson and Bell spoke alone. (Tr. 22.) Both Hermanson and Bell testified about what happened after Baker left the room, and their testimony is generally, albeit not entirely, consistent.

1. Hermanson's Testimony about January 10

According to Hermanson, after Baker left, he and Bell spoke alone. Hermanson began by telling Bell that he did not know where things were going, but that the events of January 3 "didn't seem like that big of an event that needed that much reaction, that we should be able to solve this." (Tr. 23.) Hermanson testified that Bell responded that the interaction did not seem like a big deal, but that she had further investigating to do, and that Baker had a prior work history that was "problematic." (Id.) Hermanson testified that he responded by stating that *if* some response was needed, the Union was willing to discuss referring Baker to an employee assistance program ("EAP") or additional training. (Id.) According to Hermanson, Bell replied that Baker was already on a final warning, and that she had a complicated work history. (Id.) Hermanson testified that he responded by arguing that, in the future, an arbitrator would give more weight to something that the Union had agreed to than to disciplinary history that could not have been grieved because it predated the Union. (Id.) According to Hermanson, Bell

responded to this suggestion by stating that she still had more investigating to do, and that Baker's discipline was not ultimately her decision to make, but that she would get back to Hermanson. (Tr. 24). Hermanson asked how long Bell's investigation would take, and Bell responded that she expected to have it wrapped up within the week. (Id.) Hermanson testified that he then stated that *if* Respondent was going to issue any discipline, that the Union demanded to bargain over it. (Id.) According to Hermanson, Bell retorted by saying "if we're going to have to bargain over it, then I suppose I should take the most extreme position." (Tr. 24, lines 19-20.)¹⁶ Hermanson testified that he answered this by stating: "I don't really think that's the best way to bargain, but you do what you have to do." (Id., lines 23-24.) Hermanson and Bell agreed to talk again at the end of the week, and the meeting ended. (Tr. at 25.) According to Hermanson, Bell did not explicitly say at that meeting that Respondent was planning to fire Baker. (Tr. 39.)

2. Bell's Testimony about January 10

According to Bell, after Baker left, Bell and Hemranson spoke for about 10-15 minutes. (Tr. at 72.) Bell told Hermanson "that I thought that the situation to me, this particular incident, seemed relatively minor, but that in my opinion this was a straw that broke the camel's back issue. That this was not the first such issue that Dirgni had had with other coworkers." (Tr. 72.) Bell also testified that "I repeated several times that the final decision was not mine to make. That would be Annie's decision, because she was the supervisor." (Tr. 72.) According to Bell, Hermanson agreed it was a minor incident, said that he thought they could come to some agreeable resolution, and suggested discipline and a referral to EAP. (Tr. at 72.) Bell testified that she told Hermanson that

¹⁶ Although Bell was present for Hermanson's testimony, she did not attempt to deny this statement when she later testified.

his suggestion did not strike her as completely unreasonable, but that Baker had a “long history” and that “it wasn’t ultimately my decision to make,” and that she would pass Hermanson’s suggestion to Howley. (Tr. at 72.) Bell testified that, as of January 2017, she had only incomplete knowledge of Baker’s disciplinary record, and that she did not discuss Baker’s prior disciplinary history with Hermanson with any specificity. (Tr. 109.)

Bell also testified that Hermanson made a strange comment about arbitration:

Q: Okay. Do you recall anything else that Mr. Hermanson said in that meeting?

A: He said -- he made a comment something about an arbitrator and that an arbitrator would find what we were doing to be discipline. I didn’t -- I wasn’t exactly following.

Q: Did he say discipline or bargaining?

A: I’m sorry, bargaining. Sorry. I didn’t exactly follow what he was saying, but that does stick out to me, because I thought it was odd in the moment that he would be referring to an arbitration in the -- where we were at that moment.

(Tr. at 72-73, lines 23-7.) Despite the fact that Bell did not understand what Hermanson was trying to say, Bell did not ask Hermanson to clarify. (Tr. 128.) According to Bell, the meeting ended with Bell telling Hermanson that she needed to wrap up her investigation and that she would try to do so by the end of the week and get back to him.

Baker testified that, after the January 10 meeting, she expected to be put back to work. (Tr. 241.) Other than the January 10 meeting, there was no other formal meeting between the Union and the Employer to discuss Baker’s status before the Employer took disciplinary action against Baker.

E. January 13, 2017 Correspondence

On January 13, at 4:12 pm, Bell emailed Hermanson that she had been unable to close out the investigation as quickly as she had originally thought, but that it was still a priority and that she hoped to be able to get back to Hermanson by the end of the day on the following Tuesday (January 17). (GC-5 at 2.)

Earlier that morning, at 9:39 am, Howley sent an email to Tran and O'Donnell with an attachment: a draft "Employee Warning Notice" dated October 25, 2016. The document discussed an interaction between Baker and coworker Nicoll Rodriguez that had occurred on October 24, 2016. (GC-27.) At 11:58 am that same day, Howley sent another email to O'Donnell and Tran, to which she attached a different draft Employee Warning Notice concerning the same October 24, 2016 incident, but which was dated November 28, 2016 and contained several stylistic and substantive differences from the draft sent earlier that morning. (GC-28.) O'Donnell and Howley both testified that the documents were emailed to Tran and O'Donnell for formatting assistance. (Tr. 594, 620.) O'Donnell testified that she regularly assists Howley with formatting Employee Warning Notices, but that she does not read them because they are none of her business. (Tr. 598, 603.) O'Donnell did not specifically recall whether or not she provided Howley with any assistance on either document. (Tr. 595.) There is no evidence that either O'Donnell or Tran emailed a formatted/edited version of either document back to Howley. (Tr. 676.)¹⁷ Howley testified that she orally told Tran and O'Donnell to expect a warning notice from Howley for formatting assistance. (Tr. 621.)

¹⁷ Respondent stipulated that, after an exhaustive search of its email system, it found no other drafts of the October 2016 Notice other than those that are in the record. (Tr. 676.)

Later during the afternoon of January 13, Howley sent Bell three emails, at 1:34, 1:56, and 4:25 pm respectively. (GC-32, GC-33, GC-34.) It seems that these emails were sent to Bell in response to Bell's January 9 email. (GC-31.) Attached to these emails were different versions of an Employee Warning Notice for the October 24, 2016 incident. As will be discussed in greater detail below, the 1:34 and 1:56 pm drafts had significant substantive differences, and the 4:25 pm draft appears to have been an attempt to merge different parts of the earlier drafts into a single document.

F. January 18: Baker's Termination

On January 17, Hermanson emailed Bell (and copied Baker) to request an update on the status of the investigation, noting that "As you can imagine Dirgni is anxious to get back into the normal routine and get back to work." (GC-5 at 1.)

At 8:19 am on January 18, Bell emailed Howley to request that Howley provide a statement regarding the January 3 event (something Bell had previously requested, but had not yet received). (GC-35.) At 12:07 pm that day, Howley emailed Bell her written version of the events of January 3. (GC-36.) At 1:50 pm, via email attachment, Bell sent Howley most of the documents that were combined into GC-6 (the "Termination Notice") and sent to Baker later that day.

Bell responded to Hermanson's January 17 email with a "reply all" email at 4:18 pm on January 18. (GC-5.) Attached to Bell's email was a termination letter¹⁸ addressed to Baker, which began:

This letter is to inform you that your employment with Community Health Services is being terminated effective today, January 18, 2017 for poor

¹⁸ There were also additional documents attached to the termination letter, which were not included in the exhibit because they related to payroll and other administrative details that were not material to the merits of this case. (Tr. 30.)

work performance including the failure to conduct yourself in a professional manner. Details are described in the Employee Warning Notice provided to you under separate cover.

(GC-7.) In addition to the termination letter, an Employee Termination Notice dated January 18, 2017 was also attached to Bell's email. (GC-6.)

1. The Termination Notice

Although it was written from the perspective of, and signed by Anne Howley, the Termination Notice made no mention of patients or family members being present for the January 3 incident, nor did it claim that any patients or family members complained about Baker's conduct that day. Instead, the Termination Notice purported to recount Howley's investigation into the events of January 3 and discussed several allegations of misconduct against Baker dating back to June 2015, some of which—but not all—had resulted in discipline. (GC-6 at 1-3.) Thus, the Termination Notice was accompanied by 13 exhibits, which added another 27 pages of documentation. (GC-6.)

2. The Attached Disciplinary "History"

Among the exhibits attached to Baker's termination notice were three prior disciplines, each of which preceded the Union's certification. There is no evidence that copies of any of those disciplines were provided to the Union prior to Baker's termination. The Employer also attached several documents relating to incidents for which Baker had received no discipline, but on which Respondent apparently relied in its attempt to justify Baker's firing. Again, there is no evidence that copies of those documents were provided to the Union prior to Baker's termination.

a. The “10/25/2016” Employee Warning Notice

Attached to Baker’s Termination Notice was an Employee Warning Notice dated “10/25/2016,” which itself had two exhibits attached. (GC-6 at 23-30.) The documents related to the above-mentioned dispute between Baker and coworker Nicoll Rodriguez, which occurred on October 24, 2016 (the “October 2016 Incident”). At the time, Howley recommended that Baker be terminated for the October 2016 Incident, but for reasons that have not been fully explained, Howley was overruled, and Baker was not issued **any** discipline at that time. (Tr. 374-75.) The “10/25/2016” Employee Warning Notice was never actually issued to Baker, and despite the fact that it was dated “10/25/2016,” it was not completed until January 2017.

i. The October 2016 Incident

On the morning of October 24, 2016, Baker went to one of the waiting areas in Adult Medicine to try to find a patient who was scheduled to see the provider to whom Baker was assigned that day. Baker had the patient’s “return sheet” with her, but she did not recognize the patient because the patient was a coworker whom she knew by a nickname. (Tr. 527.) When Rodriguez saw that Baker was looking for a patient, Rodriguez went to Baker to see if the patient that Baker was looking for was also their coworker (as Rodriguez was aware that the coworker had an appointment). (Tr. 417.) When Rodriguez approached Baker, however, she did not explain any of these things, but instead simply asked to see the sheet. (Tr. 418, 527.) Believing that she should not divulge the name of the patient unless Rodriguez had a legitimate, medically related reason to know the patient’s identity, Baker asked why Rodriguez needed to know. (Tr. 528.) Instead of explaining to Baker why she needed to know the patient’s name—

instead of simply saying that she thought she knew who the patient was—Rodriguez asked for the sheet again and then began *reaching for* the sheet that Baker was holding. (Tr. 528.) Baker did not let Rodriguez grab the paper, and Rodriguez eventually left without seeing the file. Baker eventually located the patient. (Tr. 528-29).

Later that morning, Rodriguez approached Baker to discuss the above incident. According to Baker, Rodriguez accused Baker of grabbing her arm, and Baker denied touching Rodriguez. (Tr. 531.) After discussing the incident between them without resolution, Baker suggested that they go speak with Howley. (Tr. 531.)

ii. Howley’s “Investigation” of the October 2016 Incident

When Baker and Rodriguez first met with Howley that day, Howley was pressed for time and the meeting ended before the issue could be fully discussed. According to Howley, she ended the meeting when she felt that she could not get Baker to provide a “yes” or “no” answer to the question of whether Baker had grabbed, touched, or made any contact with Rodriguez. (Tr. 300.) Howley told both Baker and Rodriguez that they would revisit the issue, and asked both to write statements regarding the incident and to try to get along with each other in the meantime. (Id.)

Howley’s story evolved as she tried to explain what happened next. On her first day of testimony, Howley testified that later on October 24, 2016, after finishing her report, she met with Baker and Rodriguez together in her office. (Tr. 301.) During that meeting, Howley testified, Baker claimed that she blocked Rodriguez’s arm, prompting Rodriguez to accuse Baker of changing her story. (Tr. 301.) Howley testified that she then told Rodriguez to write that up also, which resulted in Rodriguez writing an “addendum” to her original write up. (Tr. 302; R-3.)

Howley's original testimony is inconsistent with Rodriguez's testimony. Rodriguez testified that there were two meetings with Baker and Howley, one on October 24 and one on October 25, 2016. Rodriguez also testified that there was at least one meeting where she discussed the incident with Howley without Baker being present. (Tr. 409, 421-22.) Rodriguez also testified that Howley did *not* ask her to write the addendum. (Tr. 422.)

Howley's original testimony also conflicts with what was written in the "10/25/2016" Employee Warning Notice that was included in Baker's termination packet. (GC-6 at 23-24.) In that document, Howley wrote that:

- at her first meeting with Rodriguez and Baker, Baker initially claimed that she tried to block Rodriguez's arm;
- at the end of that first meeting, Howley told both Baker and Rodriguez to write statements;
- a few moments after leaving the exam room, Howley spoke with Rodriguez and Baker individually;
- during Howley's individual meeting with Rodriguez, Rodriguez gave a similar explanation as before, and Howley asked her again to write up the incident; and
- during Howley's individual meeting with Baker, Baker denied touching Rodriguez, prompting Howley to tell Baker that what she had just said contradicted Baker's earlier account.

(GC-6 at 24.) This written account of Howley's investigation is incompatible with Rodriguez's testimony, as well as Howley's original testimony, because in this version, Rodriguez could not have heard Baker supposedly contradict herself.

During her second day of testimony, Howley attempted to reconcile this inconsistency by claiming that she met with Rodriguez and Baker first together on October 24, 2016 and then individually with each on October 24, and that there was a

third meeting, on October 25, 2016, which was attended by Howley, Rodriguez, and Baker, and in that third meeting, Baker again contradicted herself. (Tr. 626.) While this second-day testimony is theoretically consistent with Rodriguez's testimony and statement, it is inconsistent with Howley's original testimony, as well as GC-6 (at 24) insofar as that document makes no mention of any third meeting. It is also inconsistent with Howley's later testimony that all three meetings occurred on the same day. (Tr. 629.)

iii. Howley's Recommendation to Fire Baker

On or soon after October 24, 2016, Howley concluded that Baker should be fired. (Tr. 309.) This might seem to be a strange conclusion: Rodriguez accused Baker of grabbing her wrist, Baker denied grabbing Rodriguez's wrist, and no other witnesses came forward to corroborate Rodriguez's allegation. Moreover, Rodriguez could have avoided the dispute by (1) actually answering Baker's question about why Rodriguez wanted to know Baker's patient's name, and (2) not reaching for Baker's papers when Baker had made it clear that she did not want to give the papers to Rodriguez. Nevertheless, Howley arrived at the conclusion that Baker was somehow the problem, and recommended that Baker be fired. (Tr. 308-09.) However, Howley's recommendation was not put into effect. (Tr. 310.)

How that happened is still somewhat unclear. Howley originally testified that pp. 23-25 of GC-6 were "the notice of termination that I first put forward to have Dirgni terminated" but that "[i]t was in HR and unfortunately did not go forward." (Tr. 309, 310.) This description is inaccurate insofar as there is no evidence that Howley submitted any "Employee Warning Notice" (or any other form of written recommendation) for Baker's

termination in October or November 2016. Although Howley initially testified that she began drafting some version of an Employee Warning Notice in October 2016, the record reveals that Howley did not email her draft to anyone else until January 9. (GC-25)¹⁹ Moreover, a review of Howley's various drafts of the October 2016 Notice (GC-27; GC-28; GC-32; GC-33) shows significant substantive differences between the competing drafts, illustrating their unfinished nature. For example, in the first draft that Howley emailed to Tran and O'Donnell (GC-27), Howley described a similar sequence of meetings with Baker and Rodriguez as is found in the final (GC-6) version, but also mentioned that the Medical Assistant Supervisor (Joan Ashman) was present for Howley's individual meeting with Rodriguez (and suggesting, albeit somewhat ambiguously, that Ashman might have also been present for Howley's individual meeting with Baker).²⁰

The second draft that Howley sent to O'Donnell and Tran (GC-28, the "11/28/2016" draft) described Howley's investigation differently: according to that draft, there were only two meetings, both of which were attended by Howley, Rodriguez, and Baker, on October 24 and 25, 2016, respectively. Howley apparently abandoned that narrative, however, by the time she started emailing drafts of the October 2016 Notice

¹⁹ Also, Bell's January 9 email shows that, as of January 9, Bell did not possess a copy of any draft—at least not one that Bell was able to find at that time. (GC-31.)

²⁰ It would have made sense for Ashman to have attended some of the meetings, or to have at least discussed the issue with Howley, as Baker's statement (GC-6 at 30) mentions that she was talking to her supervisor when Rodriguez initially approached her on October 24, and Baker also testified that Joan Ashman was present for the interaction. (Tr. at 528-29.) However, the final draft (GC-6 at 23-25) contains no mention of any supervisor other than Howley, and there is no evidence (apart from the drafts) that Ashman was interviewed or asked to provide a statement. When Ashman testified on November 14, she made no mention of the October 2016 incident. The documents indicating that Ashman may have been present for one or more of Howley's meetings were not produced until *after* Ashman had testified.

to Genea Bell. Specifically, the first two drafts that Howley sent to Bell describe Howley's investigatory meetings similarly to the final version: one meeting with both Baker and Rodriguez, then one meeting with each individually. (GC-32; GC-33.) It bears noting, however, that GC-33 (which was emailed at 1:56 pm) showed the same reference to the Medical Assistant Supervisor's presence as was found in GC-27, whereas GC-32 (the 1:38 pm version) contained no reference to the Supervisor.

There are additional substantive inconsistencies between these draft documents, which not only show that Howley's written recommendation was very much unfinished until January, but also cast doubt on the veracity of the final product. The most alarming of those are Howley's edits of quotes attributed to others. In two of the earlier drafts, Howley wrote:

When Nicoll went to reach for the papers "Dirgni grabbed my wrist, would not let go and lowered my arm." "I tried to raise my hand. I asked her to let me see who you have. She still would not answer me and would not let go of my arm. I pulled my arm away and said good luck trying to find your patient."

(GC-27; GC-33.) In two other drafts, as well as the final version, the quotes attributed to Rodriguez are more elaborate:

When Nicoll stated when went [sic] to reach for the papers, "Dirgni grabbed my wrist, would not let go and physically lowered my arm. I tried to raise my hand, but could not. I asked her to let me see who you have. Dirgni still would not answer me and still would not let go of my arm. I then had to pull my arm away from Dirgni's grip and said to Dirgni good luck trying to find your patient."

(GC-32; GC-34; GC-6 at 23.) From Howley's testimony, it was clear that Howley understood and intended that the quotation marks denote the use of someone else's words: "It came from Nicoll. Those are Nicoll's words." (Tr. 648.) Yet, when asked to

explain why or how Rodriguez's quote was changed after-the-fact, Howley could provide no explanation. (Tr. 649.)²¹

Thus, it is not entirely clear how Howley made her recommendation in October 2016, or exactly how and why that recommendation was blocked. Nevertheless, Howley was unhappy with the decision. (Tr. 310, 347.) Howley testified that, from that point until January 2017, she continued to believe that Baker should be fired, and that in January 2017, she was a strong advocate for termination. (Tr. 347.)

At the time of the October 2016 allegation, Howley told Baker that she would refer the matter to HR. (Tr. 346.) Baker was not told of Howley's termination recommendation, and Baker was not issued any discipline, or shown any draft discipline, in connection with the October 2016 allegations until January 2017. (Tr. 380-81.)

b. The June 2016 Incident Report

Baker's termination packet also included an "Incident Report" dated June 29, 2016 from a now-former coworker, Angelita Capo, who alleged that Baker made inappropriate physical contact with Capo. (GC-6 at 18-19.) Specifically, Capo accused Baker of moving Capo's hand off of a mouse, and also pushing Capo in an elevator. (GC-6 at 20.) Capo did not testify in these proceedings, and there was no other witness who saw the alleged physical contact at the computer. Howley testified that Baker

²¹ Howley did not even want to admit that she changed the quote. (Tr. 649.) However, given the fact that the parties stipulated that the exhibits in the record constitute all drafts of the October 2016 Notice that Respondent was able to identify (Tr. 676-77), and given that the emails reflect that Howley was the only person emailing unfinished drafts of the October 2016 Notice to others, it must have been Howley who changed those quotes.

pushed Capo in some manner or to some degree in an elevator. (Tr. 294-95.)²²

However, Capo apparently typed into the Incident Report that “I was told by Anne that she reviewed the video tape of this incident in the elevator and said she didn’t see exactly what happened but seen that there was physical contact but didn’t see us pushing each other [all sic]” (GC-6 at 19). Interestingly, Howley mentioned nothing in her testimony about reviewing any video of the incident, or about how that video failed to support Capo’s accusation.

There is no corresponding Employee Warning Notice for these allegations, and no discipline was issued to Baker for this alleged incident. Instead, Baker and Capo attended a series of team-building exercises together, which Baker successfully completed. (Tr. 488.) Again, there is no evidence that Baker or the Union were provided copies of the incident report prior to January 18.

c. The March 11, 2016 Warning Notice

Baker’s termination Notice also included an Employee Warning Notice dated March 11, 2016, indicating that Baker had received a final written warning based on allegations of work performance issues and rudeness to a coworker. (GC-6 at 14-16.) The coworker at issue there was Maria Guzman. When Guzman testified in this hearing, however, she could not recall any details of the incident, merely recalling that she felt that Baker had been disrespectful to her on one occasion. (Tr. 404-05.) She also recalled that she wrote the email complaining of the incident (GC-6 at 13) at Howley’s request. (Tr. 405.)

²² “To what degree I don’t know. But she pushed Angie and that was something else that was brought to my attention. So that all got documented in this on email. It was --.”

Regarding Baker's work performance issues, Medical Assistant Supervisor Joan Ashman testified that a couple of months after Baker was assigned to work with provider Elaine Hamilton, Hamilton voiced complaints about Baker's ability to complete call lists and to mail care plans in a timely manner. (Tr. 485-86.) Ashman testified that Baker was counseled on these issues, and that Baker's work performance eventually improved. (Tr. 486.) Howley and Ashman also responded by reassigning Baker to another provider, Dr. Salehi, even though Salehi was a brand new doctor. (Tr. 389.) Apparently, Howley and Ashman were not so worried about Baker's performance that they thought it might be risky to assign her to a less-experienced provider.

d. The October 1, 2015 Warning Notice

In her termination packet, Respondent also attached an Employee Warning Notice, dated October 1, 2015, indicating that Baker received a written warning for three alleged transgressions: (1) use of her cell phone, (2) "engaging in excessive distractive conversation with other staff"; and (3) being "rude and demanding in her tone and hinder[ing] work flow" when telling a receptionist that she should not be transferring calls to the back. (GC-6 at 11-12.)

Regarding the use of her cell phone, Baker did not dispute that she had occasionally used her cell phone while walking the floor. However, Baker was not the only employee to have become accustomed to using cell phones at work: Howley described the use of cell phones as "rampant" when she arrived. (Tr. 334.) Given that Baker is a mother of six—with two children presently in elementary school, and another in middle school, and two children presently in college—it is entirely predictable that she might want to keep her phone nearby in case of an unexpected emergency. It bears

noting that, after receiving this warning, Baker worked for Respondent for another 15 months, and she did not receive another cell phone-related discipline in that time. In other words, Baker was not incorrigible, as Howley seemed to allege (Tr. 316), but did learn from her mistakes.

With respect to the alleged rudeness, Nicoll Rodriguez testified that she had a disagreement with Baker over Rodriguez's attempt to transfer a call to Baker one day. (Tr. 410-11.) Specifically, Rodriguez testified that after she transferred a phone call to Baker, Baker accused Rodriguez of not wanting to take a message, and that Baker complained to a provider regarding the call transfer. (Tr. 411.) According to Rodriguez, after her disagreement with Baker about the call, the provider went and spoke to Rodriguez and asked her why she refused to take a message. (Tr. 413.) This suggests that Baker was correct—or at least not being unreasonable—when she told Rodriguez that Rodriguez should have taken a message instead of transferring the call. Indeed, Rodriguez confirmed this when she testified that she would normally take a message, but that this particular call had been unusual. (Tr. 414.)

With respect to the remaining allegation in that Notice, the document is hopelessly vague when it alleges that “Dirgni has been observed engaging in excessive distractive conversations with other staff.”(GC-6 at 11.) At the hearing, Howley testified that Adult Medicine was physically divided into two sides: the “appointment side” and the “walk-in side,” and that Baker would often “disappear” from the side to which she was assigned and “go to the other side to chitchat or be disruptive with conversation.” (Tr. 282) One of Baker's job duties was to locate patients and to bring them to the clinical areas of the department to meet with providers. (Tr. 384.) And more than one

witness testified that it was common for patients with appointments to check in (and wait for their appointments) on the walk-in side, and that it was also common for walk-ins to check in at the appointment side. (Tr. 335-36.) Thus, Medical Assistants working in the Adult Medicine department routinely had to cross sides to find patients. (Tr. 336.) It seems hardly surprising that Baker—or any other employee—might engage in conversation with people while moving about the department. Howley never explained what she meant by “disruptive conversation,” nor did she indicate how Baker might have exceeded an acceptable amount of “chitchat.”

e. The July 15, 2015 Warning Notice

An Employee Warning Notice, dated July 15, 2015, indicated that Baker received an oral warning for using her cell phone in a clinical area. (GC-6 at 10.) This warning was issued shortly after Howley arrived at CHS, and when cell phone use was admittedly “rampant” among the staff. (Tr. 334.) Moreover, as noted above, by the time Baker was fired, she had not received any cell-phone related discipline for over a year.

f. The June 2015 Memo

Baker’s termination packet also included an unsigned memorandum on Respondent’s letterhead, written by Howley, discussing allegedly inappropriate interactions between Baker and a coworker, Receptionist Rosie Pagan, as well as a patient’s wife in June 2015. (GC-6 at 9.) At the hearing, Pagan testified that she and Baker had never had *any* kind of confrontation—that Baker has a “strong character” that “the way she talks, if you don’t know her, if this is the first time meeting her, you might think she’s very rude. But as you get to know her, she’s very sweet, as a person.” (Tr.

437, lines 20-25.) There was no evidence that Baker (or the Union) was ever shown this memo, or that she was even aware that it was in her personnel file.

G. The Union's Effort to Bargain with Respondent after Baker's termination

On January 19, Hermanson replied to Bell's email about Baker's termination. He wrote:

I'm very surprised to hear this decision, considering our last conversation, where we discussed possibly going forward in a more acceptable fashion. Please provide dates in which you can bargain over this subject. We are requesting a copy of all disciplines issued over the last 3 years as a part of information request to support this bargaining.

(GC-9.) Bell responded by email later that afternoon, providing the times that she was available the following Monday, Tuesday, and Wednesday. (Id.) Hermanson testified that he called Bell and suggested that they discuss Baker's discipline at the next collective-bargaining session, which was scheduled for January 24, and that Bell agreed. (Tr. 33.) Bell testified that she did not recall this conversation. (Tr. 77.)

The January 24 bargaining session was cancelled because of a death in the family of a member of the Union's bargaining team. The next bargaining session was held on February 16. (Tr. 33.) At that session, the Union made several contract proposals, as well as a proposal to reinstate Dirgni Baker. (Tr. 34.)²³ Although CHS responded to the Union's contract proposals, Respondent gave no response to the Union's proposal about Baker. (Id.) After the bargaining session, Hermanson spoke in the hallway with Respondent's lead negotiator, Hugh Murray. According to

²³ Although Geneva Bell testified that she could not recall any proposal being made at that bargaining session, Hermanson's testimony that such a proposal was made was corroborated by Dr. Volpe, a member of the Union's bargaining team who recalled that the proposals was made, but did not recall any response from the Employer. (Tr. 521-22.)

Hermanson's uncontested testimony, Hermanson told Murray that the Employer "needed to respond, that they needed to bargain over the discipline and that we wanted Dirgni to be -- to come back to work." (Id.) Murray responded that Hermanson did not understand the law, and that Respondent did not have to bargain. (Tr. 35.) Hermanson said that they would then have to let the Labor Board decide the issue, to which Murray responded by shrugging his shoulders. (Id.)

On March 30, Bell emailed Hermanson and advised the Union that Respondent was willing to meet with the Union over Baker's termination, but did not offer to reinstate Baker or otherwise modify Bell's disciplinary status. Bell's email to Hermanson was as follows:

As you may recall, you and I met on January 10, 2017, to discuss potential discipline for Dirgni Baker. Following that meeting, CHS terminated Ms. Baker's employment. As you know, the NLRB recently held that where there is a newly certified union and prior to the initial collective bargaining agreement, an employer has the obligation to provide the union with notice and an opportunity to bargain before imposing discipline. The Board further noted that if the parties do not reach agreement, the employer may impose the selected discipline and then continue to bargain to agreement or impasse. I am happy to continue bargaining over the discipline issued to Ms. Baker. If you wish to continue such bargaining, please contact me to set up a time to do so.

(GC-10.) Bell testified that she sent the March 30 email because she was "sort of surprised" that the Union had filed a charge over Baker's discharge. (Tr. 77.) Given that the Union had filed the charge on January 23, 2017 (GC-1(a)), Bell's testimony regarding her surprise is itself surprising.

Hermanson did not respond to Bell's email. (Tr. 38.) As he explained, the Union had tried to negotiate with Respondent both before and after Baker's termination, but Respondent avoided engaging with the Union on the topic of Baker's discipline—by this

point, Baker had been out of work for nearly three months, the Union had filed a charge with the NLRB, and it appeared that Bell's email was not directed at the Union, but at the NLRB investigation of the Union's charge. (Tr. 38.) According to Hermanson:

We had tried to bargain with Ms. Bell in the office before Dirgni was terminated. We had tried to bargain at a real bargaining session with Mr. Murray and really had gotten nowhere. And then the Board was processing the complaint [sic]. I felt like this was really just an effort to sort of subvert that process and not really to sit down and bargain in good faith. Dirgni was out of work now for months and, you know, there was no real ability for us to come to a solution that made sense without her there.

(Id.)

H. Baker's Lost Wages & Search for Work

At the opening of this hearing, the parties stipulated that prior to her discharge, Baker regularly worked 40 hours per week, and that, had she not been fired, her gross weekly earnings would have been \$582 up until July 29, 2017, after which date her average gross weekly earnings would have been \$560.80. (JT-1 at ¶¶ 2-3.)

Following her termination, Baker began a search for employment. (Tr. 243.) Baker initially had luck, finding employment as a medical assistant with Kathy's Urgent Care, an urgent care center in Wethersfield, Connecticut. (Tr. 244.) When Baker first began working for her new employer, she worked from 10:00 am to 6:00 pm, Monday through Friday, and every other weekend. However, after a few weeks, Baker's employer told her that she was needed to start work at 8:00 am instead of 10:00 am. (Tr. 245.) Baker was unable to start work that early because she had to take three of her children to school no earlier than 8:15 am. (Tr. 245.) Unfortunately, her children's school charges a fee of \$10 per day, per student, for parents who drop their children off

at school before 8:15. (Tr. 260.) Baker's supervisor said that her employer could no longer accommodate Baker's 10 am – 6:00 pm schedule, and Baker was let go.

After being let go from Kathy's, Baker continued to search for work, but had little success. Baker searched for jobs on the internet (using websites such as Indeed.com as well as individual employers' websites), and also regularly reviewed job openings sent to her by the Connecticut Department of Labor (as Baker eventually began collecting unemployment benefits at that time). (Tr. 249, 250.) Baker applied for positions with some of the larger health care employers in the Hartford, Connecticut area: Saint Francis, Hartford Hospital, Hartford Healthcare, UConn Health, Starling Physicians, and Connecticut Children's Medical Center. (Tr. 250-51.) Baker testified that she filled out at least 20 job applications. (Tr. 250.) As of the date of the hearing, Baker had had three interviews, but had not received any job offers. One of the difficulties that Baker encountered was that she lacked certification as a medical assistant. Individuals can become medical assistants without certification (Tr. 88), but some employers will not consider job applicants unless they are certified medical assistants. (Tr. 160, 253.) Other employers may indicate that certification is "preferred," meaning that individuals without certification are free to apply, but will be at a disadvantage. (Tr. 161.) At the time that it hired and employed Baker, Respondent did not require that its medical assistants have a certification, but after Baker's termination, Respondent (with the Union's agreement) began to require that its medical assistants be certified. (Tr. 160.) There does not appear to be a shortage of applicants in Baker's profession: Genea Bell testified that Respondent hired somewhere between six and 10 medical assistants in the past year, but that it had hundreds of job applications in the queue (Tr. 161.)

Baker also applied for jobs outside of the medical field, filling out applications with JetBlue, Delta, Spirit, and American Airlines, but without any success as of the date of the hearing. (Tr. 255.)

I. Respondent's Defenses

1. Respondent's Claim That It Bargained With the Union

It is undisputed that Respondent provided the Union with neither notice nor opportunity to bargain prior to suspending Baker with pay on January 3. With respect to Baker's termination, Respondent claims that Geneva Bell's meeting with Ole Hermanson on January 10 fulfilled its pre-imposition bargaining obligation under *Total Security Management*. The testimony of Hermanson and Bell shows, however, that while the Union attempted to engage in bargaining on January 10, Respondent (specifically, Bell) refused to engage.

The January 10 meeting was primarily intended as an investigatory meeting to interview Baker. Until that date, Baker had not yet provided her written statement. Bell took a significant amount of notes when interviewing Baker, but took no notes of her conversation with Hermanson. (Tr. 128.) It is undisputed that Bell told Hermanson multiple times during their conversation that her investigation was still unfinished. (Tr. 48.)

Bell testified that, at the time that she met with Hermanson, she still did not have Baker's complete disciplinary history. (Tr. 109). Given that Respondent later claimed that its decision to fire Baker was based to a significant degree on Baker's prior disciplines, Bell's incomplete familiarity with those prior allegations would have rendered her poorly informed for a negotiator.

When Hermanson suggested that the Union might be agreeable to referring Baker to an EAP, Bell dodged the issue by stating that it was not her decision to make. (Tr. 72.) In fact, it is undisputed that Bell told Hermanson at least twice during the meeting that Baker's discipline was not her decision to make. (Tr. 129.)²⁴ Whether or not this was actually true is questionable: Bell later testified that she had veto authority over any disciplinary decision that Howley might make, and Howley suggested in her testimony that Bell had some sort of role in holding up Howley's October 2016 recommendation to fire Baker. (Tr. 159, 352.) If Bell did in fact have veto authority, then her disclaimer to Hermanson was misleading at best. On the other hand, if Bell had no authority to decide Baker's fate, then one must question whether Bell had any actual authority to negotiate. Regardless of the truth of Bell's statement, it was obviously an attempt to avoid further discussion of Baker's possible future discipline.

Bell's account of Hermanson's "arbitrator" comment showed that either Bell was massaging her testimony to fit Respondent's legal theory, or it shows that Bell was not interested in listening to Hermanson. During the meeting, Hermanson told Bell that "something that we discussed and the Union signed off on would be something that an arbitrator would probably take with a lot more weight than something -- that her prior work history before there was a union where she didn't have an opportunity to grieve any of those things." (Tr. 23.) Here, Hermanson was communicating that once the Union and Respondent reached a CBA (presumably with an arbitration clause), if there

²⁴ Bell testified that she told Hermanson that the ultimate decision would be Anne Howley's. (Tr. 72.) Hermanson's testimony included no such discussion of Howley's decision making role. Had Bell told Hermanson that the decision was Howley's, then Hermanson's optimism about getting Baker reinstated (Tr. 240; GC-5) would have been quite strange. Moreover, Howley actually testified that although she strongly recommended Baker's termination, it was not her ultimate decision, but a "joint" decision. (Tr. 309, 348.)

were further disciplinary incidents with Baker, then an arbitrator would likely put greater weight on any past disciplinary warnings or other measures that the Union had agreed to. (Tr. 41, 49.) The implications of this statement were two-fold: first, Hermanson clearly must have expected that Baker would ultimately be returned to work—were Baker fired before the parties reached a CBA, then an arbitrator’s opinion would have been irrelevant. Second, Hermanson was offering Bell *something of value*: that if Respondent would negotiate with the Union now, it could obtain something that would strengthen its hand if there were disciplinary issues with Baker in the future. Sadly, Bell missed these points entirely. With some leading assistance from Respondent’s counsel, Bell testified that Herman said that an arbitrator would find that what he and Bell were then doing was “bargaining” (Tr. 72-73.) But that would have been a non-sequitur, as arbitrators do not adjudicate whether parties have met their statutory bargaining obligations, but whether the parties have complied with whatever agreements they negotiated between them. Moreover, despite the fact that she did not fully understand Hermanson’s comment, Bell did not ask Hermanson to explain what he meant. (Tr. 128.) Assuming that Bell’s testimony genuinely reflected what she thought she had heard, there are two likely reasons why Bell did not seek clarification from Hermanson: either (1) Bell did not care, because she was not interested in negotiating with the Union and so it was immaterial whether she actually understood anything that Hermanson might propose; or (2) Bell expected that the Union might file an NLRB charge in the future alleging that Respondent failed to engage in pre-disciplinary bargaining, and so when she heard Hermanson say something that might sound like an admission that Respondent was bargaining, she seized on it (either consciously or subconsciously).

Either way (or both, as the explanations are not mutually exclusive), the fact that Bell did not understand Hermanson's statement and made no attempt to clarify it show that Bell was not at that meeting to bargain. Hermanson testified that at the end of his conversation with Bell on January 10, he requested to bargain over any discipline that Respondent intended to issue to Baker, and Bell's testimony does not contradict him.²⁵

Finally, when Hermanson told Bell that if Respondent was going to issue and discipline that the Union demanded to bargain over that, Baker replied "if we're going to have to bargain over it, then I suppose I should take the most extreme position." (Tr. 24, lines 19-20.) This retort clearly showed that Respondent was not yet bargaining, and had not yet taken a position regarding whether to discipline Baker, and if so, to what degree.

2. Respondent's Assertion That It Fired Baker "For Cause"

Respondent called Howley, O'Donnell, Santiago, and Bell as witnesses in its attempt to prove that Baker engaged in misconduct on January 3. Each of those witnesses had serious issues affecting their credibility: from bias to inconsistent testimony to simple memory failure.

Bell testified that she told Hermanson that she was conducting an "investigation" of the January 3 incident. The record reveals Bell's investigation had little to do with ascertaining the facts of what happened on January 3, but rather that it was about coordinating with Howley to complete a paper trail to justify Baker's termination. Other than interviewing Baker, Bell spoke with only one other witness, O'Donnell. Yet Bell did not take any notes of her conversation with O'Donnell, nor could she recall if she spoke

²⁵ Bell was present for Hermanson's testimony. (Tr. 141-42.)

with O'Donnell before or after Baker had been fired. (Tr. 102, 108.) Bell simply took O'Donnell's and Santiago's write-ups at face value.²⁶ When Bell interviewed Baker, she did not ask Baker if she had seen any patients or family near the reception area at the time of her interaction with O'Donnell—even though this detail was so important that Howley had two witnesses amend their statements to include assertions that Baker's alleged misconduct occurred in front of patients.²⁷

At the hearing, Alex Santiago's recollection of the January 3 incident ranged between murky and incorrect. Although she dutifully recited that Baker had been "unprofessional" and spoke "with an attitude" in front of patients, family, and staff, Santiago visibly struggled to recall the few details that she could (Tr. 495). Although Santiago recalled that the conversation related to whether Dr. Salehi's administrative time began at 4:30 pm, and she also recalled some discussion of an email, Santiago could not recall exactly what Baker had actually said—a critical element to Respondent's defense (Tr. 495-96, 500-01). Contrary to both Baker and O'Donnell, Santiago did not recall Baker leaving the reception area and returning with Dr. Salehi, but instead recounted the interaction between Baker and O'Donnell as one

²⁶ Interestingly, the version of Nicoll Rodriguez's October 2016 write-up that was included in GC-6 was the original, shorter draft which lacked the allegation that Baker had contradicted herself. (*Compare* GC-6 at 29 to R-3 at 2.) This may be because Bell noticed that Rodriguez's supplemental allegation would have contradicted Howley's narratives (found in in GC-32, GC-33 & GC-34) of how she investigated the October 2016 incident (since Howley never sent GC-28 to Bell, and that was the only draft warning that matched the chronology of Rodriguez's supplemented write-up). Also, Tran's write-up (GC-41) was omitted from GC-6, possibly because Bell recognized that its invective clearly and suspiciously outweighed its negligible probative value.

²⁷ Oddly, Bell's notes state that Dr. Salehi did not ask Baker to go to the reception area (GC-6 at 6). However, Baker testified that Salehi asked her to have the patient moved. (Tr. 227.) O'Donnell also testified that Salehi insisted that O'Donnell move the patient, which corroborated Baker's testimony. (Tr. 468.)

uninterrupted event. (Tr. 494.) Also contrary to both Baker and O'Donnell, Santiago did not remember a patient having been scheduled for 4:30 pm that day, nor did Santiago recall that there was any conversation about a patient (Tr. 501). Instead, Santiago seemed quite confident that Dr. Salehi had no patients scheduled on January 3 (Tr. 509). Santiago testified that she had no idea why Baker approached her to discuss Salehi's administrative time. (Tr. 507.) Nor did Santiago remember that Dr. Salehi sounded frustrated (Tr. 503), something that both O'Donnell and Baker recalled. (Tr. 230-31, 467). Santiago also testified that the "EXHIBIT 2" at the top of page 5 of GC-6 was part of her original document (Tr. 496-97, lines 23-2), even though it was obviously added when Genea Bell was compiling the termination paperwork.

Kylie O'Donnell's testimony also suffered from credibility problems. O'Donnell originally testified that she began drafting p. 4 of GC-6 (the final version of her statement) on January 3, that when she finished the document, she saved it and emailed it to Howley, and that after she sent her statement to Howley, she had a brief discussion with Howley about the incident but "no extensive conversation about it afterwards." (Tr. 461-62.) After her original testimony however, when Respondent finally produced the subpoenaed emails, it was obvious that O'Donnell's "statement" was a document that O'Donnell had first drafted and then revised according to Howley's instructions. Yet despite her willingness to criticize Baker in conclusory terms as "rude" and "unprofessional," O'Donnell did not claim that Baker raised her voice, made threats, or used insults or obscene or offensive language, or rolled her eyes or made a face, or made any kind of inappropriate hand gestures. O'Donnell did little more than accuse Baker of speaking in a demanding tone or manner.

Anne Howley used her testimony to bloviate and disparage Dirgni Baker's character, painting a grotesque caricature of Baker as toxic personality who, despite innumerable chances and coachings, remained an incorrigible rogue who grappled with her coworkers instead of actually getting work done:

It appeared as though [Baker] was going rogue with her performance with complete disregard of policies, procedures, counseling, coaching, the numerous attempts to try to get her to put forth a more professional demeanor and attitude and to no avail. It was very challenging.

(Tr. 308-09, lines 25-4.)

Enough is enough. How many chances is one going to be given before the toxicity it's just -- it permeates in the department and her tone and demeanor it was not changing with the amount of again, the coaching, the counseling. Everything was out there and the tools given to her, in which to be able to become more professional more mature. And I saw absolutely little to no change nor any desire. She hindered workflow and when she would leave her post, she went out of her way to make things very challenging.

(Tr. 316 LL. 13-21.) Yet when examined closely, Howley's testimony about Baker contained a lot of big generalizations, but few specifics. Despite repeatedly accusing Baker of being "unprofessional," Howley had a difficult time providing specific descriptions of Baker's allegedly rude or unprofessional conduct. When she did provide specifics in her testimony, Howley was contradicted by other witnesses, documents, and even by herself. Below are a few examples:

- When asked if she had shared her draft of the October 2016 discipline with anyone outside of Human Resources, Howley testified "Not that I'm aware of" (Tr. 360, line 19). Yet the emails later produced by Respondent showed that she had emailed two drafts of the October 2016 discipline to both O'Donnell and Tran in January 2017. (GC-27 & 28.) When confronted with her prior testimony, Howley replied unconvincingly: "I said -- -- I didn't recall" (Tr. 614-15, lines 25-2).

- When asked if O'Donnell sent her any revisions to her statement, Howley testified that she was aware of none (Tr. 344), but as the belatedly produced subpoenaed documents eventually showed, that answer was false. Not only did O'Donnell make revisions to her write up, she did so explicitly at Howley's request. (GC-25.) And O'Donnell was not the only employee whom Howley asked to revise her statement. When asked why she requested that O'Donnell amend her write up, Howley suggested that O'Donnell suggested a dramatic, and dramatically implausible, reason: that O'Donnell had orally told her about the patients and family members present, but that O'Donnell was so "visibly shook up" by the encounter that she may have accidentally left that detail out of her write up. (Tr. 687.)
- Howley originally testified that she felt that Baker's conduct on January 3 was "egregious" (Tr. 356 L. 15). Then, a few moments later, Howley testified that Baker's January 3 was "unprofessional" but "*not* egregious" (Tr. 356-57, lines 25-2, emphasis added). But then a few moments after that, Howley testified that Baker's conduct on January 3 was egregious. (Tr. 357, line 17; Tr. 358, line 17.)
- Howley could not explain why Baker's alleged misconduct on January 3 was so serious as to warrant ejecting Baker from the facility and placing her on paid administrative leave when no such measure was taken against Baker over the October 2016 allegations or any of the prior allegations against her. (Tr. 353-54.)
- Howley's testimony that Baker would not listen to coachings and instructions is belied by other testimony and evidence. For example, after receiving two disciplines related to cell phone use, Baker received no more, demonstrating that any problems Baker had with cell phone use in the months following Howley's arrival were resolved. According to Joan Ashman, when Baker was presented with criticism of her work performance, Baker's performance eventually improved. None of this is evidence that Baker was incorrigible.
- Howley testified that Baker was rude, yet she also testified that on at least one occasion, she told Baker to "grow up" (Tr. 349, lines 19-23). Of course, Howley denied that her comment—telling an adult employee and mother of six to "grow up"—was rude (Tr. 350, lines 4-15).

Dirgni Baker testified twice in these proceedings, where her demeanor and professionalism were freely subjected to examination and cross examination. Baker provided a stark contrast to Howley: she did not exaggerate, equivocate or try to dodge

questions, but provided straight and honest answers. Baker was poised, calm, and credible when she defended herself against Respondent's many dubious accusations of workplace misconduct, as well as Respondent's utterly meritless accusation that Baker did not search hard enough to find another job after Respondent fired her. Confronted with stinging personal and professional accusations from her former employer, Baker responded with honesty and dignity.

J. Evidence of Disparate Treatment

The record revealed evidence of disparate treatment. In October 2015, Amy Mourabit, a Licensed Professional Counselor employed in Respondent's Behavioral Health department, was put on a performance improvement plan (or "PIP") to address complaints from her coworkers of "negligence" as well as various interpersonal issues, including complaints that Mourabit showed "unwillingness to work cooperatively," made "inappropriate racial/ethnic remarks and innuendos" as well as "non-constructive criticism" which were expressed "in an intimidating manner and/or in a manner that undermines confidence, is belittling, or implies incompetence." (GC-13.) Mourabit was instructed to contact Respondent's EAP and was placed on a PIP for 60 days. Mourabit completed the PIP and was still employed by Respondent as of the date of the hearing in this case. (Tr. 164-66.) The record contains no evidence that Mourabit was issued an Employee Warning Notice regarding the complaints described in GC-13.

In June 2015, Respondent issued a final written warning to APRN Alison Riley for "Rudeness to Employees or Customers" and "Physical abuse of staff member." (GC-14.) Apparently, Riley struck the hand of a coworker twice as the coworker reached for a telephone that Riley was using. (Id.) The Union grieved Riley's discipline, and in

September 2015, the Union and Respondent agreed to reduce Riley's warning to a first written warning for "disrespectful conduct." (GC-15.)

Although both Mourabit and Riley were in the providers' bargaining unit, and therefore covered by a collective-bargaining agreement, it is undisputed that the same rules of conduct applied to Mourabit and Riley as applied to Baker. (Tr. 189-90.) Baker was merely accused of speaking with a demanding tone, yet she was fired, while the above employees received far lighter consequences for what appears to have been significantly more serious misconduct. Moreover, there is no evidence in the record that either Mourabit or Riley were sent home early or placed on paid administrative leave while Respondent investigated the allegations against them. Indeed, the record contains no evidence that anyone other than Baker was put on paid administrative leave for rudeness or discourteousness.

In issuing Baker's termination, Respondent relied on accusations that were months old and which had not resulted in any discipline at the time. But there is no evidence in the record showing that Respondent did the same thing to any other employee. For example, in July 2017, Respondent concluded that Angelita Capo's allegations (which were at least partially, if not entirely, discredited) did not warrant issuance of any discipline to Baker, but merely warranted team-building exercises with Baker and Capo (which Baker successfully completed). Respondent did not issue any discipline to Baker in connection with the October 2016 allegations at the time they were made and investigated: while the circumstances of Respondent's inaction are still somewhat murky, it is probably safe to surmise that Respondent concluded that Baker had not engaged in any conduct that warranted discipline. Yet two months later, Baker

and the Union were given a backdated draft discipline for an alleged “Display of Bullying and Aggressive physical contact towards a co-worker.” (GC-6 at 23.) Respondent has provided absolutely no evidence that it has treated any other employee in a similar manner.

Moreover, there is no evidence in the record that Respondent took any kind of action was taken with regard to Dr. Salehi. The scheduling problem on January 3 was Dr. Salehi’s problem, not Baker’s. The administrative time was Salehi’s, not Baker’s. Baker only became involved because she was trying to assist Salehi. (Tr. 363.) Moreover, multiple witnesses described Salehi as frustrated and upset over the issue, and Salehi was vocal to several witnesses about her discussions and (as yet unseen) email(s) with Dr. Montezuma about her administrative time. After Baker left the reception area, Salehi stayed and insisted that O’Donnell adjust her schedule. (Tr. 468.) Clearly, whatever frustration was felt at the reception desk that afternoon originated with Dr. Salehi, yet there is no evidence that it was addressed or taken into account. At the very least Salehi’s contribution to the situation should be considered a mitigating factor.

V. ARGUMENT

A. Respondent Violated § 8(a)(5) of the Act by Failing to Engage in Pre-Imposition Bargaining

1. Legal Standard: Respondent Had an Obligation to Engage in Pre-Imposition Bargaining with the Union.

In *Total Security Management*, 364 NLRB No. 106, slip. op. at 1 (Aug. 26, 2016), the Board affirmed its decision in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), holding that, “like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and . . . employers may not unilaterally impose serious discipline” “on employees represented by a union but not yet covered by a collective-bargaining agreement.” The Board held, *inter alia*, that discretionary discipline is a mandatory subject of bargaining, and therefore, absent exigent circumstances, employers must give unions notice and an opportunity to bargain before imposing certain serious types of discretionary actions. *Id.* In explaining an employer’s bargaining obligation, the Board explained that pre-imposition bargaining would be required for “[s]erious disciplinary actions such as suspension, demotion, and discharge plainly have an inevitable and immediate impact on employees’ tenure, status, or earnings.” *Total Security*, slip op. at 3-4. The Board reasoned that pre-imposition bargaining in such situations is appropriate for two main reasons: (1) the impact on the employee, and (2) “the harm caused to the union’s effectiveness as the employees’ representative if bargaining is postponed.” *Id.* at 4. Moreover, “the pre-imposition obligation attaches only with regard to the discretionary aspects of those disciplinary actions that have an inevitable and immediate impact on an employee’s tenure, status, or earnings, such as suspension, demotion, or discharge.” *Id.* at 11.

The Board further explained that the pre-imposition bargaining obligation does not require that an employer and union bargain to impasse before the employer may lawfully impose discipline. Rather, the employer must provide the union with notice and an opportunity to bargain. As the Board explained:

This entails sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion. It will also entail providing the union with relevant information, if a timely request is made, under the Board's established approach to information requests. The aim is to enable the union to effectively represent the employee by, for example, providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties do not reach agreement, the employer may impose the selected disciplinary action and then continue bargaining to agreement or impasse.

Id. at 8-9. As the Board further noted, this “more limited pre-imposition bargaining” does not apply to an employer who issues discipline without engaging in pre-imposition bargaining. *Id.* at 12, fn.29. The Board applied its holding prospectively from the date of its decision on August 26, 2016.

2. Respondent Failed to Engage in Good-Faith Pre-Imposition Bargaining

As a threshold matter, it is undisputed that *Total Security Management* applies in this case because at the time Respondent placed Baker on paid administrative leave and fired her, the employees in the Unit were represented by the Union but were not yet covered by a collectively-bargained agreement regarding discipline. The parties stipulated that, at the time of Baker's suspension and discharge, Respondent exercised discipline on a discretionary basis. (JT-1 at ¶ 1.)

It is also undisputed that Respondent provided the Union with no notice or an opportunity to bargain about Baker's paid suspension. Respondent argues, however, that placing an employee on paid administrative leave is not the kind of discipline that triggers a pre-imposition bargaining obligation under *Total Security*. Respondent argues that it is a lesser form of discipline, more akin to a verbal or written warning than a suspension or discharge. Although a paid suspension would have a lesser financial impact on an employee than a termination or unpaid suspension (of similar length), in many contexts a paid suspension would have a greater financial impact on an employee than a mere warning would. Depending on the workplace, paid suspensions can deprive employees of opportunities for overtime, commissions, or other incentive pay, or interfere with an employee's ability to meet deadlines or productivity goals, and can limit employee access to advancement opportunities. Moreover, a unilaterally imposed paid suspension can have a significant adverse impact on a union's effectiveness as the employees' representative as it demonstrates, to the entire bargaining unit, an employer's ability to remove undesirables from the shop floor. It is only logical that a union should have the same right to engage in pre-imposition bargaining regarding paid suspensions as it would for employee reassignments. Moreover, as the facts of this case demonstrate, placing an employee on paid suspension can be used as a tool to escalate discipline. The record here shows that Howley wanted to fire Baker in 2016, but for whatever reason, HR did not act on her recommendation. Months later, on January 3, Howley was able to force Respondent's hand by putting Baker on paid administrative leave—a maneuver that Genea Bell was unhappy about. With Baker on paid leave, HR could not ignore Howley's complaints indefinitely. Howley put Baker on

paid leave to increase the likelihood that Baker would be fired.²⁸ Accordingly, a paid suspension should trigger a pre-imposition bargaining obligation just as an unpaid suspension would.

Respondent contends that the January 10 meeting fulfilled its pre-imposition bargaining obligation with respect to Baker's termination. It did not. There is no claim that the parties reached an impasse on January 10, nor does *Total Security* require a pre-imposition impasse. What *Total Security* requires is a "meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion." 364 NLRB No. 106 at 8. No such "meaningful discussion" happened on January 10. Bell did not inform Hermanson that a preliminary decision had been made to fire Baker—to the contrary, Bell had just completed her interview of Baker, and Bell repeatedly told Hermanson that her investigation was still incomplete. While Bell made a general reference to Baker having prior discipline, she did not discuss any specifics, and in fact could not meaningfully discuss those prior disciplines because, as of January 10, she still did not know all of the details regarding those prior accusations. This is significant here because Respondent relied so extensively on Baker's disciplinary history, including relying on incidents that had not resulted in any warning or other discipline at the time, and relying on documents that had not previously been shown to Baker (or the Union). When Hermanson suggested alternatives to

²⁸ There is simply no credible alternative explanation. Howley's bold assertions that Baker caused "toxicity" in the department (Tr. 316) are simply not supported by the record. Moreover, Howley did not put Baker on administrative leave on October 24, 2016, even though Howley's final draft Employee Warning Notice for that incident accused Baker of "[d]isplay of [b]ullying and [a]ggressive physical contact towards a co-worker" (GC-6 at 23), which would seem to be a much more alarming transgression than "rudeness" (GC-6 at 1).

discipline, Bell ducked the issue by professing that it was not her decision to make. Either intentionally or unintentionally, Bell failed to understand what Hermanson was offering, and she made no attempt to clarify the Union's position. In sum, the evidence reveals that Respondent fell far short of meeting its duty to bargain in this matter.

B. Baker Should Be Reinstated and Made Whole

1. Legal Standard: Reinstatement & Backpay is the Appropriate Remedy

In *Total Security Management*, the Board concluded that the standard remedy for an unlawful unilateral change should be granted, including reinstatement and backpay, subject to the limitations of § 10(c). Section 10(c) of the Act imposes a limitation on the availability of reinstatement and backpay: “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged *for cause*.” 29 U.S.C. § 160(c) (emphasis added). In *Total Security Management*, the Board construed § 10(c) to preclude reinstatement and backpay only if the employer establishes that the employee's discharge was “for cause.” To meet this burden, the employer must first show that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. 364 NLRB No. 106, at 15.²⁹ In response, the General Counsel may contest the employer's defense by

²⁹ To the extent that Respondent argues that *Taracorp, Inc.* stands for the proposition that the “for cause” language of § 10(c) means only the absence of a prohibited reason, and that “[m]anagement can discharge for good cause, or bad cause, or no cause at all.” *Taracorp Inc.*, 273 NLRB 221, 224 fn. 8 (1984). There are several problems with that argument. The Board extensively discussed and distinguished *Taracorp* in *Total Security Management. Id.*, slip op at 14. *Taracorp* itself involved an employee who engaged in misconduct, and so the Board's discussion of 10(c) in non-disciplinary cases was dicta. Second, both at the time of the Taft-Hartley amendments and today, “for cause” has been universally understood to mean something alternative to “at-will,” and it would be nonsensical to hold that the meaning of “for

showing mitigating circumstances or by showing that the employer failed to impose similar discipline on other employees for similar misconduct. *Id.*³⁰ If the General Counsel makes such a showing, the employer must show that it nevertheless would have imposed the same discipline. *Id.* The employer retains the burden of persuasion. *Id.* The Board also stated that “[t]he remedial guidance we provide today will be further developed in the course of future decisions applying the analysis we are adopting today.” *Id.* at 15.

Unfortunately, the Board has yet to issue any cases further expounding on this doctrine. Nevertheless, it is clear that first element requires actual misconduct, not merely a good faith belief by the employer that an employee engaged in misconduct. Thus, if Respondent fails to prove that Baker actually engaged in misconduct, then Respondent has not met its burden under 10(c). Cf. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) (issue of actual misconduct is dispositive, despite an employer’s good faith belief). With respect to the second element, causality, the Board explained it is not sufficient merely to show that some form of misconduct immediately preceded the discipline: “Assuming that an employee who was disciplined after engaging in misconduct was disciplined because of the misconduct is a common logical fallacy.”

cause” in § 10(c) is coterminous with “at-will” termination. It would be absurd for Congress to have used the term “for cause” to also mean “no cause.” To the contrary, as the Supreme Court has observed, “The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct.” *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964).

³⁰ *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007) is readily distinguishable because there was no dispute that the employees had, in fact, engaged in the alleged misconduct, nor was it disputed that the misconduct provided adequate grounds for the terminations and suspensions issued to the employees. *Id.* at 645 (“we overrule *Tocco* and *Great Western* to the extent that they hold that an employer may not discipline employees for *uncontested misconduct* if that misconduct is detected through unilaterally and unlawfully implemented means.” Emphasis added).

Total Security, 364 NLRB No. 106 at 14, fn.36. Moreover, although the Board does not discuss it explicitly, this causation element necessarily implies that an employer must have acted in good faith—if an employer’s assertion of misconduct were mere pretext, then that misconduct did not actually “cause” the discipline even though the employer might not have chosen to issue the discipline absent the availability of a pretext.

2. Reinstatement is Appropriate Because Respondent Failed to Establish that it Fired Baker “For Cause”

Respondent has failed to carry its burden that it discharged Baker “for cause” within the meaning of § 10(c) of the Act, as it has failed to prove that Baker engaged in misconduct and that Baker’s misconduct caused Respondent to fire her. When stripped of conclusory characterizations and hyperbole, the evidence against Baker shows that, at worst, Baker chided a coworker or spoke to a coworker with a demanding tone. Baker’s termination was not the result of a good-faith investigation: witnesses were coached, statements were changed, and documents were backdated to create the appearance that Respondent had been searching for the truth. In fact, Respondent has offered no evidence that it has ever issued any kind of discipline to any employee other than Baker over such a trivial affair. To the contrary, the evidence shows that Respondent embraced a significantly more conciliatory posture with regard to Baker’s coworkers, Mourabit and Riley, who were accused of far more serious infractions. As noted above, Respondent relied on stale allegations of misconduct against Baker, which resulted in no discipline at the time they were made, to justify Baker’s termination. Yet there is no evidence that Respondent had similarly waited in the weeds with any employee other than Baker. Moreover, as described above, Dr. Salehi’s role in the

January 3 incident constituted an important mitigating factor that should have been, and should be, considered.

Any argument that Baker was on a final warning since March 2016 is unavailing. Respondent cannot have it both ways: if Baker *did* engage in misconduct after March 11, 2016 but before January 1, 2017, then the “final” warning was not really final. If, on the other hand, Baker did *not* engage in any misconduct between March 11, 2016 and January 1, 2017, then Respondent relied on at least two meritless accusations of misconduct against Baker to justify her termination in January 2017.

3. Respondent’s ‘Offer’ to Negotiate After Baker’s Discharge was Not in Good Faith and is Insufficient to Limit Baker’s Reinstatement Rights

As noted above, *Total Security* provides that an employer who had met its pre-imposition bargaining obligation can impose discipline prior to agreement or impasse but only if the employer continues to negotiate with the union to agreement or impasse after discipline. 364 NLRB No. 106 at 9. In another section of *Total Security*, the Board left open the possibility that “[i]n some cases, it may happen that a respondent that unlawfully fails to provide pre-disciplinary notice and an opportunity to bargain... complies with its obligation to bargain to agreement or impasse after it has imposed discipline.” 364 NLRB No. 106 at 13 (emphasis added). The Board noted that “Such compliance with the post-discipline bargaining obligation does not moot or cure the pre-discipline bargaining violation, but it may affect the scope of remedial relief.” *Id.* The Board, however, did not elaborate on what cases it referred to by writing “some cases.” Clearly, the Board did not intend to imply that in all cases, an employer may escape a backpay remedy by attempting to bargain in the wake of its own unlawful conduct. This is indicated not only by the prefatory language “in some cases,” but is also suggested

by the Board's extensive precedent holding that, as a general rule, where an employer has made an unlawful unilateral change, it would be futile to attempt to impose a bargaining remedy without first establishing the pre-change status quo. *Id.* at 12 (citing cases). Moreover, the Board has repeatedly held that an employer cannot arrive at a good-faith impasse via its own unfair labor practices. See, e.g. *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001) (noting that serious unremedied unfair labor practices that affect the negotiations will taint an asserted impasse). Thus, the "some cases" that the Board alluded to are likely cases where the employer's unilateral action does not impede the parties' ability to negotiate to an agreement or impasse. The facts here present no such situation.

Genea Bell's March 30 email to Hermanson (GC-10) appears to have been written with the above-described sections of *Total Security* in mind. However, Ms. Bell's efforts are unavailing. First, because Respondent did not comply with its pre-imposition bargaining obligation, it cannot avoid the finding of an unfair labor practice. Moreover, even assuming *arguendo* that the January 10 meeting would have otherwise satisfied an employer's pre-imposition bargaining obligation, Respondent subsequently refused to bargain with the Union over Baker's discipline on February 16. Under *Total Security*, an employer does not have the right to engage in limited pre-imposition bargaining unless it later fulfills its obligation to bargain to an agreement or good-faith impasse.

Moreover, this case does not fall within the category of cases where an employer's compliance with its post-disciplinary bargaining obligation can limit its backpay liability. As of March 30, Baker had not worked at the Facility in nearly three months: absent Baker's reinstatement, the Union would be forced to try to negotiate the

restoration of something Respondent had unlawfully changed in the first place. To allow employers to do so categorically would be to nullify the entire premise of *Total Security*: that bargaining is far more effective before a change is made than after.

Bell's March 30 email should have no bearing on this case because it was not a good-faith request to negotiate. By that point, Respondent had already violated its pre-imposition bargaining obligation, and had also refused to engage in post-disciplinary bargaining with the Union. The email itself is written more like a position statement to submit to the NLRB than a request to bargain, and so it was perfectly reasonable for the Union to see the email for what it was: a theater prop. Finally, Bell's testimony that she sent the email because she was "sort of surprised that we had gotten the charge" (Tr. 77, lines 17-18) is not a credible explanation, as the original charge in this case (GC-1(a)) was already two months old by that time.

4. Baker Diligently Searched for Work After Her Discharge

Baker diligently searched for work after her discharge. While she was fortunate to find another job after her termination, her employer was ultimately unable to offer Baker a work schedule that met her needs as a mother. Baker continued to search for work after she was let go of that job. There is no basis to diminish her backpay.

VI. CONCLUSION

Counsel for the General Counsel respectfully submits that the record evidence supports the Complaint allegations that Respondent suspended and discharged Dirgni Baker unlawfully, in violation of its § 8(a)(5) bargaining obligation. The Administrative Law Judge is, therefore, respectfully urged to make appropriate findings of fact and conclusions of law and to issue the requisite remedial order. As part of the remedy Respondent should be ordered to reinstate Baker and make her whole for the losses she suffered due to her discharge and to take certain affirmative action designed to effectuate the purposes of the Act.

Dated at Hartford, Connecticut this 16th day of February, 2018.

Respectfully Submitted,

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CERTIFICATION

The undersigned hereby certifies that copies of the aforesaid Corrected Brief to the Administrative Law Judge were caused to be served on February 16, 2018 in the manner set forth below:

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