

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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MONTEFIORE MEDICAL CENTER : Case Number: 02-CA-229024
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-and- :
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NEW YORK STATE NURSES ASSOCIATION :
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REPLY BRIEF OF CHARGING PARTY
NEW YORK STATE NURSES ASSOCIATION IN SUPPORT OF ITS EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE’S DECISION

Charging Party New York State Nurses Association (“NYSNA”) respectfully submits this reply brief in the above-captioned case in support of its Exceptions to Judge Kenneth W. Chu’s May 30, 2019 Administrative Law Judge Decision (“Decision”).

INTRODUCTION

The Respondent, Montefiore Medical Center, submitted a 28 page brief in support of the Decision (“Respondent Brief”). Respondent puts forth every potential argument under the sun yet still fails to offer any valid justification for Judge Chu’s bizarre credibility findings. Because Judge Chu made zero specific references to witness demeanor, the Board must apply a de novo standard of review and reverse this troubling Decision. Judge Chu’s credibility findings contradict both record evidence and basic Board legal principles and would lead to absurd results. For example, under the Respondent’s twisted rationale, it was not enough for Registered Nurse (“RN”) Andrea Guzman to assert her right to a delegate after her supervisor Shalom Simmons threatened her in the middle of a hospital unit. Rather, Guzman should have escalated the situation and directly challenged Simmons regarding the threat, which could have disturbed patients and led to discipline. Judge Chu (and Respondent) rely heavily on Simmons’ e-mail to

her supervisor sent shortly after Simmons threatened Guzman, in order to bolster Simmons' thin credibility. Yet this self-serving e-mail contradicts Simmons' testimony and merely serves to strengthen the account of the three RNs who witnessed Simmons' threat. For these reasons and those articulated in the opening brief, the Board's independent review of this case can only lead to a reversal.

I. The Board Should Apply a De Novo Standard of Review

The Board has held, time and time again, that it will independently examine credibility findings not primarily based upon demeanor. *See In Re Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011) *enforced* 498 F. App'x 45, 45 (D.C. Cir. 2012) (applying de novo review and reversing ALJ finding that manager was credible); *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) ("The Board has consistently held that where credibility resolutions are not based primarily upon demeanor the Board itself may proceed to an independent evaluation of credibility."); *El Rancho Mkt.*, 235 NLRB 468, 470 (1978) *enforced* 603 F.2d 223 (9th Cir. 1979) (applying de novo review because "it does not appear that specific credibility resolutions were based on [the ALJ's] observations of the witnesses' testimonial demeanor"). *See also Humes Elec., Inc.*, 263 NLRB 1238, 1238 (1982) *enforced* 715 F.2d 468, 469 (9th Cir. 1983) (applying de novo review because "although the Administrative Law Judge referred generally to the demeanor factor, certain credibility resolutions do not appear to have been based on his observations of the witnesses' testimonial demeanor").

Here, Judge Chu made no specific findings on witness demeanor. Yet somehow, the Respondent argues that the credibility findings in the Decision must be affirmed unless "the clear preponderance" of evidence establishes otherwise. Respondent Brief at pp.2, 8. Respondent surprisingly relies on *Standard Dry Wall Prod., Inc.*, 91 NLRB 544, 545 (1950) *enforced*, 188

F.2d 362 (3d Cir. 1951), which holds that the Board attaches significant weight to credibility findings based on demeanor. *Id* (“it is our policy to attach great weight to a Trial Examiner's credibility findings *insofar as they are based on demeanor*”) (emphasis added). Because Judge Chu did not base his credibility findings or discuss the demeanor of any specific witness in the Decision, the Board here must reject Respondent’s far-fetched argument on the standard of review and apply de novo review.

II. Judge Chu Erred in His Credibility Findings

Judge Chu’s credibility findings are irrevocably flawed for a multitude of reasons. The Board’s independent de novo review of these findings will reveal significant error compelling reversal of Judge Chu’s decision.

First, Judge Chu’s reliance on the assertion that “no one spoke up when Simmons allegedly made this threat” is clear error. Decision at p.15. To begin with, Guzman did speak up and tell Simmons, “I’m not comfortable going into the room without my Union delegate.” Tr. 31. Respondent argues that “this was a response to Ms. Simmons’ request to meet with her, not a response to the alleged ‘threat.’” Respondent Brief at p.20 n.17. It is unclear how adamantly an employee must object to a threat for Respondent to consider the response adequate. For the Board to require employees who are threatened to actively challenge their supervisors in order to be found credible could lead to escalation of workplace conflict, which is completely inconsistent with the Board’s goal of promoting labor peace.

Further, this particular incident took place not in a private office or away from patients, but at the nurses’ station in the middle of the Surgical Progressive Care Unit of a hospital, which provides stepdown care for patients too sick to be on a typical hospital floor. Tr. 13, 182. The Respondent argues that RN Una Davis’ “individual silence” in the middle of this hospital unit

with patients potentially present somehow undermines her credibility. Respondent Brief at p.21. Yet to expect RNs to aggressively challenge their supervisors in the middle of a hospital patient care unit is contrary to RNs' basic standards of professionalism. Further, arguing with supervisors in such a patient care area could lead to discipline. Here, it is clear that the credibility of Davis and the other RN witnesses should not depend on whether they decided to challenge their supervisor in the middle of a patient care area.

Second, Judge Chu also clearly erred when he found that "no testimony was proffered that [the RNs] spoke afterwards about the threat." Decision at p.15. To the contrary, Davis testified that she spoke to Guzman after Simmons' threat and that Guzman "expressed to me that she was anxious and was unable to focus and she was going to go to employee's health." Tr. 111. Similarly, the record shows that Guzman and Kiffin also subsequently discussed the threat and Kiffin e-mailed Guzman approximately a week later describing what had occurred. Tr. 175; Respondent Ex. 1 (July 5, 2018 e-mail from Kiffin to Simmons). Like Judge Chu, Respondent completely ignores this record evidence which contradicts Judge Chu's unsupported credibility findings.

Respondent also argues that the Decision does not undermine the well-established objective standard for threats against employees. *See Miller Electric Pump and Plumbing*, 334 NLRB 824, 824 (2001); *El Rancho Mkt.*, 235 NLRB at 471. *See also Miami Systems Corp.*, 320 NLRB 71 n. 4 (1995) *enfd. in relevant part* 111 F.3d 1284 (6th Cir. 1997) (test for a Section 8(a)(1) threat does not depend "on an employee's subjective interpretation of a statement"). Yet Judge Chu specifically relied on the lack of testimony regarding the witnesses' states of mind, to find all three RNs not to be credible. *See* Decision at p.15 ("Perhaps, the nurses were afraid to confront Simmons over her alleged threat, but no one testified to that."). Respondent fails to cite

any Board precedent which considers the state of mind of threatened employees *for any purpose*. If the Decision is allowed to stand, it will significantly undermine the objective standard by allowing and potentially requiring evidence with respect to the state of mind of employees, in order to find such employees to be credible.

Finally, Judge Chu and Respondent rely heavily on a long e-mail from Simmons to her supervisor Justine Huffaker, sent shortly after she had threatened Guzman. Decision on p. 15 (“the contemporaneous statement made by Simmons on the day of the incident outweighs the memory of other witnesses made several months later”); GC Ex. 5. Almost a week after the daughter of a patient complained that Guzman caused her father to bleed, Simmons had still not notified her supervisor, Justine Huffaker, of this incident. Only after Simmons asserted her Weingarten rights did Simmons find it necessary to notify Huffaker and include the subject line “URGENT NURSE GUZMAN.” Without citing any support in the evidentiary record, Respondent speculates that Simmons labeled the e-mail “URGENT NURSE GUZMAN,” because of a potential lawsuit. Respondent Brief at p.25, n.22. Yet if Guzman was concerned about a lawsuit, there is no explanation for why she waited a week to escalate this to her supervisor and why she focused on Guzman in the subject line. The only plausible explanation to explain the timing and focus of this e-mail is that Simmons was worried about her own job after threatening Guzman.

It is also telling that Simmons’ e-mail corroborates the testimony of RNs Guzman, Davis and Marie Kiffin regarding much of the Weingarten rights incident, only diverting when it comes to the final threat. This e-mail also corroborates Guzman and Davis’ testimony regarding Patient Care Technician (“PCT”) Natalie Grant, and totally contradicts Simmons’ testimony on this point. Tr. 25, 102. Simmons was adamant at the hearing that she did not admonish Guzman for

not using simple language with Grant yet in her e-mail Simmons admits that she told Guzman to use “simple” terms with Grant. Tr. 208; GC Ex. 5. Judge Chu totally ignored this contradiction and its impact on Simmons’ credibility.¹

In her e-mail, Simmons states that instead of threatening Guzman, she stated “[a delegate is] not needed but if this is what you want to do I would like to meet with your delegate sooner because of the nature of issue.” G.C. Ex. 5. It is telling that despite the alleged urgency of the situation that Simmons never followed up with Guzman. Judge Chu (and the Respondent) struggled to explain why three currently employed RNs would accurately describe an entire incident and then lie under oath regarding their supervisor’s threat at the tail end of that incident. Perhaps that is why Judge Chu had to rely upon the above-described irrational and irrelevant factors in evaluating the RNs credibility.²

¹ Judge Chu also ignored another important contradiction which undermines Simmons’ credibility. In her e-mail description of the incident, Simmons referred to Davis as a charge nurse, but in testifying regarding the incident, she refers to her as a delegate, an important distinction given that Simmons threatened to “pull [Guzman’s file] and open a can of worms” if Guzman exercised her right to request a delegate. *See* GC Ex. 5; Tr. 214. This e-mail corroborates Guzman and Davis’ testimony on this point. Tr. 26, 105.

² In addition, Respondent heavily relies on Judge Chu’s superfluous statement in his Decision, questioning “why the charge was not filed much earlier if indeed this was a severe threat of reprisal[.]” Decision at p.15, n.13; Respondent Brief at p. 12-13. Respondent cites this dicta in the Decision to advocate for a new, shorter statute of limitations in violation of Section 10(b) of the Act. Respondent Brief at p.13 (“Delayed filing of a charge . . . [should] cast doubt on the validity of an unfair labor practice claim.”). This blatant attempt to re-write the Act must fail. Of course, Respondent’s far-fetched claim that the charge is somehow invalid because NYSNA did not grieve this statutory violation also totally lacks merit. Respondent Brief at p.12.

CONCLUSION

For the foregoing reasons, the Board should reject Judge Chu's decision and find that Montefiore violated the Act.

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