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**Queen of the Valley Medical Center and National Union of Healthcare Workers (NUHW).** Cases 20–CA–191739, 20–CA–196271, 20–CA–197402, and 20–CA–197403

November 25, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On February 28, 2018, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed briefs in response to the Respondent’s exceptions. The Respondent filed reply briefs to the General Counsel’s and Charging Party’s responsive briefs. In addition, the General Counsel filed a cross-exception with supporting argument, and the Respondent and the Charging Party filed briefs in response.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision<sup>2</sup> and the record in light of the exceptions,<sup>3</sup> cross-exception, and briefs and has decided to affirm the judge’s rulings, findings,<sup>4</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>5</sup>

<sup>1</sup> In its responsive brief, the Charging Party states that it concurs with the General Counsel’s cross-exception and supporting argument and replies to the arguments set forth in the Respondent’s answering brief to the General Counsel’s cross-exception.

<sup>2</sup> Prior to the issuance of the judge’s decision, the United States District Court for the Northern District of California granted the Board’s petition for injunctive relief filed pursuant to Sec. 10(j) of the National Labor Relations Act. See *Coffman v. Queen of the Valley Medical Center*, No. 17-cv-05575-YGR, 2017 WL 6884316 (N.D. Cal. Nov. 30, 2017). The Respondent appealed the district court’s decision, and, after the judge issued his decision, the United States Court of Appeals for the Ninth Circuit affirmed the district court’s order of the Sec. 10(j) injunctive relief. See *Coffman v. Queen of the Valley Medical Center*, 895 F.3d 717 (9th Cir. 2018).

On July 23, 2018, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed a letter calling the Board’s attention to the Ninth Circuit’s decision and challenging the court’s findings therein. The General Counsel and the Union filed responsive letters.

<sup>3</sup> We deny the Respondent’s request for oral argument as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>4</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d

The Respondent operates an acute care hospital in Napa, California. In October 2016, the National Union of Healthcare Workers (Union or NUHW) filed a petition to represent approximately 420 non-professional employees at the hospital. The Regional Director ordered a mail ballot election, in which the employees voted for representation, with 202 votes for the Union and 132 votes against the Union. The Regional Director certified the Union as the employees’ exclusive bargaining representative on December 22, 2016. The Respondent filed a request for review of the direction of election and certification on January 9, 2017, but around the same time, as described in the judge’s decision, began negotiating with the Union and treating the Union as the unit’s designated representative. On February 28, 2017, the Board denied the Respondent’s request for review. On March 16, 2017, the Respondent informed the Union that, unless the Union agreed to certain terms, the Respondent would refuse to bargain to initiate test-of-certification procedures. Soon thereafter, the Respondent ceased negotiating with the Union. As a result of the Respondent’s conduct during this period, the General Counsel alleges that the Respondent violated the Act in numerous respects, including by unlawfully withdrawing recognition from the Union.

We agree with the judge, for the reasons stated in her decision, that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on about March 24, 2017, and by subsequently failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees.<sup>6</sup> In

Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge’s denial of additional sanctions against the Union for failure to comply with the Respondent’s subpoena duces tecum. We find that the sanctions imposed by the judge were proportionate to the Union’s noncompliance and that the judge did not abuse her discretion in denying additional sanctions. See, e.g., *McAlister Towing & Transportation Co.*, 341 NLRB 394, 396–397 (2004), enfd. 156 F. Appx. 386 (2d Cir. 2005).

No party has excepted to the judge’s dismissal of the allegation that the Respondent violated Sec. 8(a)(3) by reassigning Renee Frogge to a new position.

<sup>5</sup> We have amended the judge’s conclusions of law consistent with our findings herein. In addition, we have amended the judge’s remedy to remove the notice-reading remedy and to clarify the backpay computation and the tax and social security remedies for the Respondent’s unlawful unilateral changes. Further, we shall modify the judge’s recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), and to conform to the judge’s unfair labor practice findings, the Board’s findings, and the Board’s standard remedial language. We shall substitute a new notice to conform to the Order as modified.

<sup>6</sup> To remedy this violation, the judge ordered an affirmative bargaining remedy. We note that although the Respondent excepts to the judge’s finding that it unlawfully withdrew recognition from the Union in violation of Sec. 8(a)(5), it does not argue that the judge’s recommended

addition, we adopt the judge's findings that the Respondent, on several occasions, violated Section 8(a)(5) by failing and refusing to provide information to the Union that was relevant and necessary for collective-bargaining purposes. Further, we adopt the judge's findings that the Respondent violated Section 8(a)(5) by unilaterally: (1) failing to abide by the negotiated and signed agreement regarding the effects of the Respondent's kitchen construction project; (2) ending its practice of permitting the Union to use meeting rooms at Respondent's facility for Union meetings; and (3) changing shift assignments for Sterile Processing Department employees.<sup>7</sup> Finally, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by refusing the request of an employee for union representation during an investigatory interview that she reasonably believed may result in discipline.

We reverse, however, the judge's finding that the Respondent violated Section 8(a)(1) of the Act in December 2016 by threatening an employee with futility for seeking union representation. As more fully described by the judge, the director of the Respondent's Environmental Services (EVS) Department, Kevin Herring, informed a prounion employee that "[u]nion or no union, I'm going to run this department as I see fit." We do not find that Herring's statement constituted an implied threat of futility for seeking union representation. In our view, employees would not have reasonably understood Herring's statement to imply that their attempt to secure union

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affirmative bargaining order is improper even assuming the Board affirms the judge's Sec. 8(a)(5) finding in this regard. We therefore find it unnecessary to provide a specific justification for that remedy. See *Sheraton Anchorage*, 359 NLRB 803, 803 fn. 4 (2013), incorporated by reference as modified in 362 NLRB 1038 (2015); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001); see also *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

Relatedly, we find merit in the General Counsel's alternative argument in his limited cross-exception that, even absent a finding that the Respondent unlawfully withdrew recognition, the Respondent nevertheless violated Sec. 8(a)(5) by failing and refusing to bargain with the Union since about March 24, 2017.

<sup>7</sup> In light of our finding that the Respondent violated Sec. 8(a)(5) by unilaterally changing the shift assignments of employees in the Sterile Processing Department, we find it unnecessary to pass on whether those shift changes also violated Sec. 8(a)(3) as the finding of an additional violation would not materially affect the remedy. See, e.g., *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 145 (2007), enf'd. 550 F.3d 1183 (D.C. Cir. 2008).

<sup>8</sup> Member McFerran would adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening an employee that seeking union representation would be futile. During a time period when the Union had requested to meet with the Respondent over the shift reassignment of employee Renee Frogge, Manager Herring called Frogge to his office for a meeting. When Frogge asked if she needed union representation for the meeting, Herring was, according to the judge, "visibly irritated" by her question. Herring then declared to Frogge, "[u]nion or no union, I'm going to run this department as I see fit." Contrary to her

representation would be futile because his statement was too vague to suggest that the Respondent would not comply with its duty to bargain in good faith if the Union was certified as the employees' representative. Accordingly, we dismiss the allegation that Herring's statement was unlawful.<sup>8</sup>

We also reverse the judge's finding that the Respondent violated Section 8(a)(3) by reassigning EVS Department employee Miguel Arroyo to a different shift from the shift assigned to his wife.<sup>9</sup> Applying the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the General Counsel met his initial burden largely based on inferences she drew from the record evidence. She then found that the Respondent did not meet its rebuttal burden because, in her view, the Respondent's asserted reasons for Arroyo's discharge were pretextual. As explained below, we find that the judge erred in concluding that the General Counsel met his initial burden under *Wright Line*.

Regarding the General Counsel's initial burden, the judge found that Arroyo was a union supporter, had worn a union lanyard, and had appeared in a photograph on the Union's Facebook page. The judge also found, however, that there was no direct evidence to show that the Respondent knew of Arroyo's union activity or that the shift change was motivated by any union activity.<sup>10</sup> Absent such direct evidence, the judge found that there was

colleagues, Member McFerran agrees with the judge that Herring's declaration reasonably conveyed his disregard for the employees' selection of the Union as their representative and that it would be pointless for Frogge to seek the Union's assistance in this or any other matter. See, e.g., *Gene's Bus Co.*, 357 NLRB 1009, 1011 (2011); and *Kenworth Trucks of Philadelphia*, 229 NLRB 815, 818 (1977).

<sup>9</sup> Members Kaplan and Emanuel join in reversing the judge on the threat of futility charge and Arroyo's unlawful reassignment charge. As explained, Member McFerran would affirm the judge's findings on these issues.

<sup>10</sup> In the related 10(j) proceedings, the Ninth Circuit affirmed the district court's finding that the Regional Director had submitted evidence sufficient to establish a likelihood of success on the merits of the Sec. 8(a)(3) allegation related to Arroyo's shift reassignment. In agreeing with the district court, the Ninth Circuit relied on testimony that a manager knew of Arroyo's union activity and, in the week before the election, conspired to "hurt" Arroyo for his union activity. See *Coffman v. Queen of the Valley Medical Center*, supra, 895 F.3d at 729. The testimony relied on by the Ninth Circuit was from landscaping foreman Ardy Van Winden, who testified that, in the first week of November 2016, Herring identified Arroyo as a union supporter and later directed EVS Supervisor Shari Roe to examine Arroyo's schedule to see if there was a way to change it to make sure Arroyo was "hurt" by his support of the Union. The judge stated that she did not rely on Van Winden's testimony in analyzing the General Counsel's initial burden regarding Arroyo. Additionally, earlier in her decision, the judge found more generally that the "Respondent discredited Van Winden's testimony on a number of issues, including the circumstances surrounding his resignation." Unlike our dissenting colleague, we do not think that the statement about the

circumstantial evidence sufficient to warrant an inference of the Respondent's knowledge and animus. To be sure, knowledge and discriminatory motive may be inferred from circumstantial evidence. See, e.g., *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (unlawful motivation); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995) (knowledge), enfd. mem. per curiam 97 F.3d 1448 (4th Cir. 1996). Here, however, based on consideration of all the circumstances of this case, we find that the judge's inferences of animus were not warranted.<sup>11</sup>

The judge first inferred animus from the timing of Arroyo's reassignment and the "suddenness" of the Respondent's decision to enforce an existing policy against family members working on the same shift. In reaching these conclusions, however, the judge failed to give sufficient weight to the facts surrounding Herring's decision to reassign Arroyo to a different shift—in particular the facts that Herring had only recently become the EVS Department director and based his reassignment of Arroyo on advice from the Respondent's human resources department. Since starting in the EVS director position, Herring, in conjunction with his direct superior, had been reviewing the numerous employees under his direction and seeking to improve workflows, assignments, and schedules. At some point, Harold Young, the department's evening supervisor, informed Herring that the Arroyos were married and stated that this could cause scheduling problems on the second shift. According to Herring, he was aware that some companies had restrictions on family members working together, and he therefore contacted the human resources department for assistance. The human resources department informed Herring that the Respondent indeed maintained a policy prohibiting, among other things,

"related persons," including spouses, from being employed on the same shift and apparently advised Herring that Arroyo should be reassigned to a different shift than his wife. Consistent with this advice, Herring reassigned Arroyo to the day shift. In light of these facts, unlike the judge, we find that the timing of the decision to reassign Arroyo to be of negligible evidentiary weight. See, e.g., *Caribe Ford*, 348 NLRB 1108, 1109 (2006).

The judge also found that Herring's limited investigation into the Arroyos' situation warranted an inference of animus. Although it is true that Herring did not inquire into the specific details of the Arroyos' marriage or their tenure with the Respondent, it is not clear to us how that warrants an inference of animus based on the record evidence before us.<sup>12</sup> Concerned about the existence of a policy prohibiting family members from working together, Herring raised the matter to human resources and was advised, based on the Respondent's policy, that Arroyo should be reassigned. Under the circumstances, Herring's actions give us no reason to question the adequacy of his investigation. See *Frierson Building Supply Co.*, 328 NLRB 1023, 1023–1024 (1999) (finding that judge's inference of animus was not warranted where a new supervisor discharged an employee for poor work performance as soon as it came to the supervisor's attention).

Finally, the judge took issue with Herring's reliance on a concern about vacation scheduling issues with the Arroyos in reassigning Miguel Arroyo to a different shift. Specifically, the judge found that this amounted to pretext since the Arroyos had apparently never requested vacation leave at the same time.<sup>13</sup> Again, however, the judge failed to account for the broader circumstances of the case. Although Herring's initial concern may have been about

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Respondent's discrediting of Van Winden creates any doubt that the judge herself implicitly discredited Van Winden's testimony regarding Herring's knowledge of and feelings about Arroyo's union activity. Therefore, it is not necessary to remand this issue to the judge for a more specific credibility resolution.

Contrary to her colleagues, Member McFerran questions whether Van Winden's testimony is, in fact, discredited. After setting forth the substance of Van Winden's testimony, the judge stated that the "Respondent discredited Van Winden's testimony on a number of issues" and later stated that she did not rely on Van Winden's testimony. It is unclear to Member McFerran if the judge herself actually discredited Van Winden's testimony or if she did not rely on it because the Respondent thought it discredited. If the judge discredited Van Winden's testimony, Member McFerran would defer to that determination in the absence of a reason not to do so. However, if only the Respondent discredited the testimony and the judge did not actually make a credibility determination, Member McFerran believes that such a determination would need to be made as the credibility of Van Winden's testimony is potentially outcome determinative on the matter of Arroyo's reassignment. Given the lack of clarity, Member McFerran would remand this issue to the judge for a specific credibility resolution regarding Van Winden's testimony.

<sup>11</sup> In light of our conclusion that the judge's inferences of animus were not warranted and thus that the General Counsel did not satisfy his initial *Wright Line* burden, we find it unnecessary to pass on whether the judge properly inferred that the Respondent had knowledge of Arroyo's union activity.

<sup>12</sup> In drawing inferences from the Respondent's investigation, the judge was apparently troubled by the fact that EVS Supervisor Roe knew about the Arroyos' marriage for 10 years but the Respondent never took any action consistent with the policy against the couple. There is no evidence in the record, however, to suggest that Roe, a low-level supervisor who did not directly supervise Arroyo, shared this knowledge with other members of the Respondent's management team. Similarly, the judge relied on the fact that no one in human resources testified as to how long that department might have known Arroyo and his wife worked the same shift. But the General Counsel had the burden to put forth evidence in support of his initial burden, and he did not call any witnesses to show that anyone in human resources knew about the Arroyos' marriage prior to Herring raising the matter to them.

<sup>13</sup> In two sentences at the end of her analysis, the judge also found that Herring's decision to reassign Arroyo instead of his wife somehow warranted an inference of unlawful motivation. In our view, the judge's reasoning is too vague and insubstantial to sustain an inference of animus or discriminatory motivation.

vacations and staffing coverage, the ultimate decision to reassign Miguel Arroyo was based on the Respondent's policy against "related persons" working the same shift and the recommendation from human resources to reassign him.

In light of the foregoing, we find that the judge erred in inferring animus.<sup>14</sup> As a result, we find that the judge erred in concluding that the General Counsel met his initial burden under *Wright Line* of proving that Arroyo's shift reassignment was discriminatorily motivated.<sup>15</sup> We thus dismiss the allegation that the Respondent violated Section 8(a)(3) by reassigning Arroyo to a different shift.

#### AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusions of Law 6 and 11 (i) and (ii) and renumber the remaining paragraphs accordingly.

#### AMENDED REMEDY

The Respondent excepts to the judge's recommended remedy requiring a public reading of the notice by a Board agent or responsible management official. The Board will order a notice-reading remedy "where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious." *Postal Service*, 339 NLRB 1162, 1163 (2003). Here, a notice-reading remedy is neither necessary nor appropriate to remedy the violations in this case because the Board's traditional remedies suffice to inform employees of the Respondent's unlawful conduct. See, e.g., *Bodega Latina Corp. d/b/a*

<sup>14</sup> Our dissenting colleague would adopt the judge's finding that Arroyo's shift reassignment was unlawful. In so doing, she essentially agrees with the judge's decision to infer knowledge and animus from the circumstances surrounding the reassignment decision. As discussed above, however, we do not find that the judge's inferences were warranted.

<sup>15</sup> Contrary to her colleagues, Member McFerran would not find Arroyo's shift reassignment to be a proper, nondiscriminatory action by a new supervisor. Instead, applying *Wright Line*, she would find the reassignment to be an unlawful action that served as the opening act of the Respondent's subsequent campaign of unfair labor practices designed to stymie the collective-bargaining process and punish union supporters. See supra 1-2 (adopting judge's findings of various violations of the Act); and *Coffman v. Queen of the Valley Medical Center*, supra, 895 F.3d at 730 (court noting numerous instances in the record where the Respondent engaged in retaliatory and hostile acts against union supporters). Specifically, as to the General Counsel's initial burden, she would find that Arroyo engaged in union activity and, even assuming there is no direct evidence of knowledge or animus, see supra fn. 10, she would find, as the judge did, that the circumstantial evidence here warrants an inference of knowledge and unlawful motivation. As an initial matter, although not specifically relied on by the judge, Herring's general knowledge of the union campaign warrants an inference of knowledge of Arroyo's union activity. See, e.g., *Montgomery Ward & Co.*, 316 NLRB 1248, 1253-1254 (1995), enf'd. 97 F.3d 1448 (4th Cir. 1996). In addition, as the judge found, the timing of the reassignment during the

*El Super*, 367 NLRB No. 34, slip op. at 1 (2018). We accordingly amend the judge's remedy to remove the notice-reading remedy.<sup>16</sup>

In addition, we note that in remedying the Respondent's unlawful unilateral changes, the judge did not address the related computation of backpay or the tax and social security remedies in her recommended remedy. Instead, she addressed them in the recommended Order. We therefore amend her recommended remedy to clarify that the make whole relief ordered in connection with the Respondent's unlawful unilateral changes shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We further amend her recommended remedy to clarify that the Respondent shall be required to compensate the affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

#### ORDER

The National Labor Relations Board orders that the Respondent, Queen of the Valley Medical Center, Napa, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

mail-ballot voting period, the suddenness of the decision to reassign Arroyo based on a policy that had been in place since 1977, the limited nature of the investigation into the Arroyos' long-standing schedule arrangement, and the pretextual reasons for the discharge all warrant inferences that the Respondent knew of Arroyo's activity and bore animus towards that activity. Having found that the General Counsel met his initial burden, Member McFerran would find, in agreement with the judge, that the evidence of pretext here means that the Respondent necessarily cannot meet its rebuttal burden. See, e.g., *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). As a result, she would adopt the judge's finding that the Respondent violated Sec. 8(a)(3) by reassigning Miguel Arroyo to a different shift.

<sup>16</sup> Unlike her colleagues, Member McFerran would adopt the judge's recommended notice-reading remedy. She agrees with the judge that the Respondent's unfair labor practices were widespread, serious, and demonstrated the Respondent's clear intent not to honor its bargaining obligations under the Act. In addition, she notes that the judge's recommended notice-reading remedy is consistent with the remedy ordered by the district court in the related Sec. 10(j) injunction proceeding, a remedy ultimately affirmed by the Ninth Circuit. In these circumstances then, Member McFerran would find that a notice reading is appropriate "to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices," and will allow the employees to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (internal quotes omitted), enf'd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).

(a) Withdrawing recognition from National Union of Healthcare Workers (the Union) and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(d) Refusing the requests of employees for union representation during investigatory interviews they reasonably believe may result in discipline.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All nonprofessional employees, including technical employees, employed by the Respondent at its facilities located at 1000 Trancas Street, 980 Trancas Street, 3448 Villa Lane, and 3421 Villa Lane in Napa, California; but excluding all other employees, skilled maintenance employees, business office clerical employees, confidential employees, guards, and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on the following dates:

(i) December 15, 2016, and January 24, 2017 requests for information related to changes to Renee Frogge's linen duties;

(ii) January 10, 2017 request for information to bargain a full collective-bargaining agreement;

(iii) March 3, 2017 request to Interim Director of Surgical Services Diane Kriegel for information related to possible changes for Sterile Processing Department employees;

(iv) March 21, 2017 request for information regarding the pharmacy;

(v) March 21, 2017 request for information regarding the Environmental Services Department and policies related to disciplinary action; and

(vi) March 21, 2017 request for information regarding productivity calculations in patient access services.

(c) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on the following dates:

(i) On March 24, 2017, regarding the Respondent's refusal to allow the Union to schedule meeting rooms at the Respondent's facility;

(ii) On April 5, 2017, regarding the change of schedules for Sterile Processing Department employees; and

(iii) On or about April 21, 2017, regarding the Respondent's abrogation of the kitchen construction agreement.

(d) Make all affected unit employees whole for any loss of earnings or benefits suffered as a result of the Respondent's unilateral changes, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Napa, California copies of the attached notice marked "Appendix."<sup>17</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted.

<sup>17</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 25, 2019

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from National Union of Healthcare Workers (the Union) and fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse the requests of employees for union representation during investigatory interviews they reasonably believe may result in discipline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed collective-bargaining agreement:

All nonprofessional employees, including technical employees, employed by the Employer at its facilities located at 1000 Trancas Street, 980 Trancas Street, 3448 Villa Lane, and 3421 Villa Lane in Napa, California; but excluding all other employees, skilled maintenance employees, business office clerical employees, confidential employees, guards, and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on the following dates: December 15, 2016; January 10, 2017; January 24, 2017; March 3, 2017; and March 21, 2017.

WE WILL rescind changes in terms and conditions of employment for our unit employees that were unilaterally implemented on the following dates: March 24, 2017; April 5, 2017; and April 21, 2017.

WE WILL make unit employees whole for any loss of earnings and other benefits resulting from the unilateral changes in terms and conditions of employment, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

QUEEN OF THE VALLEY MEDICAL CENTER

The Board's decision can be found at [www.nlr.gov/case/20-CA-191739](http://www.nlr.gov/case/20-CA-191739) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Marta Novoa, Esq.*, for the General Counsel.  
*Ellen Bronchetti and Philip Shecter, Esqs.*, for the Respondent.  
*Jonathan Siegel and Latika Malkani, Esqs.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. On January 20, 2016, Charging Party National Union of Healthcare Workers (NUHW) (Union) filed a charge in Case 20-CA-191739 against Respondent Queen of the Valley Medical Center (Respondent). The Union filed first and second amended charges in Case 20-CA-191739 respectively on February 1 and 17, 2017. The Union filed a charge against Respondent in Case

<sup>1</sup> The last dates for hearing were scheduled twice for October but rescheduled each time due to severe wildfires in the Napa Valley, California region, which affected Respondent's operations and its witnesses' availability.

<sup>2</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56

20-CA-196271 on April 3, 2017. The Union filed two more charges, in Cases 20-CA-197402 and 20-CA-197403, on April 21, 2017.

Counsel for the General Counsel (General Counsel) issued against Respondent a consolidated complaint on May 31, 2017, and an amendment to the consolidated complaint on June 15, 2017. General Counsel issued a second amendment to the consolidated complaint on July 24, 2017. Respondent filed timely answers to the consolidated complaint and its amendments.

The alleged unfair labor practices involve Respondent's actions surrounding the Union's petition to represent nonprofessional employees in Respondent's Napa Valley, California facilities. The primary issue is whether, in violation of Section 8(a)(5), Respondent refused to recognize the Union or withdrew recognition after the Union won an election and the Board denied Respondent's request for review of the election. Respondent, denying that the Union was properly certified and that the Union is the bargaining unit's 9(a) representative, concedes that it refuses to bargain with the Union. General Counsel, citing meetings and agreements reached after the Regional Director certified the Union as the 9(a) representative, maintains that Respondent withdrew recognition from the Union.

The consolidated complaint also alleges several instances of Respondent refusing to provide information. It further alleges that Respondent violated the Act regarding scheduling and changes of duties for two employees in the sterile processing department and 8(a)(3) violations for two employees in the environmental services department. Hearing in this matter was held on August 7—11, August 23—25, and November 1 and 2, 2017.<sup>1</sup> All parties had the opportunity to present testimony and evidence and file briefs. After carefully considering the parties' briefs and the record evidence, I hereby make these

FINDINGS OF FACT<sup>2</sup>

I. JURISDICTION AND UNION STATUS

Respondent, a California corporation, operates an acute care hospital with facilities located at and near 1000 Trancas Street in Napa, California. During the past 12 months, Respondent has performed health-care services valued in excess of \$250,000 and has purchased and received goods valued in excess of \$5000 directly from sources located outside the State of California. I therefore find that Respondent is an employer within the

Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).

meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

The parties stipulated, and I find, that Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. BACKGROUND

Respondent's facilities consist of a main hospital, a wellness center, additional buildings for imaging and outpatient surgery, and a separate building for community outreach. Respondent was part of the Saint Joseph's Health Center until July 2016, when it merged into Providence Saint Joseph Health. Respondent employs approximately 1150 employees, with approximately 420 employees in the certified bargaining unit involved here.<sup>3</sup>

Larry Coomes serves as Respondent's president. The Human Resources (HR) Director is Donna Schelling. HR Director Schelling has worked for Respondent for 33 years in various HR capacities. For the last 5 years, she has been HR director. She oversees the day to day operations in HR, such as recruitment, on-boarding, employee relations, compensation and benefits, and, to a certain extent, labor relations. (Tr. 1840.) Two of Schelling's direct reports were also involved in these events: HR Ministry Partner Kathy Hutchinson; and, HR Manager Jill Gruetter.

Bill Candella, the Director of Labor and Employee Relations, reports to a different vice-president than Schelling. Candella's responsibilities include negotiating all collective bargaining agreements within the health care system and handling grievances and unfair labor practices. He has negotiated numerous agreements and resolved grievances. He also holds a law license but has not worked as an attorney.

The environmental services department (EVS) is led by Kevin Herring, currently the Director of Environmental Services and Facilities. During these events, he directed two supervisors, Shari Roe and Harold Young, and, until December 2017, the landscaping facilities with Ardy Van Winden.

The Union's organizer working with the bargaining unit is Hilda Poulson. In addition to assisting with organizing employees, postelection she represents employees in investigatory meetings and negotiates over local worksite issues. She served as primary field organizer in the unionization campaign. Poulson reports to Dan Martin, the assistant to the Union president. Once the Union won the election, Poulson became the Union's representative, working closely with the bargaining unit employees on a day to day basis. Martin was in charge of negotiating the collective-bargaining agreement.

## III. UNION FILES A PETITION FOR NONPROFESSIONAL EMPLOYEES AND WINS A MAIL BALLOT ELECTION

On October 4, 2016, in Case 20-RC-185503, the Union filed a petition to represent approximately 420 non-professionals in Respondent's Napa Valley facility. (Jt. Exh. 2.)<sup>4</sup> Approximately 20 employees served on the organizing committee. Shortly after the Union filed its petition, the Union provided Union lanyards,

buttons and badge holders to its organizing committee members, who in turn distributed the paraphernalia to interested employees. Employees also distributed flyers after October 4. HR Director Schelling observed approximately half of the employees she saw wore union buttons or lanyards. (Tr. 1845-1846.)

A number of hospital departments involved heavily with the organizing efforts included dietary, sterile processing, house-keeping (also called environmental services, or EVS), and respiratory therapy. The Union maintained a special Facebook page regarding the employees it sought to represent.

On November 15, 2016, after a mail ballot election, the votes were counted. The Tally of Ballots reflects that, of the approximate 419 eligible votes, 202 votes were cast for the Union and 132 votes were cast against the Union, a difference of 70 votes. Twelve ballots were void and the 33 challenged ballots were insufficient to affect the election's outcome. (Jt. Exh. 4; Jt. Stip. ¶8.) On November 22, 2016, Respondent filed objections to the election with the Acting Regional Director. Among its 21 objections, Respondent contended that a number of employees were denied opportunities to vote and the number of missing mail ballots affected the outcome.

On December 22, 2016, a month after the objections were filed, the Acting Regional Director dismissed the objections and challenges and certified the Union as the exclusive bargaining representative of the following group of employees:

All nonprofessional employees, including technical employees, employed by [Respondent] at its facilities located at 1000 Trancas Street, 980 Trancas Street, 3448 Villa Lane, and 3421 Villa Lane in Napa, California; but excluding all other employees, skilled maintenance employees, business office clerical employees, confidential employees, guards, and supervisors as defined in the Act.

(Jt. Exh. 6; Jt. Stip. ¶10.)

On January 9, 2017, Respondent filed with the Board a request for review of the Regional Director's decision to certify the Union. (Jt. Exh. 7.) The Board, in an unpublished decision dated February 28, 2017, denied Respondent's Request for Review. (Jt. Exh. 8.)

Once the tally of ballots reflected that the Union won the election in November 2016, the Union prepared for its representational duties. It put together a group of approximately 20 employees for its bargaining team representatives. The union bargaining team representatives were to participate in contract negotiations and collect information from fellow bargaining unit members regarding what issues were important to contract negotiations. Each department elected its bargaining team representative. The bargaining unit employees also elected departmental "leads." In addition, Poulson continued to meet with employees in the cafeteria and other areas of Respondent's properties. Throughout these events, the Union loosely characterized Respondent's actions as a refusal to recognize; however, the events

<sup>3</sup> Not at issue in this matter is the bargaining unit of registered nurses, represented by the California Nurses Association.

<sup>4</sup> Abbreviations in this decision are: "Tr." for transcript; "GC Exh." for General Counsel exhibit; "R. Exh." for Respondent exhibit; "CP Exh."

for union exhibit; "Jt. Exh." for joint exhibit; "Sub. Exh." for exhibits related to the subpoena issues; "Stip." for stipulation; "GC Br." for General Counsel brief; "R. Br." for Respondent brief; and, "CP Br." for union brief.

themselves are the gravamen of whether the case is a failure to recognize (test of certification) versus a refusal to bargain or withdrawal of recognition.

Poulson was now the Union representative for this bargaining unit. She met with bargaining team representatives each month. The meetings were conducted at Respondent's facility. Poulson reserved the meeting rooms by contacting HR Director Schelling. Schelling typically asked Poulson how many people the meeting would need to accommodate. Schelling then assigned the meeting room within the facility. At least three such meetings were held.

#### IV. THE UNION REQUESTS TO NEGOTIATE THE "FULL COLLECTIVE-BARGAINING AGREEMENT"

While Poulson handled the day-to-day issues with Respondent, Dan Martin, the Union's assistant to the director, worked towards negotiating a collective-bargaining agreement.

##### A. *The Union Requests Information to Negotiate a Collective-Bargaining Agreement*

###### Union request

On January 10, 2017, Martin sent a letter to HR Director Schelling. Martin cited the December 22, 2016 decision in which the Union was the certified bargaining representative for the 420-employee bargaining unit. The letter specifically told Respondent that it was required to negotiate with the Union regarding any changes to employees' wages, benefits and working conditions, which could not be implemented unilaterally. (Jt. Exh. 12.) The letter identified the Union's goal to prepare to negotiate "a full collective bargaining agreement" and stated the Union was making an information request needed for negotiations, reserving the right to make additional information requests later. In this letter, Martin requested:

1. Information regarding bargaining unit members. For each member of the bargaining unit represented by the Union, please provide the following:

- (a) Gender
- (b) Race/ethnicity
- (c) Shift differential pay rate and/or premiums and wage differentials in lieu of benefits;
- (d) Benefited status (e.g., benefited or non-benefited);
- (e) Health insurance coverage level (e.g., employee only, employee plus spouse, employee plus children, family);
- (f) The number of hours worked by pay code (e.g., straight time, overtime) during the past 12 months;
- (g) Seniority date;
- (h) Date of birth
- (i) Home address;
- (j) Home telephone number;
- (k) Cell phone number; and
- (l) E-mail address.

2. Personnel Handbooks and Regulations: Please provide copies of any personnel handbooks, written rules, regulations, policies or procedures governing bargaining-unit employees, including those applicable to particular departments, work units or shifts.

3. Health and Welfare Benefits: Please provide:

- (a) A copy of the current Plan Document and Summary Plan Description for each plan available to bargaining-unit members;
- (b) Monthly premiums for each coverage level (employee only, employee plus child, employee plus spouse, family);
- (c) Monthly premium contributions required from a full-time and part-time employee for each coverage level (employee only, employee plus child, employee plus spouse, family); and
- (d) The number of employees enrolled in each plan and at each coverage level.

4. Retirement Plans. Please provide: The Audited Financial Statement and Trustees' Report for the three most recent years available for each plan.

5. Cost of Benefits to Employer. Please provide the total annual costs to the Employer for 2014, 2015, and 2016 for:

- (a) Retirement;
- (b) Health Coverage;
- (c) Dental Coverage;
- (d) Vision Coverage;
- (e) Life Insurance; and
- (f) Long Term Disability.

6. Bargaining-Unit Work Hours and Payroll. Please provide the total annual hours and total annual payroll for the bargaining unit for 2014 and 2015 in aggregate and by classification.

7. Bargaining-Unit Non-Work Hours. Please Provide the total annual hours for the following items for 2014, 2015, and 2016:

- (a) PTO [sic, paid time off] and/or vacation
- (b) Sick Leave and/or Extended Sick Leave
- (c) Education Leave

8. Staffing Matrix. Please provide staffing matrices and the number of staff by classification for each shift and work station.

9. Employee Turnover. Please provide:

- (a) The total number of staff hired, terminated and remaining during 2014, 2015 and 2016; and
- (b) The employee turnover rates for 2014, 2015, and 2016.

10. Health and Safety Information. Please provide:

- (a) A copy of the OSHA 200/300 logs and unedited Sharps Injury Log for each of the past three years; and
- (b) The current Blood Born Pathogen Control Plan and Injury and Illness Prevention Plan.

11. Registry/Temporary Personnel. Please provide:

- (a) The number of Registry personnel utilized during 2014, 2015, and 2016; and
- (b) Expenditures on Registry/Temporary and other supplemental personnel during 2014, 2015 and 2016 by classification.

(Jt. Exh. 12.)

2. Respondent's answer to the information request and the Union's continued efforts

Candella testified that he received the information request but put it into a folder until he received an unfair labor practice charge about it: Because Respondent intended not to bargain, he did not find the information request to be a pressing matter. (Tr. 1567-1678.) Candella's representation of Respondent's position was contradicted by Respondent's communications with the

Union. Nonetheless, by February 10, Respondent was supplying some of the information.

On January 17, 2017, Interim Respondent CEO Larry Coomes emailed to all employees a memorandum about the bargaining status. It announced Respondent's decision to appeal the Regional Director's decision regarding the representation case. Simultaneously, he committed to go forward with "good faith bargaining" during the appeal period and anticipated the Union would request to begin negotiations. (CP Exh. 1; stipulation at Tr. 1144.)

On January 30, Martin contacted HR Manager Schelling about the information request. Schelling stated the information request had been sent to the "labor department." Martin again emailed Schelling on February 6 for the information.

By letter dated February 10, 2017, HR Director Schelling stated, "On behalf of [Respondent], this responds to your January 10, 2017 letter requesting information in preparation for the upcoming negotiations for an initial collective bargaining agreement covering employees represented by the [Union]. The amount of information requested was quite voluminous. I have enclosed the responsive documents and information we have gathered to date. [Respondent] is gathering additional responsive information and will supplement this response." A number of items, however, were considered objectionable. Schelling stated, "[W]e are prepared to bargain in good faith with the NUWH over the scope and/or relevance of such request, and will reconsider our objections if provided with an explanation establishing the relevance of the request and/or the reason for this seemingly overbroad, unduly burdensome and/or oppressive scope." (Jt. Exh. 22.) Respondent provided: the job descriptions (Item 2); a summary plan description for its 403(b) plan (Item 5); the name, address and telephone number of the workers' compensation carrier (Item 13); and no prior bargaining agreements exists for these employees (Item 15). Respondent advised it was gathering information and would provide the OSHA 200/300 logs and unedited sharps injury logs for the previous 3 years and the blood-borne pathogen control plan and injury and illness prevention plan (Item 11).

For information request Item 1, Respondent partially provided the information. Respondent disclosed the first and last name, title, department, shift and typical number of hours worked per pay period. The remaining information for Item 1 would be supplemented as Respondent was gathering information, except for the health insurance coverage. Schelling contended that Respondent could not provide the specific health insurance coverage for the individuals due to privacy concerns under HIPAA but offered "to discuss other alternatives to reach an accommodation that provides you the information you need while allowing us to comply with our HIPAA obligations." (Jt. Exh. 22.)

For a number of the Items requested, Respondent stated the requests were overly broad and unduly burdensome; yet Respondent agreed to provide information for year 2016 only, but

not years 2015 and 2014 as requested. These requests were for: annual costs of benefits to employer (Item 6); bargaining-unit work hours and payroll (Item 7); bargaining unit non-work hours (e.g., PTO or vacation, sick leave, education leave) (Item 8); and employee turnover—responsive information provided only for 2016 (Item 10). For Item 3, personnel handbooks and regulations, Schelling wrote that she assumed the Union was referring to the HR policies and would provide those.

On February 16, 2017, Martin emailed Schelling, with a copy to Candella and Bibby, regarding information not yet received. Martin generally stated the information not received was "presumptively relevant" for bargaining. He also clarified that the information related only to the bargaining unit. He listed all items not received, including for all years requested and the information Schelling's email said was in process of being gathered. Regarding health insurance, still was missing each employee's level of coverage, and still was missing the health plan and summary plan description for each plan available to the bargaining unit members, monthly premiums and contributions and the number of employees enrolled in each plan and at each coverage level. (Jt. Exh. 26.) On February 27, Martin called Schelling about the information request and Schelling said she was "not in the loop" regarding collection of information and Candella was the person collecting the information. Martin then emailed Candella, reminding him that it had been over a month and a half since he made the request and could not begin the bargaining process until the information was received. Candella replied that he had more information for him and was working on the request. (Jt. Exh. 27.) Nothing was said about the pending Board review. On March 1, Respondent provided more of the information identified in the January 10 request. Still, many items had not been provided to the Union.

*B. After the Board Denies Respondent's Request for Review of the Representation Case, Respondent Refuses to Bargain Unless the Union Agrees to Certain Conditions*

On about February 28, 2017, Candella learned that the Board rejected Respondent's request for review of the representation case. On March 1, 2017, Martin contacted Candella and stated he would send Candella proposed bargaining dates to negotiate a collective-bargaining agreement. Although he was aware of the Board's decision of the previous day, Candella just said "okay." (Tr. 1532.) On the same day, Martin emailed Candella the possibility of two dates for an initial bargaining session.<sup>5</sup> (Jt. Exh. 32.) Candella provided some of the information regarding the bargaining unit on March 1, but never mentioned what Respondent intended to do about the Board's decision on Respondent's request for review.

On March 7, 2017, Martin emailed John Bibby, Respondent's HR vice president for the Northern California region, and informed him that "it appears as though Queen of the Valley management is dragging its feet in commencing the negotiating process with its employees represented by [Union]." Martin cited

<sup>5</sup> Respondent contends that this statement shows the Union knew Respondent was not bargaining before this date. However, the context of the correspondence between Martin, Candella, and Schelling shows Martin was dealing only with the bargaining of an overall collective-bargaining agreement and not the day-to-day issues with which Poulson dealt.

This conclusion is further supported by Respondent's March 16, 2017 to Martin, which Respondent stated was "in response to your request for information and request to begin bargaining an initial collective bargaining agreement . . ." (Jt. Exh. 34.)

that about 2 months before, on January 10, he made an information request to prepare for negotiations and gave the history of the information request. He noted Candella sent a scant amount of information the previous week. Martin also cited that he made a proposal for dates of negotiation to Candella but had no response. Vice President Bibby, by email the same day, informed Martin: "I will reach out to the labor team we will get you a response on the dates, along with the information." (Jt. Exh. 33.)

The response to Martin's March 7 email came in the form of a letter, dated March 16, 2017, from Michael Garrison, senior labor counsel to Respondent's parent company. Garrison said he was "suggest[ing] a path forward that allow the Medical Center to continue its appeal while avoiding any unnecessary delay." (Jt. Exh. 34.) Garrison again cited Respondent's beliefs about the unfairness of the mail ballot election and its position to continue to appeal the matter. Garrison proposed the following:

- [T]he parties stipulate to a new in-person election to be held at the Medical Center in 30 days. This will ensure that eligible voters' voices are heard and that all votes are counted;
- If the Union is unwilling to do this, to fulfill its promise to continue the appeal the Medical Center will have no choice procedurally but to engage in a "technical refusal to bargain." Doing so will allow the Board to issue a final appealable order that can be reviewed by the courts; and
- To avoid undue delay during the appeal, we are willing to discuss the terms of a collective bargaining agreement with the mutual understanding that it will only take effect if and when all of the Medical Center's appeals in court are denied. If the Medical Center's appeals are granted, the tentative agreement will not take effect and the parties will follow the court's direction.

According, if the Union is unwilling to stipulate to a new in-person election, we propose that the parties agree to the following:

- The Medical Center will formally notify the Union that it believes the unit certification was faulty and, therefore, the Medical Center will refuse to bargain with the Union so that it can pursue its review of the certification in the courts. The Union will file an unfair labor practice charge alleging the Medical Center has refused to bargain, which the Medical Center will not deny. The Medical Center's sole defense will be that the underlying certification was faulty and invalid. The parties will do everything reasonably possible to expedite the processing of the case and the issuance of a final decision by the Board to ensure the court process is not delayed;
- Notwithstanding the technical refusal to bargain, the Medical Center and the Union will sit down and discuss the terms of a tentative collective bargaining agreement that will not take effect unless and until all of the Medical Center's appeals in the courts have been exhausted in a manner unfavorable to the Medical Center. If the appeals

are resolved in the Medical Center's favor, the tentative agreement will have no force and effect and

- The Union agrees that it will not claim the negotiations described in the previous bullet point constitute recognition of the Union or create any binding legal obligation to bargain with the Union.

(Jt. Exh. 34.)

This letter was the first time that Respondent put conditions upon any bargaining with the Union and set forth a plan to proceed with a technical refusal to bargain.

On March 21, 2017, HR Manager Schelling encapsulated Garrison's proposals in a memo to Respondent's employees and volunteers. Schelling stated: "Not only are we committed to getting a final resolution to our appeal as quickly as possible, we are committed to proceeding with discussions regarding terms of a collective bargaining so we can keep the negotiation process moving forward as well in the event our appeal is denied by the courts." (Jt. Exh. 35.)

On March 24, 2017, Schelling then emailed Poulson about a number of inquiries made by Poulson and the union representatives about issues for the "service and technical employees," but, finding no response from the Union regarding its March 16 proposal, Respondent declined all Union requests to meet. Schelling informed Poulson, "[W]e strongly believe the mail ballot election caused employees' free choice not to be honored, which resulted in a flawed Board certification. We are committed to having that decision reviewed by the courts. Because the certification is flawed, we cannot recognize the NUWH as the exclusive representative of the employees until this legal issue is resolved." (Jt. Exh. 37.) In addition, Schelling directed Poulson and the representatives to contact her rather than any other managers. (Jt. Exh. 37.)<sup>6</sup>

Respondent has not met with the Union regarding wages, hours and terms and conditions of employment since it issued the March 16 letter. (Stip. at Tr. 936–937.) Poulson still meets with employees in the cafeteria. However, she has faced a few instances in Respondent's hallways when Respondent's managers told Poulson she should not talk to employees or that she should not be present. Poulson cited one instance when she was in front of bathrooms on the first floor of the hospital, near the kitchen; a manager asked to see her badge, which she did not have, and the manager told her to leave. (Tr. 946.) Poulson also testified that she was not permitted to request meeting rooms at Respondent's facility for this bargaining unit.

The Union and the bargaining unit employees conducted public appearances on radio and a vigil and attempted to reach CEO Coomes about Respondent's refusal to bargain any further. The Union frequently used language in communications to employees and the public that Respondent should recognize and bargain with the Union. As of the last day of hearing, Respondent continued to refuse to negotiate with the Union.

<sup>6</sup> Respondent never offered any new information about the representation case. I sustained objections on questions that would lead to a

rehash of the previous representation case, other than the bare facts serving as foundation.

*C. On March 21, 2017, the Union Makes Three More Information Requests*

The Union issued three more information requests. The Union never received the information as requested. Respondent's answer contended it had no obligation to do so because it never recognized the Union.

1. Information request to the pharmacy

On March 21, 2017, Poulson emailed Pharmacy Director Neill Barker and HR Director Schelling with a cease-and-desist demand and a request to meet and bargain over intended changes to the pharmacy technician duties. The email also included a request for the following information:

1. How management will ensure that all employees are properly trained to perform these new duties;
2. How employees are supposed to manage these additional duties given their already overwhelming workload;
3. If it is [Respondent]'s intention to rotate all [technicians];
4. If the plan is to rotate one [technician] per shift to cover [medicine] reconciliation duties, or assign an additional employee per shift; and
5. If the rotation will happen by seniority.

Poulson included an explanation about the duties at issue, noting that rotation of medication reconciliation rotation changes constituted a change to employees' working conditions. (GC Exh. 17.) On April 3, Poulson again asked to meet, offering April 5 as a specific date. She sent this message to Schelling and Barker. On April 5, Barker, despite the inclusion of Schelling on Poulson's email, replied by email, "At this institution HR is the only entity that can bargain with a union." (GC Exh. 17.) By this time, Respondent had made clear that it was no longer recognizing the Union.

2. Information request to EVS

On March 21, 2017, the Union, by Poulson, emailed HR Director Schelling and EVS Director Herring with a request for the following information:

1. The introductory period policy for Respondent;
2. The probationary period policy for Respondent; and
3. Any policies or procedures regarding discipline or termination for Respondent.

Poulson explained why she wanted the information: ". . . inquiring on behalf of a recently terminated employee . . . I am just trying to make sure that I understand the current policies in place so I can offer her the correct information/advice." (GC Exh. 17.) On April 3, Poulson emailed the two managers about receiving a response to her information request, but never received any response. (GC Exh. 17.)

3. Information requests for patient access services

The Union emailed Patient Access Services Manager Taylor

and HR Director Schelling a request for the following information:

1. Any policies Respondent has on file which deal with productivity;
2. Any documents or guidelines explaining how productivity is calculated.

Taylor responded that she would check with HR about the protocol for providing the requested information. (GC Exh. 17.) On April 3, Poulson emailed Taylor, with HR Director Schilling copied. Again, Poulson asked Taylor whether the information would be provided. This time, Taylor directed her to human resources. (GC Exh. 17.) The Union never received any of the requested information and apparently never met over the issue.

*D. General Counsel Obtains Injunctive Relief in Federal District Court*

General Counsel alleged additional violations in different areas of the hospital, some of which occurred before Respondent's determination to seek a test of certification, and others that continued afterwards. These allegations involve further information requests, unilateral changes, threats and discrimination based upon protected concerted activities and/or union activities, and one *Weingarten* situation.

A number of these allegations were included when General Counsel petitioned federal district court for an injunction pursuant to Section 10(j) of the Act. The court granted the injunction on November 30, 2017. *Coffman v. Queen of the Valley Medical Center*, 17-cv-05575-YGR (N.D. Cal. 2017). Respondent moved for a stay pending appeal, which the district court denied on December 5, 2017. Chilling effects of Respondent's actions were litigated as part of the action for injunctive relief. *Coffman v. Queen of the Valley Medical Center*, Case 17-cv-05575-YGR (N.D. Cal. November 30, 2017). In *Coffman v. Queen of the Valley Medical Center*, Case 17-cv-05575-YGR, Order Denying Motion for Stay of Injunction Pending Appeal (December 5, 2017), the district court judge again found that General Counsel submitted evidence of irreparable harm regarding loss of union support and unilateral changes.<sup>7</sup>

V. CHANGES IN SCHEDULES AND DUTIES IN THE EVS DEPARTMENT

The complaint alleges schedule and duty changes for two employees in the Environmental Services Departments (EVS): Miguel Arroyo and Renee Frogge, who initially worked in linen distribution on the second shift. The employees in EVS normally work on potentially three shifts: 8 a.m. – 4:30 p.m. (first shift); 4 p.m. - 12:30 p.m. (second shift); and 11 p.m. - 7:30 a.m. (third shift).

On June 6, 2016 Herring began working for Respondent as director of environmental services and grounds. In December 2016 he also became director of facilities. His initial duties included directing and supervising employees who disinfect and

<sup>7</sup> In the Order Denying the Stay, Judge Yvonne Gonzalez Rogers stated:

[Respondent]'s argument that it was not permitted to present evidence relative to the irreparable harm factor is not supported by the record. Petitioner submitted evidence of irreparable harm regarding loss of union support and unilateral changes, in the moving papers. It is this

evidence upon which the Court relied in reaching its decision. In response to the moving papers, [Respondent] characterized the evidence as insubstantial and disingenuous, but did not offer its own evidence on this factor. Although [Respondent] objected to the petitioner's rebuttal evidence on this factor, which objection the Court overruled, [Respondent] did not seek to present its own evidence at or before the hearing.

sanitize patient rooms, the remainder of the hospital, and several offsite buildings. He directly supervised two supervisors, Harold Young (evening supervisor) and Sheri Roe (day supervisor), and indirectly supervised about 40 housekeepers.<sup>8</sup> Roe directly supervises approximately 19 employees working the day shift. Upon his increased responsibilities for facilities, he also acquired responsibility for the maintenance and construction projects in the facility and one more direct report, Eric Roe, the manager of facilities.

When Herring came on board, he and Regional Director of Environmental Services Gordon Douglas discussed improving workflows and day-to-day assignments and schedules. Herring testified that one issue would be whether an employee could be utilized in a more localized area rather than half of the hospital. (Tr. 451.) Workflow examines logistics for an area assignment to be conducive for patient care and safety. They discussed workflows in the emergency and surgery departments and linen distribution. Herring testified that Douglas specified that he wanted to examine consolidating linen distribution from two shifts to one. In June and July 2016, Herring, with Supervisors Roe and Young, “walked” all hourly housekeepers’ schedules to determine how much time was spent on tasks in different areas and where time was not spent efficiently.<sup>9</sup>

*A. Respondent Changes Arroyo’s Shift Schedule so that it No Longer Coincide with His Wife’s*

Miguel Arroyo<sup>10</sup> and his wife, Yolanda, worked in EVS on the evening shift. Supervisor Sherri Roe knew Miguel Arroyo was married to his wife, who worked the same shift, for at least 10 years. Arroyo worked as a lead housekeeper and cleaned a fixed area while working the evening shift. The Arroyos carpooled together to work. Arroyo’s union activities included wearing a lanyard at work, which also appeared in a Facebook picture.<sup>11</sup> EVS Director Herring testified he and Arroyo had one conversation regarding the Union, and that Arroyo was the one who brought up the topic. Herring found Arroyo to be a good worker and had no problems with his performance.

According to EVS Director Herring, Harold Young<sup>12</sup> told him that the two were married and the second shift possibly could have problems with scheduling if the two wanted to take vacation at the same time. Herring testified that he contacted the human resources department to clarify what were the rules about spouses working in the same department on the same shift. A day later, Herring testified that HR Manager Jill Gruetter advised him that Respondent had a long-standing policy, which she provided to him. In effect since 1977, the policy addressed “employment of related persons” with a purpose of “prevent[ing] problems of supervision, safety, security and morale . . .” (R.

Exh. 24.) The policy defines related persons as “husband, wife, child, step-child, parent, step-parent, grandparents, mother/father-in-law, aunt, uncle, sister, brother, sister/brother-in-law, niece, nephew and cousin.” (R. Exh. 24.) It then states:

- • • •
4. Applications for employment from close family relatives will be considered along with other qualified applications when vacancies occur.
  5. A relative of a current employee may be hired for a position in the same unit/department in which the employee is working, but not on the same shift.
  6. No employee will be allowed to transfer to a unit/department on the same shift to which a relative is currently assigned.
  7. In no case will an employee be placed in a unit/department in which a relative is a supervisor or manager, regardless of shift.
  8. If two employees in the same work unit and/or on the same shift marry, attempts will be made to comply with the intent of this policy by placing the employees on different shifts. Ample time is to be allowed so as not to adversely affect patient care.
  9. Regardless of assignment, no supervisor will complete a performance evaluation for a relative.

(R. Exh. 24.)

Respondent presented no evidence showing any previous policy enforcement, or that Arroyo supervised his wife, much less gave her any performance evaluations.

On November 7, 2017, EVS Director Herring determined that Miguel Arroyo’s shift assignment had to be changed. Herring, with Supervisor Young present, advised Arroyo that he would now be scheduled to cleaning a number of areas on the day shift. Arroyo allegedly told Herring that he was aware of the policy but wanted the evening shift because the couple could save money on transportation and he earned the evening differential. Herring testified that he told Arroyo he understood but “due to the changes that are happening, this is one of the many issues we have to address and fix.” The change went into effect on Monday, November 15, 2016. (R. Exh. 25.)<sup>13</sup> Herring admittedly never asked how long the couple was married or asked to verify documentation in Arroyo’s file about the relationship. He also did not ask HR what, if any, records existed to reflect how long the couple was married. (Tr. 1969.)

On November 14, 2016, Poulson issued a cease and desist letter to EVS Director Herring and Human Resources Vice President Bibby for Arroyo’s and Frogge’s working schedules.

<sup>8</sup> The department also had a groundskeeper until December 2016.

<sup>9</sup> Herring testified that three housekeepers were assigned, full-time, to the Emergency Department. Based upon his study of the area, the housekeepers’ schedules, which added another housekeeper to the third shift, were changed in July 2016. On January 24, 2017, Poulson sent a cease-and-desist letter to Respondent about the changes in the housekeepers’ schedules in the ED. (R. Exh. 52.) For the Operating Room, the schedules were changed but did not go into effect until November 2016.

<sup>10</sup> Arroyo was not called to testify.

<sup>11</sup> General Counsel points out that Yolanda Arroyo did not appear in any Facebook pictures. It is unknown whether she wore a lanyard.

<sup>12</sup> By the time of the hearing, Young was no longer working for Respondent. Respondent never indicated whether he was subpoenaed to appear.

<sup>13</sup> Herring testified that the notes in R. Exh. 25 were taken by Young and placed in Arroyo’s file. I admitted it as a business record but do not rely upon it. (Tr. 522.) It impliedly is written by Young but has no signature or identification that Young was the author.

Poulson characterized the changes as unilateral and abrupt and significant. (Jt. Exh. 9.) Herring and Bibby, in turn, forwarded the email to HR Director Schelling. Schelling wrote back that discussion was needed with the EVS director and then Respondent would be in touch. (Jt. Exhs. 9, 10.)

On December 9, 2016, Poulson contacted Schelling and asked whether Human Resources had investigated the changes and offered specific dates and times to “bargain over these changes.” (Jt. Exh. 10.) Poulson advised that should management not honor the cease and desist request the Union would file an unfair labor practice charge. (Jt. Exh. 10.) HR Director Schelling, by email dated December 14, offered either December 20 or 21. She told Poulson, “Let me know what works for you and I’ll get this set up with the manager and our labor team member.” (Jt. Exh. 10.) The meeting included changes for Frogge as well, and the parties agreed to meet on December 20. However, Poulson did not raise the change to Arroyo’s schedule at the January or February meetings with EVS about Frogge.

EVS Director Herring testified that he needed to enforce the policy in order to avoid understaffing on the same shift when both took vacation. However, years of vacation requests revealed that Miguel Arroyo and his wife never requested the same vacation dates, even at the time he learned the couple worked the same shift. He also admitted he could have moved Arroyo’s wife to a different shift instead of moving his second shift lead but did not consider it. (Tr. 1971.) Nor does the record demonstrate that Miguel Arroyo’s lead duties affected Yolanda, plus Young was the actual evening supervisor.

Herring testified that in December 2016, Arroyo requested a change in duties from trash to floor cleaning and Herring was able to accommodate Arroyo’s request, which involved a schedule change. Herring did not notify the Union of the change to Arroyo’s schedule. (Tr. 539–540.)

#### B. Changes to Renee Frogge’s Duties

##### 1. Frogge’s duties and the linen department in EVS

Renee Frogge worked in the environmental services department (EVS) from July 2007 until April 2017, when she resigned. For most of the relevant time, Frogge’s direct supervisor was Harold Young. Over the years she had different assignments, including linen delivery and cleaning different areas throughout the hospital. When Herring arrived in 2016, Frogge primarily made linen supply deliveries. Three housekeepers covered linen distribution: Frogge primarily worked a traditional evening shift; Maria Padilla, the traditional day shift; and, Frogge, Padilla, and Olga Gargeda covered the weekend linen shifts, which were 11 a.m. to 7:30 p.m. Saturday and Sunday. (Tr. 455–456.) Roe recalled that the hospital had two linen shifts for her entire 32-year tenure. (Tr. 1173.)

The linen supply job involved delivery of linen to the various clinical areas. The housekeepers took inventory of the linen in each area on a paper form. Upon returning to the department, they then entered the inventory data into the computer, which took 1-2 hours per shift. The first and second shift linen delivery

housekeepers also assisted with cleaning rooms post-discharge<sup>14</sup> and setting up meeting rooms.

In early September 2016, Herring added “turndown service” to Frogge’s second shift duties, which involved checking patient rooms and emptying the trash; Herring apparently told Frogge she did not have enough work on the second shift.

##### 2. Herring determines that the linen department could operate more efficiently

EVS Director Herring discussed departmental changes with Supervisor Roe, which Roe testified occurred shortly after Herring began in June 2016. Regarding the linen changes, Herring told Roe that, with only one person covering weekends, the departments should only need one person during the week. (Tr. 1153–1154.) In August 2016, Herring and Roe made rounds with Padilla on the day shift to check linen delivery and stock in the different departments. (Tr. 1155.) Herring and Roe then met with Supervisor Young about doing the same on the evening shift with Frogge. (Tr. 1157–1158.) At the end of August, after observing Frogge’s deliveries, Herring, Roe and Young again met about how to condense the linen deliveries to one person and how to change the schedule to accomplish the goal. The decision was to change the linen delivery shift time to 11 a.m. to 7:30 p.m. during the weekdays, the same as the weekend linen delivery.

Herring also discussed the linen systems with two vendors, Medline and Mission Linen. (Tr. 492.) Although he kept no notes of these conversations, Herring discovered that linen inventories could be kept per electronic tablet, which saved the linen housekeeper from entering the information into the computer each shift and thereby decreasing hours of duplicative work. Three tablets were ordered in August 2016. Roe did not know why the three tablets were needed for tracking the linen. (Tr. 1162.)

During late August 2016, the vendors met with some managers and linen housekeepers. After speaking with the housekeepers on linen supply duties, Herring, Young and Roe determined that the linen department on the weekends was operating effectively with only one person and the weekday shift could be limited to the same hours with one person working 11 a.m. to 7:30 p.m.

On September 2, 2016, the vendors again met with the EVS managers, a lead housekeeper, Maria Padilla and Frogge. During the meeting, the managers and vendors discussed changing to one linen housekeeper, changing the shift time, and how the changes would be implemented. (Tr. 493–494, 1164.) The training also introduced the electronic tablet.

Herring’s affidavit reflects that shortly after the meeting to implement changes, Frogge spoke to Young and Herring to request to stay on the second shift, 4 p.m. to 12:30 a.m. She was told she could not work those hours and perform linen services because of the consolidation, but instead could remain on the shift and perform float duties. According to his affidavit, Frogge chose not to go to the 11 a.m. to 7:30 p.m. linen shift. (Tr. 558–559.) Herring testified that, within a few days after the September 2 meeting, he asked Padilla, who worked at the facility for 20 years

<sup>14</sup> The cleaning might include utilizing a specialized robot to clean room contaminated with bacterium *Clostridium difficile* (*C. diff.*). Cleaning these rooms also involves changing cubical curtains.

and had seniority, whether she wanted to take the new 11 a.m. linen shift. Padilla accepted the change in schedule.<sup>15</sup>

About the second week of September, Herring, with Young present, advised Frogge that her 4 p.m. – 12:30 a.m. shift would remain unchanged but she would not be performing linen duties; instead she would be working in the float pool, to cover assignments on the second shift when another assigned housekeeper was off on a day.<sup>16</sup> Herring reported Frogge said okay and the changes were to take place in mid-November 2016. The implementation, however, was delayed because Herring ordered a special linen cart to accommodate the change in volume of linen to be delivered at one time.<sup>17</sup> In the meantime, in early November 2016, Respondent received the linen carts it needed to proceed with the schedule change for linen delivery. (Tr. 1165.)

The new linen cart arrived at the facility shortly before Respondent removed Frogge from the linen position. (Tr. 657.) When Frogge used the cart, she found it more efficient and less stressful for her back. (Tr. 657.) General Counsel points out that the weekend shift was using the old cart for the 11 a.m. to 7 p.m. shift and Respondent did not need to wait until the new cart arrived.

Frogge could not recall the exact dates when she was removed from the linen position and placed in a full-time float position; she could not say when this occurred in relationship to the election. She testified that, after 5 weeks of covering vacations by performing float duties, she asked Supervisor Young when she would be returned to her linen position. Young told her the evening linen position was eliminated and she instead would work as a full-time floater. (Tr. 622–623, 628.) The full-time float position involved more traditional housekeeping duties of cleaning beds, floors and lights and handling biohazardous waste and other trash.

### 3. Frogge's union activities

Frogge was active during the unionization campaign, including wearing union paraphernalia (buttons and lanyard) on her scrubs and having her picture posted on the Union's Facebook page, showing her support of unionization. Poulson's testimony places the public campaign evident in early October 2016. Frogge wore a union button on her scrubs at the beginning of the unionization campaign until the election, during which time she spoke with Supervisor Young every day. Frogge also discussed unionization with other employees when she passed out flyers in the cafeteria and hallways during her lunchbreak. Frogge testified that, while she engaged in flyer distribution and discussions in the cafeteria, Jill Gruetter and HR Director Schelling came in the cafeteria. She participated in delivering petitions to HR Director Schelling and others in human resources. (Tr. 612.) Four other second shift EVS employees also wore union paraphernalia. Herring could not recall when he learned the employees were

circulating a petition or when the petition was filed. (Tr. 507–508.)

EVS Director Herring specifically recalled, in response to a leading question and its followup, that another float employee, affected by the subsequent schedule changes, volunteered her views on the Union to him. That employee, Olga Gregada, worked as the linen float and also on the day shift for floor care. Herring testified that Gregada walked up to him one day and said she did not need another voice and she only needed support from administration and the hospital. (Tr. 1954–1955, 1967–1968.)

### 4. The Union asks to bargain about changes to Frogge's schedule and makes an information request

On November 14, 2016 (the day before the votes were counted), Poulson, in an email to EVS Director Herring, requested that Respondent cease and desist from making the unilateral changes in scheduling and shift changes to the EVS department, including the changes to the linen department. (Jt. Exh. 9.) In mid-December 2016, Poulson contacted HR Director Schelling about meeting with her regarding Frogge's assignments. Candella also wanted involvement in the process and subsequently was included.

On December 15, 2016, Poulson emailed a request for December 20 meeting and further requested that, before the meeting, Respondent provide information regarding Frogge's reassignment:

- How long has it been the case that there have been two designated linen positions at Queen of the Valley?
- On what date was the linen position Renee Frogge previously held first posted, and on what date did Renee assume that position?
- Job descriptions for the linen positions, including the job description for the linen position previously held by Renee, as well as the new job description for the new linen position currently held by Maria Correa.
- Any evidence that workload in linen has decreased drastically in the past 2-3 months.
- Any hospital policies which cover linen handling and laundry, including any staff trainings.

(Jt. Exh. 11.)

Poulson testified that the information was needed to bargain about the changes to Frogge's job. On January 12, 2017, Poulson, by email to Schelling and Candella, re-requested the information as no information had been provided. (GC Exh. 6.) The information was not provided before the parties conducted a meeting about Frogge's schedule on January 24, 2017. (Tr. 69.)

### 5. Meetings on January 24, 2017 and February 13, 2017 regarding Frogge's assignments

On January 24, 2017, Poulson met with Labor/Employee Relations Director Candella,<sup>18</sup> HR Director Schelling, HR Manager

<sup>15</sup> The lead housekeeper, who sometimes covered the linen spot, would remain on days except when she performed linen duties to cover Padilla.

<sup>16</sup> Herring later testified that he was unsure that he told her what her duties would be other than the duties would include not linen.

<sup>17</sup> Roe testified that, after the September 2 meeting, she learned that the carts would not be available in September.

<sup>18</sup> Candella testified that these meetings were not bargaining because Respondent did not recognize the Union as the exclusive bargaining representative and he wanted to "make sure that the employees who had

Gruetter, and EVS Director Herring regarding schedule and duty changes for Renee Frogge. Poulson began the meeting by presenting Candella with an unfair labor practice charge regarding discrimination against employees for union activity and unilateral changes in EVS for, among other things, scheduling. She explained that the charge was filed but she would prefer to resolve the issues there. (Tr. 346.) Candella provided Poulson with a general job description for the EVS department and stated no other information existed on file. (Tr. 72.) Poulson testified that she stated that the change to Frogge's working conditions were a unilateral change and asked for justification for eliminating a linen position. She questioned whether the linen volume or patient volume had changed. EVS Director Herring stated that the change was necessary to improve patient room turnover times. Frogge spent a few minutes explaining her job duties and how linen delivery did not change how quickly patient rooms could be cleaned post-discharge from the rooms. According to Poulson, Candella indicated that Frogge's working conditions changed and asked for a remedy. Poulson stated the remedy would be to return Frogge to her linen position. Candella, however, testified that Frogge was more concerned about having a set schedule. (Tr. 1488.) Poulson offered to meet again if Respondent would give some data to support its decision to eliminate the position. Candella stated that Respondent's representatives would discuss among themselves and get back in touch with Poulson at a later date. Poulson testified that Respondent stated it would "get back to us very soon." (Tr. 354.) Neither party made any written proposal.<sup>19</sup>

On about February 13, the parties met again regarding Frogge. Poulson and Frogge were present for the Union. Respondent was represented by HR Director Schelling, Labor/Employee Relations Director Candella and Facilities Director Herring. Poulson reminded Respondent's representatives that it did not cease and desist regarding changes to Frogge's working conditions and asked whether Respondent had further information about the justification for the change. Candella stated Respondent had no further information about its justification and that Respondent would not re-institute Frogge to her linen assignment. Poulson and Frogge caucused and came back with a verbal proposal to have a new permanent, fixed assignment for Frogge. Herring indicated that it might be possible. He and Candella agreed to explore the idea. In addition to Frogge's work condition changes, the parties also discussed employees missing breaks in EVS. At the end of the meeting, Candella stated he would respond regarding the Union's proposal.

On February 17, Candella emailed Poulson with a fixed assignment offer for Frogge to work in the MRI offices, stating

requested that she be there heard it from us again." He also opined that the Union issued "political hit pieces." (Tr. 1481.) These opinions hold no weight.

<sup>19</sup> Respondent carefully phrased Candella's questions to conclude the meetings were only to resolve the unfair labor practice charges; thus, Candella testified that the meeting was scheduled to resolve the unfair labor practice and present the situation again to the employees. At this point, however, his testimony also demonstrated that the meeting was the first time he had seen the unfair labor practice charge. (Tr. 1485-1487.) He was asked leading questions about further meetings to resolve the unfair labor practice charges. Candella also testified that the meeting

"We would like to get this, and the ULP, resolved asap so that we can focus on the other issues we have with NUHW." (R. Exh. 16 at QVMC 3079.) On February 22, Poulson emailed back to Candella and Schelling that Frogge was not interested in the proposed assignment because another employee would be displaced and Respondent had not presented data or evidence to justify the elimination of Frogge's position. Poulson countered with a different area that could be covered, and also raised that employees could then take their 15-minute breaks, which was also discussed at the prior meeting. *Id.*

On February 23, Candella, by email, rejected the Union's counterproposal. Candella stated that Respondent "[could not] make NUHW's counter proposal regarding the fixed duties assignment work." Candella then explained the reasons why the fixed duties assignment did not work. He instead offered a "pre-existing area assignment and continue to see what can be done." Candella asked for a fast response as the Board had a timeline for Respondent's answer regarding the unfair labor practice charge. (R. Exh. 16.) Poulson emailed back that the Union was not willing to withdraw the unfair labor practice charge and did not want to require a less-senior employee to be "bumped" from a fixed assignment. Poulson further noted, "Management has failed to provide any explanation for why Renee's linen hours/work went away." (R. Exh. 16 at QVMC 3088.)

According to Herring, around March 2017,<sup>20</sup> Frogge allegedly asked Herring and Young to switch her to permanent schedule to clean the first, second, and third floor of the MRI building. They agreed and she remained in that schedule until she resigned her employment with Respondent. (Tr. 537.) Herring did not notify the Union of the change to Frogge's schedule. (Tr. 538.) Frogge denied that she requested a transfer to the MRI building and took the assignment only because of an attempted settlement for her removal from linen; she also testified that she never had a direct conversation with Herring whether she would accept or wanted to perform duties in the MRI building. (Tr. 635-636.)

Frogge eventually resigned her position with Respondent and left to work at a facility where Young was working.

### *C. Evidence Regarding Possible Animus in the EVS Department*

#### 1. Huddle discussions about the Union

EVS Director Herring testified that, during the month before the election, he discussed the Union with the employees in huddles several times. Huddles are group meetings with employees, usually about topics for interest and training for employees and lasting for 10 to 35 minutes; they take the place of departmental meetings. Some of the huddles have invited speakers for various

was not a negotiation because he took no notes and he regularly takes notes in negotiations. However, he admitted he was meeting in the presence of the union representative. I do not credit his conclusion that the meeting, or others, could not have been negotiation because he did not take notes.

<sup>20</sup> Due to scheduling issues, Herring was called twice to testify in Respondent's case in chief. During his first appearance, Herring required leading questions to be able to testify to the date. On his second appearance, he could only identify that it was in spring 2017, and that was to a leading question as well.

hospital departments; others talk about daily census and any issues a supervisor finds important.

Herring stated employees brought up the topic of the Union. Herring did not specifically answer whether he had a script, but admitted he had documentation. He could not recall any specific topic included in the documentation, nor could he call a specific conversation. (Tr. 1949–1950.) He then testified that he did not tell employees that if the Union was elected, he could not talk to them anymore. (Tr. 1952.)

### 2. Van Winden's testimony

Ardy Van Winden, a longtime grounds foreman, resigned from employment in December 2016. He stated he was against the Union and told his supervisor so.

While employed, he attended daily morning meetings with his supervisor, EVS Director Herring, and day EVS Supervisor Sheri Roe. In November 2016, after the petition was filed, Van Winden testified that Herring said he thought the Union was overreaching and he would rather not have a third party involved with employee discussions. Van Winden testified that he agreed with Herring. On two to three occasions, around the first week of November, Herring identified two employees, Miguel Arroyo and Renee Frogge, as union supporters. According to Van Winden, Herring was disappointed that Arroyo was in the union's Facebook posting and thought Arroyo would have opposed the union, but then realized he was pronion. In a later meeting, Van Winden testified that Herring directed Roe to examine Arroyo's schedule and see if there was any way to change it, because Herring wanted to make sure that Arroyo knew he was hurt by supporting the union. Herring further stated he would check with Jill Gruetter in HR about changing the schedule. During the second week of November, Herring allegedly stated that he discovered that Arroyo and his wife were both working the same shift and wanted to switch Arroyo's shift so that Arroyo would have difficulty. Roe said that it would be difficult because the family only had one vehicle and had children in day care.

Regarding Frogge, Herring allegedly stated that Frogge was pronion and very vocal about it. Herring not only wanted to change her shift but change her duties to a float schedule. Although Van Winden was familiar with some other names of other EVS employees identified as union supporters in the hearing, he testified that he never heard EVS Director Herring threaten to take action against them or heard him identify them as union supporters. Roe never made any comments.

Respondent discredited Van Winden's testimony on a number of issues, including the circumstances surrounding his resignation. Van Winden also hit the "like" button on the Union's Facebook page on certain articles after he was no longer employed.

### 3. Frogge's testimony

In December 2016, during the period of time after Poulson requested to meet and bargain over Frogge's assignment, Frogge was called into EVS Director Herring's office. Herring, Harold Young and Sheri Roe met with Frogge around 4:15 p.m. Herring said he would not allow anyone to harass his people. (Tr. 634.) Frogge asked if this conversation was going to lead to discipline and implied she needed union representation. Frogge said Herring became angrier and asked twice, "Is this how you're interpreting this?" He then said, "Do you see me writing down

anything? Union or no union, I'm going to run this department as I see fit." Herring then went back to his computer and told her to have a nice day. Frogge returned to her work assignment. (Tr. 634.) Herring denied ever making threats and Roe testified in line with Herring.

### VI. RESPONDENT NOTIFIES AND MEETS WITH THE UNION OVER LAYS OFF AN INTERPRETER AND A POINT OF CARE COORDINATOR

On February 9 and 10, 2017, Director of Employee Advocacy and Labor Relations Candella notified Poulson that Respondent was laying off two bargaining unit employees, an interpreter and a point of care coordinator. He offered to discuss the matter on February 13, 2017, and provided a copy of the policy. Again, Candella said nothing of the representation case in relationship to the notification or offer to discuss. (Jt. Exhs. 17, 18.)

Candella admitted that the Union was not notified about the decision to lay off these employees before it made the decision. (Tr. 1492.) The notification included that the point of care coordinator was to be notified on February 10 that her position was being eliminated. The interpreter's job would be eliminated on February 15. The Union did not meet with Respondent, or request to bargain, between February 9 and the point of care coordinator's layoff on February 10. (Tr. 424.) These employees were the only employees in their respective job classifications.

On February 13, the parties discussed the interpreter's layoff. (Tr. 424–425.) Before the meeting, Poulson sent Candella a list of questions about the layoffs, such as what factors necessitated the layoff, and would the affected individual receive severance payments. (Jt. Exh. 19.) At the meeting, Candella provided Poulson with the layoff policy and otherwise verbally answered Poulson's questions. (Tr. 425.) The parties did not reach any agreement after 30–45 minutes of discussion. (Tr. 426.) Poulson sent to Candella an email labeled "action items we agreed to." The email addressed some issues in the February 13 meeting, but did not include anything about the layoffs. Poulson did not pursue the matter further.

### VII. RESPONDENT NOTIFIES AND MEETS WITH THE UNION REGARDING THE EFFECTS OF THE KITCHEN CONSTRUCTION PROJECT

Before the Union filed its petition and was certified, Respondent had plans for construction in certain areas, one of which involved kitchen construction. The State of California ordered kitchen construction to be completed or Respondent could face fines or risk licensing problems. The renovation plans not only affected the 40 to 50 employees working in the kitchen and cafeteria, but also employees who used the cafeteria.

In early 2016, Respondent submitted tentative renovation plans to the State, which were approved in early summer 2016. (Tr. 1850–1851.) After State approval of the plans, Respondent assembled a task force discuss the plans for changes to staffing and scheduling in the dietary department. The lengthy renovation involved the food service employees' locker rooms, and temporarily closing the kitchen and cafeteria.

On January 16, 2017, HR Director Schelling emailed to Director of Employee Advocacy and Labor Relations Candella and other managers a plan for the employees' shifts and assignments, with the caveat, "This is our 'best guess at this point in time.

\*Once this actually gets implemented, there will be some learning and tweaking that need to be done . . .” (R. Exh. 63.) On the same date, Candella notified Poulson of the upcoming project for food services. Candella advised that the construction and closure would temporarily alter work schedules and work flows. (Jt. Exh. 13.)<sup>21</sup> The locker room was closed on January 16. (Tr. 1497–1498.)

On January 19, after consulting with bargaining team members for the dietary department, Poulson requested to bargain the effects involving the renovation, particularly the temporary closure of the kitchen and demanded that Respondent cease and desist. (Jt. Exhs. 14(a) and (b)). Poulson pointed out that the planned closure could have far-reaching implications for the 30 bargaining unit employees in that department and other represented employees in the facility, such as how employees would obtain food for purchase. The cease and desist letter also included the Union’s request for information: The specific plans to change the schedules of the kitchen and cafeteria employees affected by the closure; the anticipated lengths of the closures; and, plans for feeding the patients and the employees while the kitchen was closed. Poulson said she did not have sufficient information about the plans for renovation. Poulson provided dates for meeting based upon her request to bargain. (Jt. Exhs. 14(a) and (b).)

The parties met regarding the kitchen construction project on three dates: January 24, February 13, and February 17, 2017.<sup>22</sup> The parties also corresponded between the meetings. None of the correspondence reflected any reluctance on Respondent’s part to enter into negotiations, much less due to the representation case pending before the Board.

For the January 24, 2017 meeting, present for Respondent were Labor and Employee Relations Director Candella, HR Manager Grutter, HR Partner Kathy Hutchinson; Director of HR Schelling, Director of Operations Taylor Rudd and Director of Construction Bruce Grey. The Union was represented by Poulson and two cooks who also serve on the Union’s bargaining team. Respondent presented the Union with a Statement of Assumptions for the changes in the kitchen. Poulson testified that during the meetings, management discussed job flows and finalizing plans. (Tr. 370.) Poulson and the cooks examined Respondent’s temporary job flows but did not make a proposal at that time. Poulson’s understanding was that the job flows might change over time. (Tr. 422; R. Exh 20.) Regarding food availability for employees, Respondent stated its plans, which included hiring food trucks and adding more vending machines and microwaves in the facility. (Tr. 371.) Poulson found the plans for providing employees food satisfactory. (Tr. 371.) According to

<sup>21</sup> Candella denied that the letter to Poulson was an invitation to bargain or constituted recognition; he instead maintained that the letter was to promote transparency and avoid any picketing that might disrupt the construction project. Respondent, further relying upon Candella’s testimony, also contends that Respondent’s decision to have discussions with the Union was to address employee concerns and “ward off potential ULP charges. The record contains no evidence of threats of picketing or possible disruption of the construction project. The events that followed, with the concurrent documentary evidence, do not support Candella’s testimony that Respondent did not engage in effects bargaining regarding the kitchen construction.

Poulson, Grutter stated she would send Poulson the job descriptions plus a memorandum of understanding email. Poulson also testified that Respondent agreed to return kitchen employees to their previously assigned posts after the temporary closure and would meet and bargain over the issue as well. Candella testified that the words “meet and bargain” were never used, but that Poulson “might have” said she would have further information requests. Candella testified that he intended to give information to employees, but upon further questioning, stated he also provided information to Poulson. (Tr. 1507.) Poulson sent an email to confirm the matter. Candella agreed to provide the Union “something in writing.” (Tr. 1514.)<sup>23</sup>

On January 27, 2017, Poulson emailed Candella, Schelling and VP Bibby with thanks for the January 24 meeting and agreeing to continue meet and bargain over the effects of the kitchen construction project. She provided additional dates to continue the process. (Jt. Exh. 16.) On February 1, Candella advised he was trying to set up a meeting for the following week. (Jt. Exh. 16.) Notably, the email does not state that the bargaining was conditioned upon Respondent’s pursuit of its exceptions to the Board in representation case, or even raise the representation case at all.

On February 1, 2017 Poulson made another information request about the kitchen project, including the project contract, budget, and a list of all job duties for the temporary jobs of the affected staff. She also included a number of questions based upon the Assumptions, when the cafeteria would be reopened, and whether Respondent intended to return all staff to their prior positions and shifts. She requested a response no later than February 6. (Jt. Exh. 16.) On February 7, Poulson sent Candella a followup email, asking when she could expect a response to the request for information. (Jt. Exh. 16.)

Also, on February 1, 2017 and dates thereafter, kitchen employees received training for new cleaning duties necessitated by the construction. Respondent admittedly did not notify the Union about the training. EVS Director Herring testified that some EVS employees also had additional duties for cleaning during this time, such as removal of trash. (Tr. 1943–1944.) Herring testified that he never met with the Union on made proposals about these changes. (Tr. 1945.) However, Herring never testified that he or any other member of management notified the Union about these changes in the EVS department. (R. Exh. 64; Tr. 1873.)

On February 10, 2017, in preparation for the next meeting, Poulson emailed a union proposal to Schelling, Candella, and VP Bibby. (Jt. Exh. 20.) Poulson further advised that she received

<sup>22</sup> Schelling testified neither she nor Candella ever said that they were negotiating with the Union regarding the kitchen closures. She stated the purpose of the meetings was to share information with employees, obtain feedback and employee concerns. (Tr. 1846.) As the bargaining was not conditioned upon the results of the pending representation case and conflicts with the concurrent documentary evidence, this portion of Schelling’s testimony is self-serving and unreliable.

<sup>23</sup> When faced with documents labeled “Union proposal,” Candella denied that these were proposals at all. Nothing in the documents reflects that Candella took issue with documents labeled “proposal” at the time of the events. (Tr. 1508–1509.)

some of the information for her request, but still had questions about what was received.

The parties met again on February 13, 2017. (R. Exh. 18(b).) On February 14, 2017, Poulson emailed the management negotiators and outlines the “action items agreed to out of yesterday’s meeting . . . .” Included in the list: Respondent would email digital copies of jobs descriptions, job flows, and employee memo presented in hard copy the previous day; “Bill will draft and submit “management’s counter-proposal to the Union”; and and agreement to meet again on February 17 “to review management’s counter-proposal.”

On February 16, Candella emailed HR Director Schelling with the copy of Poulson’s email and stated, “Hilda, see the hospital’s counter on the impact bargaining.” (Tr. 1516; Jt. Exh. 24.) Attached were documents labeled as Respondent’s counterproposal, now dated February 14, 2017, with modifications to the Union’s February 13 proposal. (Jt. Exh. 24.)<sup>24</sup> Before the meeting on February 17, the Union responded with another counterproposal.

The information request noted in Poulson’s February 14th email was provided on February 17, 2017. Regarding the requested information, Poulson stated she received enough information to reach a tentative agreement. (Tr. 404.)

At the February 17 meeting, Respondent and the Union signed a Letter of Understanding with the note “Tentative Agreement.” Schelling was one of the three Respondent signatories. Before signing the agreement, Respondent caucused and Schelling conferred with Candella, who was not in physical attendance. One condition of the agreement was that the tentative agreement was subject to “ratification by the NUHW-represented employees in the dietary department at the Hospital.” (Jt. Exh. 28.) Schelling arranged with Poulson a room in the facility in which the Union could hold a ratification vote. (Tr. 1900.)

Also, on February 17, 2017, Respondent distributed a flyer to employees about plans for the upcoming kitchen closure. About February 22, 2017, the Union conducted a ratification vote with the dietary employees in the main conference room within Respondent’s facility. The employees voted to ratify the agreement. Poulson emailed HR Manager Schelling the results. (Tr. 97–98; GC Exh. 9.)

On about February 27, the kitchen closed.

On April 21, Poulson emailed HR Manager Schelling about Respondent’s failure to comply with the negotiated agreement. Two days later, Schelling, by email, denied that Respondent was bound by the negotiated agreement because the “certification of the election results is flawed” and Respondent was not recognizing the Union. Schelling wrote, “[T]he letter of agreement simply describes the process the hospital intended to follow

during construction, and that remains the hospital’s intention.” (Jt. Exh. 38.)

The kitchen project also caused changes in the Environmental Services Department, which handled the trash from the project. EVS Director Herring admitted that he changed employees’ schedules and duties in relationship to the kitchen project. The employees received additional training. He further admitted that Respondent did not notify or bargain with the Union over these changes.

#### VIII. RESPONDENT CHANGES SCHEDULES IN THE STERILE PROCESSING DEPARTMENT

Employees in the Sterile Processing Department (SPD) had a strong showing for the Union before the election. One of those employees was Martha McNelis, who has worked for Respondent for over 22 years. For the last 18 years, she worked in the Central Processing Department as a sterile processing technician, first in outpatient surgery and then in the operating room (OR). Before April 2017, McNelis worked a 7 a.m. - 3:30 p.m. schedule for 9 years; Respondent then changed her start time to 9 a.m. McNelis’s immediate supervisor is Stacy Guck, the supervisor for sterile processing.

Guck reported to Interim Director of Surgical Services Diane Kriegel.<sup>25</sup> Kriegel directly supervised three additional employees, including the manager of surgical services, Ralf Jewowski, and indirectly supervised 130 employees. Kriegel’s duties included ultimately approving schedules for the various services reporting to her. Although Guck is still in Respondent’s employ, Respondent did not call Guck to testify.

##### A. Duties, Locations and Hours of Work for Sterile Processing Technicians

The sterile processing department employs technicians as associate technicians, certified technicians, and case cart technicians. Certified technicians have further education in sterile processing than the associate technicians. (Tr. 1203–1204.) The duties of the associate and certified technicians are not different, but the certified technician supposedly understands the reasons why certain processes are needed for sterilization.

The case cart technician assembles carts with sterile supplies and instruments for the following day’s surgeries. The case cart technician works with the material management department to order supplies, then checks in the supplies when delivered to ensure the appropriate supplies were sent. The case cart technician works from 7 a.m. until 3:30 p.m., Monday through Friday.

The sterile processing technicians work in: the main hospital OR, which is surrounded by six operating rooms and is called the center core; the location where all sterile supplies are kept; and/or the outpatient surgery center, across the parking lot from

<sup>24</sup> Candella testified the statement was “probably a mistake.” He claimed he never intended to call the exchanges impact bargaining but “more to codify what we were already intending on doing.” (Tr. 1516–1517.) General Counsel suggests that, given Candella’s vast labor relations experience, he would not casually use such terms. (GC Br. at 21.) I agree that Candella’s testimony here is not credible, and I also find the statements in the documents are admissions against interest of a party-opponent. Fed.R.Evid. 801(d)(2); *Ferguson Enterprises*, 355 NLRB 1121 fn. 2 (2010).

<sup>25</sup> Respondent employed Kriegel through an agency to perform interim OR director duties within Respondent’s facilities. Although hired in 2015 for surgical services, she did not perform any services related to surgical services between February and August 2016. Evidence shows that she performed scheduling of employees as part of her duties during the relevant time. I find that she is a supervisor pursuant to Sec. 2(11) of the Act (changing schedules) and an agent pursuant to Sec. 2(13) of the Act.

the main hospital.<sup>26</sup> The sterile processing technician assigned to the center core ensures that all supplies in the area are stocked appropriately based upon upcoming surgical schedules, including putting away orders and responding to requests from the operating rooms for additional supplies. The center core technician, who was Amanda David during the relevant time, utilizes a computerized system for ordering supplies. Operating this computer system requires further in-house training.<sup>27</sup> Others trained on the system are the supervisor, the lead for sterile processing and one additional employee.

The sterile processing technicians' shifts occur Monday through Friday from 7 a.m., with the last shift starting at 3 p.m. ending at 10:30 p.m. However, other shifts are staggered throughout the day at 8 a.m., 9 a.m., 11 a.m. and 2 p.m. The SPD technicians may be on call on Saturday and Sunday, 8 a.m. to 8 p.m.

The main operating room sterile processing technician starts at 7 a.m. by warming up the machines and by the time shifts are completed at around 10:30 p.m., the techs have the machines clean for the next morning. Scheduled surgeries start in both the main and outpatient operating rooms at 7:30 a.m. (Tr. 1093.) However, surgeries may occur during the night, in which case the day shift picks up where the sterile processing employees left off at 11:30 p.m. (Tr. 1093–1094.)

#### *B. McNelis's Duties and Locations*

When she worked the 7 a.m. shift, McNelis warmed up machines, such as autoclaves, necessary for sterilizing instruments for surgical procedures in the main operating room. She was the only person to work in the main operating room to open sterile processing. (Tr. 873.) Another sterile processing technician, Amanda David, another union supporter, began her shift at 6:30 a.m. However, David's job was different than McNelis: Mindy made sure that the instrument carts were prepared for upcoming surgeries; David also attended the morning main operating room report meeting at 7 a.m. and ordered supplies, which McNelis did not do. (Tr. 874.)

McNelis now works a 9 a.m. shift in outpatient surgery, but, if needed, she may be sent to work in the main operating room. (Tr. 873.) On the 9 a.m. shift in outpatient surgery, she works with Robin White, another sterile processing technician. White also had duties in materials management, ordering supplies and preparing groups of instruments and other equipment for eye surgeries. David stated the change put more work upon her in the main operating room.

#### *C. Changes in the Sterile Processing Department's Schedule in 2015*

As early as September 2015, when she arrived to begin her duties with Respondent, Interim OR Director Kriegel noted that the sterile processing technicians were too heavily staffed in the early portion of the day and did not have sufficient coverage in

the later portion. Four sterile processing technicians, McNelis and Robin White in outpatient and David and Dawn Wylie in the main OR, began their shifts early, at 6:30 a.m. and 7 a.m. Kriegel began discussions with her supervisors by mid-October 2015. She found that the schedule, as it was, created significant overtime and a lack of supplies available in the morning because the sterile processing technicians were not present later in the day to complete sterilization processes. (Tr. 1233–1234.) Kriegel concluded that two technicians were not needed at 7:00 a.m. in outpatient because outpatient cases did not start until 7:30 a.m. In November 2015 Kriegel changed Wylie's schedule to start at 8 a.m.

Nothing in McNelis's schedule changed at that time. Before "the holidays" in 2015, Kriegel spoke to McNelis about changing her schedule in outpatient. McNelis asked why it could not be Robin White to change. Kriegel explained White had additional duties and advised McNelis that she desired McNelis to learn White's additional duties, which were ordering from materials management. McNelis stated she had wanted to learn how to perform those duties. Kriegel told McNelis the training could start in January but, "I need you to help me out and do this starting in January." (Tr. 1250.) According to Kriegel, McNelis refused to do so and explained she had a part-time job at a nearby military base. (Tr. 1250.)<sup>28</sup> Despite their determination to move McNelis to an 8 a.m. shift, Guck and Kriegel allowed McNelis to keep her shift assignment.

Around June or July 2016, Kriegel again considered changing schedules because the previous changes were insufficient to address the outpatient volume. (Tr. 1254–1255.) Kriegel again discussed the situation with Guck and with the HR department. Kriegel testified that she discussed the matter with McNelis again in mid-2016 and held off because McNelis took about a week off to tend to a sick child. (Tr. 1255–1256.)

After McNelis returned from leave, around the end of 2016, Kriegel testified she told McNelis to expect a change in her schedule. Kriegel notes that the department still incurred significant overtime in outpatient surgery and the sterilizing department was not working efficiently with heavier coverage in the morning, when more coverage was needed later in the day. Additionally, SPD lost three employees in the last quarter of 2016; another part-time sterile processing technician was taking intermittent medical leave. (Tr. 1257–1260.) By the beginning of 2017, Respondent hired three newly certified sterile processing technicians and, in the meantime, utilized traveling personnel to cover the gap. Kriegel notified the staff that as soon as these new employees were trained, they would be added to the rotation and employees would not be required to work as many weekends on call. (Tr. 1261, 1266–1267.) However, Kriegel also testified that the new employees were better qualified for their positions because of their certifications.

<sup>26</sup> The main OR handles the most complicated cases, such as neurosurgical cases, heart surgery, and complicated orthopedic cases. The outpatient surgical center handles elective, nonemergent cases for 4 days per week; these cases include cataracts and knee arthroscopies. The last scheduled case in outpatient surgery is supposed to end by 3:30 p.m., but sometimes runs over its time limits.

<sup>27</sup> The system lacks a scanner, so the technician entering the supply requests must type in the entire number for each item.

<sup>28</sup> R. Exh. 48 is an email that shows Guck spoke to McNelis about changing her hours, but the change would be to 8 a.m., rather than 9 a.m., and Guck documented McNelis's concern about a second job.

Kriegel testified that the changes necessary at the beginning of 2017 were because she changed the schedule of the person on intermittent leave to work on Mondays. (Tr. 1261–1262.) Kriegel testified that McNelis was the “guru” of the eye instruments but needed her to work until 4:30 p.m. or 5 p.m. each day. Kriegel testified that she felt that she had been “lenient,” “compassionate,” and “collaborative” with McNelis since 2015, but definitely needed to move McNelis to the later shift in outpatient surgery, at 9 a.m. Kriegel, apparently in conjunction with Guck, decided that David could open the main OR by herself at 6:30 a.m. (Tr. 1262–1263.)

*D. SPD Employees, Including McNelis, Engaged in Union and Protected Concerted Activities*

McNelis was active in the union campaign. On one or two occasions, she handed out union pins, union flyers and other union paraphernalia to her coworkers in the lounges for the operating room and outpatient surgery during her breaks and lunch periods. (Tr. 845–846.) She attended one or two union meetings before the ballots were counted. She also wore union pins, starting in November 2016, every day for a 2-week period. She also wore a lanyard, which she continues to wear every working day, 5 days per week.

After the ballots were counted, McNelis attended union meetings two to three times per month. Some of the meetings were held at Respondent’s facility in the rooms by the cafeteria. (Tr. 849–850.) McNelis also met with Organizer Poulson individually in the cafeteria, located in the facility’s main hallway. After the meetings, she advised coworkers about the information she obtained at the meetings. McNelis and Jesse Perla were elected as the union “leads” for their department. Perla resigned in early 2017, making McNelis the sole lead for her department.

When McNelis had a start time of 7 a.m., she saw Supervisor Guck every day. Around the time of the election, while McNelis was working in Central Processing, Guck pointed McNelis’s Union lanyard and asked why she had to wear it. Guck also stated she did not have to wear it. (Tr. 852–853.)<sup>29</sup> At an unknown date, Guck also blocked McNelis’s access to talk to a coworker, Jason, while distributing flyers, with coworker Dawn White present. (Tr. 928.)

Guck also spoke with employee Amanda David and asked her to pass out flyers against the Union. According to David, Guck said that she knew the Union was coming in, that she was against it and the Union would hurt the hospital and jobs. Guck specifically said that McNelis could lose her job in outpatient surgery if the Union came in. (Tr. 1086.) David asked what Guck meant by the comment; Guck said others wanted McNelis’s job and if the Union came in, her job would be available. (Tr. 1086.)<sup>30</sup>

Before and after the election, McNelis and her coworkers had ongoing problems with Supervisor Guck. In December 2016, some sterile processing employees met separately with Organizer Poulson, with the topic of discussion about Guck’s behavior and how to get her to listen to them. (Tr. 1062.) In December

2016 or January 2017, Poulson met with several sterile processing employees away from Respondent’s facilities to discuss further. At this time, the sterile processing employees and Poulson put together a petition to circulate on the issues. (Tr. 1064.)

*E. The SPD Employees Concertly Complain about Supervisor Guck*

By the end of January 2017, a number of the sterile processing employees signed a petition about Supervisor Guck’s behavior. McNelis signed the petition and obtained signatures from coworkers; she recalled she spoke with five or six coworkers to obtain signatures. The petition cited Guck’s inappropriate work conduct as failing to create a collaborative work environment to the detriment of the patient population. The conduct included “speaking condescendingly to and yelling at employees,” “micromanaging and harassing employees, including timing them and barking orders,” and “not listening to employees when they raise departmental concerns or serious patient care issues.” The petition requested a meeting with Guck, Interim OR Director Kreigel, OR Manager Jeworoswki and HR to “propose ideas to resolve this issue.” (GC Exh. 11.) The petitions were submitted to management on January 31, 2017. On the same day, Poulson sent to Kriegel, Guck, and Schelling an email requesting a meeting. (R. Exh. 49; Tr. 1282.)

The employees heard nothing from Respondent about scheduling a meeting. Kriegel testified that she did not respond to Poulson’s January 31 email because the hospital did not recognize the Union. (Tr. 1282.) By letter dated February 23, 2017, the employees notified Respondent about its concerns regarding Guck. They included suggestions on how to improve matters in the sterile processing department including improving specific “actions” to improve Guck’s communications, plus training and staffing within the department. The letter still requested a meeting for discussion. The letter also pointed out that Respondent could notify either of the central processing department’s shop stewards. One of the two named shop stewards was McNelis. (GC Exh. 12.)

One morning in February, McNelis and about 12 to 15 coworkers tried to have a meeting with Guck by marching to Guck’s office. (Tr. 915.) Although she attended, McNelis was not working that day and believed that no employee left a work station unattended to participate. (Tr. 916–917.) Guck had someone in her office. McNelis could not recall who started the conversation with Guck, but Guck told the group she could not meet with them and to come back later. The group asked an appointment. Shortly thereafter Guck set up an appointment with them. (Tr. 918.)

By early 2016, Guck and Kriegel told David she was not getting her job done and David complained she had too much to do. (Tr. 1097.) Around January 1, 2017, the OR management arranged for an OR nurse to assist with David’s duties. (Tr. 1097.)

To get additional help, in late 2016 or early 2017, David took it upon herself to informally train McNelis on putting together

<sup>29</sup> In September 2016, before the unionization efforts might have been known, McNelis was not pleased with Guck’s evaluation of her work. She talked with Interim OR Director Kreigel but found no satisfaction with the discussion. She also met with HR Director Schelling, with her husband present. McNelis documented with her husband’s assistance of

what happened and gave a copy of her notes to Poulson. (R. Exhs. 34, 35). McNelis received a merit increase.

<sup>30</sup> David testified that these events occurred in August 2016. Given the timing of the Union’s campaign, these events more likely occurred in October or November of that year.

case carts. David found McNelis receptive to the training. The training was limited to “downstairs,” but not in the OR itself. David’s appraisal in August or September 2016 also had advised her that she was to train each person how to pull cases.

In early 2017, Supervisor Guck offered to have McNelis trained on ordering supplies in order to improve McNelis’s skill variety. McNelis told Guck she wanted to learn. However, McNelis reported Guck later told her that she was not interested in learning. According to McNelis, Guck failed to cover McNelis’s area so that she could spend time learning and advised her of such within two weeks of when she was supposed to have the training. When Guck failed to provide coverage, McNelis did not ask for the training again. (Tr. 877–878, 895.)

On one occasion, which Respondent characterized as a failure to follow directions, Guck directed McNelis to make some changes in an eye tray. McNelis requested that Guck put the instructions in writing because she did not want to be responsible for making the charge. McNelis also denied that she raised her voice during the discussion. Guck told her she would not do so and reported her to Jeweworski. When Jeweworski asked McNelis about the exchange with Guck, McNelis stated she did not refuse the order, but merely wanted it in writing. Jeweworski told McNelis it was a communication failure, but stated he wanted her to be polite with Guck and follow her instructions. McNelis agreed to do so. (Tr. 887–889.)<sup>31</sup>

In mid-January 2017, McNelis took approximately one month of leave to handle a family medical issue. (Tr. 1268.) On February 24, 2017, McNelis, by phone, notified Guck that she was ready to return to work. Guck told her to call Interim OR Director Kriegel. When McNelis called Kriegel, Kriegel advised McNelis that her start time now would be 9 a.m. instead of 7 a.m. McNelis, by email to Kriegel, requested a meeting with her union representative present. Kriegel forwarded the email to Human Resources Manager Hutchinson, stating, “And so it begins.” (Tr. 1309; GC Exh. 24.)

McNelis was concerned about the schedule change because she had another job at Travis Air Force Base for 5 years. It was undisputed that Guck knew about McNelis’s other job because she frequently mentioned it to her. (Tr. 859–860.) McNelis later discussed with Guck that she needed to keep her 7 a.m. start time because of her other job and that she really needed the money. Guck told her to talk to Kriegel.

On February 28, 2017, after McNelis was already advised her schedule was changed, HR Manager Schelling notified Organizer Poulson of “proposed changes” to the sterile processing department schedule. Schelling summarized the changes:

- The shift rotation went from weekly to every 3 weeks
- 7a shift changed to 9a to support surgery schedule
- Per Diem days changed from Tues, Wed, Thurs to M, T, Th one week and M, T,Th, Fr the following, again

to match surgery needs

- 2 people returning from leave were put into shift rotation
- Call changed from Sat/Sun to Sat only, because one of the per diems wanted to take Sunday call

(GC Exh. 13.)

Schelling wrote that the schedule changes needed to be effective for the March 12–April 15 schedule (less than 2 weeks from the date of notification) and offered to meet 2 days later. (GC Exh. 13.) One of the schedule changes was moving McNelis from her 7 a.m. start time to a 9 a.m. start time.<sup>32</sup>

#### *F. Employees, Including McNelis, Meet with Managers about Guck and Scheduling*

On March 2, 2017, in one of the hospital’s offices, Poulson, McNelis and five to six of McNelis’s coworkers<sup>33</sup> met with HR Director Schelling, Interim OR Director Kriegel and Kathy Hutchinson. (Tr. 857, 1070.) Employees identified their major concerns as Guck’s communication within the department and the proposed schedule changes. (Tr. 1071.) Poulson initially spoke for the employee group, identifying that the employees had concerns about their department. McNelis recalled that the HR representatives and Kriegel seemed surprised about Guck’s conduct and Kriegel agreed to take care of it. (Tr. 859.)

In the last 10 minutes of the meeting, the new scheduling plan was discussed. Poulson was not present during most of this discussion. Amanda David, a 22-year sterile processing employee employed as a senior sterile case cart picker<sup>34</sup> in the operating room, was concerned because the proposed schedule changes required her position to start rotating between employee Jesse Perla and herself; McNelis was scheduled to start her shifts at 9 a.m. instead of 7 a.m. (Tr. 1073.) The schedule included the new certified technicians, who were not taking call, and were working with a certified technician. (Tr. 1332.) Kriegel opined they could not have been scheduled for a 9:00 a.m. slot because “they’re not ready.” (Tr. 1333.) However, Kriegel also stated that the certified technicians were better qualified than uncertified technicians, such as McNelis, because they understood the theoretical background of the work.

David also found that the changes placed more work upon her. David’s schedule now would require her to work 6:30 a.m. to 3 p.m. for 1 week and then work a week of 12 noon to 8:30 p.m. shifts. However, David found that Respondent’s only reason to explain the need for 3 p.m. shift was to clean up the department later, which could be an issue depending on how busy the department was. The other employees selected David to write the new schedule, after Poulson left the meeting. Kriegel gave certain parameters for staffing, such as requiring all persons to work on the 4 busiest days of the week, per diem personnel only working on the schedules they selected, and not including the

<sup>31</sup> Respondent presented alleged documentation from McNelis’s personnel file about the incident, but it did not identify whose handwriting was on the document, which was dated January 21, 2017. McNelis had never seen the document before. (Tr. 890–891; R. Exh. 32). Although I allowed admission of this document, I find it lacks sufficient evidence of who made the notations and I do not rely upon it for any findings. Jeweworski did not testify.

<sup>32</sup> David testified that the department always had rotating shifts. (Tr. 1095).

<sup>33</sup> Kriegel testified that all SPD employees were present. (Tr. 1271).

<sup>34</sup> The sterile case cart picker pulls items for surgeries the following day and any additional surgeries that may arise during her shift; she also ordered and stocked supplies for surgery. David’s supervisor also is Guck.

travelers. (Tr. 1272.) Kriegel testified that one of the criteria was that someone would have a 9 a.m. start time, which McNelis refused to do. (Tr. 1272–1273.) Kriegel told McNelis, during the meeting, that she would have to give 3 days a week with 9 a.m. start times. (Tr. 1273.) McNelis testified that, in the meeting, she attempted to explain about her other job, but was not given a chance to do so.

*G. The Union Requests Information Related to Proposed Changes in SPD and McNelis's Schedules*

On March 3, 2017, Poulson emailed to interim director of surgical services a request of information for evidence to support Respondent's asserted operational need for shifting employee Martha McNelis's start time. Poulson also requested a followup meeting on McNelis's start time. Kriegel, responding by email to Poulson 3 days later, stated she found no need for the followup meeting and further stated:

I made it very clear in the meeting in your presence and again after you left that the schedule changes are dictated by the volume in both the Main OR and the OSPC.

Everyone in SPD knows very well how these volumes effect the work load in the department.

(Tr. 1284; GC Exh. 15.)<sup>35</sup>

HR Director Schelling was copied on the email chain. The Union received no other response regarding the requested information.

*H. Respondent Implements Schedule Changes in the Sterile Processing Department*

While planning the schedule, David spoke to all personnel in the department and planned a schedule she believed met all criteria that Kriegel put forth. (R. Exh. 46.) David's schedule put McNelis at 7 a.m. every day of the week.

Kriegel agreed to allow the employees to draft a schedule but required a 3 p.m. shift. (Tr. 923, 1080–1081.) David worked on the schedule and submitted it to Kriegel. The schedule allowed McNelis to work at on 7 a.m. shifts for Monday through Friday based upon McNelis's belief that she could stay at 7 a.m. David also eliminated her rotation schedule with Perla.

On about March 9, 2017, David presented her schedule to Kriegel, who was not pleased with the schedule. Kriegel testified that the submitted schedule did not meet the department needs. Kriegel questioned David why she gave McNelis scheduled for two 7 a.m. shifts, on Monday and Friday; David explained that Kriegel had requested 3 days of 9 a.m. shifts and put McNelis on the busy days<sup>36</sup> of the week for 7 a.m. (Tr. 1083.) David considered that McNelis was needed at 7 a.m. on Mondays: After the weekend, instruments might be left dirty and McNelis could get the autoclaves started at the earlier time, rather than waiting until 9 a.m., and could prepare for the large number of orthopedic cases. (Tr. 1083–1084.)

David told Kriegel she spoke with the other employees about

the schedule, to which Kriegel remarked that the Union did not run the hospital. (Tr. 1083.) Everyone otherwise was scheduled to rotate shifts, but only one week at a time. The 7 a.m. shift was completely eliminated; instead, Dawn Wiley, a lead technician, began her shift at 8 a.m. (Tr. 1084.)

The next Friday, Guck presented the new schedule to the sterile processing employees in the department huddle. David testified that little of the schedule Guck presented was as she presented it to Kriegel, except for the determination not to rotate David and Perla. (Tr. 1084.) Poulson and the coworkers attempted to schedule another meeting with Respondent to discuss it, but Respondent never scheduled a meeting. The schedule went into effect as Respondent specifically drafted it. Effective April 4, 2017, McNelis was permanently assigned to the 9 a.m. – 5:30 p.m., instead of the 7 a.m. – 3:30 p.m. shift in the main OR and shifting to the outpatient department. (Tr. 1230.) McNelis might be asked to come in earlier than 9 a.m., depending on sick calls and volume of work. (Tr. 1230.) She also partially covers White's sterile processing when White is on vacation; a scrub technician covers the remainder of White's duties while she is on vacation. (Tr. 1306–1307.) Kriegel testified that McNelis was scheduled 5 days a week at 9 a.m., although Kriegel initially proposed to have her work 3 days per week at 9 a.m. Kriegel gave this rationale for her determination:

Because I had asked [McNelis] to give me three days, and she determined that she was not going to do that. So, by default, I scheduled the schedule five days per week.

(Tr. 1327.)

About April 5, McNelis asked Guck to keep her 7 a.m. shift. Respondent provided an email, with a reference from Guck about "Please see the conversation Martha and I had this A.M." (R. Exh. 36.) Nothing on the email itself cites an attachment. Guck's alleged notes are not signed, but only dated April 5, 2017. McNelis supposedly asked that Guck be more open minded; however, Guck notes, "I reminded her of the many times I understood but things have changed." McNelis stated the document was inaccurate in several respects. It implied that Guck explained the policies and said Guck told McNelis needed to be open-minded, both of which McNelis said Guck did not do. (R. Exh. 36.) As Guck never testified to dispute McNelis's version, I therefore credit that the document does not completely support Respondent's version of events.

As a result of the schedule change, McNelis lost her job at the military base. (Tr. 861.)

Dawn Wiley, the lead sterile processing technician in the main OR, currently works 8 a.m. – 4:30 p.m. Amanda David also works in the main OR, which has not changed. (Tr. 1232–1233.) Kriegel believed David could start the autoclaves and run the necessary equipment tests in the main OR because she came in at 6:30 a.m. (Tr. 1263.) The only change that Kriegel recalled keeping from David's proposed schedule was employees rotating one week, rather than three weeks. (Tr. 1327.) David

<sup>35</sup> Kriegel testified that the other reason she would not meet with Poulson was because Respondent was not recognizing the Union, but Respondent's position was not in the email. Kriegel said she left it out because she did not want to be "rude." (Tr. 1285.) As this email issued

before the March 16 letter, I find that the best evidence of Respondent's position is not Krieger's testimony, but the email itself.

<sup>36</sup> David testified that Monday and Tuesday were the busiest days of each week.

testified that the work schedule changes did not decrease her volume of work, and she now opens the department. She now works in two places instead of one until a second person arrives at 8 a.m. (Tr. 1119–1120.)

IX. AN EMPLOYEE REQUEST FOR UNION REPRESENTATION  
PURSUANT TO *WEINGARTEN* IS DENIED

Lab employee Jennifer Mini-Bera requested that Poulson attend a meeting with her supervisors about alleged physician complaints about Mini-Bera's work. As the meeting could lead to discipline based upon physician complaint about Mini-Bera's work, the parties stipulated the meeting was investigatory in nature. Mini-Bera also asked Laboratory Directory Olive Romero<sup>37</sup> for union representation at the upcoming meeting.

On February 28, 2017, Laboratory Director Romero, who had experience in dealing with unions, sent Mini-Bera an email agreeing that she could bring her union representative to the investigatory meeting. (Jt. Exh. 36.) Mini-Bera contacted Poulson by email for scheduling purposes. On March 1 Poulson emailed available dates to Romero and Supervisor Shanay Marquez. (Jt. Exhs. 29, 36). On March 1, Romero, by email, advised Poulson, Mini-Bera and other lab supervisors that the meeting would be scheduled for March 9 at 10 a.m., with Marquez assigned to send the "invitation" to the meeting. (Jt. Exh. 36 at QVMC-NUHW 0471.) On March 8, Poulson learned from Mini-Bera that the investigatory interview for the following day was canceled; she emailed Romero to confirm whether this was correct. (Jt. Exh. 36.) The parties rescheduled for March 21 and Romero intended to permit Poulson to attend, but Poulson did not receive the invitation to the meeting. (Tr. 198.)<sup>38</sup> The meeting was rescheduled to March 28.

In the meantime, Respondent held a meeting for its managers on March 24, 2017. Romero testified that they were advised not to make contacts or acknowledge the Union. Before that time, no instructions had been provided to Romero about contacts with the Union. (Tr. 201, 205–206.) Notably, none of the correspondence or discussions inviting Poulson to or excluding Poulson from Mini-Bera's investigatory interview ever mentioned patient confidentiality. I therefore find that Respondent had no concerns about patient confidentiality at this time of these events. On March 28, 2017, HR Director Schelling and Laboratory Director Romero emailed Poulson that she could not attend the investigatory interview.<sup>39</sup> Romero also advised Poulson that they could not meet regarding proposed changes to phlebotomists' schedules because Respondent did not recognize the Union.

Analysis

In discussing the allegations, I begin with the alleged 8(a)(1) threat. I next discuss that the Union was indeed the certified bargaining agent, then find Respondent violated its *Weingarten* obligations. I provide a detailed discussion about the 8(a)(5)

allegations, including the information requests, failure to bargain/withdrawal of recognition, and unilateral changes. I then discuss the 8(a)(3) allegations, which involve Arroyo, Frogge, and the SPD. Lastly, I discuss Respondent's demands for severe sanctions against the Union for subpoena violations.

I. EVS DIRECTOR HERRING VIOLATED SECTION 8(A)(1) BY  
THREATENING EMPLOYEES WITH UNSPECIFIED REPRISALS FOR  
UNION ACTIVITIES

Well-established Board precedent directs a Section 8(a)(1) violation if the employer's conduct "may reasonably be said to have a tendency to interfere with the free exercise of employee rights." *Unbelievable, Inc.*, 323 NLRB 815 (1997). In assessing an alleged threat, the Board uses an objective standard: Whether the statement would tend to coerce a reasonable employee. *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 5 (2018). The language of the alleged statement does not need to be explicit to make it a threat, and if so, is assessed in the totality of circumstances. *Id.*

I credit Frogge's testimony that EVS Director Herring stated to her, in his office, that she had to stop harassing employees and the Union was not going to run the department. Frogge's testimony here was clearly described. Similarly, I discredit Herring and Roe's rote denials of threats, and I question whether Roe would have been called in at 4:15 p.m. as she was the day shift supervisor. Herring's statements occurred in the department head's office with Frogge's supervisor standing by. Herring told her she couldn't be harassing others. Herring was visibly irritated when Frogge raised her desire for a union representative if the discussion was investigative. Herring's statement was that he going to do as he saw fit, with or without the Union. The timing was about 1 month after Poulson demanded to negotiate about Frogge's change in assigned duties.

The circumstances are coercive because Frogge was called into a locus of power—the department head's office—and the department head had his second in command present. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007). It was capped off with an implied threat of futility for seeking union representation, which also impliedly stated he would not follow the law regarding negotiations. *Emergency One*, 306 NLRB 800, 800 (1992). I therefore find a violation of Section 8(a)(1).

II. THE UNION IS THE CERTIFIED REPRESENTATIVE OF THE  
BARGAINING UNIT

In an unfair labor practice hearing, Respondent is precluded from litigating representation case matters that were or could have been raised during the representation case proceedings. The parties presented representation case documents in the joint exhibits. Otherwise, I excluded evidence regarding the election. *Wang Theatre, Inc.*, 365 NLRB No. 33 (2017); *Nappe-Babcock Co.*, 245 NLRB 20 (1979). Based upon the Board's rejection of Respondent's objections and challenges, which allowed the

<sup>37</sup> Romero, an admitted supervisor and agent for Respondent, testified under subpoena in General Counsel's case-in-chief as an adverse witness. Respondent did not recall her.

<sup>38</sup> On March 21, Poulson reminded Marquez that the lab's emails to her were not getting through when sent through Respondent's secure system as Poulson had no email address within the system.

<sup>39</sup> During the course of these events, Poulson also learned that Romero intended to make schedule changes and requested to bargain over them. Romero met with Poulson before any changes took place.

Regional Director's determination to stand, the Union is properly certified as the bargaining unit's 9(a) representative.

Respondent contends that the bargaining unit was not properly certified as the Section 9(a) representative. Respondent did not offer to adduce any newly discovered or previously unavailable evidence. Nor does it present any "special circumstances" that required me to reexamine the decisions made during the representation process. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Toyota of Berkeley*, 306 NLRB 893, 898 (1992). As a result of the Union's certified 9(a) status, the Union has an irrebuttable presumption of majority status during the certification year. *Auciello Iron Works, Inc.*, 317 NLRB 364, 367 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 517 U.S. 781, 785–586 (1996). Respondent relied upon this defense for most of the alleged unfair labor practices in both hearing and brief, and I find that Respondent has waived other defenses. *Conditioned Air Systems, Inc.*, 360 NLRB 789 fn. 2 (2014).

### III. HUMAN RESOURCES DIRECTOR SCHELLING AND LAB DIRECTOR ROMERO VIOLATED EMPLOYEE JENNIFER MINI-BERA'S WEINGARTEN<sup>40</sup> RIGHTS

I credit Laboratory Director Romero's testimony. She was called for testimony in General Counsel's case-in-chief. Her answers were forth-right and she showed no signs of hesitation. Documentary evidence corroborated her testimony. She also testified contrary to the interests of her employer.

*Weingarten* generally finds that an employer's denial of an employee's request for union representation at an investigatory interview that could result in discipline violates Section 8(a)(1) of the Act. *Weingarten*, 420 U.S. at 260 et seq. The parties stipulated, and I find, that the meeting for Mini-Bera could have been resulted in discipline for Mini-Bera's work and therefore was investigatory. Respondent initially planned to permit Organizer Poulson to attend the investigational meeting and withdrew its offer because it no longer would permit the Union to represent its employees. But for the "reminder" at the March 24, 2017 management meeting that the managers were not to engage with the Union, Lab Director Romero intended to permit Poulson to attend Mini-Bera's investigatory meeting. On March 27, HR Director Schelling cancelled the meeting. The meeting was held without union representation. This event also occurred after Respondent sent its March 16 letter demanding a test of certification. Respondent claims it had no obligation to meet with the Union due to its continued challenge to the certification process. (R. Br. at 72).

When an employee requests representation and it is denied after the union is newly elected, regardless of whether certified at that point, the employer must honor the request for *Weingarten* representation. *Five Star Mfg., Inc.*, 348 NLRB 1301, 1331 (2006), enfd. 278 Fed. Appx. 697 (8th Cir. 2008). The employer also cannot rely upon its unlawful refusal to recognize or bargain with the employees' elected representative to deny *Weingarten* rights to an employee. *Id.*, citing *Glomac Plastics, Inc.*, 234 NLRB 1309, 1310–1311 (1978), enfd. 600 F.2d 3 (2d Cir. 1979).

<sup>40</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

<sup>41</sup> Also see *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1007–1008 (1994) (whether request for information from bargaining

Respondent contends no *Weingarten* rights attached because the Board does not extend such rights to non-Union employees. Respondent relies upon *IBM Corp.*, 341 NLRB 1288 (2004). This situation has no facts similar to *IBM*, 341 NLRB at 1295. Here, not only had the Union won the election, it already was the certified Section 9(a) representative. Respondent had an obligation to honor Mini-Bera's request. *Five Star Mfg.*, supra. Therefore, by depriving Mini-Bera of her requested Union representation in an investigatory meeting, Respondent violated Section 8(a)(1) and the dictates of *Weingarten*, supra.

### III. RESPONDENT VIOLATED SECTION 8(A)(5) REGARDING INFORMATION REQUESTS, BARGAINING AND UNILATERAL CHANGES

In many respects, the questions about Section 8(a)(5) are the gateway for a number of the remaining allegations. General Counsel and the Union contend that bargaining began on several issues and the Union additionally made a valid request to bargain a collective-bargaining agreement.

I have already found that the Union is the Section 9(a) representative of the stated bargaining unit. Because I find that the Union is the certified representative, I deal with the information request allegations. I then discuss whether Respondent's conduct demonstrates a refusal to bargain before and after March 16, 2017. In the remainder of the section, I discuss several of the alleged unilateral changes.

#### A. Information Requests

##### 1. Applicable law

When the certified bargaining agent of the employees, requests information, an employer can fulfill its "bargaining obligation under Section 8(a)(5) of the Act" by providing relevant information. *Diponio Construction Co.*, 357 NLRB 1206, 1217 (2011), citing *United Aircraft Corp.*, 192 NLRB 382, 389 (1971). The rationale for 8(a)(5)'s requirement is:

Employees' certified representative is entitled to information that "will enable[] the union to negotiate effectively and to perform properly its other duties as bargaining representative." *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983) (internal quotes omitted). The information requested must be relevant to the union's representation, but the threshold for relevance is low. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437–38, 87 S. Ct. 565, 17 L.Ed.2d 495 (1967). Information related to the wages, benefits, hours, working conditions, etc. of represented employees is presumptively relevant to collective bargaining. *See Oil, Chemical & Atomic Workers*, 711 F.2d at 359.

*Country Ford Truck, Inc. v. NLRB*, 229 F.3d 1184, 1191–1192 (D.C. Cir. 2000), enfd. 330 NLRB 328 (1999).<sup>41</sup>

Information such as names, addresses, job classifications, base rate of pay, date of birth, date of hiring, salary rates, benefit plans, incentive plans, premium pay, vacation entitlements for each employee, medical insurance information (including types

depends on if relevant to context of the bargaining issue and standard of relevance is liberal; need not be dispositive of the issue in dispute but merely have some bearing on it).

of plans, premiums), job descriptions, scheduling, shift selection processes, overtime, records of disciplinary notices and/or negative reviews, rules and regulations and disciplinary procedures, employee handbooks and personnel manuals are presumptively relevant and “must be furnished upon request.” *Anheuser-Busch, Inc.*, 365 NLRB No. 123, slip op. at 2 (2017). Once an initial showing of relevance is made, an employer has a burden of proof to demonstrate the lack of relevance or give sufficient reason(s) “as to why he cannot, in good faith, supply such information.” *ATV/Vancom of Nevada Ltd. Partnership*, 326 NLRB 1432, 1434 (1998), citing *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977). *Country Ford*, supra, explains the rationale:

The Union sought such information stating that it was needed “for bargaining purposes,” and *Country Ford* deliberately refused. Thus, NLRB properly concluded that the Company committed an unfair labor practice. Because the information requested was “presumptively relevant” for bargaining purposes, no further explanation was required. As this Court noted, “the rationale underlying the presumptive relevance rule [is to] avoid [ ] . . . ‘potentially endless bickering . . . over the specific relevance of information, the very nature of which ought to render its relevance obvious.’” *Id.* at 359 fn. 26 (quoting *Emeryville Research Ctr., Shell Dev. Co. v. NLRB*, 441 F.2d 880, 887 (9th Cir.1971)). Vague allegations of a union’s bad faith do not change the result. Under NLRB precedent, the “good faith” requirement is met so long as “at least one reason for the demand can be justified.” *E.g., Island Creek Coal Co.*, 292 NLRB 480, 489 (1989) (citing *Hawkins Construction Co.*, 285 NLRB 1313 (1987), enf. denied on other grounds, 857 F.2d 1224 (8th Cir.1988)), enforced, 899 F.2d 1222 (6th Cir. 1990) (unpublished table decision).

Even accepting, for the sake of argument, that the Union’s request was overbroad, this does not excuse the Company from providing the requested information to which the Union had an undisputed right. See, e.g., *Oil, Chemical & Atomic Workers*, 711 F.2d at 361 (citing *Fawcett Printing Corp.*, 201 NLRB 964, 975 (1973)). That petitioner knew that it could satisfy the Union’s information request by only providing information about bargaining unit employees is beyond dispute. After *Country Ford* initially refused to provide the requested information, Union counsel clarified that its request applied only to information about represented employees. Yet petitioner still refused to provide any information. The alleged overbreadth of the Union’s information request is also irrelevant because the Board only found that petitioner engaged in an unfair labor practice by failing to provide information about unit employees.

*Country Ford*, supra.

The only defense Respondent’s brief puts forth about all of the information requests is that Respondent was not bargaining with the Union because it was challenging the certification and limits its information request analysis to Martin’s January 2017

request. Improper certification, which Respondent stated in the answer as the primary reason for not providing information, is not a valid defense. *Anheuser-Busch, Inc.*, 365 NLRB No. 123, slip op. at 2; *Orni 8, LLC*, 362 NLRB 1087 (2015). Because Respondent provides no other defenses in its brief, much less discuss the information requests other than the January 10, 2017 request, Respondent waives any alternative defenses.<sup>42</sup>

2. Complaint paragraphs 16 and 17: December 15, 2016 and January 24, 2017

In December 2016, Poulson requested by email to HR Director Schelling and Director of Labor Relations Candella five items of information regarding Frogge’s schedule change. On January 12, 2017, Poulson re-requested the information.

The requested information was:

- How long has it been the case that there have been two designated linen positions at Queen of the Valley?
- On what date was the linen position Renee Frogge previously held first posted, and on what date did Renee assume that position?
- Job descriptions for the linen positions, including the job description for the linen position previously held by Renee, as well as the new job description for the new linen position currently held by Maria Correa.
- Any evidence that workload in linen has decreased drastically in the past 2-3 months.
- Any hospital policies which cover linen handling and laundry, including any staff trainings.

(Jt. Exh. 11.)

Respondent only provided the job description and said no other information existed. I find it implausible that Respondent did not have information on when Frogge initially held the linen position and may have still had information on when the position was posted or her application for the position. I find more than implausible that Respondent, a health care institution inspected by the Joint Commission on Health Care Organizations, has no policies covering linen handling. I therefore do not credit Respondent’s blanket assertion that no other information existed. Respondent is required to make a reasonable effort to provide the information or otherwise explain why it did not present it. See generally *Hanson Aggregates BMC, Inc.*, 353 NLRB 287 (2008).

During the meeting of January 24, Poulson testified she verbally requested that Respondent’s representatives, including Schelling and Candella, provide the information as requested, despite only receiving a job description. Later, she verbally asked for evidence of changes in the linen workload to support its determination of changing Frogge’s assignment. I credit Poulson’s testimony that she made these requests. She provided significant context for the requests. Respondent never provided the information, which is considered necessary and relevant to the Union’s consideration of these events. Respondent’s defense that it was not bargaining is unavailing as it had an obligation to provide information to the certified representative. Failure to respond to these information requests is a violation of Section

<sup>42</sup> When information is clearly relevant, the Board is not required to determine whether all of it is relevant. *Hughes Tool Co.*, 100 NLRB 208,

210 (1952). However, out of an abundance of caution, I provide some analysis on relevance.

8(a)(5). *Public Service Co. of New Mexico*, 360 NLRB 573, 601–602 (2014), enfd. 843 F.3d 999 (D.C. Cir. 2016) (validity of oral and written requests).

3. Complaint paragraph 18: January 10, 2017 request for the initial contract

For Martin’s January 10, 2017 information request, Respondent’s brief failed to address the individual information request allegations. It admits it provided some information but claims it had no obligation to provide any because of its alleged refusal to recognize the Union.

The Union made a broad information request in preparation for negotiating the collective-bargaining agreement. Before March 2, Respondent provided some information. The parties agree no information was provided after March 1. Respondent leaves a large swath of unanswered information. Respondent, relying upon Candella’s testimony, claims that it began to provide information to resolve the unfair labor practice charge filed on February 1, 2017. The information provided on February 10 included certain job descriptions for the bargaining unit and a copy of the retirement plan. Respondent claims the Union already had some of the information, such as job descriptions, but provided it anyway.

An employer has an obligation to provide relevant information to a union for contract negotiations. *ATV/Vancom*, 326 NLRB at 1434. Long-held precedent dictates that employee names, addresses, job classification of unit employees, wages, hours and current benefits are necessary and relevant information to the Union’s collective-bargaining duties. *Dynamic Machine Co.*, 221 NLRB 1140, 1142 (1975), enfd. 552 F.2d 1195 (7th Cir. 1977), cert. denied 434 U.S. 827 (1977). Other necessary and relevant information includes date of hire, gender, specific descriptions of health plans, life insurance plans, employee retirement plans, all other benefits (e.g., vacation, paid holidays, sick leave, funeral leave), and all existing work rules, regulations and policies. *MEMC Electronic Materials*, 338 NLRB No. 142 (2003) (not reported in Board volumes), enfd. 363 F.3d 705 (8th Cir. 2004).

For some of the information requests, which were necessary and relevant information for bargaining, Respondent’s letter to the Union claimed the requests were overbroad and burdensome, such as for years other than 2016. Respondent has the burden of proof to demonstrate the volume requested is excessive. Respondent did not do present any evidence to support its contention that those requests were overbroad or burdensome. *L.I.F. Industries a/k/a Long Island Fire Proof Door*, 366 NLRB No. 4, slip op. at 1 fn. 1 (2018), citing *Mission Foods*, 345 NLRB 788, 788–789 (2005).

Regarding Respondent’s claim to the Union that some information was confidential, the Board balances a union’s need for the information “against any legitimate and substantial confidentiality interest established by the employer. The employer who claims confidentiality has the burden of proving that such confidentiality interests are in fact present and of such significance as to outweigh the union’s need for the information.” *Lenox Hill*

*Hospital*, 327 NLRB 1065, 1069 (1999). If that test is met, an employer is required to bargain with the Union for an accommodation. Id. at 1069; *Lenox Hill Hospital*, 362 NLRB 106, 106 at fn. 2 (2015). According to Respondent, HIPAA precludes disclosure of individual employee health insurance selections.

Respondent has waived its defense to show that health insurance selections are covered by HIPAA by failing to brief the issue. Even if it did not waive the issue, the information is considered necessary and relevant to bargaining. *McKenzie-Willamette Medical Center*, 362 NLRB 135 (2015), enfd. 671 Fed.Appx. 1 (D.C. Cir. 2016); *Laurel Baye Healthcare of Lake Lanier, LLC*, 346 NLRB 159, 161 (2005), enfd. 209 Fed.Appx. 345 (4th Cir. 2006).<sup>43</sup>

Regarding the temporary employees, Respondent’s initial response contended it saw no relevance. When Martin responded to Respondent’s letter about missing information, he provided no further rationale for the need for the information. Temporary employees are not part of the bargaining unit and to obtain information about nonbargaining unit personnel, the Union must show some relevance to the bargaining unit. However, that showing is minimal. *New York and Presbyterian Hospital v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011), enfg. 355 NLRB 627 (2010). Although the Union presumably wants the information to identify whether temporary employees are performing bargaining unit work (see id.), the record does not reflect that this goal was shared with Respondent. The Union therefore never supplied the necessary relevance to Respondent. This portion of the January 10, 2017 information request is dismissed.

As Respondent provided no information on this request after March 1, Respondent violated Section 8(a)(5) by not providing the complete information, with the exception of the information on the temporary employees.

4. Complaint paragraph 19: March 3, 2017 request to Kriegel

Poulson requested Interim Director of Surgical Services Kriegel for information to support Respondent’s asserted operational needs for shifting employee Martha McNelis’ start time. Respondent’s answer contends the request was never made, yet on March 6, 2017, Kriegel responded with a curt email that everyone knew about the operational needs. I therefore find that the Union made the information request.

The information request was made in the context of staffing and scheduling changes. Respondent relied upon the rationale of workload to make the changes. Because the workload and operational needs are directly relevant to Respondent’s intended change, Respondent has an obligation to provide the necessary and relevant information to the Union upon request. *Beverly Health & Rehabilitation Services*, 328 NLRB 885, 888 (1999). As the Union was the certified representative and Respondent failed to provide necessary and relevant information, Respondent violated Section 8(a)(5).

5. Complaint paragraph 20(a): March 21, 2017 regarding pharmacy

Respondent did not provide any of the other information about

<sup>43</sup> Respondent is not precluded from raising confidentiality of this information during the compliance phase. *Salem Hospital Corp.*, 359 NLRB 695 fn. 3 (2013), affd. 361 NLRB 962 (2014).

a planned change in pharmacy employees regarding scheduling. As noted before, scheduling is a mandatory subject of bargaining and the information is therefore necessary and relevant. Respondent therefore failed to provide information that was necessary and relevant to the Union's statutory duties and violated Section 8(a)(5).

6. Complaint paragraph 20(b): March 21, 2017 Regarding EVS Request

An employer should furnish upon demand information regarding disciplinary action because it is presumptively relevant to the Union's duties, unless the employer rebuts relevance. *Grand Rapids Press*, 331 NLRB 296, 329–330 (2000). An employer is also required to provide policies and procedures. *Anheuser-Busch*, 365 NLRB No. 123, slip op. at 2.

Poulson's request for information clearly states that the purpose of request is advising a bargaining unit employee regarding discipline. As Respondent raises no issue with relevance and fails to provide the information, Respondent violates Section 8(a)(5) by refusing to provide presumptively relevant policies to the certified representative.

7. Complaint ¶20(c): March 21, 2017 regarding patient access services

The Union requested information about productivity calculations. Productivity requirements and calculations, whether policies or guidelines, are presumptively relevant and must be furnished to the Union. *Equitable Life Assurance Society*, 266 NLRB 732, 734 (1983). Respondent failed to provide any information to the certified representative and therefore violated Section 8(a)(5).

8. Conclusion regarding information requests

Overall, Respondent claimed its reason that the Union was not properly certified to avoid providing information that was necessary and relevant to the Union's duties, despite having provided some of the information. This defense is not tenable. *DiPonio Construction*, supra. In each instance, Respondent violated Section 8(a)(5) by failing to provide information necessary and relevant to the Union's representational duties.

B. Respondent had a Bargaining Obligation to the Union and the Bargaining Unit

1. Parties' positions

Respondent contends it always was appealing the election results, first with the challenges and objections to the Regional Director and subsequently through its request for review to the Board and therefore the matter before me was a test of certification instead of a withdrawal of recognition: It never recognized the Union, nor did Respondent bargain with the Union. It points to the Union's publicity, including events that occurred after March 16, 2017, which call Respondent's actions a failure to recognize the Union. Respondent also stated that the events that occurred between the election and the Board's rejection of Respondent's request for review are irrelevant, as are the events after March 16, 2017.

At hearing, Respondent's counsel repeatedly said why Respondent acted in the above manner was as important as the events itself. Respondent's position is that it met with the Union

initially because its values dictate such a response. By March 24, however, when Respondent did not receive the Union's agreement to allow a test of certification instead of proceeding with the remainder of the unfair labor practices, it determined that it would not continue meeting with the Union over any matter.

General Counsel offers two theories regarding Respondent's conduct here: Respondent refused to bargain; and, in the alternative, Respondent withdrew recognition. I find that Respondent failed and refused to bargain with the Union, the bargaining unit's certified representative, when it had an obligation to do so, which the Board has termed a withdrawal of recognition.

2. Applicable law

Once a bargaining unit is certified, an employer is required to negotiate with the exclusive bargaining representative before making changes to wages, hours and terms and conditions of employment. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). This requirement "is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them." *Id.* Because the Union was properly certified as the unit representative, Respondent was required by law to engage in good faith negotiations with the Union until a court otherwise determined. See *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 and footnotes therein (2017) (unfair labor practices occurred and litigated while test of certification case pending before the court of appeals). For years the Board has held that good-faith bargaining "presupposes a desire to reach ultimate agreement to enter into a collective bargaining agreement . . . ." *Vanderbilt Products, Inc.*, 129 NLRB 1323, 1330 (1961), citing *NLRB v. Insurance Agent's Int'l. Union*, 361 U.S. 477 (1960).

The alternative to proceeding with good faith bargaining is the employer engaging in a test of certification (sometimes called a technical refusal to bargain). To test the certification, an employer does not recognize the union after its certification and failure to do so waives the employer's rights to obtain a review of the certification:

. . . If the union files unfair labor practices charges for refusal to bargain, under Section 8(a)(5) of the Action, the employer may then raise the issue of the propriety of the unit as an affirmative defense to the charges. An employer then obtains judicial review of a certification determination via a review of the unfair labor practice charges, under Section 10(e) or certification determination. [cites omitted]

An employer who fails to follow this procedural course waives the right to contest certification. That is, in order to challenge the propriety of a certification, an employer must refuse to recognize a union immediately after the collective bargaining unit has been certified and the union has been elected as the representative for the bargaining unit. Once an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid. *King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968); *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965).

*Technicolor Government Services, Inc. v. NLRB*, 739 F.2d 323, 326–327 (8th Cir. 1984), enfg. 268 NLRB 258 (1983). Despite Respondent’s contention that these principles are novel, these are long-held principles and they continue to apply. See, e.g., *Schwarz Partners Packaging, LLC d/b/a MaxPak*, 362 NLRB 1131 (2015); *Fallbrook Hospital*, 360 NLRB 644 fn. 2 (2014), enfd. 785 F.3d 729 (D.C. Cir. 2015).

3. The Union requested bargaining and did not limit its requests to a CBA

a. *What constitutes a request for bargaining and its relationship to recognition*

A request for bargaining subsumes a request for recognition. A request for information also constitutes a request for bargaining, as does a letter requesting to set dates for negotiations. A letter requesting dates for negotiations also indicates a desire to negotiate. *Eldorado, Inc.*, 335 NLRB 952, 954 (2001); *Biewer Wisconsin Sawmill, Inc.*, 306 NLRB 732, 733 fn. 4 (1992); *Money Radio*, 297 NLRB 705 (1990). Also see *Washington Beef, Inc.*, 322 NLRB 398 fn. 1 (1996) (information request subsumes request for recognition). Unfair labor practice charges alleging an unlawful refusal to recognize and bargain also reaffirm any previous requests to recognize and bargain. *Id.*

A request to bargain does not have to be in any specific form as long as the communication’s meaning is clear that the request is to negotiate and bargain over wages, hours and terms and conditions of employment. *Midwest Terminals of Toledo Int’l, Inc.*, 365 NLRB No. 158, slip op. at 2 (2017); *Eldorado, Inc.*, 335 NLRB at 954. A union carries the burden to make its wish known with specificity. A lack of specificity would mean a failure to state topics for discussion or when or where the union would want the discussions to take place. *Prime Service, Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001).

The employer must understand that a demand to bargain is made. *Midwest Terminals*, 365 NLRB No. 158, slip op. at 2. If not specific as a demand to bargain, a request that reflects “‘indicia of a demand, such as a suggested meeting place and time, proposed topics and a method for reply’” would indicate a demand to bargain. *Williams Enter., Inc. v. NLRB*, 956 F.2d 1226, 1233 (D.C. Cir. 1992).

b. *Respondent recognizes and bargains after the Union made legally valid requests*

Despite Respondent’s contention that the events before March 1, 2017 are irrelevant, long-held principals of labor law, the facts and *Technicolor*, supra, dictate a different conclusion. Respondent contends that the only relevant period is the period after the Board rejected its request for review. That period would begin on March 1, 2017. Because long-standing precedent dictates that Respondent’s bargaining obligation attached when the Union won the election and was certified, the suggested March 1 date is arbitrary. Instead I rely upon the course of events to dictate appropriate findings. The facts demonstrate that between the election and March 1, the Union began bargaining with Respondent over such issues as scheduling employees in specific

departments, effects of layoffs, and the effects of the kitchen closure. The Union also made information requests about these topics, disciplinary actions, and in preparation for negotiating the collective-bargaining agreement.

The Union’s requests had no vagueness when demanding to bargain, whether over issues in a specific department or its demand to bargain its initial collective-bargaining agreement with its concurrent information request. The Union’s requests to bargain from the specific departmental issues usually included a cease and desist over specific topics and requested meetings. Poulson provided available meeting times, either in the initial demand to bargain or the followup emails. Respondent answered the Union’s requests for meetings. It also met and negotiated with the Union on a number of issues, as demonstrated above. The course of events here leaves no question that the Union repeatedly asked to bargain over different issues and listed times of availability for meetings. The Union’s demands to bargain included cease-and-desist language, requests to bargaining over reassignments, schedule changes and effects bargaining regarding the kitchen construction.

I cannot rely upon Respondent’s witnesses’ claims that Respondent never recognized or negotiated with the Union. The standard of evidence in a Section 8(a)(5) allegation is objective. Respondent infers the matter has a component of subjective evidence, claiming it is part of its “‘totality of circumstances.’” I allowed Respondent to enter the evidence as relevant to its defense, but find the testimonies of subjective intent undercut the witnesses’ credibility and ultimately Respondent’s claims that no bargaining ever took place. In examining testimony from Candella, Kriegel and Schelling that Respondent never “‘negotiated’” with the Union, the testimony is in direct conflict with the contemporaneous documentary evidence. Candella testified that from November 2016 through the end of February 2017, Respondent’s decision was not to bargain for a collective-bargaining agreement. (Tr. 1461, 1463, 1468). Candella reasoned Respondent made no preparations to negotiate a collective bargaining agreement was because Respondent did not accept the election results and therefore did not recognize the Union. (Tr. 1467).<sup>44</sup> HR Director Schelling agreed that Respondent did not establish a bargaining committee to deal with the Union. Notwithstanding these opinions and subjective self-serving hindsight, the cumulative contemporaneous documentary information is the best evidence. Respondent’s actions demonstrate that it understood that the Union demanded to bargain on a number of occasions. The kitchen construction process not only demonstrates the Union’s specificity, but also demonstrates Respondent bargained without reserve over the topic. Respondent met with the Union and, in February 2017, signed an agreement with the Union about the kitchen renovations. The documents exchanged during this process are labeled proposal and counter-proposals. Respondent never conditioned discussions with the certified bargaining agent, nor did it condition the ultimate kitchen agreement upon the outcome of the representation case.

The course of events and the contemporaneous documents,

seemed contrived and preplanned. Respondent tried the same thing when EVS Director Herring was recalled, and Herring found no offense.

<sup>44</sup> During cross-examination, Candella’s charming demeanor, on display during direct examination, evaporated. He and Respondent counsel claimed the cross-examination was abusive, when, in fact, his conduct

including the kitchen red-line version submitted by Candella and the ultimate signed agreement in the kitchen, EVS and SPD discussions demonstrate Respondent bargained with the Union. In January 2017, Interim CEO Coomes' letter to employees, before the Board's ruling, stated Respondent would bargain in good faith with the Union during its appeal to the Board. It said nothing about a test of certification.

Regarding the kitchen agreement, Respondent contends that only Candella was authorized to make agreements with the Union. Before the hearing, no one raised with the Union that the kitchen construction agreement was invalid because Candella was not at the final negotiation session. None of this was evident in the contemporaneous documentation and no one testified that it was raised during the discussions about kitchen construction. In addition, Schelling consulted with Candella. Schelling could not recall Respondent's representatives raising the Union's certification during the kitchen discussions.

Respondent understood the Union intended to bargain over a complete collective-bargaining agreement: On February 10, 2017, HR Director Schelling responded to Martin and included specific language that answering the information request for "upcoming negotiations for an initial collective bargaining agreement covering employees represented by the [Union]." Respondent then included some of the responsive documents. (Jt. Exh. 22). These responses, including the provision of at least some of the requested information through March 1, recognizes the Union as the certified bargaining agent of the bargaining unit. Although Candella never provided "all the information" to Martin, he did provide some. Schelling's correspondence admits that the information was to be used in negotiations for a collective-bargaining agreement, also demonstrating Respondent's understanding that the information was a request to recognize and bargain.

The documents also demonstrate Respondent planned to provide information for negotiating a collective bargaining agreement and indeed provided some of that information.<sup>45</sup> Respondent, in some cases, met its lawful requirements by meeting and

<sup>45</sup> Respondent's brief contends that, because it only provided some of the information, it had not recognized or bargained with the Union. This statement instead turns into more of an admission that it indeed gave some information but failed to give the remainder.

<sup>46</sup> Respondent contends the facts leading up to Respondent's denial of Mini-Bera's right to representation cannot be used to prove its failure to bargain because the consolidated complaint did not specifically allege it. Respondent therefore claims a lack of due process. (R. Br. at 72, fn. 15). The facts only show recognition of the Union's position as the certified bargaining agent and the requirement to allow union representation, rather than bargaining itself. Respondent's claim of lack of due process also is not supported. Two initial charges, 20-CA-196271 filed April 3, 2017, and 20-CA-197403 filed April 21, 2017, allege Respondent's withdrawal of recognition and failure to bargain. (GC Exhs 1(j) and (p)). The consolidated complaint alleges the refusal to allow representation during an investigatory meeting as a violation of Section 8(a)(1). The Second Amendment to the Consolidated Complaint alleges that Respondent withdrew recognition on March 24, 2017 and in the alternative, refused to recognize and bargain after the same date. (GC Exh. 1(y)). The Second Amendment to the Consolidated Complaint sufficiently described Respondent's failure to recognize the Union. Respondent's answer to the Second Amendment denies that the allegations are

discussing matters with the Union, such as the effects bargaining in kitchen construction agreement, which Respondent signed without condition. Until Garrison's letter of March 16, 2017, none of these events were conditioned upon the results of Respondent's request for review to the Board, much less a test of certification.

Respondent's failure to allow Mini-Bera union representation after agreeing to permit it supports a finding that Respondent recognized the Union and then withdrew recognition. Respondent previously cited *IBM* for the proposition that non-represented employees are not entitled to *Weingarten* representation in investigatory meeting. These events primarily occurred after March 1, 2017, the date Respondent's brief sets as the beginning of the relevant period of refusing to bargain. Its initial acquiescence to the Union's demand to allow a union representation to Mini-Bera in the laboratory during an investigatory interview and its withdrawal of its agreement to allow representation is evidence of its refusal to recognize the Union after March 24.<sup>46</sup> This finding is bolstered by the Lab Director Romero's admission that she did not know until after the March 24 meeting that she could not continue as planned with the investigatory interview. Ultimately HR Director Schelling is the person who informed the Union that it could not participate in Mini-Bera's investigatory interview. As admitted supervisors and agents, Schelling, the laboratory director and the laboratory supervisor bound Respondent with their actions. These events demonstrate that Respondent was recognizing the Union, and then stopped.

Garrison's March 16 letter, laying out Respondent's plan to seek a test of certification, occurred in mid-March 2017, after much of the bargaining over the issues other than the actual full collective bargaining agreement, occurred. Respondent's attorney made clear it will seek a test of certification and mentions nothing of the past meetings and agreements

Respondent also claims that the negotiation process never started between the parties because of Martin's March 1 email to Candella, requesting negotiations for an "initial bargaining session." However, the documents, and those that following, reflect

sufficiently described, but again maintains it did not recognize the Union. Respondent maintains its refusal to allow Mini-Bera representation was because it did not recognize the Union. This answer implies that Respondent was aware that the facts when related to recognition. The laboratory director admitted that the basis for inviting Poulson to the meeting was to allow an employee to have union representation, as requested. By late March 2017, Respondent then contended it was not recognizing the Union. Much of the evidence regarding Mini-Bera's status was submitted by joint exhibit and was litigated thoroughly at hearing. Mini-Bera and her supervisor testified early in the proceedings, which had breaks between weeks of the hearing, so Respondent had opportunity to call additional witnesses if it so desired. The matter was fully litigated at hearing and Respondent had sufficient notice of the facts, which relate to the allegations that Respondent no longer recognized the Union after March 24, 2017. *Fremont Medical Center*, 347 NLRB at 1900 (closely related to other allegations). Also see *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 122 (D.C. Cir. 2001), enfg. 330 NLRB 560 (2000) (no due process violation as employer had sufficient opportunity to cross-examine witnesses and put on its own case to rebut the allegations); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993). However, even if this set of events regarding Respondent's withdrawal of recognition is ignored, my decision would not change.

that Martin sought to begin negotiation of the collective-bargaining agreement only, and did not refer to those any of the negotiations Poulson, as the “on the ground” Union representative, conducted. (R. Br. at 45–46). Respondent also cited Poulson’s March 7, 2017 Google Group message that the Union sent management some dates to begin the bargaining process. (R. Br. at 16, citing R. Exh. 54). However, looking at the dates requested for bargaining, the dates refer to those requested for bargaining the collective bargaining agreement. When taken in context of the course of communications, Respondent’s cite misinterprets the events. Beyond the specific requests to bargain, the Union made several information requests, among which was Martin’s specific request for information for negotiation of a collective-bargaining agreement and to which Respondent provided some information.

Likewise, Respondent argues that a March 2 meeting with SPD employees and Kriegel does not demonstrate bargaining. Respondent claims, had it been bargaining, “[Respondent] would have insisted that Dan Martin—the NUHW’s lead negotiator—be present when negotiating changes with the employees.” (R. Br. 45–46). Respondent’s statement is troublesome on two levels. First, the statement is purely speculative. Respondent never raised Poulson’s authority to bind the Union, either during negotiations or during the hearing. *Embossing Printers*, 268 NLRB 710, 721 (1984), *enfd.* 742 F.2d 1456 (6th Cir. 1984).<sup>47</sup> Respondent had no problem previously negotiating and signing an agreement with Poulson, who negotiated the kitchen closure agreement as the Union representative and bound the Union with her signature. It never raised Poulson’s status while discussing any of the other mandatory subjects, such as Frogge’s shift assignment or the two laid off employees. Secondly, this statement demonstrates a misunderstanding of an employer’s authority to select the Union’s representative in bargaining. It is well established that an employer must recognize the agents of the employees’ collective-bargaining representation. The union’s selection of bargaining representatives is the union’s internal affair, absent any special circumstances. *Postal Service*, 280 NLRB 685, 690 (1986), *enfd.* 841 F.2d 141 (6th Cir. 1988); *Harley Davidson Motor Co.*, 214 NLRB 433 (1974). Also see: *People Care, Inc.*, 327 NLRB 814, 824–825 (1999) (employer refusing to meet with union attorney unlawful as no special circumstances, such as obstructionist conduct, shown); *Caribe Staple Co., Inc.*, 313 NLRB 877, 889–890 (1994). Failure to meet with the union’s agents robs employees to select the representatives of their own choosing. *Postal Service*, 280 NLRB at 690. An employer cannot insist to impasse on the composition of the union’s bargaining representative as it is a nonmandatory subject. *Latrobe Steel Co.*, 244 NLRB 528, 532 (1979). Respondent raises no evidence of any special circumstances that would warrant Martin’s presence rather than David or Poulson, who left the employees’ meeting with Kriegel. The meeting on March 2 continued as David took the lead and Respondent points to no evidence that it questioned David’s authority to continue. As such, Respondent

has no basis to determine who represents the Union in negotiations and has no evidence to support its contention.

An unfair labor practice charge about bargaining subsumes a request for recognition. Therefore, Respondent’s claim that it met with the Union and provided information strictly to resolve unfair labor practice charges does not support a finding that Respondent was not recognizing and bargaining with the Union. Respondent then admits it acted upon the unfair labor practice charge, which means it recognized the Union’s authority to resolve an unfair labor practice charge and the issues underlying that charge. Candella testified that he agreed to meet with the Union to avoid a possible unfair labor practice charge or picketing during the kitchen construction project. When Respondent agreed to meet with Poulson regarding Frogge’s change in work assignment, it had limited knowledge of the unfair labor practice charge until the meeting: Poulson then presented the charge to Respondent’s representatives. Poulson apparently did not file a charge about the elimination of the two positions and the layoff of the two affected employees, yet Respondent met over those after Candella notified Poulson and offered a date for meeting. Later, Candella asked for a quick answer to Respondent’s rejection of the Union’s counterproposal. The underlying matter remained Frogge’s assignment. Despite being an unfair labor practice charge, Poulson and Respondent were negotiating over a mandatory subject of bargaining: Frogge’s work assignment, which could affect the work assignments of other bargaining unit employees within the EVS department. Candella stated he met with the Union over effects bargaining in the kitchen to avoid picketing. Again, the pattern shows Respondent met and bargained over the mandatory subjects of employee layoffs, shifts and duties.

Respondent also contends it had not recognized the Union because Candella was attempting to resolve unfair labor practice (ULP) charges by providing some information to the Union. The information requests and subsequent responses also show the Union demanded to bargain and Respondent recognized and bargained with the Union in kind. The attempts to resolve the unfair labor practices show recognition and bargaining, not the other way around. See *Washington Beef*, *supra*.

Respondent also maintains that the Union’s entire campaign to get recognition, which continued after Respondent issued its March 16 letter, is an admission that Respondent never recognized the Union. The Union’s corporate campaign, like many others, was not novel and Respondent shows nothing that would make the campaign unprotected. *Prime Health Service, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 17 (2016). I find that the Union’s efforts are part of its campaign to obtain compliance with bargaining and look to some of Respondent’s examples. First, Respondent cites the Union’s December 16, 2016 letter sent to the Board of Trustees, stating that Respondent’s objections were delaying the certification of the union. (R. Br. at 16, citing R. Exhs. 53 and 59). However, the Union’s statement is accurate: During the time the Regional

<sup>47</sup> The alternative is that Respondent admits it had no desire to reach agreements regarding matters of wages, hours and terms and conditions of employment, contrary to the requirement of good-faith bargaining in *Vanderbilt Products*, *supra*. Its actions and contention that the Union did

not represent a majority of the bargaining unit employees then infer that Respondent was bargaining with a minority union, which is unlawful under Sec. 8(a)(2) of the Act. *NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 568 (2d Cir. 1994).

Director considered Respondent's objections to the election, no certification would issue. Only after the Regional Director denied the objections did the certification of representative issue. Therefore, the Union's statement, that Respondent's objections delayed certification, is true. See generally Board Rule Section 102.69. Many of the Union's post-March 16 documents call for Respondent to recognize the Union and bargain in good faith. (R. Br. 10–17.) To say that these statements show Respondent never recognized or bargain with the Union is a fallacy. Any statements the Union made after March 16, 2017 that Respondent was not recognizing or bargaining are accurate.

Respondent cites a few cases to contend that it was privileged to bargain to a certain extent while continuing to challenge the election and certification. Respondent states:

In *Fred's*, a technical refusal to bargain case, the employer attempted to defend itself by arguing that while its appeal was pending, it simultaneously bargained in good faith with the union and reached an agreement. 343 NLRB at 138. The Board found that the employer unlawfully refused to bargain because it continued to contest the validity of the certification in its answer to the complaint, communicated its intention to test the union's certification and had not disavowed this intention despite its willingness to engage in negotiations. The Board's reasoning is straightforward and obvious: "an employer 'may negotiate with or challenge the certification of the Union; it may not do both at once.'" Id. at 138 (quoting *Terrace Gardens Plaza*, 91 F.3d at 225).

Respondent's analysis of *Fred's* includes a factual statement that the employer attempted to defend itself by arguing that while its appeal was pending, it simultaneously bargained in good faith and reached an agreement. (R. Br. at 34–35, citing *Fred's*, supra, at 138.) Further delving into the facts, however, the union there requested bargaining in November 2003; apparently the employer initially refused to bargain, then finally commenced bargaining, leaving a period in which the employer did not bargain. The period of refusing to bargain violated Section 8(a)(5). Although Respondent here maintained its intent to pursue a test of certification, it did not refrain from bargaining with the Union about issues that were related to wages, hours and terms and conditions of employment, reached agreements, and provided some information to prepare for contract negotiations. *Fred's*, 343 NLRB at 138.

*Fred's* relies upon a few cases. In one of those cases, *Overland Trans. System, Inc.*, 323 NLRB 491 (1997), enfd. 187 F.3d 637 (6th Cir. 1999), another case of a test of certification, the underlying issue in the representation cases involved whether the two employers were a single employer. After certification, an attorney for one of the entities bound both entities when he offered dates to bargain. Overland itself never offered to bargain and the parties never entered into negotiations. 187 F.3d 637. The facts from *Overland* are significantly different than those here, where Respondent agreed to bargain in good faith despite its desire to challenge the certification. As noted in *Fred's*, supra, citing *Terrace Gardens Plaza*, Respondent cannot do both.

Another case Respondent cites is *GKN Sinter Metals Inc.*, 343 NLRB 315 (2004) (summary judgment). The employer there contended that no further action was needed on summary

judgment because it now recognized the union and was willing to negotiate. It too cites the same principle from *Terrace Gardens Plaza*. The Board noted that the employer never disavowed its quest to test the union's certification and could not have good faith negotiations under those circumstances. Id. Again, apparently the employer had not yet engaged in any negotiations despite its offer. Similarly here, Respondent has never disavowed its March statements that it seeks a test of certification and, unlike the cases, Respondent never entered into any good faith negotiations for the collective-bargaining agreement. Neither *Fred's* nor *GKN* reached a Federal court of appeals for the rest of the test of certification.

Respondent also misplaces reliance upon *Desert Toyota*, 346 NLRB 99, 105 (2005) (*Desert Toyota III*). The Board relied upon a prior finding in a case issued the same day that the employer did not have an obligation to bargain. *Desert Toyota*, 346 NLRB 132 (2005) (*Desert Toyota II*). *Desert Toyota III* was based upon the Board's decision in *Desert Toyota II*, in which the Board dismissed the 8(a)(5) and (1) allegations because the employer had no obligation to bargain. Respondent cites to the administrative law judge's decision, which was reversed by the Board and therefore nonprecedential. In addition, the Board in the present case has already ruled that the bargaining unit was properly certified. Respondent therefore has a bargaining obligation that was not present in *Desert Toyota III*.

4. Respondent did not follow the required procedures to obtain a test of certification

Based upon *Technicolor*, supra, in order to obtain a test of certification, Respondent was supposed to refuse to meet and bargain *immediately* (*emphasis added*). Instead Respondent did the converse of what it is required to obtain a test of certification. Respondent not only stated its willingness to negotiate—Respondent actually negotiated with the Union within the period immediately after the election and certification of representative. The discussions started with attempting to meet regarding Frogge, which Poulson initiated the day before the vote count, and the parties emailed about dates in December 2016. Regarding the kitchen changes and the layoff of two employees, Respondent appropriately notified the Union and held bargaining discussions. At almost 3 months after the Union was certified as the bargaining agent, Respondent then demanded the Union to allow it to pursue the test of certification. Respondent has waived its right to obtain a test of certification by failing to refuse immediately to meet and bargain. It further violated Section 8(a)(5) by refusing to meet and negotiate after the March 16 letter. Respondent's failure to bargain after March 16 constitutes an unlawful refusal to bargain. *Technicolor*, supra. This unlawful refusal to bargain continues to present.

Respondent contends it never waived its right to a test of certification because any waiver must be clear and unmistakable. Respondent's contention is directly contradicted by stated longstanding law: An employer waives its rights to invalidate the election and certification when it "honors a certification and recognizes and begins bargaining with the certified representative." *King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (1968). As described above, Respondent consistently acted with its

commitment to enter into negotiations and recognized the certified bargaining agent of the bargaining unit.

Respondent's waiver argument misplaces reliance upon *United Steelworkers v. NLRB*, 536 F.2d 550, 555 (3d Cir. 1976) and *Terracon, Inc.*, 339 NLRB 221, 223 (2003), *affd. sub nom. Operating Engineers, Local 150 v. NLRB*, 361 F.3d 395 (7th Cir. 2004). First, *Steelworkers*, 536 F.2d at 555, states the general principle that the waiver of a statutory right must be clear and unmistakable. True, but *Steelworkers* occurred in interpretation of contractual rights in the collective-bargaining agreement of an already recognized bargaining unit.<sup>48</sup> In *Terracon*, supra, no election was held; the matter related to the employer's review of union cards and whether the employer made a commitment to bargain in a single conversation. *Terracon*, supra, however, states that an employer's statements or conduct can show a "commitment to enter into negotiations with the union [may constitute] an implicit recognition of the union. [cites omitted]" Id. Respondent's conduct shows more than an implicit recognition of and bargaining with the Union. Therefore, these cases provide no guidance regarding Respondent's denial that it waived its rights to a test of certification.

By requiring the Union to allow Respondent to seek a test of certification or face a situation in which Respondent would not bargain, Respondent "implicitly threaten[ed]" the Union. *Terrace Gardens Plaza v. NLRB*, 91 F.3d 222, 226 (D.C. Cir. 1996). By March 16, 2017, the date of Garrison's letter, Respondent had engaged in negotiations with the Union and reached agreements on issues. It then again asked the Union to acquiesce to a test of certification; it stated it would bargain during the time of the test of certification. According to the letter, any agreements reached would be held in abeyance pending a circuit court's determination. Respondent's statement, then, is a request for conditional bargaining, which is a permissive subject of bargaining. *Professional Transportation, Inc.*, 362 NLRB 534 (2015). The Union declined to agree with Respondent's demand to seek the test of certification. Respondent then stopped all discussions and negotiations with the Union. Respondent's continued refusal to recognize and bargain with the Union violates Section 8(a)(5). *Williams Energy Co.*, 218 NLRB 1080 fn. 4 (1975) (any further union requests to employer for bargaining are futile and unnecessary). Similar events are considered a withdrawal of recognition, and I so find here. *Schwarz Partners*, 362 NLRB 1131, 1132–1133, citing *Technicolor*, supra.

#### D. Respondent Also Made Unlawful Unilateral Changes

##### 1. Applicable law

Section 8(a)(5) and Section 8(d) define the duty to bargain collectively, which requires an employer "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). A violation of Section 8(a)(5) does not require a finding of bad faith. Id. at 743 and 747. A unilateral change acts no differently than a "flat refusal" to bargain by skipping out on a union's input when the union has so requested to do so. Id. at

<sup>48</sup> On remand, the Board found the employer violated Section 8(a)(5) by adjusting grievances without providing the union the chance to be present. *Dow Chemical Co.*, 227 NLRB 1005 (1977).

743. An unlawful unilateral change "frustrates the objectives of Section 8(a)(5)," because such a change "minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (quoting *Katz*, supra at 744, and *Loral Defense Systems-Akron v. NLRB*, 200 F.3d 436, 449 (6th Cir. 1999)); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). *Katz* occurred in a newly certified unit, just as in the situation at hand.

Once the Union won the election, Respondent was required to refrain from unilateral changes in wages, hours and working conditions unless it notified and bargained to impasse with the Union. *Northwest Graphics*, 342 NLRB 1288, 1297 (2004), citing *Mitchellace, Inc.*, 321 NLRB 191 (1996) and *LoveJoy Industries*, 309 NLRB 1085 (1992). The only exceptions to this rule are limited to two: When the union attempts to delay bargaining; and, economic exigencies requiring prompt action. *RBE Enterprises of S.D., Inc.*, 320 NLRB 80, 81, (1995). The economic exigencies do not extend to loss of accounts or contracts, operating at a competitive disadvantage or supply shortages. Id. Instead, the economic exigency occurs due to an unforeseen event that has a major economic effect and therefore requires the employer to engage in "immediate action." Id. 81–82 (cites omitted). If such exigencies occur and are not of the sort that relieve the employer of its bargaining obligations, the employer still must give the union notice and an opportunity to bargain. Id. at 82.

Any unilateral changes Respondent made between the time of the election and time of certification are unlawful.<sup>49</sup> Respondent's brief states that the Union and Respondent did not hold meetings for at least of 90 percent of the employees and "most of the departments forged ahead with changing the terms and conditions of their employees' employment without first contacting the Union." (R. Br. at 49 fn. 8). Because the Union was ultimately certified, Respondent was not privileged to make such unilateral changes. *Toyota of Berkeley*, 306 NLRB 893, 894 (1992), citing *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), *enf. denied on other grounds* 512 F.2d 684 (8th Cir. 1975).

##### 2. Respondent made unlawful unilateral changes in EVS in response to the kitchen construction project

The Board may find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d 1990). "This rule has . . . particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses." Id.

EVS Director Herring, Respondent's witness, admitted he made changes to schedules and duties of the EVS employees without notifying or bargaining with the Union. The changes are closely related to the events related to the kitchen. Respondent's brief admits it made changes without notification to the Union other than this one.<sup>50</sup> It just so happened that Herring testified to

<sup>50</sup> Respondent's brief states that Respondent made a number of changes before its January 16, 2017 notification to the Union. One of

this one. Respondent had an obligation to keep the status quo unless it notified and, upon request, bargained with the Union to a lawful impasse. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). This admission constitutes an unlawful unilateral change.

3. The unilateral changes Respondent made after the Union did not agree to Respondent's demand for a test of certification

*a. The kitchen construction agreement and the effects bargaining*

The parties' February 2017 agreement regarding effects bargaining over the kitchen construction project covered a number of issues, including temporary layoffs, changes in work duties, and changes in shifts. All of these, as negotiated, were mandatory subjects of bargaining. As noted above, the parties indeed negotiated and signed an agreement in February 2017. Then, in April 2017, after Respondent's March 16 letter, Respondent determined it had not negotiated an agreement in the signed document and it had no obligation to notify the Union of intended further changes, much less meet and bargain. Respondent again relies upon the test of certification argument as above. This change shows a shift in Respondent's position, after Respondent's March 1 timeline. It again serves as evidence of Respondent's refusal to meet and bargain with the Union. I find that Respondent violated Section 8(a)(5) when it unilaterally notified the Union that it would not abide by the negotiated and signed agreement.

*b. Union access to meeting rooms*

Respondent also violated Section 8(a)(5) of the Act by no longer permitting the Union to utilize meeting rooms for meetings. HR Manager Schelling had permitted the Union to utilize its facilities until Respondent no longer recognized or bargained with the Union. Access was granted and access was taken away. The meeting rooms that Schelling assigned did not interfere with production or patient care, and Respondent provided no evidence otherwise. Further, Poulson testified without contradiction that managers told her that she should not be in the building.<sup>51</sup>

General Counsel argues that Respondent's actions here are material and substantial by limiting the Union's access to bargaining unit employees. I agree. "An incumbent union's access to unit employees for purposes of representation 'is a mandatory subject of bargaining.' *Unbelievable, Inc.*, 323 NLRB at 817 (1997), enfd. in part, 118 F.3d 795 (D.C. Cir. 1997)." *North Memorial Health Care v. NLRB*, 860 F.3d 639, 648–649 (8th Cir. 2017), enfg. in relevant part 364 NLRB No. 61 (2016). This action constitutes a fait accompli,<sup>52</sup> as Respondent never notified or met and bargained with the Union, the certified representative, before it implemented the change on a mandatory subject of bargaining. Respondent violated Section 8(a)(5) by unlawfully and unilaterally deciding not to allow the Union to schedule meeting rooms for access to bargaining unit employees.

the examples at hearing was changing schedules of 6 bargaining unit employees. (R. Br. at 48, citing Tr. 1867–1868.) Given the requirement of notification and bargaining upon request with the Union postelection, Respondent's example is akin to another admission against interest.

*c. SPD employee schedules*

The Act requires an employer to refrain from imposing new and different working conditions on the bargaining unit employees without giving the Board-certified representative notice and opportunity to bargain over any decision that could affect the employees' working conditions. See generally *Indiana Hospital*, 315 NLRB 647, 661 (1994). Changes in employee work shifts are mandatory subjects of bargaining. *Meat Cutters Local 1289 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1995); *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006). Changes in shift starting times or ending times are material, substantial and significant changes to terms and condition of employment. *Mitchellace, Inc.*, 321 NLRB 191, 195 (1996).

Respondent, through Schelling, notified the Union of McNelis's schedule change after it already notified McNelis. Despite attempts to discuss the matter, Kriegel rebuffed Poulson's efforts, including her request for information that would show how the shift changes were necessary. Respondent then made the unlawful changes to scheduling without further discussions with the Union, after Respondent decided that it was not recognizing the Union.

As previously noted, Respondent cannot rely upon its defense that it never recognized the Union. Respondent does not maintain that it bargained to impasse regarding the scheduling. I agree with General Counsel that, after considering about these changes for at least a year, Respondent implemented them without completing any bargaining with the Union. Kriegel's explanation of workload as the reason for change is faulty in two respects: First, she failed to provide the information to demonstrate to the Union about the workload affecting the schedules, which precludes any finding of impasse; and secondly, no exigency could have existed if Respondent had been considering these changes for a year. See *RBE*, supra; *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 (2017); *Quality Health Services of P.R., Inc. v. NLRB*, 873 F.3d 375, 387–388 (1st Cir. 2017), enfg. 363 NLRB No. 164 (2016). The schedule changes altered the status quo and Respondent had an obligation to bargain with the Union upon request.

*E. Conclusion Regarding the Bargaining Allegations*

Respondent acceded to the Union's requests to meet and bargain over several issues and to provide at least some information. Prime among the negotiations was the parties' agreement regarding effects bargaining on the kitchen construction project, which Respondent unlawfully denied and refuses to abide by in April 2017. It permitted the Union to use conference rooms and then no longer granted the Union permission to do so, which also was a mandatory subject of bargaining. These issues were mandatory subjects of bargaining, such as work schedules, layoffs and duties. It also acted as if it intended to proceed with the collective-bargaining contract negotiations, at least until the Union would not agree to its terms for a test of certification. By providing

<sup>51</sup> Respondent contends that no evidence is on record that it no longer permitted the Union to schedule meeting rooms.

<sup>52</sup> The definition of fait accompli is that Respondent has already made up its mind what it intends to do. See *Comau, Inc.*, 364 NLRB No. 48, slip op. at 3 fn. 11 (2016).

information, Respondent recognized the Union as the exclusive bargaining agent. In none of these situations does Respondent raise the issue of emergencies requiring immediate action per *RBE*, supra. The entire course of conduct demonstrates that Respondent violated Section 8(a)(5) by failing to provide information, making unilateral changes, and withdrawing recognition.

In addition to these 8(a)(5) violations, General Counsel alleges violations of Section 8(a)(3).

IV. SECTION 8(A)(3) ALLEGATIONS REGARDING EMPLOYEES IN ENVIRONMENTAL SERVICES DEPARTMENT AND STERILE PROCESSING DEPARTMENT

General Counsel alleges two changes to schedules in EVS: Miguel Arroyo and Renee Frogge. For the Sterile Processing Department, the change to everyone's schedule is alleged as well as for McNelis. I first discuss applicable law under *Wright Line*, then discuss Arroyo, Frogge, and the SPD department.

A. *Applicable Law*

In the situations alleged, General Counsel contends adverse employment actions were the result of discrimination for union activities. Respondent provides possible legitimate business reasons for the actions it took. In determining whether adverse employment actions are attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 108 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).<sup>53</sup> The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Fremont-Ridout Health Group*, 357 NLRB 1899, 1902 (2011); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 67 (2d Cir. 2009).

Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428–1429 (11th Cir. 1985). Because direct evidence of unlawful motivation is seldom available, the General Counsel may rely upon circumstantial evidence to meet the burden. See *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). A showing of animus need not be specific towards an employee's union or protected concerted activities. *Colonial Parking*, 363 NLRB No. 90, slip op. at 1 fn. 3 (2016). Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Bros., Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory

motive); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appeared suspect).

Factors which may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. *Purolator*, 764 F.2d at 1429; *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995), denying rev. 311 NLRB 1118 (1993).

An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *T & J Trucking Co.*, 316 NLRB 771 (1995). If the employer's reasons are found to be pretextual—reasons that are false or not in fact relied upon—the employer fails to sustain its burden and the inquiry is terminated. See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 275–276 (2014) (“finding of pretext defeats an employer's attempt to meet its rebuttal burden”); *Servicios Santiarios de Puerto Rico d/b/a AA-1 Portable Toilet Services*, 321 NLRB 800, 804 (1996); *Caruso & Ciresi, Inc.*, 269 NLRB 265, 268 (1984). When pretext is found to be the case, dual motive no longer exists. *La Gloria Oil*, 337 NLRB at 1124.

B. *Miguel Arroyo*<sup>54</sup>

Herring was the only witness testifying about why the policy had to be enforced. Herring testified credibly that he did not ask about the length of the marriage. He apparently never asked how long everyone knew that the couple was married. However, I do not credit Arroyo's statements to him, which sounded rehearsed. However, I credit Herring's version that he told Arroyo, “things were changing,” which was similar language Guck used months later in her memo about McNelis.

Respondent did not ask for testimony about these events from HR Manager Schelling or Supervisor Roe. For the witnesses it presented, Respondent did not ask questions about the investigation into Arroyo's transfer to the day shift as enforcement of the policy. Supervisor Roe admittedly knew Arroyo's marital status for at least 10 years; Respondent asked her no questions about the shift reassignment for Arroyo to the day shift, which she supervised.<sup>55</sup> It also asked no questions on direct testimony from HR Manager Schelling regarding whether anyone in the HR department reviewed Arroyo's file before EVS Director Herring reviewed Arroyo's file before EVS Director Herring inquired about his marital status. Respondent's failure to make inquiries of Schelling and Roe warrant an adverse inference that any testimony from the two Respondent witnesses would not have been favorable to it. *Servicios Santarios*, 321 NLRB at 803.

Respondent did not call a number of witnesses who may have

<sup>53</sup> This burden shifting was approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>54</sup> Arroyo did not appear as a witness. The administrative law judge retains discretion in deciding not to draw an adverse inference. *Underwriters Laboratories v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). But

see *NLRB v. MDI Commercial Services*, 175 F.3d 621, 628 (8th Cir. 1999). I take no adverse inference for Arroyo and instead rely upon a number of representations made by EVS Director Herring.

<sup>55</sup> Over objections, I asked how long Supervisor Roe knew about the marriage.

been able to corroborate Herring and were still under its control. The adverse inference rule applies only when a party fails to call a witness “who may reasonably be assumed to favorably disposed to the party. [cite omitted]” *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78, 106–107 (1979) (unexplained failure to produce corroborating witness allows inference that the witness would not have supported uncorroborated testimony), enfd. in relevant part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). Respondent failed to present any other witness about the investigation into the marriage and ultimate enforcement of the policy regarding married employees working on the same shift. Respondent did not call a number of witnesses to corroborate events, such as anyone in HR to corroborate Herring’s testimony about application of the marriage policy or any record of the interview with Arroyo. Respondent called no one else from Human Resources about Herring’s investigation and why the policy had to be enforced at that time: Given the failure of Respondent to call these witnesses and the apparent open knowledge of the marriage identified by Roe, I take an adverse inference from Respondent’s failure to call witnesses within its control to corroborate Herring. I conclude that Respondent’s failure to call corroborative within its control indicates that if called, those persons would have testified adversely to Respondent. *Ryder Student Transportation Services*, 333 NLRB 9, 13 (2001); *Champion Rivet Co.*, 314 NLRB 1097, 1105 (1994).

Respondent suggests that I make an adverse inference that General Counsel did not call former supervisor, Young, who allegedly witnessed the exchange but is no longer within Respondent’s control. Respondent too failed to call its former supervisor, who allegedly informed EVS Director Herring of the Arroyos’ marriage and was Young’s supervisor, to corroborate its case-in-chief. I therefore make no adverse finding regarding any party’s failure to call Young.

Arroyo was a union supporter and apparently wore union gear. Herring had general knowledge about the Union campaign, having addressed the matter with employees. Without direct evidence to show Respondent’s knowledge<sup>56</sup> and antiunion animus regarding Arroyo, circumstantial evidence establishes those two elements. *Kajimi Engineering & Construction*, 331 NLRB 1604, 1604 (2000) (knowledge); *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 408–409 (7th Cir. 1992), enfg. 301 NLRB 223 (1991) (animus).<sup>57</sup> Respondent’s knowledge and antiunion animus is inferred based upon several factors: Timing; the suddenness of the decision, particularly given the history of knowledge of the marriage; Respondent’s limited investigation; false reliance upon the vacation schedule; and, failure to explore options about whether Arroyo’s wife might be moved to the first shift.

Timing of Arroyo’s reassignment creates the first inference. Herring told Arroyo that he would be reassigned the following week, which occurred while the election results were pending. The timing supports a finding that Respondent’s actions were

taken due to Arroyo’s Union sympathies and Respondent’s animus. *Sun Tech Group, Inc. d/b/a St. Thomas Gas*, 336 NLRB 711, 718 (2001) (layoff during organizing campaign); *Healthcare Employees Local 399 v. NLRB*, 463 F.3d 909, 920 (9th Cir. 2006); *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685–686 (8th Cir. 1996) cert. denied 521 U.S. 1118 (1997) (termination 24 days before election showed timing was a factor). Timing dovetails with the second factor, the suddenness of the decision and desire to enforce an old policy. Roe knew for 10 years that the couple was married, no one did anything for quite some time, and a week before the ballots are counted, EVS Director Herring decides to reassign Arroyo to the day shift. Herring had been employed with Respondent for approximately 6 months when he made this decision, yet suddenly had to enforce this policy. This too leads to an inference of knowledge and animus. *LaGloria Oil*, 337 NLRB at 1124.

The third factor is that Herring’s investigation was extremely limited. He failed to ask any questions about how long Arroyo held the position on the same shift with his wife. Allegedly Young told him that the couple was married. Roe admittedly knew about the marriage for 10 years, yet Respondent did nothing during that 10-year period. Herring seized upon the policy to move a valued employee without checking into any of the underlying facts with HR without obtaining a number of underlying facts, as previously described. He allegedly relied upon HR to make his determination, yet no one in HR testified to how long it might have known Arroyo and his wife worked the same shift. Respondent therefore failed to conduct a meaningful investigation, which also demonstrates discriminatory intent as well as pretext. See *Andronaco Industries*, 364 NLRB No. 142, slip op. at 14 (2016), citing: *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed. Appx. 656, 658 (D.C. Cir. 2015), enfg. 357 NLRB 1632 (2011); and, *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

The fourth factor is that Herring’s reliance upon scheduling vacations at the same time is a pretext. General Counsel’s evidence demonstrated that Arroyo and his wife never took vacation at the same time. It also points out again that Respondent did not conduct a meaningful investigation before it acted. Respondent’s concerns about the couple taking vacations at the same time becomes a pretext as it never occurred. *Healthcare Employees Union Local 399*, 463 F.3d at 922–923, quoting *NLRB v. Dillon Stores*, 643 F.2d 687, 693 (10th Cir. 1981) (“[A] flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an anti-union motivation.”).

The fifth factor is that Herring selected Arroyo himself and did not even explore the possibility of moving Arroyo’s wife to a different shift. Herring did not consider it and could not give a reasonable explanation of why he did not.

Respondent’s justifications, enforcement of its policy and the vacation issue, are unavailing as Respondent’s asserted

<sup>56</sup> Respondent frequently denied any knowledge of Arroyo’s union leanings or activities. However, in its brief, discussing the alleged conversation between Herring and Arroyo about the Union, Respondent cites *Colonial Parking*, 363 NLRB No. 90, slip op. at 7 (2016), then parenthetically quotes, “Conversations about union activity between

employers and employees are considered lawful when they involve open union supports, in a casual setting, and are unaccompanied by coercive statements.” (R. Br. at 59.) Respondent instead relies upon Herring’s alleged conversation with Arroyo in a hallway about the Union.

<sup>57</sup> I do not rely upon Van Winden’s testimony for these findings.

justifications are unreliable: Respondent's contentions here are undermined and leads to a conclusion that Respondent took its actions based upon anti-Union reasons. *Healthcare Employees Local 399*, 463 F.3d at 922-923. Not only do these reasons demonstrate knowledge and animus, they also demonstrate that Respondent's reasons for suddenly enforcing the policy were pretextual.

I therefore find that General Counsel established a prima facie case that Respondent acted with knowledge and animus towards Arroyo. The same analysis also demonstrates that Respondent's actions were pretextual. I therefore find that Respondent violated Section 8(a)(3) by moving Arroyo from his second shift lead position to a first shift housekeeping position.

#### B. Rene Frogge

General Counsel presents a prima facie case regarding Frogge's reassignment. At the beginning of the union campaign, Frogge worked in EVS on a Monday through Friday evening shift delivering linen and assisting as needed with other housekeeping matters. Her union activities are not in doubt. She was involved in the organizing campaign. She wore union paraphernalia at work and appeared in a public, on the union Facebook page video and another Facebook posting. Respondent's knowledge of Frogge's union activities are reflected in her later conversation with Herring, who accused her of harassing employees. However, based upon Herring and Roe's testimonies, I find no pretext in moving Frogge to a new position elsewhere. This change was an improvement in the linen delivery system and in the works before any union activity was open to Herring or Roe. Herring explained why the changes were needed and why a different employee, with more seniority, was selected, which occurred. Frogge's memory was foggy regarding some of the exchanges, including training on the iPad. However, I do not credit Herring's testimony that Frogge came to him to obtain the reassignment to MRI, which Frogge vehemently denied.<sup>58</sup> Respondent also demonstrated that the change was planned before it likely had knowledge of Frogge's union activities, as early as September.

No one replaced Frogge in an evening shift. Respondent demonstrates that her work duties were absorbed into one, more efficient shift. I therefore recommend that the 8(a)(3) allegation regarding Frogge's duty changes be dismissed. *Martin-Brower Co.*, 273 NLRB 803 (1984).

#### C. Employees Schedules in Sterile Processing Department

##### 1. Credibility

I credit McNelis's testimony. McNelis had difficulty as English is not her first language, but the testimony was sincere within that limitation. She was forthright that her husband assisted her with documentation of events. She did not stray from her description of events, even during cross-examination and honest when she could not provide further details. Amanda David, who explained much of McNelis's testimony and events surrounding the schedule changes in the sterile processing department, is

fully credited. She had better recall than McNelis regarding the meetings with management about Guck and the scheduling difficulties in central processing. Her testimony explained the events in a coherent manner and clarified much of what happened regarding the schedule. With very few minor details, she was consistent with events Poulson and McNelis described.

I partially credit Kriegel's testimony insofar as she discussed the historical events of attempting to change shifts as early as 2015. However, her testimony about the need for placing the new employees in certain position was confusing, particularly in light of when Jesse Perla actually left employment. I also do not credit that she was trying not to be rude when she failed to raise the Union's representational status during the scheduling discussions. Guck did not testify, and for the reasons previously stated for the witnesses who did not appear for EVS, I find that Guck's testimony would have been to Respondent's detriment.

2. Respondent unlawfully changed the SPD employees' schedules, including McNelis, in retaliation for union activities

As above, a *Wright Line* analysis is applicable to this scenario as Respondent puts forth its scheduling needs for its reasons why SPD schedule had to change.

McNelis and others in the Sterile Processing Department were open about their Union activities. David and McNelis testified without contradiction that Supervisor Guck was well aware of the union activity in SPD. The SPD employees also engaged in activities after the union certification that showed reaching out to one another and then to management about the issues within their department. Although employees had problems with Guck before that time, the employees engaged in protected activities to address the issues they saw involving Guck. With the Union's help, the SPD employees circulated a petition, obtained signatures and delivered the petition to Interim OR Director Kriegel in a "march on the boss." The petition was not based alone upon personal animus and Guck, an admitted statutory supervisor, had immediate control over the SPD employees' working conditions. See, *Atlantic-Pacific Construction Co.*, 312 NLRB 242, 244 (1993), enfd 52 F.3d 260, 263-264 (9th Cir. 1995) (employee letter protesting selection or termination of a supervisor protected concerted activity); *Rhee Bros., Inc.*, 343 NLRB 695, 695 fn.3 (2004) (group complaints about quality of supervision are directly related to working conditions and therefore part of protected concerted activities). Testimony regarding Guck's animus towards the Union, including threats to McNelis' job should the employees select the Union, remain uncontradicted as well.

Respondent does not adequately explain why it did not implement the desired schedule changes, particularly regarding McNelis, before the organizing campaign as it sought to make changes for years. The failure to offer a plausible explanation defeats Respondent's reasons for the schedule change. It instead leads to a conclusion that the schedule changes were for retaliation against Union and other protected concerted activities. *Willamette Industries*, 341 NLRB 560, 564-564 (2004). I therefore find the SPD schedule changes, including those particularly for

<sup>58</sup> Herring's statement otherwise would have been an admission of direct dealing, in which he bypassed the Union and dealt with an employee about a work assignment.

McNelis, were done because of the animus towards unionization and in violation of Section 8(a)(3).

#### X. SUBPOENA ISSUES

Respondent, from the beginning of hearing, complained about the Union's response to its subpoenas. Throughout the hearing, I gave Respondent significant latitude to explore its accusations that the Union failed to provide documents. As the Union points out, Respondent was particularly interested in supporting a theory that the Union subjectively knew that Respondent was seeking a test of certification. Respondent also made apparent that it was looking for something in which the Union believed the parties never bargained.

The Union repeatedly provided documents and conducted additional searches for documents. Respondent believes that the Union acted contumaciously and therefore demands that I impose "severe sanctions" upon the Union for subpoena issues as the sanctions already provided are insufficient. In addition, Respondent demands that General Counsel's refusal to initiate enforcement proceedings against the Union and severe sanctions, including dismissal of the complaint, should issue because the parties had an unfair advantage. Respondent also requested that General Counsel enforce the subpoenas, and General Counsel declined to do so.

The parties developed and stipulated to a special subpoena file with 92 exhibits, which is part of the record. During hearing, I declined to make a finding of whether the Union engaged in contumacious conduct regarding its response to the subpoenas.

The Union maintains that Respondent's conduct was irresponsible and evidences bad faith. (CP Br. at 34.) In discussing this matter, I first provide a short background, then deal with Respondent's demands for sanctions against the Union and General Counsel, and whether Respondent demonstrated bad faith in its search for documents.

##### A. Subpoena Background

About July 26 and 27, 2017, Respondent issued three subpoenas *duces tecum*, all in care of Union Counsel Malkani: the first, B-1-XHS7B5, issued to the Union; the second, also a *duces tecum*, issue to the Custodian of Records of the Union; and the third, B-1-XHSAZX, to the Custodian of Records of the Union. (Sub. Exhs. 1–3.) By about August 28, the Union received the three subpoenas. Notably, Respondent failed to include appropriate witness fees in each of the subpoenas, making them defective on their faces and did not serve the subpoenas upon the party itself.<sup>59</sup>

On August 1, the Union so notified Respondent on August 1 and, at the same time, initiated meet and confer procedures. (Sub. Exh. 4.) On August 2, five calendar days before hearing, Respondent reissued the same subpoenas, with the same numbers and attachments, to the appropriate parties. (Sub. Exhs. 5–7). On August 3, 2017, the Union filed a petition to revoke the subpoenas. (Sub. Exh. 9). However, by August 3, the meet and confer discussions seemed promising, with Respondent stating,

"I think we are in agreement on almost all of the subpoena requests." (Sub. Exh. 10.) On August 4, 2017, the parties held a conference call with me. Respondent stated it did not need the Union's custodian of records to appear. On Sunday, August 6, the day before the hearing started, the Union emailed two partial productions of documents to Respondent. (Sub. Exh. 11.)

To obtain information for the responses provided to Respondent, Attorney Malkani notified Martin, who was considered the custodian of records in the small Union office. The office does not actual have any assigned information technology personnel, but Martin usually relies upon one person to assist with it. Malkani, Martin and Poulson discussed who was involved with the allegations against Respondent and determined to 6 Union personnel who would have been involved regarding Respondent, and thereby directed the subpoena requests for documents to them. Martin told the additional Union personnel to contact Malkani directly. He also told them to take the matter seriously and thoroughly and follow up with Malkani. (Tr. 1387.) Martin himself did not review the documents found by the other Union employees. Later, Malkani confirmed to Martin that all those involved in the search for documents followed through with her and that she received their documents. Martin did not ask the Union's political director to search for documents.

Martin conducts union business through his personal computer, as the Union never issued him one. He maintains a file on the laptop itself regarding Respondent. He was not aware of how other union employees saved documents for the cases herein. The Union has no document retention policy to Martin's knowledge. (Tr. 1389.)

Malkani testified that, upon each filing of unfair labor practice charges on behalf of the Union, she instructed Poulson about maintaining "hall records" related to the allegations in the charge. In response to the subpoena, on about August 1, Malkani instructed Poulson to look for all documents related to any complaint allegation, and particularly notes and all electronic files. Malkani reminded Poulson to maintain and not deleted any files. Malkani did the same with other union officials, including some who were above the local level.

About 1 week before hearing, Martin searched various files in his laptop, including emails and files, in different variations, including different names for Respondent and names of management personnel with whom he had direct communication. He also searched his deleted files. Any internal documents regarding Respondent were kept in the file he kept on Respondent. He also searched his hard copy files as well as his personal files. He turned over what he found to counsel. He did not consult with the person he relies upon to help with information technology. His practice is to delete text messages on his phone. He did not recall receiving or sending any emails to bargaining unit employees. In addition, Poulson conducts Union business through her personal cellular telephone, which she replaced before the hearing. She did not retain her text messages, although during the hearing she attempted unsuccessfully to recover them.<sup>60</sup>

<sup>59</sup> Board's Rules and Regulations §102.32 and *Zurn/NEPCO*, 329 NLRB 484, 486–487 (1999) (requirement of witness fees); *Rolligon Corp.*, 254 NLRB 22, 23 (1981) (rendered defective on its face and recipient may decline not to comply).

<sup>60</sup> Malkani testified that her understanding of the missing texts was that they were probably covered under relevance and privileges. (Tr. 1710–1711.)

On the first morning of hearing, Respondent called the Union's subpoena response "woefully" inadequate. Through its own search, Respondent stated it discovered that the Union maintained two Facebook pages, one of which was dedicated for employees at Respondent's facility. Respondent was also concerned about press releases. The Union stated it would not produce unless ordered to do so as it otherwise had pending motions to quash. I ordered that the Union produce all documents related to any statements of refusal to bargain or withdrawal of recognition, which were relevant to the main issues in this hearing. Although public social media sites are not privileged, a requesting party cannot merely "rummage" around in hopes of finding admissible evidence. *Malhoit v. Home Depot*, 285 F.R.D. at 569. I did not require the Union to produce all information from all social media because Respondent could not identify that all of the information is relevant to the hearing. *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011). By that afternoon, the Union presented the link to the employees' Facebook page.<sup>61</sup> Respondent was not satisfied and demanded that the Union present documents referring to Respondent in PDF format. The Union presented links to the documents, videos and tweets. Despite ostensible compliance, Respondent still insisted that it had to have the documents in PDF format, and stated the Union was not in compliance with the subpoenas. (Sub. Exhs. 14–16.) The Union managed to obtain PDF format for some of the documents, and identified the responses based upon subpoena item numbers. (Sub. Exhs. 18–20.)

Respondent continued to have issues about the subpoena response during the first week of hearing. At this point, Poulson only partially testified due to other witness scheduling issues. I directed the parties to meet and confer about the issues. Poulson also conducted additional searches during the hearing for documents. One such search found a document in a place Poulson did not expect. Poulson was mortified and regretful about the error, and it was obvious that she was not purposeful in the misplacement. It was promptly produced to Respondent. Malkani also prepared privilege review logs, which took 7 hours to prepare before the October 2 order.

By letter, dated August 14, 2017, the Union identified what Respondent claimed were issues at the end of the first week of hearing: logs for attorney-client privilege and *Berbiglia*; certain Facebook posting; tweets; press releases and public releases; and certain correspondence with a political party chairperson. (Sub. Exh. 22.) The Union demonstrated to Respondent, in an August 15 email, that it provided emails for Martin, which Respondent had contested. Respondent insisted that the Union needed to identify which documents related to which subpoena requests, and the Union again pointed out it previously provided the information. (Sub. Exhs. 30–31.) Respondent also began requesting that General Counsel enforce the subpoena, but General Counsel stated the administrative law judge would have to give a ruling on the record. (Sub. Exh. 30.) Respondent's August 15 return email apologized for its accusations on the Martin emails, which it finally located; however, it still demanded privilege logs

despite the ALJ review of the documents for privilege, demanded documents related to the correspondence with the political party chairperson, and continued to demand documents be ordered by subpoena item. Regarding the need for the documentation to the political party chairperson, Respondent stated it was responsive to the subpoena and did not give any reasoning why it would be relevant. (Sub. Exh. 32.) During this time, I also reviewed numerous documents for privileges, and many of the Union's withheld documents were indeed privileged.

The Union, after a conference call on August 16, 2017, again directed personnel at NUHW to search for responsive documents. On August 18, 2017, Respondent provided a position statement about compliance, including a statement that the parties believed they had agreed on twenty requests and had only one request left pending. The position statement detailed the person to whom subpoena directions were given, with some having minimal contact with the issues in the hearing. The Facebook search at the beginning of hearing was discussed, and the Union produced voluntarily any new documents, generated since the hearing began. (Sub. Exhs. 36–37.)

In regards to subpoena issues, I permitted Respondent to examine union witness Dan Martin on day 7 of the hearing and cross-examine Union Counsel Latika Malkani on day 8 of the hearing.<sup>62</sup> Respondent, in response to Martin's testimony, stated the Union was "blatantly non-compliant" in its search for documents.

After examining Martin, Respondent counsel wanted to question Martin further. The Union objected, stating that Respondent had ample opportunity to examine Martin. I scheduled a videoconference to conclude any remaining issues regarding Martin. Additionally, on that day, Respondent revealed it obtained information about a private "listserve" that the Union maintained, apparently only for employees. When asked how Respondent obtained the information, it would not reveal its source.

On day 8, the Union presented Malkani as a witness. Malkani testified in detail about instructions given to various union employees and officials to obtain documents and what type of documents she obtained in return, including specific date ranges to search for documents. Malkani testified that she probably did not issue written litigation holds and did not use the term "litigation hold" when talking to clients about preservation of evidence. However, she testified that each time she filed a charge, she instructed Poulson to preserve emails, hard copy records, and any records kept in any electronic format, that were related in any way to the charge. (Tr. 1689). Malkani further testified that she and Poulson had many verbal communications about what to retain in each charge, based upon what an investigation might need, and Poulson indicated she would comply. Malkani based her determination that Poulson would comply upon further discussions about the charges. In some cases, regarding holding documents for the charges, Malkani also spoke with Martin. Martin conveyed to her he did not usually use text messages for this type of communication.

<sup>61</sup> Respondent also delayed in providing attendance records for Arroyo to the General Counsel, which were provided the afternoon of the first day of hearing.

<sup>62</sup> The Union presented Malkani as a rebuttal witness, then Respondent cross-examined her.

The parties were scheduled to question Martin in a videoconference with a court reporter on September 6, 2017. In an order, dated August 28, 2017, I ordered the videoconference. I also ordered Respondent to identify and present to all parties what documents it believed Charging Party had not presented for subpoena compliance and by September 15, 2017, the Union would present Respondent with additional documents, if any, or hold documents pending my review for any asserted privileges.<sup>63</sup>

However, on August 29, 2017, Respondent then issued a number of subpoenas duces tecum to the Union. Because of the Labor Day holiday, the motions to quash would have been due on September 6, the date of the scheduled videoconference. The Union, not waiting until the due date, filed Petitions to Revoke Subpoenas, including the testimony of Martin, on August 30. (Sub. Exh. 58.) On September 6, after reviewing Respondent's motion and the Union's early motions to quash, with the previous testimonies of Martin and Malkani, I determined that further hearing on the matter of the subpoenas was not warranted. I partially quashed Respondent's most recent subpoenas and cancelled the videoconference as it would not serve any useful purpose to permit further questioning and the remainder of the schedule would proceed. My decision was prompted by Respondent seeking two bites at the apple by expanding its inquiry in the intervening time when the Union had no refusals pending at the time and Respondent should have asked any further questions during the hearing.

In response to the prior Order, on September 7, 2017, Respondent provided a list of 10 areas of documents it believed to be missing. The Union presented documents for review. On October 2, 2017, I issued another Order Partially Quashing Respondent's Subpoenas Duces Tecum B-1-XHS7B5 and B-1-X1HSGP, and Quashing Subpoena Duces Tecum B-1-XHSAZX. I reviewed that the Union presented 573 pages of documents for *in camera* review. Only 8 pages belonged to the recently identified Google group listserve, and all were protected by *Berbiglia*. Any documents that had no probative value or were duplicative were withheld. However, I ordered that the Charging Party to provide privilege logs of the withheld documents by October 6, 2017.

In the October 2 Order, I also noted that the ligation hold and subpoena search instructions may have been limited and/or unclear to the Union. I ordered that the Union could present no further evidence about the subject matter sought by the subpoenas and produced only on September 15, 2017. I also did not permit the Union to cross-examine any witnesses to the extent that the content dealt with the Union's September 15 production. Respondent also wanted documents from listed persons, and the Union stated that no documents existed. To the extent that those documents did not exist, I quashed the subpoenas. Regarding documents that Respondent continued to state it needed regarding the political party chair, the Union stated again it did not have

it. I additionally found that Respondent's desire to have these documents held no probative value and quashed the subpoena to that extent. I also denied Respondent's demand that the Union provide its position statements sent to General Counsel. Respondent repeatedly demanded drafts, and I quashed that request. I also addressed that Respondent, at least through September 7, sought any witness statements and witness documents from the Union, particularly of Arroyo, and to avoid further confusion on the matter, I addressed it and quashed the subpoena. I also stated that, with the extent of the Order, I saw no need to request the Regional Director to enforce the subpoenas. No further examination on the record regarding the subpoenas would be permitted. (Sub. Exh. 83.)

In response to the Order, Respondent maintained it had not had a fair opportunity to explain and analyze the Union's non-compliance with the subpoenas. It also maintained that the sanctions I placed upon the Union were insufficient. During the hearing I had indicated that I would have briefing before the hearing resumed. However, as events wore on, I ordered otherwise. Respondent did not believe that this was fair and wanted to continue to litigate the subpoena matter by briefing it before the hearing continued. Respondent, however, did not identify what, if anything, was missing after my Order. (Sub. Exh. 86.) I did not order briefing to continue and, on the record, stated any subpoena issues should be part of the final brief.

Respondent replied twice to the October 2 Order, one of which was to respond to the Union's correspondence. (Sub. Exhs. 84–86.) Respondent contended that the sanctions provided were evidence that I had determined the Union engaged in contumacious conduct. (Sub. Exh. 86.)

As ordered, on October 6, 2017, the Union produced its 41-page privilege log. (Sub. Exh. 87.) When we resumed the hearing in November, Respondent asked to be heard on the subpoena matters and I denied that request. My reason for doing so was because Respondent had more than adequate time to raise issues through its prior correspondence, including Sub. Exhs. 84 and 86. Respondent, when questioning Poulson on recall in early November, attempted to question further on the subpoenas, against my explicit Order. On the record I again denied ordering the Regional Director to seek enforcement of Respondent's subpoenas in Federal court.

### B. Applicable Law

Respondent, as the requesting party for the subpoenas, has the burden of proof to demonstrate noncompliance. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 8 (2015), citing *R.L. Polk & Co.*, 313 NLRB 1069, 1069–1070 (1994), affd. sub nom. *Auto Workers Local 174, Autoworkers v. NLRB*, 74 F.3d 1240 (6th Cir. 1996). The administrative law judge has authority to sanction parties who fail to comply with the Board subpoena and is a matter of the judge's discretion. *Teamsters Local 917 (Peerless Importers, Inc.)*, 345 NLRB 1010, 1011–1012 (2005).<sup>64</sup>

<sup>63</sup> Respondent raised no objections to my ex parte reviews and discussions with the Union regarding their alleged privileges.

<sup>64</sup> *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1028–1029 (10th Cir. 2003) gives general background on subpoenas:

Section 11(1) of the Act governs the issuance of subpoenas in NLRB proceedings. This section provides that “[t]he Board, or any member

thereof, shall upon application of any party to [its] proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses in such proceedings. . . .” 29 U.S.C. § 161(1). On application of the subpoenaed party, “the Board shall revoke[ ] such subpoena if in its opinion the evidence whose production is required does not relate to . . . any matter in question in such proceedings, or if

The requesting party may request relevant documents in the responding party’s control, so long as the request describes the desired items with “reasonable particularity.” *Mailhoit v. Home Depot, U.S.A, Inc.*, 285 F.R.D. 566, 569 (C.D. Calif. 2012). Broadly stated demands do not describe with sufficient particularity so that a reasonable person would know what is expected to produce under Fed.R.Civ. Pro. 34(b)(1)(A). *Id.* The party in receipt of the subpoena has an obligation to make a reasonable search for responsive documents, whether in paper or electronic form. *Starbucks Coffee Co.*, Case 01–CA–177856, 2017 WL 2241023 (NLRB), slip op. at 1 fn. 1 unpub. dec. (2017).

Although not yet adopted by the Board, the Sedona Conference provides a number of principles that primarily deal with production of electronic documents. A responding party is to produce documents and electronically stored information (ESI) with its possession, custody or control. However, those terms are not defined in the Federal Rules. Courts differ on how to interpret the terms. *The Sedona Conference Commentary on Rule 34 and Rule 45 Possession, Custody or Control*, 17 SEDONA CONF. J. 467, 484 (2016). In analyzing the handling of the Union’s pre-litigation business decisions regarding document management, including ESI, Sedona recommends a two-prong test: “(1) [A]fter asserting an intention to rely upon modified business judgment rules presumption, the entity makes good faith disclosures concerning pre-litigation decisions that were made about documents and ESI and (2) absent indicia of bad faith. *Id.* at 557–558. The standard applied is objective, including whether a reasonable inquiry is undertaken. *Id.* at fn. 150. The modified business rule presumes that business decisions within the scope of duties are made in good faith and honest beliefs, and intent does not drive the discussion. *Id.* at 558 fn. 151.

The producing party is supposed to place reasonable construction and make reasonable and diligent searches for responsive documents. *Reinsdorf v. Skechers USA, Inc.*, 296 FRD 604, 614 (2013). However, these searches do not demand perfection. *Id.* Reasonableness is measured by an objective standard and the Federal Rules of Civil Procedure rely upon a proportionality standard to do so. *Id.* at 615 and fn. 8. Therefore, the analysis requires a determination of whether the responding party’s actions were objectively reasonable, but not necessarily “error-free.” *Id.* at 615. Supplemental responses “do not necessarily equate to discovery misconduct.” *Reinsdorf*, 296 FRD at 615. The Sedona Conference recently identified six principals regarding proportionality:

Principle 1: The burdens and costs of preserving relevant electronically stored information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

Principle 2: Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources.

Principle 3: Undue burden, expense, or delay resulting from a party’s action or inaction should be weighed against that party.

Principle 4: The application of proportionality should be based on information rather than speculation.

Principle 5: Nonmonetary factors should be considered in the proportionality analysis.

Principle 6: Technologies to reduce cost and burden should be considered in the proportionality analysis.

*The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 146 (2017).

Proportionality includes addressing whether information is not reasonably accessible, unreasonably cumulative or duplicative, whether the party has had ample opportunity to obtain the information, and whether the production would cause “undue hardship.” *Id.* at 148. Principle 4’s Comment 4b states that attempts to evaluate the importance of requested information are fact-specific to the case. In doing so, the efforts may be challenging because evaluation of the importance of the documents may not be truly assessed until the documents are produced. 18 SEDONA CONF. J. at 163–165.

After numerous efforts and productions, I determined that the Union delayed somewhat in its production. I also found that the testimony reflected problems in the Union’s litigation hold procedures. I weighed that delay and gave sanctions in my October 2 order. I made no finding of contumacious conduct.

Respondent contends severe sanctions are warranted because the Union engaged in spoliation. The party demanding sanctions for spoliation has the burden of proof for proving spoliation. *Reinsdorf*, 296 FRD at 626 and cases cited therein.

Spoliation is defined as “destruction or significant alteration of evidence or the failure to preserve property for another’s use as evidence [,] in pending or reasonably foreseeable litigation. *Zubulake v. UBS Warburg, LLC*, 220 FRD 212, 216 (S.D.N.Y. 2003) (*Zubulake IV*) (internal quotes omitted). *Zubulake IV*, 220 FRD at 220 provides a conjunctive three-part test:

A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a “culpable state of mind” and (3) that the evidence was “relevant” to the

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in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.” *Id.* “Although the statute explicitly permits the quashing of subpoenas only for irrelevance or lack of particularity, it does not explicitly exclude other grounds.” *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727, 730 (D.C. Cir.1983). Rather, the statute provides that the Board may also revoke

a subpoena on any other ground which is consistent with the overall powers and duties of the Board under the Act considered as whole. “In short, section (11)(1) is not intended as a complete and inclusive catalogue of all grounds upon which a Board subpoena may be revoked.” *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 373 (9th Cir. 1965).

party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Part of Respondent's spoliation contention is that the Union failed to preserve documents began when the initial charge was filed, pursuant to a litigation hold. Instead, one must make a fact-specific analysis, depending on each case, as the duty to do so defies attaching a precise point in time. *The Sedona Conference Commentary on Rule 34 and Rule 45 Possession, Custody or Control*, 17 SEDONA CONF. J. 467, 555 fn. 157. Regarding the second point, Respondent assumes a culpable state of mind.

### C. Respondent's Demands Sanctions for the Union

The Union's brief developed several pages of the history of the subpoena fight. Respondent does not develop any of the history behind the subpoenas and instead states that "a detailed recitation of the facts would inundate this post-hearing brief." It instead states it incorporates the 92 subpoena exhibits into its brief and "requests that the Administrative Law Judge consider all of these exhibits when determining whether further sanctions are warranted and when determining the merits of the case." (R. Br. 74 at fn. 16.). It then picks and chooses items in the transcript to bolster its arguments and includes no cites to the exhibits. In doing so, Respondent has failed to demonstrate that the entire subpoena history demonstrates that the Union engaged in contumacious conduct.

The burden of proof for subpoena noncompliance is upon the party issuing the subpoena. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 8 (2015). I fully credit Martin and Malkani, as they stated what they had done to comply with the subpoenas, even when their testimony was to their detriment. Testimony from Martin and Malkani revealed that the Union had not used the term "litigation hold" and began its search for relevant documents upon receipt of the first subpoenas. I also considered that Respondent did not always understand what it was looking for when it questioned them. At one point, Respondent asked whether the Union searched for metadata. Martin did not know what it was and asked Respondent counsel to explain. Respondent counsel was unable to say what metadata was and the judge provided a brief explanation. I also credit Poulson's explanations about her telephone and searches for additional documents.

Testimony from Martin, Poulson and Malkani, and their brutally honest answers about searches for documents, do not demonstrate any culpability and at most, negligence. Malkani particularly testified in detail about how she verbally instructed the persons related to activity in the charges when she filed them on behalf of the Union. Lastly, and perhaps most importantly, Respondent also presumes the information would have been relevant.

I consider proportionality and find some of Respondent's demands were not proportional to the information requested. Respondent insisted at the beginning of the hearing that the Union's Facebook production must be in PDF form violated principle 2 of proportionality, that the production of sought-after documents should be generally obtained from the most convenient, least burdensome, and least expensive sources. The Union gave Respondent the links to the relevant Facebook posts. However, Respondent continued to insist that the Union was required to produce in PDF format and stated the Union was not in compliance

with the subpoena. Respondent's repeatedly maintained throughout hearing and its correspondence that the Union failed to index its produced documents according to Respondent's requested items. At that time Respondent's only reason for its requirement was that its subpoenas so instructed the Union. Respondent's contention was incorrect as the Union provided numbering. Additionally, this matter was not a class action hearing, which might have necessitated such numbering pursuant to discovery orders. Respondent does not raise this point in its brief and I consider it waived. Respondent was searching for information to support its main defense, that the Union made subjective statements showing the parties were not bargaining or that the Union was not recognized. Respondent presumes relevant evidence was destroyed and I find no basis for that conclusion as Respondent only cites to testimony rather than the record as a whole. Respondent never identified any documents that are missing based upon a reasonable search. For example, Respondent complained that it never received draft documents of flyers and handbills. I excluded drafts as irrelevant. Respondent maintains it is entitled to the drafts, but never states how the drafts were relevant to the case other than finding it to be a part of its version of a "totality of circumstances" defense to the withdrawal of recognition. A draft does not reflect the ultimate position of the Union, and Respondent has been provided the final products. This contention does not support a finding of spoliation or purposeful conduct. As pointed out in the transcript and in this decision, Respondent's reliance upon subjective evidence in the Section 8(a)(5) discussion is irrelevant.

Respondent contends that testimony from Martin and Malkani revealed that the Union had not placed litigation holds. Respondent contends that this failure resulted in spoliation. The Union contends that, although it did not use the language of "litigation hold," it properly instruct on retention of documents once the subpoenas were received. Malkani's testimony supports the Union's finding; Martin, only to the degree involved with preparation of the subpoenas. However, the Union repeatedly provided documents and privilege logs when ordered to do so. I reviewed documents in camera and frequently found that most of the documents were either irrelevant or privileged. In some cases, I required redaction of the Union's documents when the documents revealed Section 7 activity of employees who were not involved in the matter, which made any such production protected and/or irrelevant. Respondent cites *McDonald's USA, LLC*, 364 NLRB No. 144, slip op. at 6 (2016) about when the duty to preserve evidence arose and whether the employer's litigation holds were adequate. However, outside of Respondent quoting general principals, the Board ultimately ruled that it was not necessary to reach those issues because the employer was required to conduct another search for documents. Further, the Board determined that it was premature to determine whether the employer's attempts at preservation were adequate. *Id.*, slip op. at 2, fn. 5. I therefore cannot rely upon *McDonald's* to reach the Respondent's desired conclusion.

I also find no spoliation regarding Poulson's text messages when she bought a new cell phone. In hearing, Poulson revealed that she did not have all text messages during the relevant time period because she had a new personal cellular telephone and did not know to retain it. She made another search for the texts,

which could not be recovered. I find that these text messages, usually between Poulson and employees, are not formal business records. It is quite plausible that Poulson changed telephones without retaining all text messages. *Spurlino Materials*, 353 NLRB at 1214, citing *inter alia*, *Champ Corp.* 291 NLRB 803, 803–804 (1988), *enfd.* 933 F.2d 688 (9th Cir. 1990).<sup>65</sup> However, nothing in the record reflects Poulson made a purposeful deletion of the texts.

With the eventual production of documents after my Orders, Respondent must demonstrate what effects, if any, the missing documents had to prejudice its case. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 9. Poulson's continued search for documents revealed one misplaced document and I find that this revelation showed a minimal mistake, which was easily corrected. Respondent suffered no prejudice as Poulson produced the document as soon as she found it. *People's Transportation Service*, 276 NLRB 169, 225 (1985) (additional search revealing misplaced document produced as soon as discovered). Respondent was not precluded from raising its defenses or finding evidence to support its defenses, however irrelevant I now have found them to be. Irrelevant evidence, even presuming it was deleted, does not warrant a spoliation claim. *Rengsdorf*, 296 FRD at 631.

Respondent states the only sanction levied against the Union was to prevent its cross-examination of Poulson regarding Google Group documents. (R. Br. at 78.) This statement mischaracterized the breadth of the Orders given throughout the hearing and Respondent's own understanding of the sanctions. (Sub. Exh. 84, 86.) The October 2 Order regarding subpoenas included several sanctions against the Union. To quell any possible prejudice to Respondent, the sanctions included prohibiting the Union from cross-examining witnesses regarding any documents produced after that date and allowing Respondent to call and recall witnesses regarding recently produced documents. That Respondent admits it only recalled Poulson indicates the limits of the relevant information found in the subpoena production. In addition, with the delays from the wildfires, Respondent had from October 2 to November 1 to prepare the remainder of its case.

During the course of the hearing and intervening events regarding the subpoenas, Respondent suggested that I take adverse inferences for the Union's failure to produce documents and I ordered adverse inferences in the last Order, dated October 2, 2017, for the delayed production. By its definition, the adverse inference rule states "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *UAW v. NLRB (Gyrodyn Co.)*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). Additionally, the adverse inference rule may be preferred to a subpoena enforcement proceeding. In administrative processes, enforcement proceedings are collateral to the "main event," here alleged unfair labor practice hearing, and are likely "costly and time-consuming." *Gyrodyn*, 459 F.2d at 1338–1339. The adverse inference then permits the administrative law judge to

proceed and find that the failure to produce documents is likely due to unfavorable information. *Id.* However, Respondent's brief fails to what, if any, adverse inferences should be taken. As Respondent fails to suggest what appropriate adverse inferences should be made, I decline to make any. *Howard Johnson Co.*, 242 NLRB 386, 388 (1979).

For sanctions to apply, not only is the party seeking the documents required to prove the missing documents would be relevant, the party must also show prejudice to the point it affected Respondent's ability to go to trial or "threatened to interfere with the rightful decision of the case." *Reinsdorf*, 296 FRD at 627, citing *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). While the subpoena fight continued at hearing, Respondent stated it was entitled to documents reflecting what the Union did and thought, particularly on the bargaining issues. The Union provided documents about what it did, yet Respondent continued to demand evidence of the Union's thought processes, including draft documents. Respondent denied that trying to get into what the Union thought processes was subjective evidence and affirmatively stated the thought processes were objective. Respondent to date has not shown a case in which what the union people "thought" was relevant for any Section 8(a)(5) violation sought herein. As a result, Respondent failed to demonstrate that its ability to try the case was affected or could have exculpated Respondent's unlawful conduct.

Respondent also contends that it suffered severe consequences due to the Union's alleged contumacious conduct regarding the subpoenas, including recessing twice in the middle of its case. The contention that the recesses were caused only by the subpoenas is not correct: Much of the scheduling issues were due to Respondent's inability to schedule back-to-back weeks. Respondent was given all the time it desired to review affidavits and prepare its cross-examination. Respondent's cross-examinations of General Counsel's witnesses extended hours longer than Respondent initially estimated. During the first week of hearing, the Joint Commission on Accreditation of Health Care Organizations arrived for a surprise assessment of Respondent's facility. General Counsel and the Union allowed Respondent to call EVS Director Herring during the first week as he was waiting for the call, and then he was released to assist with the accreditation review. Respondent was allowed to recall him during the last days of the hearing as a rebuttal to Frogge's testimony. In one situation, Respondent could have called Sheri Roe, who could provide a short testimony, and did not do so. (Sub. Exh. 50). It was also proposed on day 8 of hearing that Respondent call HR Schelling and start her testimony as she was present as Respondent's corporate representative. Respondent declined to do so and blamed the subpoenas. (Tr. 1595–1596.) As previously noted, some of Respondent's demands exceeded the limits of proportionality. When Roe testified in the last week of the hearing, nothing related to any of the Union documents provided at any time. Respondent was still presenting its case-in-chief in the last week, and outside of Poulson, did not call anyone else in response to the documents it received. The delay between the

<sup>65</sup> Whether the Union ever made an attempt to secure control and custody of Poulson's device is questionable and it may not have a legal right to do so. *The Sedona Conference Commentary on Rule 34 and Rule*

*45 Possession, Custody or Control*, 17 SEDONA CONF. J. at 526. Nor is it likely she had a requirement to preserve information on her personal device. *Id.*

end of August and the beginning of November occurred partially when Respondent moved to postpone twice due to wildfires in the Northern California region, included the area in which Respondent's facility is located. Furthermore, any delay in production does not demonstrate a need for additional sanctions. See generally *Reinsdorf*, 296 FRD at 614–615 (2013).<sup>66</sup>

#### D. Respondent's Demands Sanctions for General Counsel

Respondent contends that the sanctions already provided against Respondent were insufficient because General Counsel was still allowed to question Respondent witnesses and gained an unfair advantage against Respondent. Respondent cites that General Counsel was permitted to cross-examine union witness Poulson when she was recalled by Respondent, although the Union was not allowed to examine the witness. Otherwise, Respondent spent the remainder of its arguments against the Union and provided only one case to support its conclusion regarding the General Counsel. Respondent also states that sanctions against General Counsel are warranted because General Counsel did not seek enforcement of Respondent's subpoenas upon Respondent's demands.

Additional sanctions against General Counsel, including dismissal of the complaint, are not warranted. First, at hearing, I denied Respondent's request to order General Counsel to proceed with subpoena enforcement. After the Union's response to my October 2, 2017 Order, the Union produced documents and a privilege log. In end, I have found that those Respondent entered into evidence had little, if any, probative, effect. Second, the Union made clear the extent to which it made its searches and Respondent's searches for drafts and the like, which I made clear in the October 2 order, were irrelevant. Respondent's request for search terms in the ilk of "barbeque" served no probative purpose for this hearing. To require a recess to enforce a subpoena that would reveal little, if anything, would not have been a prudent use of resources and time for any party.

Additionally, Respondent believes denying General Counsel's questioning of Poulson in the last of the hearing is warranted. I disagree. During the hearing, I reminded Respondent that the Board recently dealt with such an issue in *Marquez Bros. Enterprises, Inc.*, Cases 21–CA–039581 and 21–CA–039609, unpublished decision (September 7, 2017), request for reconsideration denied, unpublished decision (January 17, 2018). Respondent did not address this case in its brief and again relies upon *Prime Healthcare Services-Encino*, 364 NLRB No. 128 at fn. 39. *Marquez Bros.* was a compliance case in which an administrative law judge prohibited the general counsel from questioning any witnesses other than the compliance officer because the alleged discriminatees had "failed to fully comply with the subpoenas duces tecum issued to them." *Id.*, slip op. at 1. The decision finds that General Counsel's role is to not to vindicate the private rights of the Union; instead, General Counsel is

responsible to enforce the Act as part of the public interest. *Id.*, slip op. at 1–2, citing *Alberici-Fruin-Colnon*, 226 NLRB 1315, 1316 (1976). Respondent instead mistakenly relies upon *Prime Health Services-Encino, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 18 fn. 39. The Board in *Marquez Bros.*, supra, slip op. at 1 fn. 2, discussed that *Prime Healthcare Services-Encino*, supra, has no precedential value regarding sanctions against General Counsel as no exceptions were filed on that point. Additionally, General Counsel does not control the Union's conduct and any sanctions against General Counsel would be considered "unduly harsh." *Marquez Bros.*, supra, slip op. at 1.

Respondent also states that dismissal of the complaint is an appropriate sanction. Although the Board allows the administrative law judge to apply a variety of sanctions for subpoena non-compliance, the Board apparently has not dismissed a complaint based upon subpoena noncompliance. *Local 917 (Peerless)*, 345 NLRB at 1011–1012, citing, inter alia, *Smitty's Supermarkets*, 310 NLRB 1377, 1380 (1993) (reinstating complaint after alj dismissed for charging party's failure to comply with the subpoena duces tecum regarding a document). I balance the need for sanctions in a situation with alleged noncompliance against the need to preserve the Board's mandate in Section 10(c), to remedy unfair labor practices. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 8. Balancing the gravity of the many unfair labor practices and the sanctions already given for any possible delay in providing documents and at most a negligent litigation hold process, dismissal of the complaint would be an abuse of discretion.<sup>67</sup>

#### E. Conclusion Regarding Subpoenas

I find the Union's conduct regarding its responses to Respondent's subpoenas was not contumacious. Any destruction of documents appears inadvertent at best and does not demonstrate a level of culpability required to sustain a finding of spoliation. In addition, any requirement for General Counsel to seek subpoena enforcement was not warranted. Respondent failed to consider the complete record when making demands in its brief. The sanctions already provided are more than adequate and Respondent had ample time to prepare its remaining case in chief.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and an employer in health care within the meaning of Section 2(14) of the Act.

2. I find, and the parties stipulated, that the following personnel are Respondent's supervisors within the meaning of Section 2(11) and agents within the meaning of Section 2(13) of the Act:

- |    |              |                                |
|----|--------------|--------------------------------|
| a. | Larry Coomes | CEO/Interim CEO                |
| b. | John Bibby   | Regional Vice President, Human |

<sup>66</sup> For further sanctions, Respondent also relies upon *675 West End Owners Corp.*, 345 NLRB 324, 326 fn. 11 (2005). In that case, Respondent's owner Uzi Einy<sup>66</sup> served subpoenas after the hearing that the judge had previously revoked. In doing so, he abused Board processes.

<sup>67</sup> None of the cases Respondent cites are in the same ballpark with the conduct here. For example, Respondent cites *NHL v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642–643 (1976). The Supreme Court found

dismissal of a case was warranted where the plaintiffs in large part failed to answer interrogatories over a 17-month period, despite numerous extension and waiting for days after the due date to give any response. *Id.* at 640–641. Plaintiff's responses to district court were grossly inadequate and the plaintiff was warned of the sanctions. *Id.* at 641–642. The abuses of the subpoena process in *NHL* have nothing in common with the facts of this case.

- c. Bill Candella Resources for Northern California  
Director, Labor & Employee Relations
- d. Jill Gruetter Manager, Human Resources  
Ministry Partner
- e. Kathy Hutchinson Human Resources Ministry Partner
- f. Neill Barker Manager, Pharmacy Operations
- g. Ralf Jeworski Manager, Nursing
- h. Olive Romero Director, Laboratory
- i. Shanay Marquez Supervisor, Laboratory
- j. Elizabeth LuPriore Director, Nutrition Services/Contract
- k. Bruce Kevin Herring Director, EVS and Facilities
- l. Stacy Guck Supervisor, Sterile Processing
- m. Sherri Roe Supervisor, EVS
- n. Harold Young Supervisor, EVS

3. Interim Director Surgical Services Diane Kreigel is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

4. Charging Party National Union of Healthcare Workers (Union) is a labor organization within the meaning of Section 2(5) of the Act.

5. At all times since the Regional Director certified it as the Section 9(a) representative of the nonprofessional employees on December 22, 2016, and reaffirmed by the Board on February 28, 2017, the Union has represented a majority of Respondent's employees in the following appropriate bargaining unit:

All nonprofessional employees, including technical employees, employed by [Respondent] at its facilities located at 1000 Trancas Street, 980 Trancas Street, 3448 Villa Lane, and 3421 Villa Lane in Napa, California; but excluding all other employees, skilled maintenance employees, business office clerical employees, confidential employees, guards, and supervisors as defined in the Act.

6. In late December 2017, Respondent, by EVS Director Herring, violated Section 8(a)(1) of the Act by threatening an employee with futility of unionization.

7. On March 28, 2017, Respondent violated Section 8(a)(1) of the Act by refusing an employee's request for union representation during an investigatory interview, as required by *Weingarten*.

8. On the occasions listed below, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information to the Union that is necessary and relevant for collective bargaining:

- i. December 15, 2016 and January 24, 2017, related to changes in Renee Frogge's linen duties;
- ii. January 10, 2017 request for information to bargain full collective bargaining agreement;
- iii. March 2, 2017 request for information to Interim Director of Surgical Services Kriegel, related to possible schedule changes for SPD employees;
- iv. March 21, 2017 request for information regarding the

- pharmacy;
- v. March 21, 2017 request regarding EVS and policies related to disciplinary action; and,
- vi. March 21, 2017 request regarding productivity calculations in patient access

9. Since about March 24, 2017, Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and subsequently failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

10. Respondent violated Section 8(a)(5) of the Act by unilaterally and without bargaining with the Union:

- i. Since April 21, 2017, failed to abide by the negotiated and signed agreement regarding the effects of the kitchen construction project;
- ii. Since March 16, 2017, refusing to permit the Union to use meeting rooms at Respondent's facility for Union meetings.
- iii. Since April 5, 2017, by changing shift assignments for SPD employees, including Martha McNelis.

11. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(3) of the Act:

- i. On November 15, 2016, changing Miguel Arroyo's shift and duties because of his Union activities.
- ii. On about April 5, 2017, changing shift schedules for SPD employees, including Martha McNelis, because of their union and/or protected concerted activities.

12. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondent has not violated the Act in any other manner.

REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, Respondent shall be ordered to cease and desist from such practices and take certain affirmative action designed to effectuate the policies of the Act. In addition to traditional remedies, General Counsel seeks a *Mar-Jac* extension of the certification year, an order requiring Respondent to bargain by a schedule as pled in the amendment of the consolidated complaint, reading of the notice by HR Director Schelling to employees during working time in the presence of a Board agent, or, in the alternative, allow the Board agent to read the notice to employees during working time in the presence of Respondent's alleged supervisors and agents. General Counsel also requests that the Union be granted reasonable access to its bulletin boards and all places where notices to employees are customarily posted and that Union access to the facility be restored. Lastly, General Counsel also requests that Respondent reimburse the discriminatees for consequential damages. I analyze these as traditional and enhanced remedies.

I. TRADITIONAL REMEDIES

In order to restore the status quo ante, in light of Respondent's withdrawal of recognition and refusal to bargain with the Union, Respondent must recognize and bargain with the Union for a

reasonable period of time as the bargaining representative of the unit employees. *Liberty Bakery Kitchen, Inc.*, 365 NLRB No. 19, slip op. at 1 (2018), citing *Caterair International*, 322 NLRB 64 (1996). Where Respondent has withdrawn recognition, the affirmative bargaining order remains the remedy for Respondent's unlawful conduct. 365 NLRB No. 19, slip op. at 1.

Respondent must bargain upon request with the Union as the exclusive collective bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement. Respondent is required to meet to negotiate with the Union at reasonable times and reasonable places.

The employees who suffered losses due to Respondent's unlawful unilateral changes will receive make whole remedies as described in the Order. These employees include any changes in the kitchen after March 24, 2017 and the schedule changes in EVS on April 5, 2017. Because I also find that Respondent failed to notify the Union regarding changes in the EVS department, I order a similar remedy, beginning from the Union's election as bargaining representative. Additionally, employees who suffered losses due to Respondent's violations of Section 8(a)(3) will receive make whole remedies as described in the Order.

## II. ENHANCED REMEDIES

### A. Extension of the Certification Year, Per Mar-Jac Poultry

I find that Respondent's conduct warrants extension of the certification year for 12 months. *Mar-Jac Poultry*, 136 NLRB 785 (1962); *Fallbrook Hospital Corp.*, 360 NLRB 644, 645 (2014), enfd. 785 F.3d 729 (D.C. Cir. 2015). The certification year should be extended when "an employer refuses to bargain with a newly certified union during part of all of the year immediately following certification. In refusing to bargain, an employer deprives a union of the expediency of bargaining while the union holds its "greatest strength." *Fallbrook Hospital*, 360 NLRB at 645. The factors that must be considered for are the "nature of the violations, beginning when Respondent starts to bargain in good faith. The number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process, and the conduct of the union during negotiations." *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), rev. denied, enfd. 156 Fed.Appx. 331 (D.C. Cir. 2005).

Respondent has a litany of 8(a)(5) violations, the most severe of which are the refusal to recognize the Union as the employees' 9(a) bargaining representative within approximately 4 months after the count of votes and refuse to bargain for a collective-bargaining agreement. It ultimately refused all bargaining because the Union would not acquiesce to its demand to allow it to pursue the test of certification claim. Regarding information requests, the first of which was made in December 2016, Respondent only partially responded to some information requests, and failed to respond to others. It failed to notify the Union about at least one intended unilateral change.

In March 2017, Respondent stopped all efforts to bargain in other quarters as well and made at least three known unilateral changes shortly thereafter. *Fallbrook Hospital Corp.*, 360 NLRB at 645. It never met to negotiate a collective-bargaining agreement. Respondent's brief admits to making numerous

changes without first notifying the Union, and these actions, although not litigated, cannot go unnoticed. These unfair labor practices show that Respondent's efforts to bargain were less than good faith, and deprived the represented employees and the Union over a year of good faith bargaining from Respondent. *HTH Corp.*, 356 NLRB 1397, 1403 (2011). As a result, I order a 12-month *Mar-Jac* extension to the certification year, to begin when Respondent begins to bargain in good faith. *Thermico, Inc.*, 364 NLRB No. 135, slip op. at 4 (2016); *Fallbrook Hospital*, 360 NLRB at 645.

### B. Bargaining Schedule

I decline to order a bargaining schedule at this point. The traditional remedies, coupled with the *Mar-Jac* extension of the certification year, should permit Respondent and the Union sufficient time to start negotiations. A remedy of a bargaining schedule has been declined in more extreme cases of surface bargaining and where Respondent's defenses were fairly frivolous. *The Leavenworth Times*, 234 NLRB 649, 672-673 (1978). Compare *Eastern Maine Medical Center*, 253 NLRB 224, 248-249 (1980), enfd. 658 F.2d 1 (1st Cir. 1981) (employer's unlawful conduct extended to bad-faith bargaining, destruction of the bargaining unit, and publication of bargaining steps to the entire employee population, not just the bargaining unit, which warranted a bargaining schedule). In addition, the district court's order for injunctive relief requires Respondent to bargain.

### C. Notice Reading

Notice readings are considered an effective but moderate method of reassuring employees and allowing in a "warming wind of information . . ." *United States Service Industries*, 319 NLRB 231, 232 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997). "Reading the notice to the employees in the presence of a responsible management official serves as a minimal acknowledgment of the obligations that have been imposed by law and provides employees with some assurances that their rights under the Act will be respected in the future." *Whitesell Corp.* 357 NLRB 1119, 1123-1124 (2011). Remedies are warranted when the violations are serious, persistent and widespread. *Id.* at 1124.

The gravity of the violations Respondent committed are serious, as Respondent withdrew recognition and abandoned agreements with the Union under the guise of obtaining a test of certification. The gravity is further enforced by the district court's findings in its determination to grant injunctive relief and to deny Respondent's motion to stay. *Whitesell Corp.*, 357 NLRB at 1124 fn. 15. I rely upon the district court's determination of chill, a topic I did not permit testimony as not relevant to determining the merits of the allegations. The district court also required Respondent to read its order to employees. See *Coffman v. Queen of the Valley Medical Center*, supra. In addition to the district court's determination of chill, I also consider the extent and breadth of Respondent's 8(a)(5) violations: Respondent failed to provide information on a number of occasions, it made unilateral changes, generally admitting in its brief to more than those litigated here; and most of all, withdrew recognition from the certified bargaining representative of the bargaining unit employees. Respondent also committed 8(a)(3) violations. One entire job group, the SPD employees was affected not only by the

unilateral changes but Respondent's violation of Section 8(a)(3). With the chill and violations found, I find that a notice reading is warranted here. Although Respondent is not a "repeat customer," with more than one Board order to come, its main violation of withdrawing recognition and failing to bargain with the Union has continued. The notice should be read aloud, in English and any other languages that the Regional Director deems necessary, to the bargaining unit employees during working hours by a senior management member, or failing that, a Board agent in the presence of a senior member of management.

#### D. Union Access to Bulletin Boards

Regarding General Counsel's request for Union access to the bulletin board and all places where notices to employees are customarily posted, I deny this request. This remedy is applied when an employer has taken immediate action against the employees who attempt to aid a union and to do so to make "employees think twice before doing so again." *U.S. Service Industries, Inc.*, 319 NLRB 231, 232 (1995). Poulson has retained the ability, albeit sometimes restricted, to meet with employees in the cafeteria. The remedies herein, with the notice reading and correction of the Union's access to meeting rooms, should be sufficient to notify employees of their rights.

#### E. Consequential Damages

General Counsel proposes that the discriminatees receive consequential damages. Arroyo, for example, had to change shifts and make additional transportation arrangement, and possibly other child care arrangements. McNelis lost a second job and its income. Although these events are due to Respondent's unlawful conduct, the Board has yet to require payment for consequential damages. I am obligated to follow existing Board precedent for the remedies in this case. *Pathmark Stores, Inc.*, 342 NLRB 378, 348 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I deny General Counsel's request for consequential damages.

#### ORDER

Respondent Queen of the Valley Medical Center, Napa, California, its officers, agents, successors, and assigns shall

1. Cease and desist from
  - (a) Threatening employees with futility for their union and protected concerted activities.
  - (b) Failing to honor employees' requests for union representation during investigatory interviews.
  - (c) Changing employees' shift assignments due to their union and/or protected concerted activities.
  - (d) Changing employees' work duties due to their union and/or protected concerted activities.
  - (e) Failing and refusing to bargain in good faith over the terms and conditions of a collective bargaining agreement with National Union of Healthcare Workers (Union) as the exclusive collective-bargaining representative of the employees in the following unit:

All nonprofessional employees, including technical employees, employed by Respondent at its facilities located at 1000 Trancas Street, 980 Trancas Street, 3448 Villa Lane, and 3421 Villa Lane in Napa, California; but excluding all other

employees, skilled maintenance employees, business office clerical employees, confidential employees, guards, and supervisors as defined in the Act.

(f) Withdrawing recognition of the Union as the exclusive bargaining representative of bargaining unit employees within the certification year bar, without objective evidence that the Union actually lost the support of a majority of bargaining unit employees.

(g) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Miguel Arroyo full reinstatement to his former job on the evening shift, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from their files any reference to the unlawful shift reassignment and loss of lead position for Miguel Arroyo and, within 3 days thereafter notify Arroyo in writing that this has been done and that the shift reassignment and loss of lead position will not be used against him in any way.

(c) Make Miguel Arroyo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

(d) Make whole Miguel Arroyo, with interest, for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, including but not limited to making contributions to employees' 401(k) accounts that Respondent would have paid but for the unlawful unilateral changes.

(e) Make SPD employees who for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(f) The make whole remedy for the unlawful discrimination suffered by Arroyo and SPD employees, including Martha McNelis, shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(g) The make whole remedy for the unlawful unilateral changes suffered by the EVS employees and SPD employees, including Martha McNelis, shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(h) In accordance with *Don Chavas, LLC*, 361 NLRB 101 (2014), Respondent shall compensate Miguel Arroyo, the

kitchen employees and SPD employees affected by the unlawful schedule and duty changes, for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 20 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

(i) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification is extended 12 months from the date that Respondent begins to comply with this Order.

(k) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

(l) Rescind, upon request of the Union, the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on the following dates:

- i. On April 5, 2017, regarding change of schedules for SPD employees;
- ii. On about April 21, 2017, regarding Respondent's abrogation of the kitchen construction agreement; and,
- iii. On March 24, 2017, refusing to allow the Union to schedule meeting rooms at Respondent's facility.

(m) Furnish to the Union in a timely manner the information requested by it on the following dates:

- i. December 15, 2016 and January 24, 2017, related to changes in Renee Frogge's linen duties;
- ii. January 10, 2017 request for information to bargain full collective bargaining agreement;
- iii. March 2, 2017 request for information to Interim Director of Surgical Services Kriegel, related to possible schedule changes for SPD employees;
- iv. March 21, 2017 request for information regarding the pharmacy;
- v. March 21, 2017 request regarding EVS and policies related to disciplinary action; and,
- vi. March 21, 2017 request regarding productivity calculations in patient access services.

(n) With 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix." Copies

of the notice, on forms provided by the Region Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. The Regional Director may determine that the notice be translated into other languages. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an internet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that Respondent has gone out of business or closed any facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language to all current employees and former employees employed by Respondent at any time since December 22, 2016. Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at Respondent's facilities at any time since December 22, 2016.

(o) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by a responsible corporate executive in the presence of a Board agent or, at Respondent's option, by a Board agent in the presence of a responsible corporate executive.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively threaten you with futility of unionization.

WE WILL NOT deny your requests to have representatives of the National Union of Healthcare Workers (NUHW) present during investigatory interviews.

WE WILL NOT change your wages, hours, or other terms and conditions of employment in order to discourage you from engaging in union and/or protected concerted activities.

WE WILL NOT withdraw recognition from and fail and refuse to recognize the National Union of Healthcare Workers (NUHW) as the certified bargaining agent of our employees

WE WILL NOT change your wages, hours, or other terms and conditions of employment, without first notifying the Union and giving the Union an opportunity to bargain about the changes.

WE WILL NOT fail to provide the Union with requested information that is necessary and relevant to its bargaining duties.

WE WILL NOT unilaterally change shift assignments or effects bargaining agreements without notifying the Union and giving the Union an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, upon request, bargain in good faith with NUHW, the exclusive bargaining representative of the bargaining unit listed above, and if an understanding is reached, embody the understanding in a signed agreement. The unit is as follows:

All nonprofessional employees, including technical employees, employed by [Respondent] at its facilities located at 1000 Trancas Street, 980 Trancas Street, 3448 Villa Lane, and 3421 Villa Lane in Napa, California; but excluding all other employees, skilled maintenance employees, business office clerical employees, confidential employees, guards, and supervisors as defined in the Act.

WE WILL, upon request, provide NUHW with information that is necessary and relevant to its duties as bargaining representative and WE WILL provide NUHW with the information requested, as described in the Order.

WE WILL restore Miguel Arroyo to his previously assigned duties on the previously assigned shift, or a similarly, and WE WILL make him whole, and WE WILL remove from his file within 3 days all references to our unlawful action and notify him in writing

within 3 days that this has been done.

WE WILL restore SPD employees to their previously scheduled shifts and duties, in effect before April 5, 2017, and WE WILL make them whole for any losses incurred by our unlawful conduct. WE WILL remove from their files within 3 days all references to our unlawful actions and notify them in writing within 3 days that this has been done.

WE WILL make whole all EVS and kitchen employees who suffered losses due to our unlawful unilateral changes and WE WILL remove from their files within 3 days all references to our unlawful actions and notify them in writing within 3 days that this has been done.

WE WILL, upon request of NUHW, restore the terms and conditions of the kitchen agreement.

WE WILL, upon request of NUHW, schedule meeting rooms for union meetings in our facilities.

QUEEN OF THE VALLEY MEDICAL CENTER

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/20-CA-191739](http://www.nlr.gov/case/20-CA-191739) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273-1940.

