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

VALLEY HOSPITAL MEDICAL CENTER, INC. d/b/a VALLEY HOSPITAL MEDICAL CENTER and UNIVERSAL HEALTH SERVICES, INC., Joint Employers		
and	Cases	28-CA-272658
		28-CA-274618
CULINARY WORKERS UNION, LOCAL 226		28-CA-278258
a/w UNITE HERE INTERNATIONAL UNION		28-CA-278417
	Cases	28-CA-295997
		28-CA-298245
		28-CA-298680
		28-CA-299926
		28-CA-300279
And	Cases	28-CA-278356
		28-CA-283074
SERVICE EMPLOYEES INTERNATIONAL		28-CA-283651
UNION, LOCAL 1107		28-CA-288293
And	Case	28-CA-280746
JOANN JUDGE, an Individual		
And	Case	28-CA-291529
JUNE EDWARDS, an Individual		
VALLEY HEALTH SYSTEM, LLC d/b/a DESERT SPRINGS HOSPITAL MEDICAL CENTER and UNIVERSAL HEALTH SERVICES, INC., Joint Employers		
And	Cases	28-CA-278343
		28-CA-278352
SERVICE EMPLOYEES INTERNATIONAL		28-CA-281836
UNION, LOCAL 1107		28-CA-283166
		28-CA-284088
		28-CA-288283

Néstor Zárate Mancilla, Esq. **and** ***Mehmet Kepir, Esq.***, for the General Counsel.
Patricia G. Griffith, Esq. and Thomas H. Keim, Esq. (Ford & Harrison, LLP), of Atlanta, Georgia and Spartanburg, South Carolina, for the Respondent.
Luke N. Dowling, Esq. (McCracken, Stemerman & Holsberry, LLP), of Oakland, California, for Charging Party Culinary Local 226.
Evan L. James, Esq. and Daryl Martin, Esq. (Christensen, James & Martin), of Las Vegas, Nevada, for Charging Party Service Employees International Union, Local 1107.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: Respondent Valley Hospital Medical Center withdrew recognition from the Union representing its registered nurses and then granted them a wage increase. However, it could not prove that a majority of bargaining unit employees no longer wished the Union. Both the withdrawal of recognition and the unilaterally-granted wage increase violated Sections 8(a)(1) and 8(a)(5) of the Act.

Procedural History

The Charges

This case began February 10, 2021, when Culinary Workers Union, Local 226, a/w UNITE HERE International Union (referred to below as Culinary Local 226)[1] filed the original unfair labor practice charge in Case 28–CA–272658 against Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center (referred to below as Respondent Valley Hospital or simply Valley Hospital). Culinary Local 226 amended this charge on February 12, 2021.

On March 23, 2021, Culinary Local 226 filed another charge against Respondent Valley Hospital. The Board's staff docketed this charge as Case 28–CA–274618. Culinary Local 226 amended this charge on March 26, April 14, and September 9, 2021.

On June 4, 2021, Culinary Local 226 filed a charge, docketed as Case 28–CA–278258, against Respondent Valley Hospital. The Union amended this charge on September 27, 2021.

On June 9, 2021, Service Employees International Union, Local 1107 (referred to below as SEIU Local 1107) filed two charges against Valley Health Systems, LLC d/b/a Desert Springs Hospital Medical Center (referred to below as Respondent Desert Springs). The Board's staff docketed one of these charges as Case 28–CA–278343. SEIU Local 1107 amended this charge on October 6, 2021.

Board staff docketed the second June 9, 2021 charge against Respondent Desert Springs as

[1] When the context allows without possibility of confusion, Culinary Local 266 may be referred to below simply as the Union.

Case 28–CA–278352. SEIU Local 1107 amended this charge on October 6, 2021.

Additionally, on June 9, 2021, SEIU Local 1107 filed an unfair labor practice against Respondent Valley Hospital. Board staff docketed this charge as Case 28–CA–278356. SEIU Local 1107 amended this charge on October 6, 2021.

On June 10, 2021, Culinary Local 226 filed a charge against Respondent Valley Hospital. Board staff docketed this charge as Case 28–CA–278417.

On July 30, 2021, Joann Judge, an individual, filed a charge against Respondent Valley Hospital. Board staff docketed this charge as Case 28–CA–280746.

On August 17, 2021, SEIU Local 1107 filed a charge against Respondent Desert Springs. The Union amended this charge, which had been docketed as Case 28–CA–281836, on February 7, 2022.

On September 15, 2021, SEIU Local 1107 filed a charge against Respondent Valley Hospital. The Union amended this charge, docketed as Case 28–CA–283074, on February 7, 2022.

On September 16, 2021, SEIU Local 1107 filed a charge against Respondent Desert Springs. The Union amended this charge, docketed as Case 28–CA–283166, on February 7, 2022.

On September 28, 2021, SEIU Local 1107 filed a charge against Respondent Valley Hospital. The Union amended this charge, docketed as Case 28–CA–283651, on February 7, 2022.

On October 5, 2021, SEIU Local 1107 filed a charge against Respondent Desert Springs. The Union amended this charge, docketed as Case 28–CA–284088, on February 7, 2022.

On December 29, 2021, SEIU Local 1107 filed a charge, docketed as Case 28–CA–288283, against Respondent Desert Springs.

Also on December 29, 2021, SEIU Local 1107 filed a charge against Respondent Valley Hospital. Board staff docketed the charge as Case 28–CA–288293.

On February 28, 2022, June Edwards, an individual, filed a charge against Respondent Valley Hospital. Board staff docketed it as Case 28–CA–291529.

On May 16, 2022, Culinary Local 226 filed a charge against Respondent Valley. The Union amended the charge, docketed as Case 28–CA–295997, on June 9, 2022.

On June 24, 2022, Culinary Local 226 filed a charge, docketed as Case 28–CA–298245, against Respondent Valley Hospital.

On June 29, 2022, Culinary Local 226 filed a charge, docketed as Case 28–CA–298680, and Respondent Valley Hospital.

On July 21, 2022, Culinary Local 226 filed two charges against Respondent Valley Hospital.

Board staff docketed the first as Case 28–CA–299926 and the second as Case 28–CA–300729.

The Complaint and Erratum

On December 2, 2022, after an investigation, the Acting Regional Director for Region 28 issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing. (This pleading will be referred to below as the original complaint.) In doing so, the Acting Regional Director exercised authority delegated by the Board's General Counsel (referred to below as the General Counsel).

The original complaint named three Respondents: Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center, Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center, and Universal Health Systems, Inc. The original complaint alleged this latter entity to be a joint employer with each of the other Respondents. None of the unfair labor practice charges alleges Universal Health Systems, Inc. to be the employer.

On December 15, 2022, Respondent Valley Hospital and Respondent Desert Springs filed a joint answer to the original complaint. This answer stated, in part, that Respondent Valley Hospital and Respondent Desert Springs "have no relation with Universal Health Systems, Inc. and therefore are not joint employers with Universal Health Systems, Inc."

On May 19, 2023, the Regional Director for Region 28 issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing. (For brevity, this pleading will be referred to below as the complaint.)

The complaint again alleged that Universal Health Systems, Inc. was a joint employer. The June 1, 2023 answer filed by Respondent Valley Hospital and Respondent Desert Springs Hospital stated that "Respondents have no corporate relationship to Universal Health Systems, Inc., and consequently deny they are a joint employer with Universal Health Systems, Inc., in every allegation of the complaint."

On May 31, 2023, the Regional Director issued an erratum to Order Further Consolidating Cases, Second Consolidated Complaint, and Notice of Hearing. This erratum stated that the complaint had "inadvertently and incorrectly" named "Universal Health Services, Inc." as "Universal Health Systems, Inc." It corrected the complaint by changing "Systems" to "Services."

As noted above, the name "Universal Health Systems, Inc." does not appear on any of the unfair labor practice charges. Neither does the name "Universal Health Services, Inc." In effect, the Regional Director's "Erratum" was amending the complaint to add a new respondent, claimed to be a joint employer with the other respondents. Respondent Valley Hospital and Respondent Desert Springs vigorously objected.

On June 7, 2023, Respondent Valley Hospital, Respondent Desert Springs Hospital, and Universal Health Services, Inc. together filed a Response in Opposition to Erratum to Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing. This Opposition identified Universal Health Services, Inc. as a "non-party." The Opposition stated, in part:

First, permitting the Regional Director to add a new respondent only 8 business days before the Hearing is prejudicial to Non-Party UHS as it will not have sufficient time to prepare for the Hearing. Critically, Non-Party UHS was not named as a respondent in the Complaint or the Second Complaint. Rather, the Regional Director focused on alleging a joint employer relationship between Universal Health Systems, Inc. and each of the Respondents. The Regional Director did not provide any notice that Non-Party UHS was the subject of the allegations in the Complaint or the Second Complaint until it was too late and prejudicial for Non-Party UHS to have sufficient time to defend against such allegations.

In fact, prior to the Regional Director's issuance of the complaint, the Region and the General Counsel both sought information on the purported joint employer relationship between Respondents and Non-Party UHS. In January 2022, the Region requested evidence on this issue, which Respondents responded to in March 2022 by explaining in detail that no joint employer relationship existed between Non-Party UHS and either of the Respondents. Subsequently, in April 2022, the General Counsel served investigative subpoenas on Respondents seeking documents relating to the purported joint employer status between them and Non-Party UHS. Respondents responded to the subpoenas stating that no such responsive documents existed in their possession, custody, or control. Despite the Region's request for evidence and the General Counsel's investigative subpoenas identifying Non-Party UHS from over 1 year ago, the Regional Director failed to properly identify Non-Party UHS in the complaint and the second complaint. Based upon the Region's failure to identify Non-Party UHS in the Complaint or the second complaint, combined with Respondents' responses to the Region and the General Counsel that no joint employer relationship existed and that no documents existed to establish the purported joint employer status between Respondents and Non-Party UHS, it was reasonable for Non-Party UHS to believe that it would not be involved in this proceeding. The Regional Director's last minute attempt to remedy the deficiency of not naming Non-Party UHS as a respondent in the complaint and the Second Complaint by filing the erratum merely 8 business days before the hearing should not be permitted due to the prejudicial effect it will have on Non-Party UHS in having to defend itself in this proceeding with less than 2 weeks' notice of the allegations against it.

Second, Non-Party UHS cannot be named as a respondent in the Second Complaint because it was never named as a respondent in any of the unfair labor practice ("ULP") charges that are the subject of the Second Complaint, and thus, the Board is without jurisdiction over Non-Party UHS. See *Concrete Haulers, Inc.*, 106 NLRB 690, 698 (1953) (quoting *NLRB v. Hopwood Retinning Co.*, 98 F.2d 97, 101 (2d Cir. 1938)) (prerequisite for the Board's jurisdiction begins with the filing of a charge against the respondent, which is followed by a complaint and hearing that ">must be in accord with the charge"); see also 29 U.S.C. § 160(b) (stating that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made"). As explained in *Concrete Haulers*, "[t]he Board should be an impartial administrator and must ascertain if there were unfair labor practices as charged. The Board cannot use its own initiative in respect to charging unfair

> practices." *Concrete Haulers*, 106 NLRB at 698 (emphasis added) (quoting *Hopwood Retinning*, 98 F.2d at 101). Thus, Non-Party UHS is not a proper respondent in this action based on the allegations in the ULP charges. See id. (trial examiner dismissing the complaint against the respondent because it was not named in the ULP charge). Rather, the Regional Director is impermissibly attempting to use his ">own initiative" to advance these allegations against Non-Party UHS. See id. (quoting *Hopwood Retinning*, 98 F.2d at 101).

Section 10(a) of the Act empowers the Board to "prevent any person"[2] from engaging in any unfair labor practice . . ." 29 U.S.C. § 160(a). However, Section 10(b) ties that power to the filing of a charge accusing that person of committing, or having committed, such an unfair labor practice. Specifically, Section 10(b) states, in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges. . .
>
> 29 U.S.C.§ 160(b)

The words "shall have power to issue and cause to be served upon such person a complaint" clearly refers to the power to institute unfair labor practice proceedings which name that person. However, the Board possesses this power only when it is charged that the person has engaged in unfair labor practices.

As noted above, no unfair labor practice charge in this proceeding names Universal Health Services, Inc. or accuses that company of committing unfair labor practices. Accordingly, the Regional Director was not empowered to issue a complaint naming it as a respondent. *Expert Electric, Inc.*, 347 NLRB 18 (2006); *Innovative Communications Corp.*, 333 NLRB 665 (2001).[3]

During the hearing, the General Counsel moved to amend the complaint to add another respondent, UHSDI. Because the General Counsel generally has discretion to amend the complaint, I granted the motion. (Tr. 4070-4073) However, none of the charges in this matter names UHSDI or

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[2] Sec. 2(1) of the Act broadly defines " "person" to include "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code [under title 11], or receivers." 29 U.S.C. § 152(1).

[3] Any argument that the complaint itself could be deemed a charge, and thereby satisfy the Sec. 10(b) requirement, would also fail. Sec. 10(b) also includes a proviso that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . ." 29 U.S.C. § 160(b). Neither the December 2, 2022 original complaint nor the May 19, 2023 second consolidated complaint falls within that 6-month period. Additionally, these documents' affidavits of service do not list either Universal Health Systems, Inc. or Universal Health Systems, Inc. as a recipient.

states that it engaged in any unfair labor practice. Therefore, for the same reasons discussed above, I conclude that the General Counsel lacked authority to add UHSDI as a respondent and that I erred in granting the motion.

Because the Act does not empower the Board to issue a complaint against a person in the absence of a charge naming that person, I conclude that the actions taken to designate Universal Health Services, Inc., and UHSDI as respondents, and to include them in the complaint, were of no force or effect. Therefore, I further conclude that neither Universal Health Services, Inc. nor UHSDI is a respondent herein.

Because the complaint repeatedly refers to "UHS" and, as amended, to "UHSDI" as respondents, and because this decision often quotes the complaint when discussing its various allegations, to avoid confusion I will follow the complaint's practice. However, references to "Respondent UHS" and "Respondent UHSDI" merely mirror the complaint language and do not signify that these entities are respondents. They are not.

The Hearing

The parties, counsel and witnesses are dispersed throughout the continent United States. from Oakland, California on the West Coast to Atlanta, Georgia on the East. Additionally, from the number of allegations in the 46-page complaint, it appeared that the hearing would take at least 30 days. All parties and their counsel agreed that the hearing would be conducted by videoconference.

The hearing opened before me on June 13, 2023. It proceeded on the following dates: June 13 through 16. 2023; June 21 and 22, 2023; June 26 through 29, 2023; July 11 through 14, 2023; July 17 through 20, 2023; July 24 through 28, 2023; August 8 and 9, 2023; August 22, 2023; August 21 through 23, 2023; September 18, 2023; September 27 through 29, 2023; October 23, 2023; October 31, 2023; November 2, 2023; November 14,2023; December 18 through 21, 2023; January 22 and 23, 2024.

The hearing closed on January 23, 2024. Thereafter, the parties filed briefs.

Post-Hearing Motions

Footnote 17 of the General Counsel's post-hearing brief includes the following: "CGC [counsel for the General Counsel] respectfully moves to amend complaint paragraph 4(a) and name [Respondent Valley's CEO Collin] McLaughlin as a Section 2(11) supervisor and Section 2(13) agent of Respondent Valley, Respondent UHSDI, and Respondent UHS." The motion does not indicate that the General Counsel contacted the other parties to find out their positions concerning whether the motion should be granted and it does not state the positions of these parties.

It is inappropriate to place a motion in a brief to the administrative law judge because such briefs are not part of the official record. See Section 102.45(b) of the Board's Rules. Moreover, all parties' briefs to the judge are filed simultaneously and no further filing is contemplated before issuance of the judge's decision. Therefore, there is no immediate reason for counsel to read an opposing counsel's brief, which could result in delay responding to the motion with the promptness required by the Board's Rules. A motion placed in a footnote is particularly easy to overlook.

Section 102.24 of the Board's Rules and Regulations provides, among other things, that a post-hearing motion to an administrative law judge shall be filed by "transmitting three copies thereof together with an affidavit of service on the parties." The Rule further states that unless otherwise provided in the Rules, "motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding."

At this juncture, after the hearing has closed, allowing the General Counsel to amend the complaint could necessitate reopening the hearing. The General Counsel has not stated either why such a reopening would be justified or why adding this allegation is essential to the government's case.

The General Counsel also has not explained why there was a delay in filing this motion and has not offered any reason why the delay should be excused. Accordingly, the motion is denied as untimely.

It does not appear that denying the General Counsel's motion will affect the government's case in any way. Although the complaint does not allege that Valley Hospital's chief executive officer is Respondents' supervisor and agent, the complaint also does not allege that this person engaged in any conduct which violated the Act. Rather it alleges that Respondent acted through other people whom the complaint does allege to be Respondents' supervisors and agents.

Footnote 21 of the General Counsel's brief similarly seeks to amend the complaint to allege that Karla Perez, whom the brief identifies as "the Vice President of the Las Vegas and Reno market," is the supervisor and agent of "Respondent Valley, Respondent Desert Springs, Respondent UHSDL, and Respondent UHS." Likewise, footnote 24 seeks to amend the complaint paragraph to allege that Michelle Carson, whom the brief identifies as the general counsel of UDSDI, is the supervisor and agent of "Respondent Valley, Respondent Desert Springs, Respondent UHSDI, and Respondent UHS."

Had the General Counsel made these motions during the hearing, I would have asked why. The complaint does not allege that either Perez or Carson made any statement or took any action which constituted an unfair labor practice. Additionally, for reasons stated above, I have concluded that neither Universal Health Services, Inc. nor UHSDI is a respondent in this case.

Granting the motions would add nothing to the government's case and denying them would subtract nothing. I deny them as untimely.

Admitted Allegations

Paragraph 1 of the complaint alleges that the charges were filed on the dates shown above and also alleges the dates of service of the charges. The Respondents' answer to the complaint admits that the Respondents received the charges but states that the Respondents did not know whether the charges were filed and served on the dates alleged.

No evidence contradicts the dates alleged in the complaint. Based on the dates shown on the charges and certificates of service, and noting the presumption of administrative regularity, I conclude that the General Counsel has proven the facts alleged in complaint paragraph 1 and its various

subparagraphs.

The Respondents' answer admits the allegations in complaint subparagraphs 2(a) through 2(d). Based on those admissions, I find that. at all material times, Respondent Valley Hospital has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. Additionally, I conclude that it meets the Board's discretionary standards for the assertion of jurisdiction.

The Respondents' answer admits the allegations raised in complaint subparagraphs 2(e) through 2(h). Based on those admissions, I find that at all material times, Respondent Desert Springs has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. Further, I conclude that it meets the Board's discretionary standards for the assertion of jurisdiction.

Based on the Respondents' admission of the allegations raised in complaint subparagraph 3(a), I find that. at all material times, Culinary Local 226 has been a labor organization within the meaning of Section 2(5) of the Act. Based on the Respondents' admission of the allegations raised in complaint subparagraph 3(b), I find that, at all material times, SEIU Local 1107 has been a labor organization within the meaning of Section 2(5) of the Act.

The Respondents have admitted, and I find, that at all material times the following individuals were supervisors of Respondent Valley Hospital, within the meaning of Section 2(11) of the Act, and its agents within the meaning of Section 2(13) of the Act: Environmental Services Manager Michael Blake; Environmental Services Manager Monica Griego; Human Resources Generalist Leslie Irwin; Dietary Department Manager Alice McCain[4]; Environmental Services Director Glenn McKinnon; Environmental Services Manager Darrell[5] Millet; Dietary Department Director Rick Pierce; Nursing Manager Onzla McLemore; Chief Executive Officer Erin Swenson; Human Resources Director Dana Thorne; Executive Chef Joe Shellmire; Kitchen Manager Will Brink, and Clinical Supervisor in Nursing Michelle Tuvida.

The Respondents also have admitted that, at all material times, Human Resources Market Director Wayne Cassard and Vice President of Labor Relations Jeanne Schmid are Respondent Valley Hospital's agents within the meaning of Section 2(13) of the Act. I so find.

The Respondents have admitted that, at all material times, the following individuals were supervisors of Respondent Desert Springs, within the meaning of Section 2(11) of the Act, and its agents within the meaning of Section 2(13) of the Act: Clinical Supervisor/Coordinator Jennifer Borbon; Intensive Care Unit Manager Kimberly Foxworth and Chief Executive Officer Christopher Loftus.

The Respondents also have admitted that, at all material times, Human Resources Market Director Wayne Cassard was Respondent Desert Springs' agent within the meaning of Section 2(13) of

[4] The complaint refers to "Alice" McCain. The transcript's list of witnesses spells her first name as "Alice." However, she testified that her name was "Alice McCain." (Tr. 1058)

[5] The correct spelling of Millet's first name is "Darrell" rather than "Darryl," as it appears in the complaint.

the Act.

The Respondents admit that the bargaining unit described in Article 1 and Exhibit 1 of the collective-bargaining agreement between Respondent Valley and Culinary Local 226, which was effective from January 1, 2013, through December 31, 2016, is an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.[6] "I so find."

Disputed Allegations

Complaint Paragraph 6(a)

Complaint paragraph 6(a) alleges that on dates between August 10, 2020, and February 28, 2021, more precise dates being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Glenn McKinnon (McKinnon), at Respondent Valley's facility:

> (1) by saying an employee always sought assistance of Culinary Local 226 without explaining how they learned that information, created an impression among their employees that their union and protected concerted activities were under surveillance by Respondent Valley and Respondent UHS;
>
> (2) by saying McKinnon did not like an employee because she sought assistance of Culinary Local 226, threatened employees with unspecified reprisals for engaging in union and protected concerted activities;
>
> (3) by calling an employee a cry baby for asking assistance of Culinary Local 226:
>
> > (A) threatened employees with unspecified reprisals for engaging in union and protected concerted activities; and
> >
> > (B) disparaged employees for engaging in union and protected concerted activities;
>
> (4) threatened to discharge employees for engaging in union and protected concerted activities;

[6] Complaint 5(a) raised this allegation. The Respondents' answer stated as follows: "Respondents admit only that the Culinary unit described in Paragraph 5(a) is an appropriate unit and currently represents employees. Respondents deny all remaining allegations contained in Paragraph 5(a) through 5(o) of the Complaint." It appears likely that Respondents' intended the words "and currently represents employees" to mean that it admitted Culinary Local 226 represents those employees. However, because the meaning is unclear, I do not find that Respondent admitted that Culinary Local 226 represents these employees. Rather, I find only that Respondents admitted the appropriateness of the described bargaining unit. "But even in the absence of an admission by the Respondent's, the record includes ample evidence that Culinary Local 226 is the exclusive bargaining representative of employees in the described bargaining unit and I so find."

(5) threatened to falsify Family and Medical Leave Act records as a pretext to discharge employees for engaging in union and protected concerted activities;

(6) threatened to discharge employees who supported Culinary Local 226 in order to cause the removal of Culinary Local 226 as employees' collective-bargaining representative;

(7) threatened to discharge employees for refusing to sign documents asking for Culinary Local 226 to be removed as their collective-bargaining representative;

(8) threatened employees with unspecified reprisals for supporting Culinary Local 226 by saying McKinnon would receive a bonus if he caused removal of Culinary Local 226; and

(9) promised employees increased wages and improved work hours if Culinary Local 226 were removed as their collective-bargaining representative.

The Respondents deny these allegations.

The General Counsel's brief does not identify allegations by complaint paragraph or subparagraph number. It also does not identify all the testimony pertaining to an allegation. Rather, it provides a conclusory narrative of events based on the testimony of a government witness who is assumed to be telling the truth.

To find out what the General Counsel has to say about any particular complaint allegation, the brief must be perused for clues. Sometimes there are none.

It appears that the following passage from the General Counsel's brief refers to the allegations in complaint subparagraph 6(a). In this passage, "Gouveia" refers to Shanlee Gouveia, whom Respondent Valley Hospital employed, for a while, to perform housekeeping duties. She worked in the hospital's environmental services department, overseen by Director Glenn McKinnon. The General Counsel's brief states:

In August 2020, while Gouveia worked as a Lead, McKinnon called Gouveia into his office. TR33:3768. There were employees affiliated with the Culinary 226 outside of the hospital protesting and McKinnon was upset. McKinnon called those employees the "old-timers" as a way to mean "union supporters." TR33:3769. McKinnon told Gouveia that if he ever caught her outside protesting that he would automatically fire her. TR33:3769. McKinnon also referred to some of these "old-timers" by name: JoAnn Judge, Sandra Villalobos, Cynthia Walker, Silvia Franco, Antonio Jackson, and Eric Allen. TR33:3769-70. McKinnon also referred to Villalobos as a "crybaby" because she reported too many incidents to Culinary 226. TR33:3770. McKinnon also mentioned that he wanted to get rid of the "old-timers" and that he liked walking them out, meaning he liked to fire them.TR33:3771.

During the August 2020 meeting, McKinnon asked her to sign papers to leave Culinary 226 and to get the union out of the hospital, but Gouveia refused.

TR33:3772-73. McKinnon also mentioned to Gouveia that he wanted Culinary 226 out of the hospital because he would get a big payout. TR33:3773. McKinnon also would try to persuade Gouveia by telling her that without Culinary 226 that he could set the pay for employees. TR33:3773.

Around August 2020, McKinnon also showed Gouveia how he could manipulate the EVS Department records to mess with people's attendance points and FMLA. Specifically, he showed how he could manipulate Villalobos' FMLA to create a pattern so that Villalobos could get fired. TR33:3774-75.

The General Counsel's brief cites only the testimony of one employee, Shanlee Gouveia, and fails to mention that McKinnon denied the statements Gouveia attributed to him. (Tr. 384–385, 5026–5027.) Instead, the brief accepts Gouveia's testimony as fact.

However, based on my observations of Gouveia while she testified, I have no confidence in the reliability of her testimony and do not credit any of it. Her demeanor swung between flustered and anguished even during her direct examination by the General Counsel, who called her as a witness and questioned her in a polite, non-accusatory manner.

For example, when counsel for the General Counsel asked Gouveia if she happened to know to whom Glenn McKinnon reported, she replied: "Just higher up, corporate. I'm sorry. I'm so nervous and scared right now, like I'm panicking. But, I. . ." (Tr. 3745–3746.) At this point, she had been testifying less than a minute.

At one point later in her testimony, she became so distraught she could proceed no further and had to return to complete her testimony on a later date. At times, she testified while hiding her face behind her upraised arms. However, the cause of her distress was not apparent. The reaction seemed disproportionate to the events about which she testified.

Gouveia's credibility will be discussed further below, in connection with complaint subparagraph 6(pp). For the reasons discussed in that paragraph and above, I conclude that Gouveia's testimony is not reliable and do not credit any of it.

The only other witness who gave testimony pertaining to complaint subparagraph 6(a) was Environmental Services Director Glenn McKinnon, who denied the allegations. Therefore, I conclude that the General Counsel has failed to prove the allegations in this complaint subparagraph and recommend that the Board dismiss them.

Complaint Subparagraph 6(b)

Complaint subparagraph 6(b) alleges that on about August 26, 2020, "Respondent Valley and Respondent UHS, by Glenn McKinnon (McKinnon), at Respondent Valley's facility, threatened employees that seeking assistance of Culinary Local 226 would be futile." However, it does not appear that the General Counsel introduced any evidence to prove this allegation.

In the General Counsel's posthearing brief, a list of issues to be decided includes whether "Respondent violated Section 8(a)(1) by making threats, denying employees *Weingarten* rights,

engaging in closer supervision, and *making statements of futility*." (Emphasis added.) However, the brief does not identify any instances in which the Respondent supposedly made a "statement of futility." Indeed, except for this reference in the statement of issues, neither the word "futility" nor the word "futile" appears anywhere in the General Counsel's brief.[7]

In a prehearing order, I had requested that counsel, when asking a witness questions about a particular complaint allegation, state on the record the relevant complaint paragraph number. When the hearing began, I informed counsel that they were required to do so. This practice was necessary because of the length of the complaint and the number of allegations.

On two occasions during the hearing, the General Counsel stated that the questions would pertain to complaint subparagraph 6(b).[8] The first time was during the examination of a hospital employee, Rose Therese Salvador.

Counsel for the General Counsel announced that he would be asking this witness questions relevant to complaint subparagraph 6(b) but no such questions followed. (Tr. 2553.) In fact, although complaint subparagraph 6(b) alleged a "statement of futility" by Respondents' director of environmental services, Glenn McKinnon, Salvador did not even mention McKinnon in her testimony.

During the hearing, counsel for the General Counsel also announced that McKinnon would be asked questions pertinent to complaint subparagraph 6(b). (Tr. 215, 415.) However, the questions which followed had no apparent relevance to the allegations raised by that complaint subparagraph.

My review of the record discerns no evidence which would establish that the Respondent, on about August 26, 2020, through McKinnon, threatened employees that seeking assistance of Culinary Local 226 would be futile, as alleged in complaint subparagraph 6(b). Therefore, I recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(c)

Complaint subparagraph 6(c) alleges that about September 10, 2020, the Respondent, by McKinnon, (1) threatened employees with more severe discipline if they sought assistance of Culinary Local 226 and (2) threatened employees that seeking assistance of Culinary Local 226 would be futile.

To prove these allegations, the General Counsel relies on the testimony of one witness, Sandra Villalobos, who was an employee in McKinnon's environmental services department in September 2020. Villalobos testified as follows:

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[7] Certainly, a speaker could convey the message that resort to a union would be futile without using either the word "futile" or "futility." However, the General Counsel's brief does not argue that the Respondent used any other specific words to communicate such a message.

[8] One other reference to complaint subpar. 6(b) was inadvertent and immediately corrected. See Tr. 3037.

Q. On September 10, 2020, do you happen to remember having a meeting with a management at Valley Hospital?
A. I remember—let me just refresh my memory a little bit. I know something happened but -- give me a sec. [Long pause]

Q. Ms. Villalobos, the date would be September 10, 2020.
A. I don't remember if it was for—

Q. Let me ask you a different question. Do you remember—(Tr. 3038)

The Respondents' counsel interrupted at this point. Villalobos was testifying in Spanish and the Respondents' attorney stated that she wanted "to be sure that there was a full translation of the last answer." The interpreter stated that it was. Villalobos then stated, "I don't remember really well, but I believe they called me to talk to me about a final warning." (Tr. 3038.)

The General Counsel asked Villalobos who was with her at the meeting. She testified "Darrel Millet and Glen." From context, it is clear that "Glen" referred to Environmental Services Director Glenn McKinnon.

Shortly after that testimony, I recessed the hearing for the luncheon break. Counsel for the General Counsel then resumed the direct examination of Villalobos and, after a brief technical problem with the videoconference audio, asked the following:

Q. BY MR. ZARATE-MANCILLA: Let me ask the question again. Where was the meeting where you got the discipline on September 10th, 2020?
A. In the EVS office.

Q. Besides Darrell Millet, who, if anyone else, was with you?
A. Only Darrell.

(Tr. 3044.)

This testimony contradicted her earlier testimony that both Darrell Millet and Glenn McKinnon were present during the meeting. However, after Villalobos testified that "[o]nly Darrell" was present, she gave further testimony indicating that McKinnon was there as well.

As a housekeeper, Villalobos cleaned patients' rooms. Members of management routinely inspect rooms after they are cleaned and use their cellphones to document problems. The photographs provide support for disciplinary actions. Villalobos further testified:

Q. Ms. Villalobos, can you tell us what happened when you went to the office?
A. So they showed me some pictures that I had left some urine around the toilet seat, that I had not mopped the floor and some other things.

Q. What, if anything, did you say or ask for at this meeting?
A. Yes, I told them that we should go and that I wanted talk to the patient and

remembered [Room] 394 who asked me not to clean the bathroom because she had urine in there and she was afraid of the content with the chemicals.

Q. Ms. Villalobos, do you remember if you asked to have a witness?
A. No, I was the one that I asked for a person from the union and he said, no, they didn't have anybody.

Q. Who did you ask for a representative from?
A. I asked Darrell and I told Darrell that I needed a representative from the union and he said we do not have one.

Q. What happened after that?
A. I told him, I said I wanted to go to that room and he said, no, we're not going to see that room, we're not going to see anything else. So I told him that I was going to go to the union. He said if I went to the union he was going to give me a larger discipline.

Q. Who said that they would give you a larger discipline?
A. Glen.

(Tr. 3045–3046.)

McKinnon clearly and unequivocally denied telling Villalobos that she would receive greater discipline if she went to the Union. (Tr. 423–424.) Additionally, Millet corroborated McKinnon's denial.

Q. BY MR. KEIM: Mr. Millet, have you ever informed employees or any employee that if they went to the union they would receive more harsh discipline in the future?
A. Absolutely not.

Q. Did you ever hear Glenn McKinnon say something like that?
A. No.

Q. Did you ever tell anybody if they spoke to Sandra Villalobos they would receive more severe discipline?
A. No.

(Tr. 4753.)

For the following reasons, I credit both McKinnon's denial and Millet's corroborating testimony.

Villalobos began her testimony about the meeting by saying "I don't remember really well. . ." She then testified that both Darrell Millet and Glenn McKinnon were present at the meeting. However, after a lunchbreak, Villalobos testified that "[o]nly Darrell" was present.

After testifying that only Millet was present, Villalobos then stated that "*they* showed me some pictures that I had left some urine around the toilet seat, that I had not mopped the floor and some other things." (Emphasis added.) This reference to "they" was consistent with the testimony Villalobos had given before the luncheon break, in which she said that both Darrell Millet and Glenn McKinnon were present.

After testifying that "they" had showed her pictures of the room she was assigned to clean, Villalobos continued with testimony which indicated both Millet and McKinnon had been present at this disciplinary meeting. So, her testimony that "[o]nly Darrell" was present could be considered simply a momentary inconsistency.

But why would she make this mistake? The question, concerning who was present during the September 10, 2020 disciplinary meeting is clear. Moreover, Villalobos did not merely say "Darrell"—which would leave open the possibility that someone else was present although not named - but rather "*[o]nly* Darrell." That qualifier—"only" - excludes this possibility. Moreover, the use of "only" suggests some degree of certainty.

After testifying that "only Darrell" was present, Villalbos continued her testimony without referring to Millet by name. Instead, she used the pronoun "he." Thus, she testified: "He said if I went to the union he was going to give me a larger discipline."

In view of her testimony that "only Darrell" was present, when Villalobos then used the pronoun "he," she must necessarily have been referring to Darrell Millet. However, that presents a problem of proof because the complaint alleges that Glenn McKinnon, not Millet, made the threat of greater discipline.

The General Counsel, presumably to correct this problem, then asked "Who said that they would give you a larger discipline?" Villalobos answered, "Glen."

If "only Darrell" were present, then how McKinnon could make the threat requires some explaining. Did he just arrive? Did he telephone? The General Counsel didn't ask and Villalobos didn't say.

Possibly, Villalobos had memorized what she was supposed to say, then "went up on her lines" and had to be prompted to give the right answer. The fact that Villalobos also said "I don't remember really well" the purpose of the meeting (Tr. 3038) reinforces my impression that her testimony was memorized rather than from direct recall of the event itself. Moreover, during other parts of her testimony, Villalobos occasionally appeared somewhat evasive.

Additionally, there were discrepancies between the affidavit Villalobos gave during the investigation and another part of her testimony at hearing. Her affidavit described one occasion when she became sick and went to the emergency room. According to the affidavit, her total time at the hospital was about 90 minutes, which conflicted with her testimony at hearing.

At first, Villalobos attributed this inconsistency to an error in translating the affidavit from Spanish to English. However, the Spanish version also stated 90 minutes. (Tr. 3426–3427.)

My observations of Villalobos while she testified do not persuade me that her testimony is reliable. Accordingly, I do not credit her testimony.

No similar doubts arise in connection with the testimony of McKinnon and Millet. My observations of these witnesses lead me to conclude that both McKinnon and Millet gave reliable testimony, which I credit. Based on that testimony, I find that neither of them told Villalobos that she would receive "larger" or more severe disciplinary action if she sought the assistance of any union.

The General Counsel also alleges, in complaint subparagraph 6(c)(2), that McKinnon, on September 10, 2020, "threatened employees that seeking assistance of Culinary Local 226 would be futile." The inclusion of this allegation in complaint subparagraph 6(c) suggests that it refers to some statement which McKinnon made, or which Villalobos attributes to him. However, the General Counsel has not pointed out such a statement.

As noted above, the General Counsel's brief does not refer to allegations by complaint paragraph number. Therefore, I searched the brief for the word "futile." It does not appear at all in the brief and, except for the table of contents, the word "futility" appears only once.

That appearance is in the brief's "Statement of Issues." The second issue listed is "Whether Respondent violated Section 8(a)(1) by making threats, denying employees *Weingarten* rights, engaging in closer supervision, and *making statements of futility*." (Emphasis added.) However, after listing that issue, the brief makes no further reference to futility. Moreover, my search of the transcripts did not find even one instance when any attorney or witness used either the word "futile" or "futility."

Obviously, someone can convey the message that an action is futile without using either that word or "futility." However, the General Counsel bears the burden of identifying the statement which allegedly communicates futility. Likewise, the General Counsel bears the burden of explaining why an employee reasonably would understand those words to mean that protected activity would be to no avail. The General Counsel has not done so here.

As noted above, I had instructed counsel to state the relevant complaint subparagraph number before asking a witness questions pertaining to the allegations raised in that subparagraph. Counsel for the General Counsel questioned only McKinnon and Villalobos about the allegations in complaint subparagraph 6(c) and, for the reasons discussed above, I have concluded that the testimony given by Villalobos is not reliable.

Accordingly, I conclude that the government has not proven, by credible evidence, any of the allegations raised in complaint subparagraph 6(c). Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraph 6(d)

Complaint subparagraph 6(d) alleges that, about September 10, 2020, Respondent Valley and Respondent UHS, by Darrel Millet, denied the request of employee Sandra Villalobos to be represented by Culinary Local 226 during an interview. It further alleges that Villalobos had

reasonable cause to believe that this interview would result in disciplinary action against her. Additionally, it alleges that Millet conducted the interview even though her request for union representation had been denied. The Respondent denies these allegations.

The General Counsel alleges that Millet denied Villalobos a union representative at the same September 10, 2020 meeting discussed above in connection with complaint subparagraph 6(c). However, the speaker who allegedly made the threat was not McKinnon but Millet.

To prove this allegation, the General Counsel relies on the following testimony of Villalobos: "I asked Darrell and I told Darrell that I needed a representative from the union and he said we do not have one." (Tr. 3045.)

However, for the reasons discussed above, I do not credit the testimony of Villalobos when it conflicts with that of other witnesses. Instead, I credit Millet's denial. (Tr. 4670.)

In sum, credible evidence does not support the allegations raised in complaint subparagraph 6(d). Therefore, I recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(e)

Complaint subparagraph 6(e)(1) alleges that about October 8, 2020, Respondent Valley and Respondent UHS, by Leslie Irwin, denied the request of employee Villalobos to be represented by Culinary Local 226 during an interview. Subparagraph 6(e)(2) alleges that Villalobos had reasonable cause to believe that this interview would result in disciplinary action. Subparagraph 6(e)(3) alleges that Irwin conducted the interview even though the Respondent had denied her request for union representation. The Respondent has denied these allegations.

The General Counsel bases this allegation on the testimony of employee Sandra Villalobos. As part of her job duties, Villalobos, like other employees, had to take and pass certain training given by computer. The training software is called the "Learning Management System" but employees typically refer to it by the initials "LMS." (Tr. 491.)

Parts of the training prepare employees to deal with emergencies such as a hospital visitor having a heart attack while on the premises. Even employees who do not perform clinical duties, including housekeeping employees, must complete such courses.

As will be discussed in greater detail later in this decision, management had become concerned that someone other than Villalobos had taken the training and test for her. Leslie Irwin, a human resources generalist, investigated this matter. The Respondents have admitted that Irwin is a supervisor and agent within the meaning, respectively, of Section 2(11) and (13) of the Act.

According to Villalobos, Irwin spoke with her on October 7, 2020. Villalobos did not state whether this meeting was in person or by telephone and also did not state where the meeting took place.[9]

[9] Irwin testified that she did not "remember right off on the top of my head" whether any of her conversations with Villalobos were by phone. However, she further stated that she was pretty sure

On October 7, 2020, Irwin spoke with Villalobos, who denied that anyone else had taken the LMS training in her place. On the witness stand, Villalobos briefly described this conversation, then stated that Irwin "didn't ask me anything else, she just did some writing, so I left. The next day, she called me." Her testimony continued as follows:

Q. The next day, that would've been October 8th. What happened on October 8th?
A. She asked me again the same thing, what time I had arrived, if I had seen Gloria, if I had seen Joann, if I had seen Wanda.

Q. What, if anything, did you ask from Leslie?
A. I asked her why she was questioning me so much.

Q. What, if anything, else?
A. I asked her why she was asking me the same questions and why she was questioning me so much.

Q. What, if anything, happened after that?
A. She felt that I was not being honest with her and I was not telling her the truth.

Q. What happened after that?
A. She told me that she was going to talk to Glen. I asked her what was happening, she did not tell me anything else. She just said she was going to talk to Glen.

Q. At this incident with Leslie, did you ask for a witness?
A. Yes, I asked for a person, a representative from the Culinary Union and she told me that at that time they did not have anybody.

Q. After she told you that they did not have anybody, what happened after that?
A. She said because of the pandemic, no one could enter the hospital.

Q. What, if anything else, happened on October 8th?
A. So, I finished talking to her, so again, I finished talking to her and then I just left to finish my work.

Q. Do you happen to remember whether Leslie Irwin said anything else to you before you left for work?
A. Only that she was going to talk again with Glen.

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that most of her meetings with Villalobos were face-to-face and took place in Irwin's office. (Tr. 4877.)

(Tr. 3057–3059.)

For the reasons discussed earlier in this decision, I have doubts about the reliability of all of Villalobos' testimony. Her testimony quoted above particularly concerns me. Its lack of detail suggests that it was simply memorized rather than recalled from experience.

The missing details include where the October 8, 2020 meeting took place and who else, if anyone, was present. Indeed, it is not entirely clear there was a "meeting" in the face-to-face sense. The General Counsel called it an "incident with Leslie," which could mean either a meeting in person or a telephone conversation.

After describing her previous meeting with Irwin, on October 7, Villalobos said "the next day, she called me." That would suggest that the October 8th conversation was by telephone. However, after describing this discussion, Villalobos stated that "I finished talking to her and then I just left to finish my work." These words suggest a face-to-face discussion, but Villalobos did not say where this meeting took place.

The absence of a foundation—where the meeting took place and who else was present—is not the only problem. Of more concern, as long as the General Counsel asked nonleading questions (such as "What happened after that?"), Villalobos did not mention asking for a Union representative. Only after the General Counsel asked the leading question ("At this incident with Leslie, did you ask for a witness?") did she say anything about requesting a Union representative.

Additionally, a significant part of the story is missing. When asked about what happened after Irwin told her they "didn't have anybody," Villalobos said that Irwin told her no one was allowed to come into the building because of the pandemic. However, Villalobos did not describe what she said in response,

Villalobos' reply to Irwin is highly relevant. For example, did her tell Irwin that it would be all right if her representative were a fellow employee, such as a shop steward? Did she ask that the interview be rescheduled so that a representative could be present? Did she say that she did not wish to proceed in the absence of a representative? Did she say that, under the circumstances, she would agree to proceed without a representative? Did she say anything at all?

Villalobos' testimony provides no answers to these questions. She only stated that she "finished talking to her" and then left to finish her work.

Additionally, another material detail is missing. Villalobos did not say *when*, during the interview, she requested a Union representative to be present.

Subparagraph 6(e)(3) alleges that Irwin conducted the interview "even though Respondent denied the employee's request for union representation." To establish this allegation, the General Counsel must prove that Irwin asked Villalobos questions pertaining to a subject which could lead to disciplinary action, and did so *after* denying the employee's request for a union representative.

However, Villalobos' testimony does not establish that Irwin asked any substantive questions, about a matter which reasonably could lead to disciplinary action, after telling Villalobos that a union

representative was not available. The General Counsel bears the burden of proving that, after a request for a union representative is denied, the interviewer asked such questions.

The General Counsel has not carried that burden. As noted above, after the General Counsel asked what, if anything else happened after Irwin explained that no one could come into the building because of the pandemic. Villalobos answered "I finished talking to her and then I just left to finish my work." That answer does not establish that Irwin asked any questions pertaining to the LMS, or concerning other matters which might lead to disciplinary action, after she told Villalobos that a union representative was not available.

Irwin's testimony also was vague. When asked if Villalobos ever asked "for anyone to accompany her, a witness or a representative," Irwin answered: 'I believe the only time she brought somebody with her was at the termination meeting. It's always offered if they want to bring a witness or somebody with them and it would have been her choice whether she came alone or, and met with me, or brought somebody." (Tr. 4877-4878)

Irwin did not squarely deny saying the words which Villalobos attributed to her. However, I believe that she was a reliable witness who took care not to testify beyond what she actually remembered. In contrast, for reasons discussed above, I have doubts about the testimony of Villalobos. These doubts prevent me from concluding that Villalobos' account is more likely than not true.

However, even were I to credit Villalobos' testimony, it still would be insufficient to establish the violation alleged in complaint subparagraph 6(e)(3). This testimony fails to establish that, after denying Villalobos' request for a Union representative, Irwin asked questions which reasonably might lead to disciplinary action

Certainly, Irwin's own testimony establishes that she was asking questions which reasonably would lead to disciplinary action. Based on that testimony, I conclude that the General Counsel has proven the allegations raised in complaint subparagraph 6(e) (2). Even assuming that Villalobos made a request for a Union representative, no evidence establishes that Irwin persisted in asking investigative questions after that request.

However, it should be noted that, because I do not credit the testimony of Villalobos, I conclude that the General Counsel has not proven that she requested Union representation at any time. Therefore, I further conclude that the General Counsel has not proven the allegations raised in either complaint subparagraph 6 (e)(1) or 6(e)(3).

In sum, I conclude that the General Counsel has failed to prove the unfair labor practices alleged in complaint subparagraph 6(e) and recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(f)

Complaint subparagraph 6(f) raises allegations similar to those raised in complaint subparagraph 6(e). The main difference is that the complaint alleges that these unfair labor practices took place on October 9, 2020.

More specifically, complaint subparagraph 6(f)(1) alleges that on this date, Respondent Valley and Respondent UHS, by Irwin, denied Villalobos' request to be represented by Culinary Local 226 during an interview. Complaint subparagraph 6(f)(2) alleges that Villalobos had reasonable cause to believe that this interview would lead to disciplinary action against her. Complaint subparagraph 6(f)(3) alleges that Irwin conducted the interview even though the Respondents had denied the request for union representation.

The General Counsel relies on the testimony of Villalobos to establish these allegations. After testifying concerning her October 8, 2020 conversation with Irwin, Villalobos said that the "next day, she called me again, day 9." Her testimony continued:

> Q. Day 9? That's October 9th?
> A. Yes.
>
> Q. What happened when Leslie called you on October 9th?
> A. Because she asked me again the same question, what time did I arrive, what time did I finish the LMS, if I had seen Wanda, if I'd seen Joann, if I had seen Gloria.
>
> Q. This meeting on October 9th, do you happen to remember if you had a witness with you?
> A. No, again, I asked at that time for a representative of the Culinary Union and I did not have anybody and she said I did not have plans.
>
> Q. She said she did not have plans?
> A. No. She said that she didn't have any representative. She didn't have anybody in the representative.
>
> Q. What happened after Leslie said she did not have a representative for you?
> A. No, nothing. There was no representative and I told her I was doubting now things, I was suspecting something was going on and I had to (inaudible).
>
> Q. What, if anything, happened after that?
> A. No, she told me that she thought that Gloria was -- did the LMS for me and I told her, no, Gloria did not do the LMS for me. Gloria was doing her work and she has to do her work, the lights come on in the rooms and she has to do her work.
>
> Q. What happened after you told Leslie this?
> A. No, she did not believe me and she said she was going to talk to Glen.

(Tr. 3059–3060.)

In this instance, Villalobos' testimony does indicate that there was discussion of the subject which reasonably could lead to disciplinary action. However, no other witness corroborated this

testimony.

For reasons stated above, I do not believe Villalobos gave reliable testimony and I do not credit it. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(f).

Complaint Subparagraph 6(g)

Complaint subparagraph 6(g)(1) alleges that about October 14, 2020, Respondent Valley and Respondent UHS, by Darrell Millet, denied the request of employee Villalobos to be represented by the Union during an interview. Complaint subparagraph 6(g)(2) alleges that Villalobos had reasonable cause to believe that this interview would result in disciplinary action being taken against her. Complaint subparagraph 6(g)(3) conducted the interview anyway, even though the Respondent denied the request for union representation. The Respondents deny these allegations.

The General Counsel relies solely on the following testimony of Villalobos to establish these allegations. For clarity, it may be noted that Villalobos testified in Spanish, sometimes in extended uninterrupted stretches which the interpreter had difficulty translating because of their length.

Q. What, if anything else, happened October 14th?

INTERPRETER: Interpreter did not hear. I'm going to ask her what she said.

A. That was the day that they were watching me and went to me.

Q. Do you remember having a meeting with Glen McKinnon on October 14th, 2020?
A. In October. [Long pause]
A. It was when I was let go.

Q. When you had that meeting with Glen McKinnon and you were let go, who, if anyone else, was with you at that meeting?

INTERPRETER: I'm sorry, I did not hear. Counsel, she's going on, okay, I'm trying to keep up with what she's saying. Could you ask her again please?

Q. Ms. Villalobos, could you please provide -- restate your response but in segments please for the Interpreter?
A. Yes, I was doing a room and was finishing up my work. It was towards the end of the day, I was in a room. Darrell tapped on the window, the patient told me "Your supervisor wants to talk to you." When I turned around, I saw it was Darrell and he signaled for me to come to the door. I asked him what happened, and he said, "Leave your cart and everything else here."

Q. After Darrell told you to leave your cart there, what happened?
A. He told me to go to the office.

Q. And what happened?
A. We started walking towards the office (inaudible) to the office. We went to the 3rd floor, somebody else was there and I said at that time I need a representative of the union and he said, "I do not have one."

Q. Who was it that said he didn't have one?
A. Darrell.

Q. Where did Darrell tell you that you were going to go?
A. Human resources.

Q. After Darrell told you that he did not have a union representative, what happened?
A. I told him that I needed a witness to be with me, a witness.

Q. What happened?
A. And he asked me who did I want and I said Joann Judge.

Q. What, if anything, happened next?
A. *We were waiting there across the cafeteria until Joann came*.

Q. What happened next?
A. We went to human resources and Glen was already there.

Q. What happened next?
A. So, Glen told me that this was the last warning and this would have completed my fourth warning. I said -- and he said this was my mistake, I was being terminated and I said why. Leslie said because I had not been honest with her and she always thought that I never completed the LMS by myself.

Q. After Leslie told you she didn't believe that you completed the LMS by yourself, what happened next?
A. She told me that I was not honest and I have not been honest with her, that she had given me three opportunities and I did not tell her the truth.

Q. What happened next?
A. I told her that I was not going to lie to her, that was my truth and I was not going to change it.

Q. What happened after you told her this?
A. I told her that she was letting me go unfairly.

Q. What happened next?
A. She told me that she was sorry.

Q. What, if anything, else?
A. I told her if she would give me a chance to write something about the unfairness of my firing and I am not going to tell lies, I would always tell you the truth.

Q. What happened next?
A. I wrote it and then we left and they took me back to my locker to get my personal belongings.

(Tr. 3061-3064.)(Emphasis added.)

As the italicized portion of her testimony establishes, the Respondent did not deny Villalobos the presence of a representative. To the contrary, Environmental Services Manager Millet asked Villalobos who she wanted to be present and then waited until that person arrived before proceeding to the meeting.

Additionally, the meeting was not an investigative interview to ascertain facts before deciding what disciplinary action, if any, would be appropriate. To the contrary, the Respondents already had decided to discharge Villalobos. The meeting's only purpose was to notify her that her employment was terminated. An employee does not have the right to union representation under these circumstances. *Miceli & Oldfield, Inc.*, 357 NLRB 505 fn. 2 (2011).

Therefore, I recommend that the Board dismiss the unfair labor practice allegations described in complaint subparagraph 6(g).

Complaint Subparagraph 6(h)

Complaint subparagraph 6(h)(1) alleges that on October 14, 2020, Director of Environmental Services McKinnon directed employees not to send text messages while inside the Valley Hospital facility. Complaint subparagraph 6(h)(2) alleges that on the same date McKinnon "physically grabbed employees' hands to prevent them from sending text messages while inside Respondent Valley's facility." Complaint subparagraph 6(h)(3) alleges that McKinnon did so "because employees attempted to engage in union and protected concerted activities via text message and/or Respondent Valley and Respondent UHS believed employees were attempting to engage in union and protected concerted activities via text message." The Respondents deny these allegations.

The General Counsel relies on the testimony of Villalobos to prove these allegations. According to Villalobos, after the meeting at which she was discharged, "Mike, Darrell and Glen[n] took me to my locker where I had my personal belongings." Presumably, she was referring to Environmental Services Managers Michael Blake and Darrell Millet, and Environmental Services Director Glenn McKinnon. Villalobos further testified:

Q. When Mike, Darrell and Glen took you to get your personal belongings, what, if anything, happened?
A. Yes, I took my bag, I took my things, then I realized that Glen had left through the stairs, he had taken the stairs. We were all waiting for the

elevator about three minutes, we waited for the elevator for three minutes, and then they said let's go take the stairs. When I was going up the stairs, I was going at the stairs up two steps, Darrell said, "Wait, wait," and we were waiting for Mike. So Mike came. Darrell was talking to someone on phone there and then Mike asked me to wait for Darrell.

Q. What happened next?
A. So when we were going down the stairs, Mike was right behind me. There's a little place where you can rest, Mike stayed there. I kept on going up two more steps.

Q. What happened next?
A. Darrell was still talking to those people there in basement with an open door.

Q. What happened?
A. So Mike was right behind me and I was texting my husband. I was letting him know that I was going to go to the union, I was going to put a grievance in the union and let him know that I had been let go. when I saw Glen and Glen came over, he opened the door and then he just went right by me. As I was texting, out of respect and let him go by, I leaned against the wall but he did not exchange any words with me.

Q. When Glen walked by and didn't say anything to you, what, if anything, did he do?
A. He told Darrell to tell me stop texting.

Q. What, if anything, else?
A. Darrell shouted at me, "Close your phone." I did not listen to him.

Q. What happened next?
A. I did not say anything, but I did not do what he asked me because I was not employed by the hospital anymore, I was not an employee of the hospital.

Q. What happened next?
A. So when Glen was coming down the stairs and I kept on texting because my phone opens up like a book, so I had it right here, right in front of me like a book with both of my hands. Then when I kept on texting, I did not close it like I was told, and then when Darrell comes right in front of me and told me, "You do not understand, close your phone."

Q. Ms. Villalobos, when you said you had your phone right here, you were motioning somewhere on your body. Where on your body where you motioning?

A. Like I'm showing you now, I was texting like this with my hands, right in front of my chest.

Q. After Glen told you that you didn't listen and to close your phone, what, if anything, happened?
A. I left running towards my left where the HR was, but Mike asked me where was I going.

Q. Ms. Villalobos, there may've been something missed in the translation. What, if anything, did Glen McKinnon do besides tell you to close your phone?
A. When he came down and he was on my level, he was there in front of me, he looked at my eyes and I looked at him too and he tapped on my hand where I had my phone to close my phone. He said, "You do not listen. You do not follow rules, you do not listen."

Q. Ms. Villalobos, can you explain what you mean by tapped your hand?
A. He did not tap, he hit me. He hit me. I told the previous Interpreter[10] that I felt dirty because he put his hands on my chest. I felt dirty.

Q.When you said he put his hands on your chest, who was it that put his hands on your chest?
A. Glen.

Q. Glen McKinnon, the director?
A. Yes.

Q. I'm sorry, I made you go back on your story. You mentioned that you also ran into Michael Blake. What happened when you ran into Michael Blake?

INTERPRETER: Please ask her to go shorter. It's just too much information, I cannot write that fast. She's emotional.

Q. BY MR. ZARATE-MANCILLA: Ms. Villalobos, I understand this—from what the Interpreter just mentioned to me asking to ask you to break down your statement into smaller segments for the Interpreter's sake. Can you restate in small segments what happened?

MS. GRIFFITH: But can the Interpreter give us what she was able to get down from the prior statement before she restates it?

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[10] The record does not suggest that, apart from her testimony now under discussion, Villalobos had any communication with a foreign language interpreter in the present matter. However, in 2021, she testified during the hearing in *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 28BCAB234647 et al. See JD(SF)25B21.

INTERPRETER: No, I can't.

MS. GRIFFITH: Like we've done in the past?

INTERPRETER: No, I cannot because I did not hear her voice, so it would be incorrect. I'm sorry.

Q. BY MR. ZARATE-MANCILLA: MS. VILLALOBOS, Can you please tell us what happened after Glen touched your chest? Tell us in small segments please for the Interpreter.
A. I was very afraid and I was very nervous and I went out really fast to go up to the first floor.

Q. And then?
A. I opened the door on the first floor. Glen was telling them to put me outside, outside, outside, "I do not want to ever see her in the hospital."

Q. Ms. Villalobos, besides telling Michael Blake and Darrell Miller that he did not want to see you in the hospital, do you happen to remember if Glen McKinnon said anything else that he did not want you to do in the hospital?
A. When I was going towards human resources, Mike asked me why I was going to human resources, "You're not working here anymore."

MR. ZARATE-MANCILLA: I'm sorry, Ms. Interpreter, can you ask her to repeat her statement?

A. So I was going to my left to human resources, to HR, human resources. Mike asked me why I was going to human resources, "You have nothing to do in there, you're not working here," so he asked me to go outside.

Q. He asked you to go outside?
A. Yes, he told me outside.

Q. What, if anything, happened next?
A. I ran towards a door. Where the soda machines are, there's a little door.

Q. What happened next?
A. I tried to open it and I forgot that it was during the pandemic time and the doors had been closed.

Q. What happened next?
A. When I could not open the door and then I told Mike that I had just called the police to let them know that Glen had attacked me.

Q. After you told Mike that you had called the police to let them know that Glen had attacked you, what happened next?
A. Supposedly, he had to take me outside and he had some documents and he started shaking.

Q. What, if anything, happened next?
A. I went outside running to meet my husband outside and I told my husband not only did they let me go and terminated me, but they also attacked me and they humiliated me too.

(Tr. 3065–3070.)

Glenn McKinnon clearly and unequivocally denied hitting Villalobos. (Tr. 428, 5011.) Likewise, he denied hitting her phone and grabbing her hands. (Tr. 428.) He similarly denied touching her chest. (Tr. 5011.)

Darrell Millet's testimony does not indicate that McKinnon was even present. In Millet's version, he and Blake accompanied Villalobos as she left the building:

Q. Were you involved in Ms. Villalobos exiting the hospital after her termination of employment meeting?
A. Yes. I escorted her out.

Q. All right. All right. Now tell me about that, what happened?
A. She had went and got her belongings and we escorted CC we escorted her out of the building.

Q. All right. Who did that?
A. Mike Blake and myself.

Q. All right. Did you ever hear Glenn McKinnon tell her to close her phone, to stop talking and texting that day?
A. No. No.

Q. Did you see Ms. Villalobos run out of the stairwell?
A. No.

Q. What about Mr. McKinnon touch Ms. Villalobos on the chest?
A. No.

Q. Did you hear Ms. Villalobos say that?
A. No.

Q. Did you hear Mr. McKinnon say put Sandra outside?
A. No.

Q. While in the hospital?
A. No.

Q. So how would you describe her exit?
A. Uneventful. [Long pause]

(Tr. 4671–4672.)

From Villalobos' testimony, it is unclear whether she claims that Michael Blake was nearby when McKinnon supposedly hit her. She testified that on the stairs, "There's a little place where you can rest, Mike stayed there." (Tr. 3065.)

Her testimony does not state but necessarily implies that Blake must have caught up with her at some point because she testified "I told Mike that I had just called the police to let them know that Glen had attacked me." (Tr. 3070.) However, Blake's testimony contradicts her:

Q. Okay. And did she ever tell you that Glenn McKinnon had attacked her?
A. No.

Q. Now, did she ever tell you she'd called the police because Glenn McKinnon had attacked her?
A. No.

Q. And do you recall when she was terminated, shaking papers at her?
A. No.

(Tr. 4182–4183.)

For the reasons stated above, I have concluded that Villalobos' testimony is not reliable and I credit it only when it is corroborated by other testimony or evidence. However, nothing in the record supports her claims that McKinnon touched her, grabbed her hands and attacked her. Nothing in the record corroborates her testimony that she told Blake she called the police, and nothing in the record establishes that she did call the police.

Moreover, her testimony also suffers from internal inconsistency. First, she testified that McKinnon "tapped on my hand where I had my phone to close my phone." The General Counsel then asked her to explain "what you mean by tapped your hand?" Contradicting the testimony she had just given, Villalobos said "He did not tap, he hit me. He hit me." (Tr. 3067.)

The complaint does not allege that McKinnon hit Villalobos. Presumably it would have included that allegation if Villalobos had made such a statement during the unfair labor practice investigation. However, the complaint only alleges that McKinnon "physically grabbed employees' hands to prevent them from sending text messages."

After testifying that McKinnon hit her, Villalobos added "I told the previous Interpreter that I felt dirty because he put his hands on my chest. I felt dirty." (Tr. 3067–3068.) It isn't clear whether

Villalobos is asserting two separate actions - hitting her and putting his hands on her chest - or whether she meant that McKinnon hit her in the chest.

In any event, McKinnon clearly denied touching her chest and no evidence corroborates Villalobos' claim that he did. Moreover, the present complaint does not allege that McKinnon, or any other supervisor or agent, did so. For the reasons discussed earlier in this decision, I do not believe Villalobos' testimony is reliable and do not credit it when uncorroborated. To the contrary, I credit the testimony of McKinnon, Millet, and Blake.

Villalobos already had been discharged before the events described in complaint subparagraph 6(h) allegedly took place. Although the General Counsel alleges that her discharge was violative, for reasons discussed later in this decision, I conclude that her discharge was lawful and for cause.

Accordingly, she was not an employee when the events described in complaint subparagraph 6(h) allegedly took place. Moreover, the record does not establish that any employee was present.

Therefore, even were I to credit her testimony, which I do not, I still would find that the Respondents, either through McKinnon or any other supervisor or agent, did not direct any employee not to send text messages and did not grab any employee's hands. However, it should be stressed that I do not believe Villalobos' testimony and do not find that McKinnon acted as she claimed.

In sum, the General Counsel has not proven the allegations raised in complaint subparagraph 6(h) and I recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(i)

Complaint subparagraph 6(i), as amended, alleges that on "a date in December 2020, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Millet, at Respondent Valley's facility:

> (1) by telling employees Millet knew they were telling other employees to check their paychecks for meal pay without disclosing how McKinnon knew of those activities, created an impression among their employees that their union and protected concerted activities were under surveillance by Respondent Valley and Respondent UHS;
>
> (2) told employees to stop telling other employees to check their paychecks for meal pay; and
>
> (3) by engaging in the conduct described above in paragraph 6(i)(2), threatened employees with unspecified reprisals for telling other employees to check their paychecks for meal pay.

During the hearing, counsel for the General Counsel stated on two occasions that he was going to ask a witness questions pertaining to the allegations in this complaint subparagraph. One of these witnesses was Environmental Services Manager Monica Griego. (Tr. 900.) The other was Market Director of Human Resources Wayne Cassard. (Tr. 1627.) However, neither witness gave testimony

relevant to the allegations in complaint subparagraph 6(i).

Although the General Counsel's posthearing brief did not refer to allegations by complaint subparagraph number, it did include several paragraphs which appear to concern complaint subparagraph 6(i). These paragraphs indicate that the General Counsel relies on the testimony of former employee Sandra Gouveia, whose credibility was discussed above in the section concerning complaint subparagraph 6(a). The General Counsel's brief stated, in part:

> In October 2020, Gouveia was still working as Lead, and she noticed an inconsistency in her paychecks because it seemed like she was not getting paid meal pay. TR33:3776-77. After noticing this, Gouveia approached Millet who then mocked her and took out two dollars from his pocket to give to Gouveia.[64] TR33:3777. After confronting Millet, Gouveia was called into the EVS managers office by Griego. Griego then informed Gouveia that her schedule had been changed so that she could cover Cox when he was not going to be at work. TR33:3777. Gouveia then went to take care of her huddle and during the huddle she asked her coworkers to pay attention to their paychecks to make sure they were getting paid meal pay. TR33:3782-83.
>
> A few days later after talking to her coworkers, Millet approached Gouveia when she was working and admonished her. Millet first asked Gouveia why she was telling employees to check their paychecks and then he scolded Gouveia to tell her to stop telling employees to check their paychecks. TR33:3783.

[64] GCX 222.

Gouveia testified that in October or November 2020, she noticed that her paycheck did not include the meal allowance provided in the collective-bargaining agreement. She described an occasion when she raised the matter with Environmental Services Manager Millet. According to Gouveia, this meeting took place in the basement and no one else was present:

> Q. And tell us, what happened during the conversation about your meal pay with Darrell Millet?
> A. I asked Darrell—I noticed my paychecks were missing meal pay. So I asked him, because I noticed after Darrell took over the hours for EVS department for us, it wasn't matching. . .So when I approached Darrell to talk to Darrell about it, he was really rude and he mocked me. And he was like, if I'm really crying over $2, he'll give it to me. He reached into his pocket to pull out his wallet to give me $2. And I was embarrassed about that. And I was upset because he wasn't even trying to listen to what I had to say about the missing meal pay.
>
> Q. What, if anything, else happened after that?
> A. He mocked me. And then, the ending of my shift—gosh, I'm sorry. I'm getting so frustrated right now. Hold on. After he mocked me about the missing meal pay—my God, I'm sorry, I'm just getting a little overwhelmed with everything. I got called into the office, and Monica

> wanted me to sign documents telling me that my schedule was going to be changing due to business demands. It was pretty much to cover her and Robert with my schedule just changing out of nowhere.
>
> (Tr. 3776–3777.)

In the last paragraph quoted above, Gouveia stated that she was "getting a little overwhelmed," the General Counsel asked her if she "needed a short break" and Gouveia answered "I kind of do. I'm getting a little flustered." (Tr. 3777—3778.) We then went off the record.[11]

When the hearing resumed Gouveia testified that she asked other employees if they were "paying attention to their paychecks because we're missing meal pay." According to Gouveia, when a couple of employees indicated that they didn't know whether they were receiving meal pay, she replied that they should "look more into it." (Tr. 3783.)

Gouveia further testified that, a few days later, "Darrell [Millet] came up to me while I was working and got all in my face about, why am I telling employees to check their paychecks? It was like a little argument we had in the ER room because he acknowledged that I was the one telling employees in my huddle on my shift to check their paychecks. And he didn't like that, so he addressed it to me to tell them I needed to -- he told me to stop telling employees to check their paycheck." (Tr. 3783.)

Millet unequivocally denied ever telling Gouveia not to talk about meal pay. Likewise, he denied telling her to stop telling other employees to check their paystubs. (Tr. 4662.) For the reasons discussed above, I do not credit Gouveia's testimony. Crediting Millet, I find that he never made the statements Gouveia attributed to him.

In sum, I conclude that the General Counsel has failed to prove the allegations raised in complaint subparagraph 6(i). Therefore, I recommend that the Board dismiss these allegations.

Complaint Subparagraphs 6(j) and 6(p)

Complaint subparagraphs 6(j) and 6(p) concern statements in flyers which the Respondent Desert Springs posted on bulletin boards for employees to read. These flyers, called "bargaining briefs," describe negotiations between the Respondent and SEIU Local 1107. Complaint paragraph 6(j) alleges the following:

> About the following dates, Respondent Desert Springs and Respondent UHS, by their distribution of "bargaining briefs" to employees, at Respondent Desert Springs' facility,

[11] Later in her testimony, Gouveia again appeared to be distressed and I asked if she were okay. She replied that she was "just trying—I can be so frustrated or breakdown and cry or get angry. I'm trying to keep it together right now." (Tr. 3954.) She also stated that she had a "medical condition" but did not get more specific. The hearing was not contentious but, nonetheless, Gouveia displayed uneasiness even when answering questions on direct examination by the General Counsel.

> disparaged SEIU Local 1107 by implying that, but for the Union, employees would receive an interim wage increase: (1) December 11, 2020; (2) April 15, 2021; and (3) May 26, 2021.

Complaint subparagraph 6(p) alleges as follows:

> About May 26, 2021, Respondent Desert Springs and Respondent UHS, by their distribution of "bargaining briefs" to employees, at Respondent Desert Springs' facility, disparaged SEIU Local 1107 by implying that SEIU Local 1107 was bargaining in its own interest and not in the interest of employees.

Complaint paragraph 10 alleges that these actions violated Section 8(a)(1) of the Act. The Respondent denies these allegations.

These complaint subparagraphs do not allege that the "bargaining briefs" conveyed a threat but only that they "disparaged SEIU Local 1107." This is significant because for many decades the Board has held that disparagement itself, without a threat, does not violate the Act. For example, in *Sears, Roebuck & Co.*, 305 NLRB 193 (1991), the Board stated that "Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." In a footnote, the Board overruled a previous decision to the extent that decision suggested that a violation of Section 8(a)(1) could be predicated on disparaging remarks alone. *Sears, Roebuck & Co.*, 305 NLRB 193 at fn. 5.

In the more than three decades since its decision in *Sears, Roebuck & Co.*, the Board has applied this principle in many cases. See *Trailmobile Trailer, Inc.*, 343 NLRB 95 (2004)(words "of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)"); *Flying Foods*, 345 NLRB 101, 106 (2005)("[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation on 8(a)(1)"); *Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006)("disparaging remarks alone are insufficient to constitute a violation of Section 8(a)(1)"); *Children's Center for Behavioral Development*, 347 NLRB 35 (2006)("an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees"); *Success Village Apartments, Inc.*, 347 NLRB 1065, 1066 (2006)(words of "disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)"); *Raley's*, 348 NLRB 382 (2006); *Park 'N Fly, Inc.*, 349 NLRB 132 (2007)("words of disparagement alone concerning a union are insufficient for finding a violation of Section 8(a)(1)"); *Erickson Trucking Service, Inc. d/b/a Erickson's, Inc.*, 366 NLRB No. 171, slip op. at 2 (2018)(employer calling a union business agent "the most arrogant son of a bitch I've ever met who wants to run your union like Hitler" not unlawful because an employer "may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees"); *Richfield Hospitality, Inc.*, 369 NLRB No. 111, slip op. at 4 (2020)(it is "well settled that an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees"); *Nexstar Broadcasting Inc. d/b/a KOIN-TV*, 373 NLRB No. 118 fn. 3 (2022)("neither 'words of disparagement,' nor false and misleading statements, nor 'unfair' or 'nasty' statements violate the Act absent evidence of a threat or promise"), citing *North Star Steel Co.*, 347 NLRB 1364, 1367

fn. 13 (2006).

Clearly, disparagement alone does not violate Section 8(a)(1). Moreover, even false and misleading statements fall within the protection of Section 8(c) of the Act, which states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.
>
> 29 U.S.C. § 158(c)

During the hearing, I asked if the General Counsel alleged that any statement in these "bargaining briefs" was a threat. Counsel for the General Counsel stated that if he "remembered correctly, there was no threat allegation related to the bargaining briefs." (Tr. 3303.)

That is correct. Neither complaint subparagraph 6(j) nor complaint subparagraph 6(k) makes any mention of a threat. Additionally. the General Counsel has not argued, either during hearing or in the government's posthearing brief, that the Respondents' "bargaining brief" flyers include any threat. In fact, the General Counsel's brief does not discuss the "bargaining briefs" at all. Therefore, I conclude that the General Counsel only alleges that the bargaining briefs "disparage" the Union.

"Disparaging" a union is not unlawful, and any change in the standard to make "disparagement" unlawful would be both unconstitutional and unworkable. The Supreme Court, interpreting the First Amendment, has stated that "an employer's free speech right to communicate his views to his employees is firmly established, and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

A "disparagement" standard would be unworkable because the term is too vague to place the public on notice of what speech is prohibited.[12] The word "disparage" means "to belittle the importance or value of (someone or something); to speak slightingly about; to lower (someone or something) in rank or reputation; degrade."[13] That broad definition draws no line separating lawful from unlawful speech.

For example, the Board has held that calling a union official "the most arrogant son of a bitch I've ever met who wants to run your union like Hitler" is not, by itself, unlawful. *Erickson Trucking Service, Inc. d/b/a Erickson's, Inc.*, above. At what point beyond this statement does the speaker cross the line into illegality, and how would the speaker know? What consistent standard could determine when the line was crossed?

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[12] A vague "disparagement" standard also would give a government official untethered discretion to find statements unlawful based on nothing more than whim. Such a standard therefore would be inconsistent with the First Amendment. See *City of Chicago v. Morales*, 527 U.S. 41 (1999).

[13] https://www.merriam-webster.com/dictionary/disparage.

The law protects an employer's right to express a negative opinion about a union or union official. During the hearing, I asked counsel for the General Counsel to explain the difference between disparaging, which the complaint alleges to be unlawful, and expressing a negative opinion. The two attorneys representing the General Counsel answered as follows:

> MR. ZARATE-MANCILLA: Okay. So Your Honor, with this simply talking negatively about a union is not the same thing as disparaging. And disparaging t ends to be more of a direct attack on an individual that's derogatory and expressing little worth regarding the union for example. So simply saying that, for example, that I guess negative communications regarding a union would depend on the context and also on the specific language. So disparaging takes it further than simply a negative word or negative phrase.
>
> JUDGE LOCKE: Well where do you draw the line?
>
> MR. KEPIR: Your Honor, we believe the misleading nature of the statements contribute to turning them into disparaging rather than just opinion or about negative opinion. So if we are providing misleading statements which can be told as opinion, that's not protected opinion because it's misleading and not true, similar to saying that but for the union employees will have received an increase or the union did not know about the bonus program, it was all initiated and provided by the hospital, but in reality they were not informed. The unions were not informed about it. So these are misleading statements creating the impression that the union doesn't care and the union is not bargaining for the employees' benefits which is disparaging the union.
>
> JUDGE LOCKE: So the difference would be that a true statement, even if it's a negative statement, would not be disparagement, but a statement that is false that shows the union in a bad light would be a disparaging statement?
>
> MR. KEPIR: If it's false or misleading, we contend Your Honor that it does contribute to the disparaging nature of it. (Tr. 3005–3006.)

In *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, above, the Board stated that, consistent with Section 8(c) of the Act, neither "words of disparagement" nor false and misleading statements nor "unfair" or "nasty" statements violated the Act absent evidence of a threat or promise. However, the Board found that the respondent had made an implied promise by statements which "both assailed the amounts of the Union's initiation fee and monthly dues, a nonmandatory subject of bargaining, *and* claimed that it was bargaining with the Union on behalf of unit employees to lower these amounts." (Italics in original.) *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 373 NLRB No. 118, slip op. at 1 fn. 3.

In the present case. the General Counsel also has not claimed that the Respondents' "bargaining briefs" contain any promise of benefits, either express or implied. Moreover, as noted above, the General Counsel has specifically stated that the "bargaining briefs" contain neither threat nor falsehood.

Because complaint subparagraphs 6(j) and 6(p) do not allege either that the "bargaining briefs" contained either a threat or a promise of benefit, but allege only that they "disparaged" the Union, I conclude that they fail to allege a violation of the Act. For this reason, I recommend that the Board dismiss these allegations.

Apart from the failure to plead a violation of the Act, these complaint subparagraphs should be dismissed because the General Counsel has not identified any statement in the "bargaining briefs" as violating the Act. The government bears the burden of proof, but when it fails even to identify an allegedly offending statement, it fails to carry that burden.[14]

The General Counsel may not simply hand the judge or the Board the "bargaining briefs" and say, "You figure out which statements in these documents are unlawful." The General Counsel alone determines what conduct should be alleged as violative and has exclusive authority over the government's theory of the case. Should the judge scrutinize the documents and determine which, if any, statements should be deemed violative, it would intrude upon the General Counsel's authority to determine the theory of violation. It would also recast the judge in the role of prosecutor and thus compromise the judge's impartiality.

In sum, complaint subparagraphs 6(n) and 6(p) do not allege a violation of the Act and the General Counsel has not identified the specific statements the government alleges to be violative, which is part of the government's burden of proof. I recommend that the Board dismiss these allegations.

Inclusion of these meritless allegations, in contravention of well-established Board precedent, has caused the Respondent to go to the expense of preparing and presenting a defense. Moreover, when, as here, the meritless allegations affect the exercise of First Amendment rights, the inclusion of such allegations harms the public more generally. Members of the public become reluctant to exercise their First Amendment rights when they see that a government official is willing to prosecute using a vague standard which the Board has rejected numerous times, a standard which arguably might apply to almost any negative comment about a union.

Government agencies sometimes have been criticized for "mission creep" but "censorship creep" - gradually increasing the amount of expression deemed unlawful—poses a greater danger. It also reflects on the agency. If we fail to guard against censorship creep, I fear, we risk becoming creeps.

Complaint Subparagraph 6(k)

Complaint subparagraph 6(k) concerns the same "bargaining briefs" discussed in complaint subparagraph 6(j). It alleges that Respondent Desert Springs and Respondent UHS, by distributing

[14] As quoted above, Counsel for the General Counsel did make an apparent reference to certain statements in the "bargaining briefs," arguing that misleading statements were not protected expressions of opinion, "similar to saying that but for the union employees will have received an increase or the union did not know about the bonus program. . ." However, this possible allusion fails to place either the Respondent or the Board on notice of the exact language which the General Counsel alleges to be unprotected by the Constitution and unlawful.

these "bargaining briefs" to employees at the Desert Spring facility, "created the impression that employees' union activities, support, or sympathies were under surveillance by Respondent Desert Springs and Respondent UHS." The Respondent denies these allegations.

The General Counsel's brief does not mention these allegations. It makes only one reference to surveillance and that did not pertain to the "bargaining briefs." The term "bargaining brief" does not appear at all.

As noted earlier, when the hearing began, I directed counsel to announce the complaint subparagraph number before asking a witness questions related to the allegations in that subparagraph. During the examination of two witnesses, Counsel for the General Counsel stated that he was asking questions about complaint subparagraph 6(k). Those witnesses were Human Resources Market Director Wayne Cassard[15] and UHS Vice President of Labor Relations Jeanne Schmid.[16]

However, it is not possible to discern from the General Counsel's questions which statements in the "bargaining briefs" are alleged to create the impression of surveillance. Counsel for the General Counsel cannot prove that any statement unlawfully caused an unlawful impression of surveillance unless he first identifies the statement which he claims violated the Act.

To determine whether a statement creates an unlawful impression of surveillance, the Board considers whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Waste Management of Arizona*, 345 NLRB 1339, 1339-1340 (2005), citing *Flexsteel Industries*, 311 NLRB 257 (1993); *Schrementi Bros., Inc.*, 179 NLRB 853 (1969). However, to apply this test it is necessary to know what statement or statements the General Counsel alleges to be violative.

Stated another way, if the General Counsel wishes to prove that a certain statement lies outside the protection of the First Amendment and violates the Act, the proof begins by identifying the allegedly unlawful words. Due process requires the General Counsel to place the Respondents on notice that a specific, identified statement created the alleged impression of surveillance. Likewise, the government must articulate a theory of violation, a rationale explaining why the particular words reasonably would interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

Simply introducing a document, without explaining what part of it the government considers unlawful, does not suffice. The General Counsel does not carry the government's burden simply by introducing a haystack and saying there's a needle in it somewhere.

Additionally, from the wording in the complaint, it appears possible that the General Counsel is not claiming that statements in the "bargaining brief" created the impression of surveillance but, rather, that the act of distributing them did. Thus, complaint subparagraph 6(k) states:

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[15] Counsel for the General Counsel announced he would be asking Cassard questions about complaint subparagraph 6(k) at Tr. 1672 and 1695.

[16] Counsel for the General Counsel announced he would be asking Schmid questions about complaint subpar. 6(k) at Tr. 1887 and 1888.

> About the following dates, Respondent Desert Springs and Respondent UHS, *by their distribution* of "bargaining briefs" to employees, at Respondent Desert Springs' facility, created the impression that employees' union activities, support, or sympathies were under surveillance by Respondent Desert Springs and Respondent UHS. . . (Italics added.)

However, if that is the government's theory, the General Counsel should describe how the Respondents actually distributed the "bargaining briefs" and explain why, in the General Counsel's view, that conduct created an unlawful impression of surveillance or otherwise violated the Act. The General Counsel has not done so.

In sum, although complaint subparagraph 6(k) alleges that the Respondents created an impression of surveillance, the General Counsel has identified neither the words nor the conduct which supposedly did so. Therefore, I conclude that the government has not carried its burden of proof and recommend that the Board dismiss the allegations in this complaint subparagraph.

Complaint Subparagraph 6(l)

Complaint subparagraph 6(l) alleges that about January 12, 2021, Respondent Desert Springs and Respondent UHS, by Kim Foxworth, at Respondent Desert Springs' facility, (1) threatened that union representation was futile; and (2) promised employees increased pay if they removed SEIU Local 1107 as their collective-bargaining representative. The Respondents deny these allegations.

As noted above, because of the length of the large number of allegations in the consolidated complaint, I directed counsel to announce on the record the pertinent complaint allegation before asking a witness questions about that allegation. Counsel for the General Counsel did not, at any time during the hearing, announce that he was asking questions relevant to the allegations in complaint subparagraph 6(l).

The General Counsels posthearing brief mentions Foxworth, an intensive care unit manager, nine times. However, none of those instances concerns any event on or about January 12, 2021. The first 6 times Foxworth's name appears in the brief, it is in connection with her job title and duties and not specific unfair labor practice allegations. The last 3 mentions concern statements which Foxworth allegedly made to employees in August 2021.

The General Counsel has failed to offer any proof in support of the allegations in complaint subparagraph 6(l). Therefore, I recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(m)

Complaint subparagraph 6(m) alleges that on about January 29, 2021, Respondent Valley and Respondent UHS, by Environmental Services Director McKinnon, at Respondent Valley's facility, asked employees to write false statements about employees who supported Culinary Local 226 so that Respondent Valley and Respondent UHS could discharge those employees. The Respondent denies these allegations.

The General Counsel did not present any evidence concerning the allegations in complaint subparagraph 6(m).[17] The General Counsel's post-hearing brief does not refer to this complaint subparagraph. Neither the date January 29, 2021, nor the term "false statement" even appears in the brief.

The General Counsel has failed to prove the allegations raised in complaint subparagraph 6(m) and I recommend that those allegations be dismissed.

Complaint Subparagraphs 6(n) and 9(r)

Complaint subparagraph 6(n), as amended, alleges that about March 25, 2021, Respondent Valley and Respondent UHS, by McKinnon, at Respondent Valley's facility: "(1) by telling employees Respondent Valley and Respondent UHS were winning everything in the context of a meeting held immediately after the employees' testimony in a Board hearing and in which the employees were confronted about attendance, conveyed that seeking the assistance of the Board would be futile; and (2) directed employees not to discuss the meeting described above in paragraph 6(n)(1)."

Complaint subparagraph 9(r) alleges that, by the conduct described in complaint subparagraph 6(n), Respondent Valley and Respondent UHS bypassed the Union and dealt directly with their employees in the culinary bargaining unit. The Respondent denies all these allegations.

At only one point during the hearing did counsel for the General Counsel state that he was going to ask questions pertaining to the allegations in complaint subparagraph 6(n). He did so while examining Environmental Services Manager Monica Griego. (Tr. 906.) However, the questions that followed did not concern the alleged conduct described in complaint subparagraph 6(n).[18]

The General Counsel's posthearing brief does not refer to complaint subparagraph 6(n) but does include a paragraph which might concern those allegations. That paragraph states:

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[17] As noted above, at the outset of the hearing I directed counsel that before they asked a witness questions pertaining to the allegations in a complaint subparagraph, they identify that subparagraph on the record. At one point, counsel for the General Counsel, in compliance with my instructions to announce the pertinent complaint paragraph numbers, listed 24 different complaint subparagraphs, one of them being complaint subpar. 6(m). (Tr. 215.) I directed him to identify the subparagraphs one at a time before asking questions about the allegations raised in the subparagraph. However, he did not thereafter state that he was going to ask questions about complaint subpar. 6(m). At another point, counsel for the General Counsel mistakenly stated that he was going to be asking questions about complaint subparagraph 6(m) but the questions pertained to other complaint subparagraphs. (Tr. 5339.)

[18] After announcing that his questions would concern complaint subparagraph 6(n), counsel for the General Counsel then asked the witness about whether there was a code of conduct. He also posed a hypothetical question concerning sick employees. (Tr. 907—908.) Neither the questions nor the answers had any relevance to the allegations raised by complaint subpar. 6(n), which concerned statements attributed to Environmental Services Director Glenn McKinnon.

> On March 24, 2021, Gouveia testified against Respondent Valley in Case 28–CA–234647. TR34:3831-32. The day after testifying, Gouveia returned to work. When she returned to work, on March 25, 2021, Millet embarrassed Gouveia by discussing her private life in front of all her coworkers during a huddle meeting. Gouveia wrote a statement and gave the statement to McKinnon.[68] TR34:3834-35. McKinnon and Blake then made fun of Gouveia because she had gotten a DUI. TR34:3835. Later that day, McKinnon and Cox were attempting to issue discipline to Gouveia for her attendance. Gouveia and Cox went back and forth, and the conversation got heated until McKinnon looked directly at Cox and said, "this is why we're winning everything." TR34:3836. Gouveia understood McKinnon's comments to relate to the hearing in which she had testified, and Gouveia told them that she had taken pictures every time she clocked in and out. TR34:3836-37; 3839. McKinnon then told Gouveia that he would wipe her attendance record clean.TR34:3837.[69]

[68] GCX227.
[69] GCX228.

The transcript citations in the General Counsel's brief point to testimony by Shanlee Gouveia. None of this testimony establishes the allegations raised in complaint subparagraph 6(n). Most of this testimony has little obvious relevance but Gouveia did quote McKinnon as saying "this is why we're winning everything," words which also appear in complaint subparagraph 6(n). However, Gouveia's testimony does not indicate he said these words while discussing the Union or the unfair labor practice hearing then underway.

Rather, according to Gouveia, McKinnon said those words while they were discussing the Kronos timekeeping systems and its records of her time and attendance:

> We were–were going back and forth on the Kronos because at first they were trying to say that I called out. And when I was pushing the issue that I didn't call out, he tried to say that I clocked in late. That's when we were going back and forth and he was just raising his voice towards me and he looked at Robert and made that comment, this is why we're winning everything. My heart sank and that's when I told them I was taking pictures of my Kronos to clock in and out. And Glenn–Glenn backpedaled on what he was saying and was -- after I told him and showed him that I took pictures every time I clocked in and out, he tried to say it was an error, that he was going to look into it, he was going to do an investigation on it. I couldn't talk to anybody about what was going on. It was pretty much done. He left that same day, Robert came up to me on the floor while I was working and said that Glenn wants you to call him on his personal phone. I told him Glenn changes his number too much that I can't keep contact with him on his personal phone. So he told me to use the lead phone to call him to talk to him about the photos. And I called him and Glenn said that he was going to wipe my record clean, everything was going to be taken care of. I wasn't going to have no attendance points and I was going to have no discipline on my record. (Tr. 3836–3837.)

McKinnon denied making the "winning everything" remark (Tr. 5027) and I credit his denial. For reasons discussed earlier, I have concluded that Gouveia's testimony is unreliable. However, even

were I to credit Gouveia, which I do not, her testimony does not establish a violation of the Act.

Were I to credit Gouveia, her testimony would establish that she was discussing with Supervisors McKinnon and Cox when she had clocked in and, more generally, the Kronos system which recorded such clock-ins. Gouveia's testimony, if credited, would support a finding that McKinnon raised his voice during the discussion, looked at Cox and said "this is why we're winning everything." (Tr. 3836.) However, I would not find that anyone mentioned the Union because Gouveia did not testify that anyone did.

Thus, even considering the evidence in the light most favorable to the General Counsel, there is no basis to assume that this conversation pertained to the Union or to its dealings with the Respondent. Although I have concluded that Gouveia's testimony is unreliable and do not credit it, even that testimony fails to establish a violation.

Moreover, even had McKinnon made such a statement *while discussing* the Union, which he did not, it would not violate Section 8(a)(1) of the Act. It makes neither threat nor promise of benefits and also does not create the impression of surveillance.

Having found that McKinnon did not make the statement attributed to him, I further find that the Respondent did not bypass the Union and deal directly with employees, as alleged in complaint subparagraph 9(r). A discussion concerning whether the computerized timekeeping system accurately recorded an employee's clock-ins or clock-outs does not constitute an attempt to negotiate a change in a term or condition of employment.

Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(n) and also dismiss the related allegation raised in complaint subparagraph 9(r).

Complaint Subparagraph 6(o)

Complaint subparagraph 6(o) alleges that about April 12, 2021, Respondent Valley and Respondent UHS, by McKinnon, at Respondent Valley's facility, by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they removed Culinary Local 226 as their collective-bargaining representative. The Respondent denies these allegations.

During the hearing, counsel for the General Counsel announced that he was asking the witness, Shanlee Gouveia, questions concerning complaint subparagraph 6(o). (Tr. 3843.) She then testified concerning a meeting on April 12,2021, in the office of Respondent Valley Hospital's environmental services manager, Glenn McKinnon. Also present, besides Gouveia and McKinnon, were employees whom Gouveia identified as "Chris" and "Juan."

Gouveia said that McKinnon asked for their assistance with a potluck he was planning, She also testified that they discussed matters related to their work. According to Gouveia, McKinnon asked them why they could never complete assigned tasks at their workstations and they replied by saying that they got pulled away to perform cleaning in other parts of the hospital.

Gouveia also testified that McKinnon said "they're going to let me have another chance at the

lead position, all I have to do is train with Darrell." (Tr. 3845)

At this point. Gouveia's testimony about the meeting had not mentioned the Union. Counsel for the General Counsel then asked her a question that didn't refer to the Union: "And what if anything else happened during that meeting." Gouveia answered "that was pretty much it." (Tr. 2835.)

Gouveia's testimony still did not suggest that the subject of the Union or Union representation had come up during the meeting. Counsel for the General Counsel asked another nonleading question:

> Q. Okay. Now, when he asked about your stations and about your work, do you happen to remember what if anything else he asked about what can be done at those stations?
> A. Yes. He said that he was going to try and get more help for us for those stations, but he -- he never got help for us for the stations that he was pulling us out of to go clean other stations. And then after that, like he started talking about my medical problems in front of Chris and Juan and I told him I didn't—that was private so I didn't want to speak about that. Then they left.
>
> (Tr. 3845–3846)

At this point, Gouveia still had not said anything to indicate that, during this meeting, the subject of the Union had arisen. Nonleading questions hadn't worked. Then, Counsel for the General Counsel asked "do you happen to remember whether he [McKinnon] mentioned anything about the Union?" Gouveia answered yes, that McKinnon had said "the only way we could get help in our departments is by getting the Union out of Valley Hospital." (Tr. 3846–3847.)

Counsel for the General Counsel then asked a nonleading, open-ended question. However, Gouveia's answer became confusing:

> Q. And what if anything happened after he said this?
> A. It was just a debate on him like talk—trying to convince us to agree with him on getting Valley out of the hospital. But I—I never signed any papers saying to leave the Union or try to get the Union out of the hospital because I'm always a Union—I've been always a union member before even Valley. So when he mentioned that—that he—the way he could get us to get help was by getting the Union out of the hospital, so we could get the help and the more pay. I'm sorry, I'm just a little bit flustered on what's going on right now.
>
> Q. That's okay. Just wait.
> A. I'm taking my breaths. I'm sorry, I just don't like being homeless. It's just that after he said that he started talking about my personal issues in front of other people, after he mentioned getting the Union out of the hospital to make it easier for the employees.

Q. So go ahead and take a deep breath, Ms. Gouveia. Ready to proceed.
A. Yes, I'm ready.

(Tr. 3847–3848.)

However, counsel for the General Counsel then began asking Gouveia questions pertaining to a different complaint subparagraph.

The testimony quoted above is far from convincing. Gouveia didn't mention any discussion of the Union until the General Counsel prompted her with a leading question. Although she then claimed that McKinnon had said that "the only way we could get help in our departments is by getting the Union out of Valley Hospital" she provided no useful or coherent description of what, if anything, was said.

For reasons discussed above in connection with complaint subparagraph 6(a) and below in connection with complaint subparagraph 7(pp), I do not believe Gouveia's testimony is reliable and do not credit it.

Neither of the other two employees who supposedly were present at the meeting testified.

During McKinnon's testimony, counsel for the General Counsel did ask him questions about his meeting on April 12, 202, 1 but did not ask any questions related to complaint subparagraph 6(o). (Tr. 390–404.)

Because no credible evidence proves the conduct alleged in complaint subparagraph 6(o), I recommend that these allegations be dismissed.

Complaint Subparagraph 6(q)

Complaint subparagraph 6(q) alleges that on "a date in late May or early June 2021, a more precise date being unknown to the General Counsel, Respondent Desert Springs and Respondent UHS, by Sharon Sanchez, at Respondent Desert Springs' facility: (1) threatened that union representation was futile; and (2) solicited employees to decertify SEIU Local 1107 as their collective-bargaining representative. The Respondents deny these allegations. They also have denied the allegation that Sanchez is a supervisor or agent within the meaning of Section 2(11) and 2(13) of the Act, respectively.

To prove these allegations, the General Counsel relies on the testimony of Jordan Baca, a registered nurse who worked at Desert Springs Hospital Medical Center from sometime in the fall of 2015 until June 2021. Baca described a conversation, in May or June 2021, with Sharon Sanchez:

Q. Okay. And where were you when you had the conversation with Ms. Sanchez?
A. In a patient room.

Q. Could you tell us what happened during this conversation?
A. We were discussing my transfer. I had decided to move to Spring

> Valley Hospital, and so it was going to be in June, and we were discussing that. And how the reason I chose was because of pay. And she said that the Union -- she was telling me about her experience with the Union and how the Union never did anything for her, and when she was a nurse at Desert Springs Hospital, the Union nurses would be on strike with the Union and with the outside, and she never participated in it. And she would still show up to work and people would be cursing at her as she was trying to go into her job.
>
> Q. And what, if anything, did you do after she said all this?
> A. I did nothing.
>
> Q. Did the conversation end at that point?
> A. From what I remember, pretty much, yes. (Tr. 2161–2162.)

Sanchez did not testify. As noted above, the Respondents have denied that she is their supervisor or agent. The General Counsel has not pointed to any particular testimony or other evidence which would prove that Sanchez is a supervisor or agent of the Respondents. The General Counsel's brief does not even mention Sanchez. In these circumstances, I conclude that the government has failed to prove that Sanchez was speaking as the Respondents' agent at any time and, therefore, any statements she made to employees may not be attributed to the Respondents.

However, even assuming for the moment that Sanchez had been a supervisor or agent at the time she spoke with Baca, her description of her own experience would not amount to an unlawful threat of futility. Neither would a statement that the Union had never done anything for her. *Hampton Inn*, 309 NLRB 942 (1992); *Mediplex of Connecticut, Inc.*, 319 NLRB 281 (1995).

No reasonable listener would understand Sanchez's words to state or imply that the Respondents would take any action to frustrate the bargaining process or make it futile. Additionally, the General Counsel presented no testimony, either from Baca or any other witness, to establish that, in late May or early June 2021, the Respondent solicited employees to decertify SEIU 1107.

In sum, the General Counsel has failed to prove that Sanchez was the supervisor or agent of the Respondent and, therefore, the Respondent did not commit an unfair labor practice by any conduct alleged in complaint subparagraph 6(q). Additionally, the government has failed to prove that Sanchez made any statement which would constitute an unfair labor practice if made by one of the Respondents' supervisors or agents. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(q).

Complaint Subparagraph 6(r)

Complaint subparagraph 6(r) alleges as follows: On a date in or around mid-August 2021, a more precise date being unknown to the General Counsel, Respondent Desert and Respondent UHS, by Foxworth, at Respondent Desert Springs' facility:

> (1) interrogated its employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees;

(2) by retaining pictures of employees engaged in union activities and questioning employees about the pictures;

(A) engaged in surveillance of employees engaged in union activities;

(B) created an impression among its employees that their union activities were under surveillance by Respondent;

(3) promised its employees that they would receive pay raises if the employees decertified the union as their bargaining representative;

(4) threatened employees with job loss for engaging in union and protected concerted activities; and

(5) threatened employees with unspecified reprisals if they did not assist Respondent Desert Springs and Respondent UHS with removing SEIU Local 1107 as their collective-bargaining representative.

The Respondents deny these allegations.

In August 2021, SEIU Local 1107 planned to conduct a 2-hour demonstration at Desert Springs Hospital. To inform employees, it published a flyer, "#WALKOUTWEDNESDAY!" (GCX124) On the flyer appeared color photos of smiling nurses.[19] Many and perhaps all of these nurses worked at Desert Springs Hospital. In the pictures, some of the nurses wore baseball caps with the SEIU 1107 emblem. A headline on the flyer stated:

> Join us for #WalkOutWednesdays on August 25. It's time to tell UHS that we want to keep our union, we want to keep our union rights, and we demand a strong contract that protects our jobs!

Below this headline was a drawing of people holding picket signs. One of the larger signs provided the email address of a person to contact and the other large sign stated:

#WALKOUTWEDNESDAYS
WEDNESDAY, AUG. 25
6:00-8:00 AM
DESERT SPRINGS HOSPITAL
2075 E. FLAMINGO RD. LV

Someone left a number of these flyers on a table in a breakroom at the hospital. The photographs on the flyers are the pictures referred to in complaint subparagraph 8(r)(2), which alleges that "by retaining pictures of employees engaged in union activities and questioning employees about the pictures" Respondent Desert Springs and Respondent UHS engaged in surveillance and created

[19] At least 19 of the 26 nurses were smiling. The other seven– wore surgical masks.

an impression of surveillance.

To prove the allegations in complaint subparagraph 8(r), the General Counsel relies on the testimony of Registered Nurse Rose Salvador, who worked at Desert Springs Hospital at that time. Salvador testified that in mid-August 2021, a few days after publication of the flyer, Intensive Care Unit Manager Kimberly Foxworth saw Salvador working in the recovery room and called her outside.

According to Salvador, Foxworth had a picture of the flyer on her phone, showed it to Salvador and asked "What is this? What's the meaning of this?" Salvador's testimony indicated that Foxworth recognized some of those in the photograph as nurses working in the intensive care unit which Foxworth supervised. (Tr. 2551) Salvador further testified as follows:

> Q. Okay. And what was your response?
> A. I just told her that I think we're trying to get the union contract, that's why the union is trying to, to let us support them and help to, to have a contract.
>
> Q. And what did she say?
> A. She said, "You have to help me, you know. I was the one who interviewed you to come into this unit." And she said, "The new hospital is going to be built, and this hospital might be transitioned to that new hospital, but you have to reapply." That's it.
>
> Q. Was there any discussion about raise?
> A. No. She said, "Because it's the union, that's why you don't have raise. We have raised a little bit." And then, she said that, "Don't you know that the techs already got rid of the union and they have raises?"
>
> Q. What did she mean by "techs"? Do you, do you, do you know what the—
> A. Respiratory techs, OR techs. I think that's—oh, yeah.
>
> Q. And what, what was the meaning that they got rid of the union?
> A. Yes, they, they got rid—they, they signed up not to go for the union.
>
> Q. And did they get an increase after that?
> A. I have no idea.
>
> Q. Was that what Foxworth said?
> A. She said it that way.

(Tr. 2552–2553.)

Foxworth denied asking any nurse about a picture on a flyer. From her testimony, I gather that she is precise and exacting, as might be expected of someone who, like Foxworth, was responsible for a hospital's critical care unit. The resolve she displayed during extensive questioning by the General Counsel also contributes to my impression that her testimony is reliable. For example, she

testified as follows when the General Counsel asked her about the encounter which Salvador described:

> Q. Now you approached some of those employees, some of those nurses that were on those flyers, and asked them what was the meaning of their picture, right?
> A. Absolutely not. The picture is obvious.
>
> (Tr. 1974.)

Foxworth's point is well taken. The purpose of the flyer is obvious on its face and it would serve no purpose to ask the question Salvador attributed to her: "What is this? What's the meaning of this?"

Foxworth appeared to be rigorously focused on her work, and I believe it would be unlikely for her to interrupt a nurse's duties, particularly the duties of a nurse in the recovery room, to ask a question when she already knew the answer. For these reasons, I credit Foxworth's testimony rather than that of Salvador.

Crediting Foxworth, I find that she did not make the statements attributed to her. Therefore, I conclude that the General Counsel has not proven the allegations raised in complaint subparagraph 6(r) and recommend that the Board dismiss those allegations.

Other Evidence

Counsel for the General Counsel also asked another witness questions which, he then stated, pertained to the allegations in complaint subparagraph 6(r). However, although the witness did discuss the flyer with the photographs of nurses, her testimony otherwise had little relevance to the specific unfair labor practice allegations in this complaint subparagraph 6(r).

The witness was Tessie Miralles, a registered nurse who, in September 2021, was working in the recovery room at Desert Springs Hospital. The General Counsel showed Miralles the flyer described above (GCX124) and then asked her the following questions:

> Q. Okay. Now, on this top part here, there are nurses with cap on their hat which says SEIU. Do you recognize that cap?
> A. Yeah.
>
> Q. Is that the Union cap?
> A. Yes. I have one of those.
>
> Q. Now, did you used to put that hat on?
> A. Yes, I did.
>
> Q. Do you remember having any conversation related to Union hat with any of your supervisors?

A. Ms. Bourbon told us that we're not supposed to be wearing it.[20]

(Tr. 3524.)

After Miralles gave this testimony, a technical problem briefly interrupted the audio. After the problem was resolved, Miralles testified that "Ms. Bourbon told me that I'm not supposed to be wearing that hat per -- according to Kimberly Foxworth." (Tr. 3524.)

Miralles further testified that Borbon made this statement during one of the short meetings which first-line supervisors frequently have with the employees they supervise. (Tr. 3525.) However, Miralles did not specify exactly when this meeting took place, or where, or who else was present. She also did not testify concerning how the subject came up or what was said.

After Miralles had given this testimony, counsel for the General Counsel stated that it related to complaint subparagraph 6(r). Notwithstanding this assertion, it is not entirely clear that the testimony does pertain to this complaint subparagraph.

Complaint subparagraph 6(r) does not refer to Borbon or allege that she made any statement to employees. Borbon's name does appear in two later complaint subparagraphs. Specifically, complaint subparagraphs 6(v) and 6(w) allege that Borbon interrogated employees about union membership, sympathies and activities. However, the complaint alleges that these interrogations took place in mid-to-late September 2021, not in mid-August, the date alleged for the events described in complaint subparagraph 6(r).

Additionally, complaint subparagraph 6(r) includes no allegation that any supervisor told an employee she could not wear a hat bearing a union insignia. Notwithstanding the General Counsel's statement that the testimony pertained to complaint subparagraph 6(r) it does not contribute to the proof of any allegations raised in that subparagraph.

The General Counsel has not moved to amend the complaint to add an allegation related to the testimony of Miralles, discussed above. Therefore, it is not necessary to decide whether such testimony should be credited. However, even were it credited, it would not affect my conclusion that the General Counsel has not proven the allegations raised in complaint subparagraph 6(r).

Complaint Subparagraph 6(s)

Complaint subparagraph 6(s) alleges that about mid- to late August 2021, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by "Teresa Hearns"[21] at Respondent Valley's facility: (1) solicited decertification of SEIU Local 1107 by directing

[20] The complaint alleges that Jennifer Borbon was a clinical supervisor/coordinator at Desert Springs and a supervisor within the meaning of Sec. 2(11) of the Act. The Respondent admits those allegations. The transcript sometimes spells her name incorrectly as "Bourbon." When quoting the transcript, the spelling in the transcript will be followed.

[21] When the Respondent Valley Hospital's assistant chief nursing officer testified, she spelled her last name "Hern," not "Hearns." (Tr. 5191) Although complaint par. 6(b) alleges that the Respondents acted "by Teresa Hearns," it otherwise does not allege that she is a supervisor or agent

employees to sign decertification cards; and (2) permitted employees to solicit for decertification of the Union during working time, while maintaining a policy prohibiting solicitation during working time. The Respondent denies these allegations.

Except for the language in complaint subparagraph 6(s) that the Respondents acted *by* Hern, the complaint, as amended, does not allege that Hern is a supervisor or agent of the Respondents. However, the General Counsel clearly seeks to attribute Hern's words to the Respondents and impose liability on the Respondents because of what she allegedly said. The complaint reasonably would be understood to allege that Hern was acting as the Respondents' agent, and the Respondents would have sufficient notice to prepare a defense.

When counsel for the General Counsel examined Hern, he did not specifically ask her whether she possessed or exercised any of the supervisory attributes described in Section 2(11) of the Act.[22] However, Hern did state during her testimony that she had hired am employee "some years ago." (Tr. 5205). This employee was Registered Nurse Raphael Canovas, who worked at Valley Hospital Medical Center from July 2020 to October 2021. He testified that Hern was his immediate supervisor. (Tr. 3484.) During that period, Hern was serving as the hospital's IMC manager.[23]

Although the record does not indicate the exact extent of independent judgment Hern exercised in performing her duties, the great responsibilities inherent in management of a hospital's intermediate care unit and the need to take prompt actions in medical emergencies would suggest that Hern's duties were far from being routine or clerical. However, the fact that the government probably could plead and prove that Hern was a supervisor does not negate the fact that the General Counsel did not specifically plead that she was a supervisor, as defined by Section 2(11) of the Act.

Although the language in complaint subparagraph 6(s)—that the Respondents were acting *by* Hern—suffices to put the Respondents on notice of the agency issue, I do not believe it reasonably would be understood as an allegation of supervisory status. Based on Hern's testimony and the record as a whole, I conclude that it is more likely than not that Hern was, at the least, an agent of the

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of any Respondent. Neither the name "Hearns" nor "Hern" appears in any complaint subparagraph alleging individuals to be the Respondent's supervisors and/or agents. Therefore, I conclude that the General Counsel has neither pled nor proven that Hern was a supervisor within the meaning of Sec. 2(11) of the Act.

[22] Sec. 2(11) of the Act states that the term "supervisor" means 'any individual having authority, in the interest of the employer, *to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action*, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). (Italics added.)

[23] The hearing transcript indicates Hern testified that the initials "IMC" stood for "intermittent care." (Tr. 5200.) However, the acronym may mean different things to different people. Other portions of the record indicate that "IMC" stood for "intermediate care." (Tr. 1468, 2123, 2151, 3484. 4809; but see Tr. 856 [Witness Griego testified that "IMC" stood for "intensive medical care"] and Tr. 2031 [Witness Loftus testified that "IMC" stood for "Immediate Care Unit."])

Respondent within the meaning of Section 2(13) of the Act. Therefore, I further conclude that the General Counsel has proven, by a preponderance of the evidence, that Hern was an agent of the Respondents.

To prove the allegations in complaint subparagraph 6(s)(1), the General Counsel called Raphael Canovas, the registered nurse. Hern's duties as IMC manager included conducting frequent staff meetings, called "huddles" to discuss patient care. Twenty or more staff members attended the huddle, sometime in August 2021, which Canovas described in his testimony:

> Q. Okay. Now, do you happen to remember any issues with the SEIU during August 2021?
> A. So there was a huddle, the typical huddle in the morning at 7 a.m. And Teresa Herns was conducting the huddle. He was leading the huddle. During the huddle, we discussed the important concerns in the unit, any updates that's surrounding the hospital, and surrounding the unit, especially patient care. And towards the end of the huddle, my coworkers, they're getting cards, drop cards being circulated around. And Teresa Herns said at the end of the huddle, go sign those cards.
>
> Q. Now, when you say drop cards, what are you referring to?
> A. So the drop cards I was talking to my fellow employees. It says they're to kick out the Union, the SEIU Union from the hospital, from Valley hospital.
>
> (Tr. 3487–3488.)

Canovas did not say that Hern distributed the "drop cards," which stated that the signer did not wish to be represented by SEIU Local 1107. Rather, his testimony only indicates that, while Hern was speaking, some employees were having side conversations concerning the cards. Canovas did not claim that Hern participated in any such side conversation.

Canovas only testified that, at the end of the meeting, Hern told the employees "go sign those cards." (Tr. 3487.) Hern emphatically denied making such a statement:

> Q. All right, so at these huddles that you led, did you ever state at any of these huddles that, make the statement, go sign those cards?
> A. Never. Never. My huddles were strictly about our patients and any safety issues and anything going on house-wide. It was never anything to do with that. I would have never said that at my huddle. It was always about my patients and myself.
>
> Q. All right. Did you ever hear a statement like that?
> A. No, sir.
>
> (Tr. 5195.)

In determining whether to credit the testimony of Canovas or Hern, it is helpful to consider what else Canovas said about this particular huddle. Canovas testified:

Q. Now, do you happen to remember whether you signed a drop card?
A. I did, yes.

Q. Can you tell us about that?
A. So I signed the drop card to kick out the SEIU from Valley Hospital because my preceptor, the one who I trusted, the one who gave me an orientation and taught me how to become a good nurse in the intermediate care unit, said that we will get a lump sum bonus if we kick out the SEIU Union from the Valley Hospital.
Q. And was that on the same day that Ms. Herns mentioned signing the cards at the huddle?
A. It was on that day, on that morning, and it was also being discussed the days before.

Q. When you say it was also discussed, can you explain what you mean by it?
A. So aside, during the huddle, Teresa Herns was talking to us, the whole unit. And on the side, me and my coworkers are also talking about the SEIU Union, the pros and the cons. And my preceptor was telling me about the benefits of kicking out the SEIU Union. And he and she, different coworkers, they give us cards to sign. And I signed my name and my signature to kick out the SEIU Union.

Q. Now, when you spoke with your preceptor and you signed the card with your preceptor, do you happen to remember when that was?
A. That was around, during that time, August, mid- to late August 2021.

(Tr. 3488–3489.)

When counsel for the General Counsel asked Canovas if he remembered the name of his preceptor, Canovas replied that he did not. (Tr. 3489.) This is somewhat difficult to believe.

Clinical Supervisor Michelle Tuvida testified that preceptors are experienced employees who are familiar with the system and willing to teach. One preceptor is paired with one student. (Tr. 1437)

Angela Rae Segura, a registered nurse who worked at Valley Hospital Medical Center from October 2019 to the end of January 2022, testified, "when you're a new nurse and you get hired at a hospital, they train you with another nurse who's been around for a while, and they also give you classes. It takes about three months to complete, to make sure you are safe to go on the floor. And when I got approved to go on my own on the floor, it was January of 2020." (Tr. 2125.)

Thus, when Canovas began work at Valley Hospital Medical Center, a more experienced nurse accompanied him as he performed his new job duties. This one-on-one relationship likely lasted for several months.

Additionally, this preceptor taught Canovas hospital procedures which Canovas needed to know to keep patients safe and, indeed, to avoid being disciplined or discharged. It seems unlikely that Canovas would not remember the name of the person so important to his success at the hospital and with whom he worked closely for a substantial period of time. Moreover, the following portion of Canovas' testimony, quoted above, is hard to square with his claimed inability to recall the preceptor's name:

> So I signed the drop card to kick out the SEIU from Valley Hospital because my preceptor, the one who I trusted, the one who gave me an orientation and taught me how to become a good nurse in the intermediate care unit, said that we will get a lump sum bonus if we kick out the SEIU Union from the Valley Hospital.
>
> (Tr. 3488–3489.)

Thus, Canovas testified that he trusted this preceptor, who taught him "how to become a good nurse in the intermediate care unit." Yet, notwithstanding the trust he placed in this person and notwithstanding that this mentor accompanied him daily for a considerable period, Canovas testified he could not remember the person's name. That is inherently unbelievable.

There is another reason, apart from Canovas's inability to remember his preceptor's name, to doubt his testimony. As quoted above, Canovas testified that while Hern was leading the huddle, employees were having a separate conversation. On cross-examination, Canovas clarified that Hern was not part of this "side conversation." (Tr. 3493–3494.)

In other words, Hern was addressing the group of 20 employees about work-related matters. Canovas described the subjects of discussion as "the important concerns in the unit, any updates that's surrounding the hospital, and surrounding the unit, especially patient care." (Tr. 3487.) Canovas did not quote Hern as saying anything about the "drop cards."

Rather, the "drop cards" were the subject being discussed in this "side" conversation Canovas was having with some other employees. However, his testimony does not establish that Hern was even aware that this conversation was taking place. Absent any evidence that Hern knew Canovas and other employees were discussing the cards, it is very difficult to believe that she abruptly changed subjects and told employees to go sign the cards.

To believe that Hern would make this implausible non sequitur, when the evidence fails even to establish that she knew employees were discussing the cards, would require some corroboration. There is none. Although about 20 employees attended the huddle, only Canovas testified that Hern said "go sign those cards."

In contrast to my doubts about the testimony given by Canovas, Hern impressed me as being a reliable witness. For these reasons, I credit Hern's testimony and find that she did not say the words Canovas attributed to her.

In sum, I conclude that the General Counsel has not proven the allegations raised in complaint subparagraph 6(s)(1).

Complaint subparagraph 8(s)(2) alleges that Respondent Valley and Respondent UHS, sometime in mid- to late August 2021, permitted employees to solicit for decertification of the Union during working time, while maintaining a policy prohibiting solicitation during working time. However, it does not appear that the General Counsel presented evidence that Respondents permitted employees to solicit for decertification of the Union at any time in *mid- to late August 2021*.[24]

In sum, I conclude that, based on the credited testimony of Intermediate Care Manager Teresa Hern, she did not make the statement attributed to her and, accordingly, the General Counsel has failed to prove the violation alleged in complaint subparagraph 8(s)(1). Further, I conclude that the General Counsel has presented no evidence to support the allegations raised in complaint subparagraph 6(s)(2). Therefore, I recommend that the Board dismiss all allegations raised in complaint subparagraph 6(s).

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[24] As noted above, because of the great number of allegations in the consolidated complaint, I directed counsel to state the relevant complaint subparagraph number before asking a witness questions. During his examination of 3 witnesses, counsel for the General Counsel stated that he would be asking questions about complaint subpar. 6(s). However, counsel the General Counsel did not ask one of these three witnesses any questions obviously relevant to complaint subpar. 6(s) and asked another of these three witnesses about events during a different time period from that specified in complaint subpar. 6(s).

The three witnesses identified by the General Counsel were Raphael Canovas, Jamerson Holloway, and Angela Rae Segura. As discussed above, The General Counsel asked Canovas questions relevant to complaint subpar. 6(a)(1) but this witness did not provide testimony relevant to complaint subpar. 6(a)(2).

Although the General Counsel stated that he would be asking Holloway questions relevant to complaint subpar. 6(s) (Tr. 3504) he did not do so. Rather, Holloway provided testimony about the negotiations between Respondent Valley Hospital and SEIU Local 1107.

The General Counsel did ask the third witness, Segura, questions that arguably might pertain to complaint subparagraph 6(s)(2). However, these questions more likely concerned complaint subparagraph 6(t). The violations alleged in complaint subpar. 6(s)(2) and 6(t) are similar—permitting employees to solicit for decertification of the Union—but the alleged solicitations happened in different months. Complaint subpar. 6(s)(2) alleges that the Respondent permitted such solicitation in mid-to late August 2021, and complaint subpar. 6(t) alleges that the Respondent permitted such solicitation in early September 2021.

Although counsel for the General Counsel stated that he would be asking Segura questions pertaining to complaint subparagraph 6(s), he instead asked about what happened in early September 2021. For these reasons, I conclude that the General Counsel did not present testimony to prove the allegations in complaint subparagraph 6(s)(2). Based on the absence of relevant testimony, I conclude that the General Counsel has failed to prove the allegations in complaint subparagraph 6(s)(2).

Complaint Subparagraphs 6(t) and 6(u)

Complaint subparagraph 6(t) alleges that, "about the first week of September 2021, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Michelle (Last Name Unknown), permitted off-duty employees to solicit for decertification of SEIU Local 1107 during the working time of the employees being solicited, while maintaining a policy prohibiting solicitation during working time." The Respondents deny these allegations.

Complaint subparagraph 6(u) raises similar allegations except that this subparagraph alleges that Respondents Valley and UHS permitted off-duty employees to solicit for decertification of SEIU Local 1107 during about the *second* week of September 2021. Like subparagraph 6(t), it alleges that these Respondents permitted such solicitation during the working time of the employees being solicited, and while maintaining a policy prohibiting solicitation during working time. Complaint subparagraph 6(u) also differs from subparagraph 6(t) in that it does not name "Michelle" or any other specific supervisor as being the person who allowed the solicitation. The Respondents deny these allegations.

To prove the allegations in complaint subparagraph 6(t), the General Counsel called and examined Registered Nurse Angela Rae Segura, who was working in the Valley Hospital Medical Center's medical surgical unit in September 2021. Her immediate supervisor was a charge nurse whom Segura identified only as "Michelle." It appears likely that Segura was referring to Clinical Supervisor Michelle Tuvida, whom the Respondents admit to be a supervisor within the meaning of Section 2(11) of the Act.

Segura testified that sometime during the first week of September 2021, a woman in street clothes came to the nursing station where Segura was working. According to Segura, this woman identified herself as a nurse, said her name was Julie, said she was "passionate about deunionizing" and tried to pass out cards to other nurses in the area. (Tr. 2127–2128.)

Segura testified that the nurses were not on break at that time. She further testified:

> Q. And what, if anything, happened after Julie talked to you all about the cards?
> A. I spoke with her and I told her if she wants to hand out that the those cards, she has to follow the same rules Union does, which means that she has to talk to the nurses off the clock and off the property. She can wait in the parking lot, which is where the Union had been pushed to, and not in the break rooms, not on floor, and especially not on the clock, that she a right to do that.
>
> (Tr. 2129.)

According to Segura, the woman spoke to "some nurses around the hall" outside patients' rooms, left a stack of cards at the nursing station, and then left. While the woman was talking with Segura, the charge nurse was at the nurse's desktop and did not look up. (Tr. 2131.) On cross-examination, Segura testified that the charge nurse was looking at the computer screen.

Segura did not testify that the woman spoke with the charge nurse. She also did not testify that the charge nurse ever saw the woman. It is clear that Segura did not alert the charge nurse to the woman's presence because, on cross-examination, Segura admitted that she never told anyone in management about the woman's presence. (Tr. 2143.)

The General Counsel relies on Segura's further testimony, concerning a second visit by the woman she identified as "Julie" - to prove the allegations in complaint subparagraph 6(u). Specifically, Segura testified that this woman returned during the second week in September 2021 and talked to nurses about signing cards. Segura again told her that she was not allowed to talk to nurses on the clock, but she spoke with them anyway. Neither Segura nor the nurses with whom the woman spoke were on break. (Tr. 2132–2140.)

When asked on direct examination whether Michelle (the charge nurse) was present during the woman's second visit, Segura answered "I believe so." (Tr. 2132.) On cross-examination, Segura testified as follows:

> Q. BY MS. GRIFFITH: You can't say, as you sit here today, that there was a charge nurse on the floor on the second occasion, can you?
> A. That's correct. That's what I said. I do not remember a charge nurse being there.
>
> Q. Okay. And you also never told anyone in management about Julie being on the floor passing out any kind of card or talking to the nurses while they were on duty. Correct?
> A. That's correct.
>
> (Tr. 2143.)

Although Segura testified that, on both visits, the woman spoke with other nurses, no other witnesses corroborated Segura's account.[25] Additionally, Segura's supervisor at the time, Michelle Tuvida, credibly testified that she did not see any off-duty nurse passing out cards. (Tr. 5215–5216.)

Segura"s testimony does not conflict with that of Tuvida, which I credit. Moreover, the record fails to establish that anyone in management was even aware of the woman's visit, let alone that management had any part in arranging it or permitting it to happen.

Therefore, I conclude that the General Counsel has not proven the allegations in either complaint subparagraph 6(t) or 6(u) and recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(v)

[25] During his cross-examination of another witness, nurse Jamerson Holloway, counsel for the General Counsel stated he would be asking questions relevant to complaint subpar. 6(u). (Tr. 3500.) However, Holloway did not provide any testimony relevant to the alleged solicitations in September 2021.

Complaint subparagraph 6(v) alleges that about "mid-to-late September 2021, a more precise date being unknown to the General Counsel, Respondent Desert Springs and Respondent UHS, by Jennifer Borbon, . . . at Respondent Desert Springs facility, interrogated its employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees." The Respondents deny these allegations.

To prove these allegations, the General Counsel relies on the testimony of one witness, registered nurse Tessie Miralles, who worked at Respondent Desert Springs from June 1990 until March 2023. Miralles testified that in September 2021, she had a discussion with Supervisor Jennifer Borbon:

> Q. And what do you remember from that conversation?
> A. I just remember when she asked me if everybody in my department, which is recovery room, are members of the Union.
>
> Q. And what was your response?
> A. My response to her is, as far as I know, everybody is.
>
> Q. And how did that conversation come to happen? How did that happen? Was that a meeting or when?
> A. No, I was just passing by in outpatient to get a medication for my patient. I was working that day, and Ms. Bourbon just asked me on the hallway if everybody in my department, which is recovery room, are members of the Union.
>
> Q. And did you talk to anyone about this conversation after it happened?
> A. My coworkers in the department, I asked them if they were asked by her or anyone about us being a Union member.
>
> Q. Do you remember what was the responses?
> A. Some of them said yes, some says no.
>
> (Tr. 3521–3522.)

Borbon unequivocally denied asking any registered nurse whether she was a union member and likewise denied asking any registered nurse if everyone in the department was a union member. (Tr. 5228.) Therefore, I must decide which testimony to credit.

As quoted above, Miralles testified that she asked other nurses "if they were asked by her or anyone about us being a Union member" and that "[s]ome of them said yes, some says no." (Tr. 3521–3522.) On cross-examination, Miralles changed that testimony slightly. Instead of stating that some of the people she asked said "no," she testified that they did not reply to her question:

> Q. Okay. And after that interaction with Ms. Bourbon, you testified that you spoke with some of your coworkers and asked them whether they had had a similar conversation with Ms. Bourbon. Do you recall that testimony?

A. Yes, I do.

Q. And isn't it true, Ms. Miralles, that those coworkers did not answer you either affirmatively or negatively? Correct?
A. Some of them answered positively, some flatly did not say a word.

(Tr. 3530.)

The testimony which Miralles gave on cross-examination differed not only from her testimony on direct examination but also from what she had stated in her prehearing statement. Upon further cross-examination Miralles admitted that in her pretrial affidavit she had stated that when she asked other workers the same question they did not answer. (Tr. 3530.)

The change from "they did not answer" to "some of them answered positively" is significant because if some other nurses had, indeed, answered affirmatively, Miralles likely would have included that fact in her prehearing statement. Stating that other nurses also had been questioned by Borbon would have bolstered Miralles' assertion that Borbon had questioned her.

These inconsistencies lead me to conclude that Miralles' testimony may be less reliable than that of Borbon. Therefore, crediting Borbon, I find that she did not make the statement which Miralles attributed to her.

In sum, I find that the General Counsel has not proven the allegations raised in complaint subparagraph 6(v). Therefore, I recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(w)

Complaint subparagraph 6(w) alleges that about the week of September 20, 2021, a more precise date being unknown to the General Counsel, Respondent Desert Springs and Respondent UHS, by Borbon, at Respondent Desert Springs' facility, interrogated its employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees. The Respondents deny these allegations.

It does not appear that counsel for the General Counsel has presented evidence to prove these allegations. The government did call to the witness stand the alleged interrogator, Clinical Supervisor Jennifer Borbon. At one point during the examination, counsel for the General Counsel announced he was asking questions relevant to complaint subparagraph 6(w) and continued:

Q. BY MR. ZARATE-MANCILLA: So, Ms. Borbon, during September of 2021, you were a clinical supervisor at Desert Springs, correct?
Yes.

Q. And you'd only been a clinical supervisor for a short amount of time?
A. Are we talking Desert Hospital, Desert Springs?

Q. Yes. In September 2021?
A. Yeah. Yes, I'm still a supervisor there.

Q. Okay. Sorry, the question was confusing. My apologies. I think you said that you've been a supervisor for three to four years.
A. Yeah. I can't just recall the exact date, yes.

Q. Yes. Okay, thank you. And during your time as the clinical supervisor at Desert Springs, at around September of 2021, do you remember talking to the RNs about the Union?
A. We don't talk about Union during clinical hours, nor even off hours. We just follow, like I said from my previous testify [sic], the management provides us letters to update each of the staff, what's going on with the negotiation? But I'm never involved in any negotiation.

Q. Now, I think you testified that you had never asked if everyone was a Union member, correct?
A. No, I did not ask.

Q. Okay. Have you asked how many nurses were Union members?
A. No, I did not ask.

(Tr. 5230–5231.)[26]

This testimony clearly does not establish a violation and the General Counsel has not pointed to any testimony that does. The General Counsel's posthearing brief does not provide any clues as to where evidence of this alleged interrogation might be found. Because the brief does not refer to complaint paragraph numbers, I searched it for the name of the person subparagraph 6(w) alleges to be the interrogator. However, the General Counsel's brief makes no mention of that individual, Clinical Supervisor Jennifer Borbon.

Not finding Borbon's name, I searched the brief for the word "interrogation." The word "interrogation" appears twice. The brief discusses an alleged October 2020 interrogation of employee Sandra Villalobos by Human Resources Generalist Leslie Irwin but that discussion pertains to the events alleged in complaint subparagraphs 6(e) and 6(f).

The brief also refers to an alleged August 25, 2021 interrogation of employee Rose Salvador by Intensive Care Unit Manager Kimberly Foxworth. Presumably, this reference concerns the conduct alleged in complaint subparagraph 6(r).

Except for these two references, which do not pertain to complaint subparagraph 6(w), the General Counsel's brief does not use the word "interrogation." The word "interrogate" does not appear at all.

Perhaps the General Counsel mistakenly alleged the same conduct as two separate violations. Complaint subparagraph 6(v) alleges that Borbon interrogated employees about "mid to late

[26] Borbon also denied the allegations when asked by the Respondents' counsel. See Tr. 5228.

September 2021." Complaint subparagraph 6(w) alleges that Borbon interrogated employees about "the week of September 20, 2021." These two descriptions cover pretty much the same time period.

The General Counsel did present a witness, Tessie Miralles, who testified about a September 2021 discussion with Borbon. However, the General Counsel specifically identified this testimony as pertaining to complaint subparagraph 6(v). (Tr. 3520–3521.) Therefore, I conclude that it cannot be the evidence upon which the General Counsel based complaint subparagraph 6(w).

Finding that the General Counsel has failed to prove the allegations in complaint subparagraph 6(w), I recommend that the Board dismiss these allegations.

Complaint Subparagraph 6(x)

Complaint subparagraph 6(x) alleges that "on a date in early October 2021, a more precise date being unknown to the General Counsel, Respondent Desert Springs and Respondent UHS, by Christopher Loftus, at Respondent Desert Springs' facility: (1) blamed SEIU Local 1107 for the delay in employees receiving a raise; (2) blamed SEIU Local 1107 for staff shortages at Respondent Desert Springs' facility; and (3) blamed SEIU Local 1107 for employees not receiving a higher raise."

Complaint paragraph 10 alleges that this conduct violates Section 8(a)(1) of the Act. The Respondents deny these allegations.

Complaint subparagraph 6(x) and complaint paragraph 10, working together, assert that it is unlawful for an employer to "blame" a union for the results of collective bargaining. As discussed above in connection with complaint subparagraphs 6(j) and 6(p), an employer's expression of opinion about a union is lawful so long as it does not make a threat or include a promise of benefit. Even false or misleading statements are lawful, absent evidence of a threat or promise. *Nexstar Broadcasting Inc. d/b/a KOIN-TV*, above.

In view of this well-established principle, how could it be unlawful to blame a union for a delay in receiving a raise, or for the amount of the raise, or for staff shortages? Counsel for the General Counsel has cited no case authority, either at hearing or in the posthearing brief, for the proposition that "blaming" a union constitutes a violation of the Act.

As discussed above in connection with complaint subparagraphs 6(n) and 6(p), the Supreme Court, applying the First Amendment, has held that "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969).

Under the *Gissel* standard, the General Counsel bears the burden of proving that the statement which allegedly "blamed" the Union contains a "threat of reprisal or force or promise of benefit." However, counsel for the General Counsel did not argue, either during the hearing or in the posthearing brief, that the statement contained such a threat of reprisal or force or promise of benefit.

The General Counsel's brief did summarize the facts, citing the testimony of one witness, Francisco Santiago, a critical care nurse. In the following excerpt from the General Counsel's brief,

"Loftus" refers to Christopher Loftus, then chief executive officer of Desert Springs Hospital. The General Counsel's brief states:

> In October 2021, CEO Loftus attended a huddle in the intensive care unit. TR29:3468. This had been the first time that Loftus had attended a huddle with the RNs. TR29:3468–69. Loftus told the RNs that Respondent Desert Springs had offered RNs a 4% raise and that SEIU 1107 had finally agreed to the raise after 12 or 13 meetings. TR29:3469. RN Francisco Santiago (Santiago) had taken part in the negotiations and was surprised that Loftus had taken credit when the SEIU 1107 had been the party to request a 4% raise. TR29:3469. Santiago had worked at Respondent Desert Springs from 2003 until it closed in 2023. TR29:3465–66. Santiago currently works for another Valley Health System LLC hospital at Summerlin Hospital. TR29:3475.
>
> At the huddle, Loftus said that Respondent Desert Springs was trying to recruit and hire more nurses but that whenever an applicant finds out that Respondent Desert Springs was a union hospital that the applicants lost interest and became sour about working at Respondent Desert Springs. TR29:3470–71. After Loftus said this, Santiago spoke up and asked Loftus how come the nurses quitting Desert Springs were going to work at other union hospitals. TR29:3471. Loftus just denied any knowledge of what I asked. TR29:3471. Before he left, Loftus again took credit for the 4% raise and Santiago asked him to give the RNs more. TR29:3471. Loftus then turned around and said, "blame it on the Union." TR29:3471–72.

However, after summarizing the facts, the General Counsel's brief made no attempt to explain why the words attributed to Loftus did not enjoy the protection of the First Amendment. The brief did not claim that anything Loftus said contained a "threat of reprisal or force or promise of benefit." The brief offered no argument at all, and cited no cases, for the proposition that anything Loftus said violated the Act.

Francisco Santiago's testimony, cited by the General Counsel, does not suggest that Loftus made any threat or promise of benefits:

> Q. And what did he say, if you remember?
> A. He greeted us that morning. He started by greeting us, good morning. And then he followed it by saying that, congratulations, because the Desert Springs Hospital has granted you 4 percent increase in your salary.
>
> Q. What, if anything, else happened?
> A. He expounded it by saying that after 12 or 13 meetings that the Union agreed on the Desert Springs offer of 4 percent. I was surprised that time when he said that because, during those collective bargaining meetings—some of those meetings I attended—and that we knew that the Union was the one who offered the 4 percent.
>
> We were the ones who presented it to Valley Health System for our

> salary increase. During those collective bargaining days, or meetings, they would postpone it. We we laid the offer, some days they would postpone it and not give a counter offer. I remember there was one counter offer, and they undercut the percentage to a lower than 4 percent.

(Tr. 3469.)

According to Santiago, when one of the nurses raised the issue of understaffing, Loftus replied that the hospital was conducting job interviews to hire more nurses, but that when candidates were told that Desert Springs is "a Union hospital, something different happens to the nurses. They change their attitude, like they're not interested in pursuing working at Desert Springs Hospital. It's like he's saying that the nurses that are applying become sour about going into Desert Springs." (Tr. 3470–3471.)

Santiago testified that he asked Loftus why "the nurses that [were] quitting and transferring to a different hospital also were transferring to a Union hospital" and Loftus replied that he had not heard of that kind of situation. (Tr. 3471.) Santiago's testimony continued as follows:

> Q. Okay. And do you happen to remember what, if anything else, happened during this meeting?
> A. Then he again stated that Desert Springs was the one who -- he repeatedly said that they were the ones who granted us the 4 percent increase in the salary. And then, as he was about done, he was walking out of the ICU huddle; I told him, give us more. I was pertaining to the salary increase. And then he turned around and told me—well, told us—well, blame it on the Union. And then he continued walking out.

(Tr. 3471–3472.)

Nothing in Santiago's testimony indicates that he made either a threat or a promise of benefits. It is true, of course, that he stated that the hospital and the Union had agreed on a 4-percent salary increase, but this statement merely reported on an agreement already made.

When Loftus said "blame it on the Union" he was expressing his opinion. Considering the give-and-take of collective bargaining, opinions will differ about which party, if either, got the better deal. Likewise, opinions will differ about whether one party got too much or could have given more. However, as the Supreme Court held in *Gissel*, an employer is free to communicate his views "so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" 395 U.S. at 618.

The General Counsel has failed to carry the burden of proving that anything Loftus said contained a threat of reprisal or force or promise of benefit. Therefore, the government has failed to rebut the presumption that Loftus' speech was protected by the Constitution. Accordingly, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(x).

Complaint Subparagraph 6(y)

Complaint subparagraph 6(y) alleges that "on a date in February 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by McKinnon and Michael Blake (Blake), at Respondent Valley's facility, by telling employees that Respondent Valley and not Culinary Local 226 is the reason for employees' grievance settlements, threatened employees that seeking assistance of Culinary Local 226 would be futile." The Respondents deny these allegations.

To prove this allegation, the General Counsel relies on the testimony of employee Vera Blanche, whose job title is "attendant." She performs housekeeping duties.

In February 2022, Blanche began mopping without first placing a "Wet Floor" sign and a nurse slipped and fell. After Blanche received discipline at the step 3 level, she filed a grievance. She testified[27] that a Union representative named Albert went with her to the human resources office, where she met with Environmental Services Director Glenn McKinnon and Environmental Services Manager Michael Blake:

Q. What happened at the HR?
A. They dropped it down to Level 2, but they had told me and Albert to go out the office. And we went out the office. We went back in, and they told me they was going to drop it down to a Level 2.

Q. And what happened after that? Did you have any conversation about that specific incident?
A. They called me to the office and told me the reason why they dropped me down from Level 3 to 2 is because of him and Glenn, Mike and Glenn.

Q. Who told you that?
A. Glenn.

Q. What else did he tell you?
A. He told me he dropped it down to Level 2. It wasn't the Union; it was them, too.

(Tr. 3557–3558.)

[27] During his direct examination of Blanche, counsel for the General Counsel asked her about discipline she had received in February 2020, which she then described. However, he also had stated on the record that the questions pertained to complaint subpar. 6(y), which refers to a disciplinary action in February 2022 rather than February 2020. (Tr. 3557.) It appears clear that both counsel for the General Counsel and the witness had in mind the discipline given to Blanche in February 2022.

Environmental Services Manager McKinnon did not deny telling Blanche that it "wasn't the Union," but he was not specifically asked if he did. Rather, the Respondents' counsel asked the following:

> Q. Do you ever tell employees that the hospital was the reason the grievance settlements were reached and not the union?
> A. No.
>
> (Tr. 5036.)

The phrasing of the question - "do you" instead of "did you"—allows it to be interpreted as an inquiry about McKinnon's usual practice rather than what he said on a specific occasion. Additionally, the words which Blanche attributed to McKinnon - "it wasn't the Union"—do not convey the meaning that the *hospital* made the decision to reduce her discipline. Rather, they suggest that McKinnon and Blake made that decision.

In other words, denying that he told anyone that the hospital was the reason for a grievance settlement is not a denial that on a particular day in February 2022, he told Blanche that it "wasn't the Union." Therefore, I find that McKinnon did not deny making that statement.

The General Counsel called Environmental Services Manager Blake as a witness and asked him about the discipline Blanche had received. However, the General Counsel did not ask whether McKinnon had told Blanche "it wasn't the union." (Tr. 596–597.) Thus, Blake did not deny that McKinnon made such a statement. Blake did explain the reason they reduced Blanche's discipline from step 3 to step 2:

> Q. And do you recall the circumstances that changed the level?
> A. I believe Vera was telling the nurse not to come through her wet floor if I remember correctly and the nurse continued to walk through. Yes.
>
> (Tr. 597; see also Tr. 4089.)

Later in his testimony, Blake further explained that Blanche "was trying to stop the nurse from coming through, even though the nurse had her earbuds in and couldn't hear her. So it was more negligence on the nurse's fault, but, you know, because of the severity of not having the sign, we still had to issue her. So we dropped it down to a level two." (Tr. 4089)

Because neither McKinnon nor Blake denied that McKinnon told Blanche it "wasn't the Union," I find that McKinnon did make that statement. For the following reasons, however, I conclude that doing so did not violate the Act.

First, it may be noted that, in a literal sense, McKinnon's statement was not false. Even if the union representative had been very persuasive, the decision rested with management. With some infrequent exceptions, such as an order from an arbitrator, the Board or a judge, management makes employment decisions.

Of course, the literal meaning of a statement may not be the message conveyed and understood. The lawfulness of the statement depends on what an employee reasonably would understand the message to be.

However, the words "it's not the Union" would reasonably be understood to refer to the Union's role in this particular instance, not to the Union's general effectiveness as the employees' representative. In this particular instance, McKinnon's words reasonably could mean that it was not the Union's plea on behalf of Blanche but the mitigating circumstance—the nurse did not heed Blanche's warning - which resulted in the decision to reduce the level of discipline.

McKinnon also may have been trying to convey that he and Blake would have made the same decision, to lower her discipline, even if the Union had never become involved. That is certainly a reasonable interpretation of his words.

However, it would not be reasonable to conclude that he was saying that the Union was futile. Saying that the Union's participation did not change the outcome in this one instance would not reasonably be understood to mean that the Union's presence would never change the outcome.

For these reasons, I conclude that McKinnon's words did not convey a message that resort to the Union was futile. Further concluding that his words did not in any way interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, I recommend that the Board dismiss the allegations in complaint subparagraph 6(y).

Complaint Subparagraphs 6(z) and 9(r)

Complaint subparagraph 6(z) alleges that on a date in February 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Alison McCain, at Respondent Valley's facility, promised employees increased wages and improved retirement benefits if employees remove Culinary Local 226 as their collective-bargaining representative.

Complaint subparagraph 9(r) alleges that by this conduct, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Culinary unit. The Respondents deny these allegations.

Counsel for the General Counsel did not state, at any time during the hearing, that he was asking a witness questions about complaint subparagraph 6(z). Therefore, I examined the General Counsel's posthearing brief to determine whether it referred to the allegations in this complaint subparagraph. If so, the brief might identify which witnesses, if any, provided relevant testimony.

Because the General Counsel's brief does not identify or discuss allegations by complaint paragraph or subparagraph number, I searched the brief for "McCain," the supervisor alleged to have made the promise of better wages and benefits. However, although the brief does refer to McCain, it does not describe any instance in February 2022 in which McCain supposedly made a statement like that attributed to her in complaint subparagraph 6(z).

The General Counsel's brief does describe a meeting in May 2022. However, the General Counsel claims only that McCain attended that meeting, not that she spoke. According to the brief, Dietary Department Director Rick Pierce did the speaking, allegedly telling employees that their benefits would improve if they "got the Culinary 226 out." However, the brief appears to be referring to events described in complaint subparagraph 6(ee), which alleges conduct in May 2022, and not to subparagraph 6(z), which alleges conduct in February 2022.

Considering that counsel for the General Counsel did not state, during the hearing, that he was asking any witness questions about complaint subparagraph 6(z), and also considering that the General Counsel's posthearing brief neither referred to complaint subparagraph 6(z) explicitly nor described any event matching the allegations in that complaint subparagraph, I conclude that the government has not offered any proof. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(z).

For these reasons, I further conclude that the Respondents did not bypass the Union and deal directly with employees, as alleged in complaint subparagraph 9(r). Therefore, I also recommend that the Board dismiss these allegations as well.

Complaint Subparagraphs 6(aa) and 4(c)

Complaint subparagraph 4(c) alleges that at all material times Demedrick Jefferson has been an agent of Respondent Valley and Respondent UHS within the meaning of Section 2(13) of the Act. The Respondents deny this allegation.

Complaint subparagraph 6(aa)(1) alleges that from about February 2022 to May 2022, more precise dates being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Demedrick Jefferson (Jefferson), at Respondent Valley's facility, solicited its employees to sign cards or other materials stating they no longer wished to be represented by the Union, Culinary Local 226, for the purpose of collective bargaining with Respondent Valley.

Complaint subparagraph 6(aa)(2) alleges that the Respondents, by the conduct alleged in complaint subparagraph 6(aa)(1), provided more than ministerial assistance to its employees in seeking to remove Culinary Local 226 as their collective-bargaining representative.

Complaint paragraph 10 alleges that the conduct described in complaint subparagraph 6(aa) violates Section 8(a)(1) of the Act. The Respondents deny all these allegations.

It is appropriate to begin with the issue posed in complaint subparagraph 4(c): Was Jefferson an agent of the Respondent at the time he allegedly solicited employees to sign the cards?[28]

The Respondent is not liable for Jefferson's actions unless Jefferson was acting as its agent.

[28] The complaint does not allege that Jefferson was a supervisor at the time he solicited signatures, but only that he was an agent. The record clearly establishes that, in all of 2022, Jefferson was an employee in the bargaining unit represented by Culinary Local 226. He received a promotion to supervisor in May 2023.

However, although the General Counsel's brief mentions Jefferson by name 27 times, it offers no argument that he was the Respondents' agent and points to no evidence to support such a finding.

Counsel for the General Counsel subpoenaed Jefferson and called him as a witness, but did not focus on the agency issue. Jefferson's testimony not only fails to establish an agency relationship but does the opposite, establishing that he undertook the decertification effort on his own. It also reveals a strong personal motivation.

Jefferson testified that after he and his wife separated, he began seeing a woman named Ann, who put him in contact with a lawyer from the National Right to Work Foundation. Jefferson explained that he wanted to get another union, one that represented employees at a different hospital, to replace Culinary Local 226 as the bargaining representative. He said that his friend Ann gave him "everything I need to do to try to get a different union in here." (Tr. 1143.)

His testimony indicates that he became dissatisfied with Culinary Local 226 because his health insurance had failed to pay $30,000 in medical bills. (Tr. 1144–1145.) Jefferson said that he went to a union representative three times to discuss the bills but the union representative "was like, 'Not my problem. Not my problem. You figure it out. Oh, well. Oh, well.' when I went to him to try to help me get this matter situated, he blew me off three times." (Tr. 1151.)

Based on Jefferson's testimony, which I credit, I find that he was not acting as an agent of the Respondents but rather on his own personal initiative. Moreover, the record does not establish that the Respondents ever gave employees reason to believe that Jefferson was their agent. The evidence also fails to establish that employees believed Jefferson was acting on behalf of the Respondents or any Respondent. Therefore, I conclude that the government has failed to prove that Jefferson was the Respondents' agent, as alleged in complaint subparagraph 4(c).

Complaint subparagraph 6(aa)(1) that the Respondents, "by Demedrick Jefferson" solicited employees to sign cards or other materials stating they no longer wished to be represented by the Union. Thus, the conduct alleged in this complaint subparagraph is soliciting employees to sign cards or other materials. Because Jefferson was not acting as the Respondents' agent, the Respondents obviously did not engage in this conduct.

Complaint subparagraph 6(aa)(2) alleges that by the conduct alleged in subparagraph 6(aa)(1), the Respondents provided more than ministerial assistance to employees seeking to remove culinary Local 226 as their bargaining representative. The conduct alleged in complaint subparagraph 6(aa)(1) is Jefferson's soliciting signatures. It follows, then, that the alleged material assistance is Jefferson's efforts soliciting signatures. In other words, the complaint does not allege that the Respondents gave assistance to Jefferson but rather that Jefferson's efforts were the more-than-ministerial assistance.

Because Jefferson was not acting as the Respondent's agent, the assistance he gave to other employees is not imputable to the Respondents. Additionally, the record does not establish that the Respondents' provided assistance to any employee's effort to oust Culinary Local 226.

In sum, the government has failed to prove either that Jefferson was the Respondents' agent, as alleged in complaint subparagraph 4(c), or that the Respondents provided more than ministerial aid to employees in their effort to remove Culinary Local 226, as alleged in complaint subparagraph 6(aa)(2). For these reasons, I recommend that the Board dismiss the unfair labor practice allegations which are based on the conduct alleged in complaint subparagraph 6(aa).

Complaint Subparagraphs 6(bb) and 9(r)

Complaint subparagraph 6(bb) alleges that on a date in April 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by McCain, at Respondent Valley's facility: (1) blamed Culinary Local 226 for employees not receiving a pay increase and better retirement benefits; and (2) promised increased wages, retirement benefits, and other unspecified benefits if employees remove Culinary Local 226 as their collective-bargaining representative.

Complaint subparagraph 9(r) alleges that by these actions, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Culinary unit. The Respondent denies these allegations.

The General Counsel has not identified what evidence, if any, the government offers to prove these allegations. At one point, while examining a witness, counsel for the General Counsel announced he would be asking questions relevant to certain complaint subparagraphs, including subparagraph 6(bb). (Tr. 1887) However, no questions followed concerning the allegations in this complaint subparagraph.

More specifically, the witness was Jeanne Schmid, who is vice president of labor relations at UHS of Delaware. Although complaint subparagraph 6(bb) alleges that Dietary Department Manager McCain made certain violative statements, the General Counsel's examination of Schmid did not mention McCain.

A search of the record revealed that 10 witnesses had mentioned McCain's name during their testimony. However, none testified that, in April 2022, McCain made statements similar to those alleged in complaint subparagraph 6(bb). Additionally, the General Counsel's brief provided no clues concerning where proof of these allegations might be found.

Therefore, I must conclude that this is another instance in which the General Counsel provided no evidence to support an unfair labor practice allegation in the complaint. I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(bb).

For the same reasons, I conclude that the Respondents did not bypass the Union and deal directly with employees, as alleged in complaint subparagraph 9(r). Therefore, I recommend that these allegations be dismissed.

Complaint Subparagraphs 6(cc) and 9(r)

Complaint subparagraph 6(cc) alleges that on a date in April 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by McKinnon and Blake, at Respondent Valley's facility: (1) blamed Culinary Local 226 for employees not receiving a pay increase and having unfavorable benefits; (2) promised increased wages and improved retirement benefits if employees remove Culinary Local 226 as their collective-bargaining representative; and (3) threatened employees that supporting Culinary Local 226 would be futile.

Complaint subparagraph 9(r) alleges that, by this conduct, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Culinary unit. The Respondents deny these allegations.

To prove this allegation, the General Counsel relies on the following testimony[29] of Vera Blanche, a housekeeping employee in the environmental services department at Valley Hospital Medical Center:

> Q. By MR. KEPIR: Ms. Blanche, do you remember being called for a meeting in April 2022 by Mr. McKinnon?
> A. Yes.
>
> Q. And what do you remember from that meeting?
> A. I was calling about when the Union came, and I filed agreement at the Union.
>
> Q. We're talking about the meeting in April 22.
> A. When one of the nurses had failed in the ER.

[29] Although counsel for the General Counsel stated that he would be asking Blanche questions pertaining to a number of complaint subparagraphs, which he listed, and that list included complaint subparagraph 6(cc), he did not further specify which part of her testimony pertained to this subparagraph. However, based on the General Counsel's posthearing brief, I conclude that the portion of Blanche's testimony quoted in this subsection of the decision is the testimony upon which the government relies in support of complaint subpar. 6(cc). The General Counsel's brief stated:

> In April 2022, Blanche was told by McKinnon that the Union had not helped her drop her Level 3 discipline from February 2020, but that it was him and Michael Blake who had dropped it. TR30:3556–57. McKinnon also told Blanche that her retirement benefits through Culinary 226 were not as good as what she could have without Culinary 226. TR30:3556. McKinnon also tried to convince Blanche to get out of Culinary 226 and enticed her with a 401k and the reduction of her discipline. TR30:3564.
> This description is the General Counsel's interpretation of Blanche's testimony but does not limit itself to what the witness actually said.

Q. No, no. That is the discipline. Do you remember meeting with Mr. McKinnon and Mr. Blake?
A. Yeah, I meet with them on the 22nd because they was telling me that, am I a retirement agent? I told him, yeah, I asked him why? And he said, because I'm not going to get more than $50,000 from the Union. I might well start another 401K.

Q. Do you remember where this meeting happened?
A. Because he told me that the Union—I had got wrote up, and he said I got a Level 3. And he said, the Union is not the one that dropped my Level 3. It was him and Mike.

Q. Now, the meeting where you talked about the 401K, do you know where did that happen?
A. He just called me. I was on my way home, and he called me in there and told me about the 4OlK.

Q. And who else was present in that meeting?
A. It was Mike—Mike and Glenn.
Q. And what did he tell you about the 401K?
A. He told me that I wasn't going to get no more from the Union. $50,000, I might as well start another 401K and work with them.

Q. What do you mean, work with them?
A. As a lead with the hospital.

(Tr. 3556–3557.)

This testimony falls far short of proving the allegations in complaint subparagraph 6(cc). Nothing in Blanche's testimony supports a conclusion that McKinnon or Blake said, or implied, that the Union was to blame for the employees' wage and benefit rates. Blanche's testimony does not indicate that either manager mentioned the Union's collective bargaining with Valley Hospital. Even if one of the managers told Blanche that she was "not going to get more than $50,000 from the Union," such a statement, without more, would not reasonably convey the message that the Union was responsible, let alone that it was culpably responsible.

Although Blanche's testimony is somewhat hard to follow, it is clear that her discussion with management pertained, at least in part, to her 401(k) plan, which she mentions more than once. She quoted one of the managers saying that she was not going to get more than $50,000 from the Union, but even if McKinnon or Blake made such a statement, it does not amount to blaming the Union. Presumably, the amount in a 401(k) plan would depend upon how much an employee contributed to it.

Additionally, nothing in Blanche's testimony indicates that the managers said anything about employees removing the Union as their collective-bargaining representative. It isn't exactly clear what Blanche meant when she testified "they was telling me that, am I a retirement agent?" However, the

conversation certainly concerned Blanche's 401(k) plan and her retirement. That she should have such a discussion is not surprising, considering that she had begun working at Valley Hospital in 1996

It is also plausible that she was discussing with the managers the possibility of a promotion to a lead position. Thus, she testified that one of the managers told her that she "wasn't going to get no more from the Union. $50,000, I might as well start another 401K and work with them." When asked what she meant by "work with them," Blanche replied, "As a lead with the hospital."

To promise Blanche increased wages or benefits if she accepted a promotion to a lead position is far, far different from a promise to increase her wages or benefits "if employees remove Culinary Local 226 as their collective-bargaining."

Additionally, nothing in Blanche's testimony suggests that either McKinnon or Blake "threatened" that supporting Culinary Local 226 would be futile. Indeed, nothing in Blanche's testimony, quoted above, proves that anyone in Respondents' management made statements similar to those alleged in complaint subparagraph 6(cc).

Moreover, the General Counsel has not claimed that the Board should "read between the lines" and discern some unstated meaning in Blanche's words. The General Counsel neither asked that an inference be drawn nor explained why it should be.

In sum, the General Counsel has failed to prove the allegations raised in complaint subparagraph 6(cc). I recommend that the Board dismiss them. Additionally, I recommend that the Board dismiss the allegations, in complaint paragraph 9(r), that Respondent Valley and Respondent UHS, by the conduct alleged in complaint subparagraph 6(cc), bypassed the Union and dealt directly with employees in the Culinary unit.

Complaint Subparagraph 6(dd)

Complaint subparagraph 6(dd) alleges that on dates in or around May 2022, more precise dates being unknown to the General Counsel, Respondent, by Blake, McCain, McKinnon, and Pierce, at Respondent Valley's facility, compelled its employees to attend captive-audience meetings in which it addressed the employees about their choice concerning union representation, without providing assurances that attendance was voluntary, that the employees were free to leave at any time, that nonattendance would not result in reprisals, and that attendance would not result in rewards or benefits. The Respondent denies these allegations.

From 1948, when the Board issued its decision in *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), until November 13, 2024, Board precedent held that an employer did not commit an unfair labor practice by requiring employees to attend a meeting at which the employer's representatives expressed views about a union or the merits of unionizing.[30] However, in *Amazon.com Services, LLC*, 373 NLRB No. 136 (2024), the Board, overruling *Babcock & Wilcox*, held that, henceforth, requiring attendance at such a captive audience meeting would be an unfair labor practice.

[30] An employer might violate the Act by some statement a representative made at such a "captive audience meeting" but the meeting itself was not unlawful.

However, the Board explicitly stated that this change would be applied prospectively only. *Amazon.com Services LLC*, 373 NLRB No. 136, slip op. at 20. Accordingly, the conduct described in complaint subparagraph 6(dd) did not violate the Act at the time it allegedly took place. Therefore, I recommend that the Board dismiss these allegations.

Complaint Paragraphs 6(ee) and 9(r)

Complaint subparagraph 6(ee) alleges that on various dates in early May 2022, including but not limited to May 5, 2022, more precise dates being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Pierce, during huddle and/or captive-audience meetings at Respondent Valley's facility:

(1) by equating employees' union activities with creating conflict, threatened employees with unspecified reprisals for engaging in union and protected concerted activities;

(2) promulgated an overly-broad rule prohibiting employees from spreading rumors and/or promulgated such rule in response to employees' union and protected concerted activities;

(3) by saying there were rumors going around about employees being fired and that there would be no more raises without explaining how they learned that information, created an impression among their employees that their union and protected concerted activities were under surveillance by Respondent Valley and Respondent UHS;

(4) threatened employees that they will not have the ability to deal directly with Respondent Valley if they do not remove Culinary Local 226 as their collective-bargaining representative;

(5) encouraged and/or instructed employees to report or identify pro-union solicitors;

(6) threatened employees that union supporters could have harassment complaints lodged against them;

(7) invited employees to quit their employment in response to employees' union and concerted activities;

(8) promulgated an overly-broad rule prohibiting bullying in the workplace in response to employees' protected union activity;

(9) by characterizing employees' union and protected concerted activities as bullying, threatened employees with unspecified reprisals for engaging in union and protected concerted activities;

(10) blamed Culinary Local 226 for employees not receiving increased pay and having unfavorable benefits;

(11) promised employees with more favorable working conditions if employees removed Culinary Local 226 as their collective-bargaining representative, including less conflict at work, an improved point system, and/or more flexibilities; and

(12) promised employees increased wages, retirement benefits, and education benefits if employees removed Culinary Local 226 as their collective-bargaining representative.

Complaint subparagraph 9(r) alleges that, by these actions, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Culinary unit. The Respondents deny these allegations.

When determining whether words spoken by a supervisor violated the Act, a judge must take care to determine, as exactly as possible, what actually was said. Just a slight change in wording can mean the difference between a lawful statement and an unfair labor practice. See, e.g., *George L. Mee Memorial Hospital*, 348 NLRB 327 (2006).

Although a complaint often describes alleged violations in general terms, the proof must be specific. In the present case, for example, complaint subparagraph 6(ee)(1) alleges that the Respondents, by Pierce, threatened employees with unspecified reprisals "by equating employees' union activities with creating conflict." These words state a conclusion—that Pierce made a threat—but the General Counsel must prove facts and then argue why such facts warrant the described conclusion.

Because Pierce likely said a number of things, the General Counsel must identify as precisely as possible that portion of Pierce's speech which the government alleges to be a threat. Only then has the General Counsel provided the predicate for an argument that Pierce threatened employees.

The need to establish a specific factual predicate is particularly apparent when the allegations of complaint subparagraph 6(ee)(1) are considered. This subparagraph asserts that the Respondent, "by equating employees' union activities with creating conflict," threatened them. It thus equates a statement that "union activities create conflict" with a threat. However, such a claimed equivalence is far from obvious.

On their face, the words "union activities create conflict" do not convey a threat but simply state an uncontroversial fact. No one doubts that union activity causes conflict. Congress did not pass the National Labor Relations Act to outlaw conflict but rather to provide a means for its peaceful resolution.[31]

Union activities also can cause friction between employees who favor a union and those who oppose it. A supervisor saying so doesn't violate the Act. To turn those words into a threat requires

[31] 1The Act fosters "practices fundamental to the *friendly adjustment* of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employees and employers." 29 U.S.C.§ 151 (Italics added). This language reflects Congress' recognition that industrial disputes will arise and will create conflict, and its intent to establish peaceful means to resolve such conflicts.

an extra ingredient.

To be an unlawful threat, the supervisor's words must communicate to employees a message that their employer will take some action. Those words need not specify exactly what action the employer will take but, to be an unlawful threat, the words must pertain to a possible action that the employer chooses to initiate.[32] Thus, a supervisor's statement that union activity causes conflict would not constitute an unlawful threat unless there were other words or circumstances that affected the message which employees reasonably would understand. For example, if the supervisor's additional words conveyed the message that the *employer* would choose to initiate conflict, that message would convey an unlawful threat.

The difference between a lawful statement and an unlawful threat can be subtle, turning on the exact words used and the totality of circumstances.[33] The General Counsel's burden of proof includes establishing what the supervisor said, identifying what portion constitutes the alleged threat, and showing that those words reasonably would communicate that an action within the employer's control would result if the employees chose to be represented by a union or engaged in other protected activity.

This need for specificity isn't limited to allegations that a supervisor made a threat. Whether an employer made an unlawful promise of benefits similarly depends on the exact words used. In either case, to be violative, the words reasonably must communicate that the employer would do something in response to the employees' actions.

In sum, the difference between an unlawful threat or promise of benefits and a lawful statement can be as subtle as the difference in the stripes of a venomous eastern coral snake compared to those of a nonvenomous king snake.[34] When an unlawful promise or threat lurks like a coral snake among king snakes, the government must describe the offender's stripes sufficiently for identification. Typically, the General Counsel's brief will do so and cite prior cases in which the Board has found

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[32] *Gissel*, above, 395 U.S. at 618. Of course, an employer might also make an unlawful threat that it will decide *not* to take an expected action, such as granting a customary annual wage increase, which employees desired.

[33] See, e.g., *Ebenezer Rail Car Services.*, 333 NLRB 167, 167 at fn. 2 (2001)("in determining whether a statement by an employer violates Sec. 8(a)(1), or is protected by Sec. 8(c), the Board considers the totality of the relevant circumstances"), citing *Mediplex of Danbury*, 314 NLRB 470 (1994).

[34] The Board's decision in *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 (2020) provides an illustration of the sometimes subtle distinction between a lawful expression of opinion and an unlawful promise of benefits. The Board found unlawful a manager's statement to employees that if they did not have a union, they would get market raises. *Valley*, slip op. at 2, fn. 10. However, the Board, reversing the judge, found that a manager did not violate the Act when she told employees that, at a hospital where she formerly worked, the quality of administrators improved after employees there decertified the union. *Valley*, slip op. at 5.

similar statements to be venomous. In the present case, the government's brief offers no analysis at all concerning the individual 8(a)(1) allegations.

Because the General Counsel's brief does not refer to complaint paragraphs there is some room for uncertainty but, so far as I can tell, the following portion is the brief's only discussion of events pertaining to complaint subparagraph 6(ee):

> Brenda Reyes (Reyes), a dietary employee at Respondent Valley, was part of the negotiations committee as a committee leader for Culinary 226 during the summer of 2022. TR32:3643. As a committee leader, Reyes wears a Culinary 226 button at work. TR32:3644. In May 2022, Pierce directed several huddles in the cafeteria in which he discussed employees getting better benefits without Culinary 226 and also talked about rumors spreading that employees were getting terminated and that employees would not get raises. TR32:3646. During the huddles directed by Pierce, there were about 25 employees in attendance and Dietary Manager Alice McCain and Executive Chef Joseph Shellmire were also present. TR32:3652. During one of the huddles in May 2022, Pierce told the Dietary Department employees that their benefits would be better if they got the Culinary 226 out. TR21:2652. Pierce told employees that Respondents would send employees to school, give 401k, and that vacation and holidays would improve. TR21:2652. Pierce also told employees that Culinary 226 was lying to them about Respondents and that employees should not let those employees bully the rest of them. TR21:2652-53. Pierce also offered to meet one on one with employees in his office if they wanted to talk about the Union. TR21:2653. Edwards also remembers that Pierce would had a paper to certain employees to sign to get Culinary 226 out but that he would be selective and did not give the paper to every employee. TR21:2653. In addition to the huddle meetings, Alice McCain would also talk to employees when they would walk by her office to let them know that employee benefits would improve without Culinary 226. TR21:2654-55.
>
> During one of the huddles in May 2022, another employee named Karen Espinoza (Espinoza) spoke up and mentioned that Demedrick "DJ" Jefferson (Jefferson) was going around with a petition to get Culinary 226 out of Respondent Valley. TR32:3646. Pierce denied 16 knowing about Jefferson's petition. TR32:3647. After the meeting, Pierce approached Espinoza and Reyes and asked them if they thought he was lying. TR32:3647. Espinoza told Pierce that she believed he was lying, and Pierce became angry and told Espinoza that he would not tolerate being called a liar. TR32:3647. After Espinoza left, Reyes also told Pierce that she thought he was lying and that he and McKinnon were involved with Jefferson's petition. TR32:3647. Reyes told Pierce that Jefferson was approaching employees while they were on the clock and that it was illegal for Jefferson to do that. TR.32:3647. Pierce did not deny that Jefferson was circulating the petition to employees on the clock, but Pierce only shot back that Culinary 226 employees were saying rumors and talking about Respondent Valley and that it was illegal. TR32:3648–49.
>
> During another huddle in May 2022, Pierce said that he wanted Culinary 226 out of Respondent Valley. TR32:3652. Pierce also said the Union never did anything for employees and that the rumors about managers getting bonuses for getting Culinary 226 out but employees not getting raises needed to stop. TR32:3652. Pierce was also upset about being

> called a liar by employees and he also spoke to employees about Respondent Valley's 401k if the employees did not want to have a union. TR32:3652–53.[35]

It does not appear that the General Counsel described any statements relevant to the allegations in complaint subparagraph 6(ee)(1). That complaint subparagraph alleges that Respondents, through Supervisor Pierce, "by equating employees' union activities with creating conflict, threatened employees with unspecified reprisals for engaging in union and protected concerted activities."

The portion of the General Counsel's brief, quoted above, does not refer to any statement that equated employees' union activities with conflict. To be sure that I had not overlooked any discussion about this statement, I searched the entire brief for any reference to the word "conflict." That word does not appear in the brief at all. Additionally, the General Counsel's brief used the word "reprisal" only once, and that was not in connection with any unfair labor practice allegation.

Neither in the complaint nor at hearing, nor in the posthearing brief, has the General Counsel placed the Respondents on notice of what words Pierce spoke which allegedly violated the Act in the manner described in complaint subparagraph 6(ee)(1). Moreover, it does not appear that the General Counsel presented any evidence to prove the allegations, I recommend that the Board dismiss them.

Complaint subparagraph 6(ee)(2) alleges that Respondent, by Pierce, "promulgated an overly-broad rule prohibiting employees from spreading rumors and/or promulgated such rule in response to employees' union and protected concerted activities."

The General Counsel's brief makes no reference to the promulgation of any rule. Likewise, it does not refer to any rule, policy or directive being overly broad.

The portion of the General Counsel's brief which apparently pertains to complaint subparagraph 6(ee), which is excerpted above, does refer to "rumors" three times but does not claim that the Respondent promulgated any rule about rumors. However, the brief did include the following:

> Pierce also said the Union never did anything for employees and that the rumors about managers getting bonuses for getting Culinary 226 out but employees not getting raises needed to stop. TR32:3652.

The transcript citation points to a portion of the testimony of employee Brenda Reyes concerning what Pierce told employees at a "huddle" meeting. According to Reyes, Pierce said "that the rumors needed to stop, rumors about being fired and raises, that there were rumors going around about management getting bonus pay if the hospital won over the Union." (Tr. 3652.)

On cross-examination, Reyes clarified that Pierce's reference to rumors concerned rumors that employees would lose their jobs if they supported the Union, that employees would be denied pay raises if the Union represented them, and that supervisors would receive bonuses if the Union no

[35] The next paragraph in the General Counsel's brief referred to another huddle in May 2022 but did not describe Pierce making any statement to employees.

longer represented employees at the hospital. Pierce denied the truth of all these rumors. Reyes testified:

> Q. Now, also want to be sure I got your testimony correct--you mentioned that in these huddle meetings that Mr. Pierce said that he had heard rumors about that people were going to be fired if they supported the Union. Do you recall that?
> A. Yes.
>
> Q. Okay. And isn't it true, I think you testified, that Mr. Pierce told people in the huddle that that was a false rumor, that no one was going to get fired for supporting the Union.
> A. Correct.
>
> Q. And similarly, isn't it also true that during these huddle meetings, when Mr. Pierce said that he had heard rumors that employees would get no more raises if the Union came in, that he said that rumor was also false, correct?
> A. Correct.
>
> Q. And again, similarly, in one of the huddle meetings, when Mr. Pierce said that he had heard rumors that managers were going to get a bonus if there was no Union at the hospital, that that rumor was also false, correct?
> A. Correct.

(Tr. 3673.)

Clearly, the rumors to which Pierce referred were false rumors. Indeed, they were statements which, had they been made by management, would constitute violations of Section 8(a)(1). Pierce wanted employees to stop saying that they would be discharged if they supported the Union, that they would be denied raises because of the Union, and that supervisors would receive bonuses if the Union didn't represent employees at the hospital.

It is not a violation of the Act to tell employees that certain false rumors needed to stop, when those rumors would have the same chilling effect on union activity as threats which would be unlawful if made by an employer. Moreover, there is no evidence that Pierce told employees not to discuss the hospital.

In sum, no evidence supports a finding that Pierce promulgated any rule, let alone an overly broad one, limiting employees' right to talk about the Respondents. Therefore, I recommend that the Board dismiss the allegations in complaint subparagraph 6(ee)(2).

Complaint paragraph 6(ee)(3) alleges that, by saying there were rumors going around "without explaining how they learned that information," the Respondents created an impression among their employees that their union and protected concerted activities were under surveillance.

The General Counsel's brief does not address this allegation at all. The brief, although 52 pages long, does not use either the word "surveillance" or "surveil" even once.

As noted above, the rumors conveyed the message that employees would be discharged if they supported the Union and would not receive raises if the Union represented them. Another rumor stated that managers would be rewarded if there were no Union at the hospital. If an employer had started any of these rumors, that employer would thereby violate Section 8(a)(1) of the Act. As a remedy for such unfair labor practices, that employer would have to post a notice which denied the messages communicated by the rumors and assured employees that they would not be discharged for supporting a union or be denied a raise if they were represented by a union.

But a supervisor telling employees that he had heard a rumor does not reasonably convey the message that the Respondents are spying on them. Any employee who heard a rumor that he might be fired for supporting the Union or lose a raise because of the presence of the Union, might go to the supervisor to ask whether the rumor was true. This kind of rumor naturally could prompt such an inquiry. Moreover, employees reasonably would know that it was not unlikely someone would ask a supervisor about the truth of such a rumor, and they would not assume that knowledge of the rumor resulted from unlawful surveillance.

Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ee)(3).

Complaint subparagraph 6(ee)(4) alleges that the Respondents, through Pierce, threatened employees that they would not have the ability to deal directly with Respondent Valley if they did not remove Culinary Local 226 as their collective-bargaining representative.

The General Counsel has not pointed to any testimony to support an argument that the Respondents made such threats. Perhaps surprisingly, the word "threat" does not appear at all in the General Counsel's brief except in a list of issues under "Statement of Issues." One of the listed issues is [w]hether the Respondent violated Section 8(a)(1) by making threats, denying employees Weingarten rights, engaging in closer supervision, and making statements of futility."

It seems odd that, after stating that one issue concerned whether the Respondents violated Section 8(a)(1) by making threats, the brief identified no statement as an alleged threat and did not even use the word "threat." Additionally, although the "threat" alleged in complaint subparagraph 6(ee)(4) concerns employees losing the ability to deal directly with management, the General Counsel's brief makes no reference to any statement about employees dealing directly with management. The word "deal" does not even appear in the General Counsel's brief.

Complaint subparagraph 6(ee)(4) appears to be another instance when the General Counsel, after alleging a violation neither withdrew it nor presented evidence to prove it. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ee)(4).

Complaint subparagraph 6(ee)(5) alleges that the Respondents, through Pierce, encouraged and/or instructed employees to report or identify prounion solicitors. The General Counsel's brief does not refer to this allegation and has identified no evidence to support it. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ee)(5).

Complaint subparagraph 6(ee)(6) alleges that the Respondents, through Pierce, threatened employees that union supporters could have harassment complaints lodged against them. However, the General Counsel has not identified any evidence to support this allegation. I recommend that the Board dismiss the allegations in complaint subparagraph 6(ee)(6).

Complaint subparagraph 6(ee)(7) alleges that the Respondents, through Pierce, invited employees to quit their employment in response to employees' union and concerted activities. However, the General Counsel has not identified any evidence to support this allegation and the General Counsel's brief makes no reference to it. I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ee)(7).

Complaint subparagraph 6(ee)(8) alleges that the Respondents, through Pierce, promulgated an overly-broad rule prohibiting bullying in the workplace in response to employees' protected union activity. The General Counsel's brief states that, during a "huddle" meeting with dietary department employees, Pierce told employees "that Culinary 226 was lying to them about Respondents and that employees should not let those employees bully the rest of them. TR21:2652–53."

The transcript citation refers to the testimony of employee June Edwards that, at a "huddle" in May 2022, Pierce told employees "don't let other employees bully you and you don't have to be in a union." (Tr. 2653) However, the words attributed to Pierce did not prohibit employees from bullying, as the complaint alleged. Rather, Pierce's words instructed employees not to be bullied.

The General Counsel has not cited any case authority or advanced any argument for the proposition that telling employees not to let others bully them violates the Act. Moreover, even assuming briefly for the sake of analysis that the Respondents had, in fact, prohibited bullying, the General Counsel has not explained how such a prohibition would violate the Act.

Because the General Counsel has failed to prove the conduct alleged, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ee)(8).

Complaint subparagraph 6(ee)(9) alleges that the Respondents, through Pierce, "by characterizing employees' union and protected concerted activities as bullying, threatened employees with unspecified reprisals for engaging in union and protected concerted activities."

Because the General Counsel's brief does not focus on individual unfair labor practice allegations, there is some uncertainty about exactly what words amounted to a characterization of employees' union and protected activities as "bullying." As quoted above, the General Counsel's brief did state that Pierce told employees that "Culinary 226 was lying to them about Respondents and that employees should not let those employees bully the rest of them. TR21:2652–53."

However, the General Counsel does not explain why the statements attributed to Pierce—that the Union is lying to employees and that they should not let pro union employees bully them—constitute a threat of reprisal. A threat of reprisal is a warning that *the employer*, the Respondents, will take some action if employees engage in protected activities.

Employees who heard a manager say that a union was lying and that they should not allow the union to bully them would not reasonably believe that their employer might take some action against them in retaliation for engaging in protected activities. It is, of course, possible to imagine a management representative going further with words that left the impression that protected activity would be deemed bullying and punished. The present record, however, would not support such a conclusion.

Additionally, the General Counsel has cited no case authority for the proposition that the conduct alleges in complaint subparagraph 6(ee)(9) violates the Act. Concluding that the government has not proven the allegations raised in this complaint subparagraph, I recommend that the Board dismiss them.

Complaint subparagraph 6(ee)(10) alleges that the Respondents, by Pierce, "blamed Culinary Local 226 for employees not receiving increased pay and having unfavorable benefits." The complaint thus states the General Counsel's conclusion about the words attributed to Pierce but does not reveal the actual words which the government considers violative.

The to prove this allegation, the General Counsel must offer more than a conclusion. The General Counsel must prove that Pierce spoke specific words and then explain why, under the totality of circumstances, those words communicated a threat of reprisal or a promise of benefit. However, the General Counsel has not done so. In effect, the General Counsel has done no more than lead the Board to a creek and say, "here, pan for gold."

The General Counsel has placed neither the Respondents nor the judge on notice of what words, attributed to Pierce, allegedly violate the Act. The government's burden of proof includes, at the outset, identifying the words which allegedly violate the Act. The General Counsel, not having identified these words, has failed to carry this burden. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ee)(10).

Complaint subparagraphs 6(ee)(11) and 6(ee)(12) both allege that the Respondents, through Pierce, promised employees benefits if they removed Culinary Local 226 as their collective-bargaining representative. Complaint subparagraph 6(ee)(11) alleges that the Respondents promised less conflict at work, an improved point system and/or more flexibility, and complaint subparagraph 6(ee)(12) alleges that the Respondents promised increased wages, retirement benefits, and education benefits.

The General Counsel's brief, quoted above, states that in May 2022, "Pierce directed several huddles in the cafeteria in which he discussed employees getting better benefits without Culinary 226. . ." The General Counsel's brief further states:

> During one of the huddles in May 2022, Pierce told the Dietary Department employees that their benefits would be better if they got the Culinary 226 out. TR21:2652. Pierce told employees that Respondents would send employees to school, give 401k, and that vacation and holidays would improve. TR21:2652.

The General Counsel's brief cites page 2652 of the hearing transcript, on which the following testimony of employee June Edwards appears:

Q. And do you remember what he said during that meeting? Pierce.
A. He was telling us about the hospital. If we was getting—if we get out the union, the hospital had like better benefits for us. He was saying they can send us to school. They don't tell us—the union was telling us lies about the pay, the raises, and he was saying the hospital had a 4Olk and then benefits aren't that bad and he was just telling us about the vacation days and holidays and was trying to get us to sign out the union. He wanted us to sign out the union. So every day, we was having huddles about that.

(Tr. 2652.)

However, on cross-examination, Edwards acknowledged that Pierce, when asked about a rumor that employees would receive a raise if the Union was voted out, said that this rumor was not true. (Tr. 2668.) Pierce thus denied that employees would get a raise if they were not represented by the Union. The denial communicates a clear message to employees that he was not making a promise that the Respondents would reward them if they voted out the Union. Employees reasonably would understand Pierce simply to be describing the compensation non-unit employees received.

In addition to the witnesses whose testimony was cited in the General Counsel's brief, several other employees testified about Pierce's statements during huddles in May 2022. There were at least two such huddles, and possibly more, at which Pierce spoke. The testimony leaves uncertain the exact dates of the huddles and what statements Pierce made at each.

According to employee Susana Cisnero, at one of the huddles, "Mr. Rick Pierce is telling us that for four years or since he started working there, the Union has not done anything for us. But if we are going to work for the hospital then we will have good benefits, a 4OlK, a chance to go to school." (Tr. 2242.)

Cisnero testified that Pierce also said "that I only want the best for you guys, if you are going to ask me, I want—I want the Union to be out." When asked whether Pierce explained what he meant by that, Cisnero answered "No, I don't--that's all I remember." (Tr. 2243.) Cisnero's testimony indicates that this huddle took place on May 3, 2022. (Tr. 2252–2253)

Thomas Burrell, who was working as a dietary employee at Valley Hospital in May 2022, attended two huddles at which Pierce spoke. He did not pinpoint the dates of these meetings.

According to Burrell, about 20 people attended a meeting at which both Pierce and Dietary Department Manager Alison McCain spoke. Burrell testified that "[t]hey were instructing us that we did not need the Union, that we were better off without the Union. That hospital had great benefits, and we didn't need our Union benefits." (Tr. 3537.) He further testified as follows:

Q. And what, if anything else, did Rick Pierce say?
A. That we didn't necessarily need the Union, and no one has ever gotten their job back after being terminated with the Union's help.

Q. And do you remember if Mr. Pierce said anything else?

A. No.

(Tr. 3538.)

Former dietary employee Florence Slade attended two huddles at which Pierce spoke, in May 2022. Her testimony largely focused on the first:

Q. Okay. Let's talk about the first one now. And what did Rick Pierce talk about?
A. He started with he wanted to talk about the Union and to let us know that there was some--they were going to talk to people, they were going to start -- he was going to start pulling people in his office to talk about the Union because the hospital was offering some great raises and benefits. That's what the meeting was about.

Q. And what kind of raises or benefits did he talk about?
A. He didn't say like the amount, but he did say that the hospital was offering some good raises and benefits and that they were going to start pulling people in one by one to talk to them about it.

Q. Okay. What else did he say?
A. That—--at that meeting he said, let me see. I believe he — at the meeting I believe that's all I can remember. That's what the focus was at that meeting, that he just wanted to let us know that the hospital is offering some great things and he was going to start pulling us in one by one.

(Tr. 2189.)

Slade admitted on cross-examination that Pierce had not called her in for such a one-on-one meeting. (Tr. 2203)(Tr. 2202).[36]

According to Slade, at the second huddle Pierce told employees that he "wanted us to stop spreading rumors and lies about the Union to our coworkers. And that he -- they wouldn't lie -- he wouldn't lie to us but we should stop telling people lies about the Union because the hospital is offering better things -- well, great things as far as the raises and the benefits." (Tr. 2190.)

[36] On cross-examination, Slade also testified as follows:

Q. And when Mr. Pierce spoke to you in the huddle, in May of 2022, as I understand your testimony he said that the employees had a right to their own opinion, correct?
A. Correct.
Q. And that employees had the right to choose, correct?
A. Yes.
Q. And that everybody should make up their own minds, correct?
A. Correct.
Q. And in fact he said people shouldn't be bullying one another one way or the other, right?
A. Yes.

As discussed above, other employees testified that Pierce had denounced as untrue rumors that employees would receive a pay raise if they rejected union representation. However, Slade said that Pierce was referring to a rumor that an employee, Demedrick Jefferson, was circulating a petition to remove the Union and was doing so on behalf of management.

Jefferson's nickname is "DJ." Slade testified that she and coworkers were "talking about how they were using DJ to have us vote the Union out." (Tr. 2199) Slade said that she and her coworkers felt "like this is the only reason why [Pierce] called the meeting, is because someone told him that we were going around talking about DJ asking people to sign the paper." (Tr. 2199.)

This difference between Slade's testimony and that of other employees who heard Pierce speak at a huddle is not the only reason I have doubts about the reliability of her testimony. There is also, to some extent, an internal inconsistency. At one point, Slade described Pierce as saying that he was going to pull people into his office to talk about the Union "because the hospital was offering some great raises and benefits. *That's what the meeting was about.*" (Tr. 2189, italics added.) But she also testified that the only reason why Pierce called the meeting was to refute the rumor that Jefferson, at the Respondents' behest, was asking people to sign an anti-union petition. (Tr. 2199.)[37]

Additionally, in August 2022, after Slade was involved in an altercation with another employee, Valley Hospital discharged her. The complaint does not allege that the Respondents violated the Act in doing so. Slade's discharge may affect her impartiality as a witness.

Additionally, based on my observations of the witnesses, I do not believe Slade's testimony is as reliable as that of other witnesses. Therefore, I do not credit it.

As noted above, complaint subparagraphs 6(ee)(11) and 6(ee)(12) allege that at "huddles" in May 2022, the Respondents, through Pierce, promised employees benefits if they removed Culinary Local 226 as their collective-bargaining representative. Complaint paragraph 10 alleges that this conduct violated Section 8(a)(1) of the Act.

An unlawful promise of benefits is an employer's statement to employees that it will do something - take some action - that rewards them if they reject union representation. For example, a statement that employees will receive a raise if they vote "no" in a representation election constitutes such an unlawful promise.

If an employer does not tell (or imply to) employees that it will take action which would result in some reward, but only describes existing terms and conditions of employment, then it has not acted unlawfully. Thus, in *Unifirst Corp.*, 346 NLRB 591, 593 (2006), the Board stated:

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[37] Although Slade testified that Pierce called the meeting because of a rumor about Demedrick Jefferson, Reyes testified that Pierce said that rumors about employees being fired and employees not receiving raises needed to stop. (Tr. 3646, 3652.) Edwards testified that Pierce, when asked about a rumor that employees would receive a wage if the union were voted out, said that the rumor was untrue. (Tr. 2668.) Edwards' testimony made no reference to Demedrick Jefferson. "However, I found no further reference to complaint subparagraph 6(ff) in the transcript."

> Under extant Board law, employers may make truthful statements to employees concerning benefits available to their represented and unrepresented employees, may compare wages and benefits at their unionized and nonunionized facilities, and may offer an opinion, based on such comparisons, that employees would be better off without a union.

From the credited testimony, it is clear that Pierce was telling employees about existing terms and conditions of employment then enjoyed by employees outside the bargaining unit. Pierce's message essentially was, to use Burrell's words, that the "hospital had great benefits, and we didn't need our Union benefits." (Tr. 3537.)[38]

Pierce was not stating that the Respondents would take any action to reward employees for rejecting the Union. Rather, he was just stating, in effect, that if employees rejected the Union, they would then receive the same benefits as other unrepresented employees.

Pierce explicitly told employees that a rumor—that if the employees ousted the Union, they would receive a raise—was untrue and had to stop. In view of Pierce's statement that this rumor was untrue, it seems unlikely that employees would understand his description of the existing terms and conditions of employment of unrepresented employees to be a promise to go beyond those existing terms by taking some action to grant a reward.

Accordingly, I conclude that Pierce did not make an unlawful promise of benefits. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraphs 6(ee)(11) and 6(ee)(12).

In sum, I conclude that the General Counsel has not proven any of the allegations raised in complaint subparagraph 6(ee) and recommend that the Board dismiss them in their entirety. Additionally, I recommend that the Board dismiss the allegations in complaint subparagraph 9(r) that Respondent Valley and Respondent UHS, by the conduct alleged in complaint subparagraph 6(ee), bypassed the Union and dealt directly with employees in the Culinary unit.

Complaint Subparagraph 6(ff)

Complaint subparagraph 6(ff) alleges that on a date in early May 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Blake and McKinnon, during a captive-audience meeting at Respondent Valley's facility: (1) interrogated its employees about their union membership, activities, and sympathies; and (2) provided more than ministerial assistance to employees during a decertification campaign by allowing Jefferson to solicit in support of decertification of Culinary Local 226 during the meeting. The Respondents deny these allegations.

The General Counsel's brief sheds no light on this allegation. Where was the meeting supposedly held? What did Blake or McKinnon say that constitutes the alleged interrogation? What

[38] Slade did testify that Pierce told the employees that the "hospital was *offering* some good raises and benefits" (Tr. 2189, italics added), but I do not credit this testimony.)

did Blake or McKinnon say or do to allow Jefferson to solicit support for the decertification effort? What did Jefferson do?

The General Counsel's brief provides no answers to these basic questions. So far as I can tell, it doesn't even provide a clue.

The General Counsel's presentation of evidence at hearing also failed to identify what testimony the government offered to support these complaint allegations.[39] This failure to place the parties on notice concerning the substance of the allegations has affected the Respondents' ability to defend against them. The Respondents' brief states that "it is not clear from the record, nor the Complaint, which specific meetings involving McKinnon or Pierce [that complaint subparagraphs] 6(dd), (gg), (ff), (hh) or (kk) are referencing."

From the Respondents' brief, it is clear that they have tried to figure out what meeting the General Counsel had in mind when drafting complaint subparagraph 6(ff). The brief discusses several meetings in May 2022 as possibilities.

Pierce, not McKinnon, spoke at two of these meetings, so these meetings don't quite match the description in complaint subparagraph 6(ff), which alleges that McKinnon and Blake made the statements to employees. The third possibility described in the Respondents' brief is a better match. Both McKinnon and Blake spoke at this meeting which, like the other two, took place sometime in

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[39] As noted earlier, at the outset of the hearing, I requested that counsel state the relevant complaint paragraph number when asking a witness questions. My search of the record found only this one instance in which counsel mentioned complaint subpar. 6(ff):

> MR. ZARATE: Your Honor, If I may, I'm just gonna identify the complaint allegations that I'm asking questions from Mr. McKinnon. It would be 4(a), 6(a), 6(b), 6(c), 6(h), 6(1), 6(m), 6(h), 6(i), 6(m), 6(n), 6(o), 6(r), 6(y), 6(cc), 6(dd), 6(ee), 6(ff), 6(gg), 6(ll), 6(oo), 7(a), 7(b), 7(f), 7(i), 8, and as you already identified, Your Honor, 9(h), and 9(s).
> JUDGE LOCKE: Okay. Well, identify them one at a time when you [adduce] testimony concerning the allegation because, obviously, it will help me to -- have -- you have two dozen allegations there. So I wanna know what allegations you're talking about -- getting testimony from the witness on a specific time.
>
> MR. ZARATE: Okay.
>
> JUDGE LOCKE: Thank you.
>
> (Tr. 215.)

"However, I found no further reference to complaint subparagraph 6(ff) in the transcript."

May 2022.

One employee, Betty Williams, testified about this meeting. Although her testimony about it was brief and sketchy, it bore some resemblance to the allegations in complaint subparagraph 6(ff). However, one problem makes a definitive conclusion impossible. Before asking Williams questions about the meeting, counsel for the General Counsel said, "we're going to go to 6(dd),7(f)." (Tr. 2274.) He did not mention complaint subparagraph 6(ff).

After making this announcement, counsel for the General Counsel asked Williams questions which leave in doubt exactly which meeting she was talking about:

> Q. BY MR. KEPIR: Ms. Williams, do you remember being in such other meetings in May 2022?
> A. Yes.
>
> Q. What do you remember from that meeting?
> A. So what I remember at that meeting, I remember hearing Glenn say we don't need unions here and we don't want unions here. And then I just remember DJ saying that yeah, because this is—this is a five or four, a five hundred company, or something to that effect. And, yeah. He said—yeah.
>
> Q. Was that a Fortune 500?
> A. Fortune 500 company. And I just know that that means that it's just a top of the line company and it was just listed to that. And I also know that DJ was just checking this paper because he was mad about a bill that he had with the union, that it was a high bill and the union didn't pay, didn't pay his bill.
>
> Q. So you said—let's back up. When Mr. McKinnon started to talk, what did he say?
> A. So when he started to talk, he just said we don't need unions here and DJ said something about yes, because this is a 500 fortune company. And then other workers were just talking and then they said something about they can get paid for their, you know. So DJ said that and then Michael, he was talking too. He was saying something about that—he was talking about how good the insurance was because he had surgery and it paid his bill. Michael said that. And everybody—and the thing about that, when Glenn said that, everybody was just looking around at each other.
>
> (Tr. 2275–2276.)

The vagueness of this testimony lessens my confidence in its reliability. Additionally, it is unclear that Williams was testifying about the meeting referred to in complaint subparagraph 6(ff). Counsel for the General Counsel began this questioning by asking if the witness remembered being in *such other meetings* in May 2022. That question suggests that Williams previously had been testifying

about a particular meeting. However, although counsel for the General Counsel had asked her general questions about "huddles," those questions had not focused on a particular meeting.

Then, after asking Williams if she remembered being in "such other meetings," counsel for the General Counsel asked Williams what she remembered from *that* meeting. Which meeting?

Because of this uncertainty, and because counsel for the General Counsel announced that he was asking questions about other complaint subparagraphs but did not mention 6(ff), I must conclude that Williams' testimony does not pertain to that subparagraph.[40] If there is any relevant testimony in the record, it must be considered well-buried treasure in need of a map with "X" marking the spot. The General Counsel has not provided such a map.

For the reasons stated above, I conclude that the General Counsel has not carried the government's burden of proof. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ff).

Complaint Paragraph 6(gg)

Complaint subparagraph 6(gg) alleges that on a date in early May 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by McKinnon, during a separate captive-audience meeting at Respondent Valley's facility than the one described above in paragraph 6(ff), blamed Culinary Local 226 for employees not receiving increased pay and retirement benefits. The Respondent denies this allegation.

It is unclear whether the General Counsel produced any evidence concerning this meeting. The General Counsel's brief does not refer to it. Additionally, although complaint subparagraph 6(gg) states that this meeting is not the same one referred to in complaint subparagraph 6(ff), there is uncertainty about which testimony, if any, pertains to the allegations in the latter complaint subparagraph.

Additionally, the General Counsel has not stated what McKinnon supposedly said which violated the Act. Alleging the conclusion that McKinnon blamed the Union suffices for the complaint, but proof requires facts.

Speech is presumed to be protected by the First Amendment, and the General Counsel bears the burden of proving that the supervisor made a statement which is unprotected because it constitutes a threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c). Such proof necessarily includes the words spoken. Moreover, due process requires the General Counsel to identify the allegedly unlawful words so that the Respondents can mount a defense, showing either that the supervisor did not speak the words or that the words were not unlawful, or both.

[40] Even if Williams' testimony did pertain to complaint subparagraph 6(ff), that testimony does not establish a violation of the Act. The words she attributes to McKinnon, that "we don't need unions here and we don't want unions here," constitute a lawful expression of opinion. Moreover, because of vagueness, her testimony is of limited probative value. It is insufficient, I believe, to establish any of the allegations in complaint subpar. 6(ff).

The General Counsel's brief does not identify what words allegedly were spoken by McKinnon which form the basis for the allegations in complaint subparagraph 6(gg). Statements made by counsel for the General Counsel during the hearing also fail to identify the allegedly offending words.

During the hearing, counsel for the General Counsel twice announced that he would be asking the witness questions pertinent to this complaint subparagraph. He made such announcements while examining Environmental Services Director Glenn McKinnon (Tr. 215) and also while examine Vice President of Labor Relations Jeanne Schmid. (Tr. 1887.) However, it is not possible to discern from the subsequent questions what words, attributed to McKinnon, form the basis for the allegations in complaint subparagraph 6(gg).[41]

Stated another way, in a meeting with employees, McKinnon supposedly said something that the General Counsel believes to be violative. Presumably, to address this putative violation, and to seek a remedy for it, the General Counsel included subparagraph 6(gg) in the complaint. However, the General Counsel has never revealed the words which allegedly constitute the violation and for which a remedy is sought.

The government does not even begin to carry its burden until it identifies the allegedly violative words. The General Counsel has not done so here. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(gg).

Complaint Paragraph 6(hh)

Complaint paragraph 6(hh) alleges that on "a date in early May 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS, by Pierce, at Respondent Valley's facility: (1) by characterizing employees engaging in union and protected concerted activities as calling Pierce a liar, threatened employees with unspecified reprisals for engaging in union and protected concerted activities; (2) by characterizing employees' union and protected concerted activities as illegal, threatened employees with legal action for engaging in union and protected concerted activities; and (3) interrogated its employees about their union membership, activities, and sympathies." The Respondent denies these allegations.

The meaning of complaint subparagraph 6(hh)(1) isn't clear. This complaint subparagraph appears to allege that Pierce characterized "employees engaging in union and protected concerted activities as calling Pierce a liar." What exactly does that mean?

The interpretation most faithful to the literal complaint language is that Pierce said to the employees "your engaging in union and protected concerted activities is calling me a liar." However, that interpretation, deeming the employees' union and protected activities to be a statement that Pierce was a liar, seems unlikely.

[41] Additionally, the testimony of neither McKinnon nor Schmid provides any basis for a finding that McKinnon made unlawful comments at any meeting of employees.

Perhaps the General Counsel meant to allege that Pierce accused employees of calling him a liar. If so, how would such a statement amount to a threat?

The General Counsel doesn't say. As already noted, the General Counsel's brief does not identify allegations by complaint paragraph or subparagraph. It also does not discuss the merits of individual Section 8(a)(1) allegations and often does not identify the evidence offered to support a particular allegation.

A word search of the General Counsel's brief found the word "liar" twice. The brief states that after one of the huddle meetings in May 2022,

> Pierce approached [employees] Espinoza and Reyes and asked them if they thought he was lying. TR32:3647. Espinoza told Pierce that she believed he was lying, and Pierce became angry and told Espinoza that he would not tolerate being called a liar. TR32:3647.

The transcript citations refer to part of the testimony of employee Brenda Reyes. According to Reyes, during the huddle, employee Karen Espinoza had said that employee Demedrick Jefferson (called "DJ") "was going around with the culinary employees with a petition for them to sign to try to get the Union out." (Tr. 3646.) Reyes testified that Pierce replied that he "wasn't aware of what was going on with that situation." (Tr. 3647.) Reyes further testified:

> Q. Okay. And what, if anything else, happened after that?
> A. After that huddle, Karen and I returned to the cafeteria. We were working next to each other. At about 10:30 a.m., Richard came out, and he asked us, more directed to Karen at first, if she believed that he was lying. And she says she believed he was lying. He became angry, very bold. I could tell he wasn't happy about it. And he said he wasn't going to tolerate being called a liar. Karen told him that she didn't want to talk about it anymore. And she then proceeded to go out through her right door that leads to the dish room. I then stayed there with him, and then he approached me, asking me if I believed he was lying. I said, yes, because I know he wasn't the only one involved in this, and, when McKinnon, housekeeping director was, too. And either he knew everything that was going on or he didn't. I said that it wasn't okay that DJ was approaching employees during the time clock and that it was illegal that he was doing that. Richard then responded to me saying that we were rumoring things about the hospital, too, and that that was illegal, too. . .
>
> (Tr. 3647–3648.)

The second time the word "liar" appeared in the General Counsel's brief was in a discussion of another huddle which took place in May 2022. This meeting followed the huddle discussed above. The General Counsel's brief states:

> During another huddle in May 2022, Pierce said that he wanted Culinary 226 out of

Respondent Valley. TR32-3652. Pierce also said the Union never did anything for employees and that the rumors about managers getting bonuses for getting Culinary 226 out but employees not getting raises needed to stop. TR32:3652. Pierce was also upset about being called a liar by employees and he also spoke to employees about Respondent Valley's 401k if the employees did not want to have a union. TR32:3652-53.

The General Counsel's brief cites the testimony of Reyes, who attended this second huddle. When she described this meeting, Reyes initially did not mention Pierce saying anything about lying. The General Counsel then asked her specifically:

> Q. Do you happen to remember whether Richard mentioned anything about lying at this huddle?
> A. Yeah, that he was being accused of being a liar just to get the employees to not vote for the hospital.
>
> (Tr. 3652.)

Although counsel for the General Counsel called Pierce as a witness, he did not ask Pierce any questions about this matter[42].

From Reyes' testimony, quoted above, I discern one statement which could constitute an unlawful threat. Reyes testified that, after the first of the huddles discussed above, Pierce came to the cafeteria where she and Karen Espinoza were working and asked if they believed he was lying. According to Reyes, she and Espinoza told him that they did believe he was lying, and he replied that he would not tolerate being called a liar.

Espinoza did not testify, so Reyes' account is uncorroborated. However, Pierce was not asked about and did not deny stating to them that he would not tolerate being called a liar. Accordingly, I credit Reyes' testimony is uncontradicted. Based on that testimony, I find that Pierce did make this statement.

Any person would be offended at being called a liar and, in the abstract, a supervisor's statement that he would not tolerate being called a liar by a subordinate would not violate the Act. However, in determining whether an employer's statement violates Section 8(a)(11), the Board considers the totality of the relevant circumstances. *Ellison Media Company*, 344 NLRB 1112, 1113 (2005), citing *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).

Pierce made the statement that he would not tolerate being called a liar soon after a huddle at which he discussed the Union. Employees at the meeting had told him about the efforts of

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[42] The word "liar" appears only once in Pierce's testimony, in response to a question about whether he had been alarmed when he heard that employee June Edwards had called him a "racist." Pierce testified that he had not been alarmed but did not necessarily remember why Edwards had "referred to Alice as an Uncle Tom and a liar and me as a racist." (Tr. 1235.) "Alice" presumably refers to Dietary Department Manager Alison McCain. This testimony has no relevance to the allegations in complaint subparagraph 5(hh).

Demedrick Jefferson to obtain signatures on a petition to oust the Union. Pierce had denied knowing about Jefferson's efforts.

Reyes and Espinoza did not believe Pierce's denial. By saying that he wasn't telling the truth, they were stating that he did know about Jefferson's actions and perhaps even implying that the Respondents assisted Jefferson's effort to oust the Union.

To determine whether a statement constitutes a threat under Section 8(a)(1), the Board considers whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), citing *Sunnyside Home Care Project*, 308 NLRB 346, fn. 1 (1992). In making this determination, the Board applies an objective standard and does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

At the time he made the "will not tolerate" statement, Pierce was director of the hospital's dietary department, in which Reyes and Espinoza worked. His statement that he would not tolerate being called a liar reasonably would make an employee fearful of adverse consequences if she called Pierce a liar or made any statement which might be construed as questioning Pierce's honesty.

Because the employees were questioning the truthfulness of statements made at a meeting where he expressed his displeasure with the Union, Pierce's statement that he would not tolerate being called a liar reasonably would create apprehension about engaging in protected activity. Therefore, I conclude that Pierce's statement that he did not tolerate anyone calling him a liar would violate Section 8(a)(1) of the Act.

However, does the rather cryptic language in complaint subparagraph 6(hh)(1) actually allege this to be the violation? Moreover, does the language in this complaint subparagraph place the Respondents on notice sufficient to prepare a defense? Preparing such a defense requires both knowledge of which facts are relevant and of the General Counsel's theory of violation.

The Respondents' posthearing brief includes a section addressing the allegations raised by complaint subparagraph 6(hh). It includes the following description of the facts:

> Reyes testified that during a dietary huddle in May 2022, a union supporting employee asked Pierce about an EVS employee, Demedrick Jefferson, soliciting decertification cards during work time. (Tr. 3646). According to Reyes, Pierce stated that he did not know anything about it. (Id.) Following this meeting, Reyes testified that Pierce approached her and the Union supporter and asked if they felt he was lying. When they replied yes, he became angry and indicated he would not tolerate being called a liar. (Tr. 3647)

However, a question remains as to whether the Respondents knew the General Counsel's theory of violation. That theory remains unclear but, for reasons discussed above, I believe the General Counsel may have reasoned that employees engage in protected activity when they express the

opinion that a manager is lying when he denies knowledge of, or involvement in, an employee's efforts to oust the Union. Therefore, the manager's stating that he will not tolerate being called a liar is tantamount to saying that he will not tolerate employees engaging in this particular protected activity. That, anyway, is my guess as to what the General Counsel intended to allege in complaint subparagraph 6(hh)(1).

However, assuming that to be the General Counsel's theory of violation, were the Respondents aware of it? Although the Respondents' brief mentions Pierce making the ~will not tolerate being called a liar" statement, the brief does not address whether the words constitute an unfair labor practice. It does not appear that Respondents considered this to be the General Counsel's theory of violation.

And perhaps it wasn't. The language of complaint subparagraph 6(hh)(1) is so enigmatic it would have challenged even the code–breakers at Bletchley Park to say, unequivocally, what it meant.

Counsel for the General Counsel's statements during the hearing also did not shed light on the meaning. During Reyes' testimony, counsel for the General Counsel announced that he was "moving on to paragraph 6(hh)" and then asked her questions about her meeting in the cafeteria with Union representatives. (Tr. 6664) These questions did not concern Reyes' encounter with Pierce after the huddle in May 2022.

After considerable questioning, counsel for the General Counsel stated "let me go ahead and correct -- I think I gave you the last few questions were for paragraph 6(hh). That was actually supposed to be 6, not 6(hh)." (Tr. 3670)

Additionally, when counsel for the General Counsel examined Pierce, he announced at one point that he would be asking questions about four complaint subparagraphs, including 6(hh). (Tr. 5372) However, he did not ask Pierce about the "would not tolerate being called a liar" statement.

In sum, I conclude that neither the complaint nor the General Counsel's statements during the hearing placed the Respondents on notice that the government was alleging the statement attributed to Pierce, that he would not tolerate being called a liar, to be an unfair labor practice. Similarly, the General Counsel did not place the Respondents on notice of any other possible meaning of the language in complaint subparagraph 6(hh)(1). Accordingly, I recommend that the Board dismiss this complaint subparagraph.

Complaint subparagraph 6(hh)(2) alleges that "by characterizing employees' union and protected concerted activities as illegal, threatened employees with legal action for engaging in union and protected concerted activities." This allegation presumably refers to another part of the same conversation, discussed above, in the hospital cafeteria. Reyes testified:

> I said that it wasn't okay that DJ was approaching employees during the time clock and that it was illegal that he was doing that. Richard then responded to me saying that we were rumoring things about the hospital, too, and that that was illegal, too.

(Tr. 3647–3648.)

Pierce did not deny making this statement. Based on Reyes' uncontradicted testimony, I find that he did.

Pierce clearly was referring to the rumors that he had denounced as false during the huddle. These rumors included that the Respondents would not give employees a raise if the Union remained their representative.

The fact that these rumors were false did not make them illegal. But does calling false rumors "illegal" amount to "characterizing employees' union and protected concerted activities as illegal" as the complaint alleges?

The rumors concerned bad things which would happen, such as not receiving a raise, if employees continued to be represented by the Union. It seems a bit odd to describe spreading that rumor as "protected activity." However, because spreading the rumor constituted a discussion of matters related to the Union and to terms and conditions of employment, I conclude that doing so was, in fact, protected.

One other false rumor stated that supervisors would be rewarded if the Union no longer represented the employees. Discussing this untrue rumor also would constitute protected activity.

Complaint subparagraph 6(hh)(2) further alleges that, by characterizing these rumors as illegal, the Respondents threatened employees with legal action for engaging in union and protected concerted activities. However, I do not conclude that any reasonable employee would believe that Pierce's statement threatened legal action.

Pierce's statement, that the rumors were illegal, came as a reaction to Reyes' statement that Jefferson's circulation of the antiunion petition was illegal. It was an offhand comment uttered in response to an accusation.

Pierce did not state that the Respondents were contemplating legal action against employees who circulated the false rumors. A logical gap separates "the statements are illegal" from "we're going to sue." Saying that something is illegal does not communicate that the speaker contemplates taking legal action to correct it.

Considering the circumstances and context, I conclude that a reasonable employee would not understand "the statements are illegal" to mean "we're going to sue." Therefore, I conclude that the General Counsel has failed to prove that the statement alleged in complaint subparagraph 6(hh)(2) violated the Act.

Complaint subparagraph 6(hh)(3) alleges that the Respondents, by Pierce, interrogated its employees about their union membership, activities, and sympathies. The complaint alleges that Pierce conducted this interrogation sometime in early May 2002, but otherwise gives no clue as to what he allegedly said that the General Counsel claims to be violative.

Neither does the General Counsel's brief. It makes no reference at all to any interrogation by Pierce.

Perhaps the General Counsel is alleging that Pierce engaged in unlawful interrogation when he asked Reyes and Spinoza if they thought he was lying. However, the General Counsel has not said so, and has not argued that such a question violated Section 8(a)(1) of the Act.

Pierce's question — did the two employees think he was lying - seeks to know whether these two employees believed Pierce was not telling the truth, when he denied knowledge of Jefferson's activities circulating the antiunion petition. He had given this denial during a meeting of employees at which he expressed the opinion that the employees did not need a union to represent them.

The test for whether an unlawful interrogation occurred is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); The Board considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Bloomfield Health Care Center*, 352 NLRB 252 (2008).

With respect to whether Reyes and Espinoza were open and active Union supporters, the evidence *suggests* that they were, but there is some doubt as to when their support for the Union became known. Reyes became a Union committee member in June 2022 and began wearing a Union button at work about the same time. (Tr. 3643–3644.) However, the complaint alleges that the unlawful interrogation occurred "on a date in early May 2022," a month before she began wearing the union button.

According to Reyes, during the early May 2022 huddle at which Pierce spoke - the huddle immediately preceding Pierce's asking them if they thought he was lying—Espinoza "brought up DJ [Demedrick Jefferson]. She mentioned that he was going around with the culinary employees with a petition for them to sign to try to get the Union out." (Tr. 3646.) Her raising this matter during the meeting would identify Espinoza as a union supporter, or at least leaning in that direction.

Reyes testified that Pierce replied that "he wasn't aware of what was going on with that situation." (Tr. 3647.) It appears that Reyes and Espinoza may have doubted that Pierce was telling the truth when he denied knowledge of Jefferson's antiunion activity but the record does not indicate whether either one of them spoke up at the meeting to question Pierce's truthfulness.

Rather, when asked about what happened next, Reyes did not describe any further discussion during the meeting but instead brought up Pierce's conversation with them after they returned to work in the cafeteria. So, the record does not clearly establish whether either Espinoza or Reyes was an open or active Union supporter at the time of the alleged interrogation.

As to the background of the interrogation, it took place immediately after the meeting at which Pierce denied knowledge of Jefferson's circulation of the petition. With respect to the nature of the interrogation, it consisted of one question: Did Reyes and Espinoza believe Pierce was lying.

The place of the interrogation was the cafeteria at which Reyes and Espinoza were working and the manner was direct and informal. The employees were not called from their workplace to the office of a management official or other locus of authority.

Considering these factors and all the circumstances, I do not conclude that Pierce engaged in an unlawful interrogation of the employees concerning their union activities or sympathies or those of other employees. Pierce's question sought information about the employees' attitude towards him, not their attitudes about the Union or unionization. Pierce also did not question the employees about their possible union activity or about the union activities of any other workers. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(hh)(3).

To summarize, I recommend that the Board dismiss all allegations raised in complaint subparagraph 6(hh).

Complaints Subparagraph 6(ii) and 9(r)

Complaint subparagraph 6(ii) alleges that from about May 2, 2022 to May 25, 2022, by posting flyers at Respondent Valley's facility, Respondent Valley and Respondent UHS: (1) threatened employees with lack of the ability to deal directly with Respondent if they do not remove Culinary Local 226 as their collective-bargaining representative; (2) threatened employees that they will have less success in the workplace by blaming Culinary Local 226 for a negative culture, non-collaborative relationship, and less flexibility, individual empowerment, and success at the workplace; and (3) promised employees a positive culture, a collaborative relationship, and more flexibility, individual empowerment, and success at the workplace if they remove Culinary Local 226 as their collective-bargaining representative.

Complaint subparagraph 9(r) alleges that, by this conduct, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Culinary Unit. The Respondent denies these allegations.

During the hearing, the General Counsel only asked one witness questions about complaint subparagraph 6(ii). That witness was Director of Environmental Services Glenn McKinnon.[43]

McKinnon identified a flyer[44] which he had received from higher management. He believed

[43] As discussed above, I directed counsel to identify the complaint allegation when asking a witness questions about it. Neither at the hearing nor in his posthearing brief has counsel for the General Counsel stated that he failed to comply with this requirement when presenting evidence about complaint subpar. 6(ii). The General Counsel only identified McKinnon as being questioned about this complaint subparagraph.

[44] The flyer, received into evidence as General Counsel's Exhibit 45, is a one-page document bearing the Valley Hospital logo and the following text:

An Opportunity and a Vote

As some of you may know, on May 2nd, employees in the Culinary bargaining unit at Valley

that the document had been posted in the hospital but was not absolutely sure. Likewise, McKinnon was uncertain whether employees had received copies of it. (Tr. 439-440)

Although the language in complaint subparagraph 6(ii) is not entirely clear, it appears to allege that statements in the flyer, rather than statements made about the flyer, constitute the violation. However, the General Counsel has not identified any particular statements, either in the flyer itself or statements made orally about the flyer, which allegedly violate the Act.

Because the General Counsel's brief includes no specific discussion about complaint subparagraph 6(ii), I looked for clues concerning what statements the government contends to violate the Act. That search was unsuccessful.

Neither the word "poster" nor the word "flyer" appears in that brief. A search did find one reference to the flyer's exhibit number but that reference only stated that Vice President of Labor Relations Schmid had provided a "petition announcement" to Human Resources Director Thorne and instructed her to hand it out. The reference sheds no light on what statements allegedly violate the Act.

Hospital filed a petition with the National Labor Relations Board (NLRB) asking that the NLRB conduct an election at Valley to determine whether the employees in the EVS and Dietary departments want to continue to be represented by Culinary. NLRB rules provide that a secret ballot election be held when at least 30% of the employees request one during certain window periods. We expect that the election will be scheduled to be held sometime in the coming weeks.

We are delighted that Valley employees have taken this step to reconsider their union status.

We wholeheartedly believe that voting "NO" to Culinary and giving us the opportunity to regain a direct relationship with our employees - and all the flexibility and individual empowerment that it provides - is the key to our future success.

And, now, for the first time in many years we are able to communicate with you about the issue of Culinary unionization vs. a direct relationship with the Hospital. We will spend some time in the coming weeks ensuring that every employee voter has this information and knows just how rare and important a chance this is to transform our culture to a positive and collaborative relationship that benefits our employees and patients.

The outcome of the election will be determined by the majority of those employees who vote. It is very important that every eligible employee casts an informed vote. Otherwise, a small minority of employees could decide the outcome.

The vote will be by SECRET BALLOT and conducted by the National Labor Relations Board. It will likely be in person at the Hospital. But, most importantly, no one will know how you vote.

Soon, the parties will be submitting their positions to the NLRB regarding the election details, including the dates and times of the election. We will communicate these decisions as we know them.

Indisputably, the General Counsel bears the burden of proving that the Respondents made a statement which constitutes an unlawful threat. To carry this burden, the General Counsel must begin by stating what words are allegedly threatening. If the exact words are not known, the General Counsel must describe the alleged statement as precisely as possible so that the message it reasonably would communicate to employees may be evaluated.

It is not enough for the General Counsel to introduce some documents into evidence and then tell the Board, "there's a threat in there, go find it." Figuratively speaking, the General Counsel may not require the Board to play a game of "Where's Waldo."

The requirement that the General Counsel must describe the allegedly violative statement is fundamental. Obviously, the Respondent must be placed on notice of the allegedly offending words so that it may prepare a defense.

This specificity requirement also is necessary to preserve the separation of the prosecutorial function from the judicial function. When Congress enacted the Taft-Hartley Amendments to the Act in 1947, it carefully and presciently separated the prosecutorial and quasi-judicial authority. Section 3(d) of the Act assigns prosecutorial power and discretion to the General Counsel, who exercises this authority independently.[45]

The General Counsel determines what conduct shall be prosecuted and the legal arguments for finding a violation, the "theory of the case." Not even the charging party, whose charge began the case and who is a full party, entitled to call, examine and cross-examine witnesses, may be heard to advance a different theory of violation. *Roadway Express, Inc.*, 355 NLRB 197, 201 fn. 16 (2010)("[t]he General Counsel controls the theory of the case, which the charging party is powerless to enlarge upon or otherwise change"), citing *Zurn/N.E.P.C.O.*, 329 NLRB 484, 484 (1999), and *Kimtrus Corp.*, 305 NLRB 710, 711 (1991).

The Act assigns the judicial function to the Board and administrative law judges act as the Board's agents. They have no authority to change the theory of the case. The Act not only gives that power to the General Counsel but makes the General Counsel's exercise of it final. 29 U.S.C. § 153(d).

The General Counsel thus has plenary authority to determine what statements should be prosecuted as violations of the Act. Although an unfair labor practice complaint typically does not set forth the exact language which the General Counsel deems unlawful, but rather describes it in conclusory fashion, such a specific allegedly unlawful statement nonetheless must exist. Indeed, if no specific statement existed, then the General Counsel would have no justification for including the allegation in the complaint.

If the General Counsel does not identify a specific statement alleged to be violative, the judge

[45] Sec. 3(d) of the Act provides, in part, that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board. . ." 29 U.S.C. § 153(d).

may be tempted to fill in this blank by looking through the record, finding some "usual suspects" and choosing one. However, the judge would then be performing a function which Section 3(d) of the Act assigns exclusively to the General Counsel. Only the General Counsel may decide which statements should be alleged as violations of the Act.

Along with this exclusive authority comes the duty to inform the Respondent in a timely fashion of the specific statement alleged to be violative, so that the Respondent can prepare a defense. Due process does not allow the government to cloak the factual basis for an allegation until it's too late to defend. Justice is not *Gotcha!*

The government must carry the burden of proving that Respondents made an unlawful statement. Until the General Counsel identifies the statement which constitutes the allegedly unlawful threat, the government has not even taken the first step. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraphs 6(ii)(1) and 6(ii)(2).

Complaint subparagraph 6(ii)(3) alleges that the Respondent "promised employees a positive culture, a collaborative relationship, and more flexibility, individual empowerment, and success at the workplace if they remove Culinary Local 226 as their collective-bargaining representative." However, that language merely pleads a conclusion and does not identify the statements which allegedly constitute such promises.

Again, the General Counsel has not identified the specific language which allegedly is unlawful. The General Counsel's brief does not even identify the document in which the supposed promises of benefits appear. It may well be General Counsel's Exhibit 45, introduced through the one witness the General Counsel questioned about this complaint subparagraph. However, the government's brief does not say so.

But even if complaint subparagraph 6(ii)(3) is referring to General Counsel's Exhibit 45, the government does not identify any portion of this document which it claims to be violative. The General Counsel does not explain why any particular statement in the flyer is phrased in such a way that it reasonably would be understood to constitute a promise that the Respondents would act to confer a benefit on employees rather than simply being an expression of opinion.

Because the General Counsel has not identified the specific statements which complaint subparagraph 6(ii)(3) alleges to be unlawful promises of benefit, the government has failed to prove any violation of the Act.

For these reasons, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(ii) in their entirety. Additionally, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(r), that Respondent Valley and Respondent UHS, by the conduct alleged in complaint subparagraph 6(ii), bypassed the Union and dealt directly with employees in the Culinary unit.

Complaint Subparagraphs 6(jj) and 9(r)

Complaint paragraph 6(jj) alleges that on about May 3, 2022, Respondent Valley and Respondent UHS, by Pierce, in the lobby at Respondent Valley's facility: (1) interrogated its

employees about their union membership, activities, and sympathies; and (2) promised its employees wage raises, better benefits, and a workplace free from bullying if they remove Culinary Local 226 as their collective-bargaining representative.

Complaint subparagraph 9(r) alleges that, by this conduct, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Culinary unit. The Respondents deny these allegations.

Susan Cisnero, a pantry worker in Respondent Valley Hospital's dietary department, testified that on May 3, 2022, she was at work, preparing for catering, when Dietary Department Director Rick Pierce approached her. No one else was around. According to Cisnero, Pierce asked her if she knew "something what's going on with the Union." (Tr. 2239-2240.) Her testimony continued:

Q. Okay. when -- when Mr. Pierce approached you, did he happen to explain what he meant?
A. Yeah, he said I asked him what's going on and he told me that it's about voting yes or no.

Q. Okay. And what if anything else happened?
A. He explained it to me that if -- that if we vote no it will -- the Union will be out and nobody will know.

Q. And what if anything else happened in this interaction?
A. He told me that -- he asked me if I had a raise, so I said that for working for almost working eight years there, I only had one raise and he told me that for eight years if you're working in the Valley Hospital you will have good benefits.

Q. Now, what if anything happened after that?
A. He did mention to me about the benefits and then he said that the bullying will stop.

Q. And was it determined whether he explained what he meant by bullying?
A. No, he didn't explain what he meant about bullying.

Q. Okay. And what if anything else happened during this interaction with Mr. Pierce?
A. Oh, we stopped when somebody showed up.

(Tr. 2240-2241.)

When Pierce testified, no one asked him about this specific conversation. No one else was present and I credit Cisnero's uncontradicted testimony.

It appears that Cisnero had somewhat limited fluency in English. Her answers do not always mean what, at first, they seem to mean. For example, the General Counsel asked her "what if any activities have you engaged in with the Union" since she began working at the hospital. She answered, "Well, activity like when we have like strike I participate."

When counsel for the General Counsel again asked her what kind of activities, she answered "Activities like the strike." (Tr. 2236)

However, there has been no strike, as Cisnero acknowledged during cross-examination:

> Q. BY MS. GRIFFITH: and I just want to be clear, Ms. Cisnero, the Union has never actually gone on strike, as far as you know, correct?
> A. Yes, they are not.
>
> Q. Okay. And they never have gone on strike, have they?
> A. No.
>
> (Tr. 2252)

The language difficulty makes it necessary to parse Cisnero's testimony carefully. For example, she testified that Pierce approached her and asked "if I know something what's going on with the Union." (Tr. 2239-2240.) At first glance, Cisnero's words seem to indicate that Pierce was asking about Union activities. However, Cisnero then testified that Pierce explained "it's about voting yes or no." (Tr. 2240.)

Thus, Pierce did not ask Cisnero about her Union activities, or those of other employees, but instead brought up the decertification election which then was on the calendar. Although it appears that Pierce then did discuss benefits received by employees outside the bargaining unit, Cisnero's testimony does not establish that made any promises. Likewise, although Cisnero quoted Pierce as stating that "the bullying will stop," her testimony does not suggest that Pierce promised that the Respondents would take any action to achieve that result.

To the extent that Cisnero's testimony is ambiguous, and capable of being interpreted in more than one way, the burden falls on the General Counsel to show that the interpretation favored by the government is more likely than not. However, the General Counsel has not carried that burden.

The evidence also fails to establish that Pierce, by talking about the wages and benefits received by employees outside the bargaining unit, bypassed the Union and dealt

directly with employees. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraphs 6(jj) and 9(r).

Complaint Subparagraph 6(kk)

Complaint subparagraph 6(kk) alleges that on about May 5, 2022, Respondent Valley and Respondent UHS, by Pierce, at Respondent Valley's facility, interrogated its employees about their union membership, activities, and sympathies. Complaint subparagraph 9(r) alleges that by this action, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Valley Culinary Unit. The Respondents deny these allegations.

The General Counsel's brief does not discuss this allegation and it is not entirely clear what conduct the government alleges to violate the Act. During the hearing, counsel for the General Counsel asked two different witnesses questions pertaining to complaint subparagraph 6(kk), but the witnesses do not appear to have been describing the same events.

Complaint subparagraph 6(kk) appears to describe a particular conversation, and only one of the two witnesses gave testimony which appeared to fit that description. That witness was Valley Hospital kitchen employee Merian Delgado.

Delgado testified that, on May 5, 2022, he went into the walk-in refrigerator to get some milk and juices and found that Dietary Department Director Pierce was already inside. He further testified:

> Q. Uh-huh.
> A. So when he -- he -- when he saw me, he told me like see -- see how my co-workers react every time I -- whenever -- he said whenever I talk about the Union.
>
> Q. And did he say anything else?
> A. No, he -- and then after that of him telling me, he said like I feel sorry for us, he felt sorry for us about our situation, about the Union and -- yeah.
>
> Q. And what did you say? How did you respond?
> A. I -- I Respondent [sic] like don't be sorry about our decision because this is going to be our decision. And -- yeah.
>
> Q. Did he say anything about bullying or intimidating?
> A. And then -- and then he told me to like don't get intimidated with my co-workers or in my voting or something like that. I can't recall.

(Tr. 2225)

Pierce also testified and during that testimony, counsel for the General Counsel announced that he would be asking questions about a number of allegations, including complaint subparagraph 6(kk). (Tr. 1266) However, he did not ask Pierce about the May 5, 2022 conversation described by Delgado. Neither counsel for the General Counsel nor Pierce even mentioned Delgado. Counsel for the General Counsel also did not ask Pierce about any conversation, with any employee, in the walk-in refrigerator.

Pierce did not deny making the statements which Delgado attributes to him and I credit Delgado's testimony. However, I conclude that Pierce did not unlawfully interrogate Delgado concerning the Union activities or sympathies of Delgado or other employees.

Delgado testified that, when Pierce saw him, "he told me like see -- see how my co-workers react every time I -- whenever -- he said whenever I talk about the Union." It is possible that Delgado used "I" to refer to himself. However, because Delgado was quoting Pierce, I believe it more likely that Pierce was using "I" to refer to himself, Pierce.

In any event, Pierce was making a comment, not asking a question. It is true, of course, that someone can effectively ask a question by making a statement, particularly a provocative statement, and waiting for a response. However, I do not believe that to be the case here.

Nothing Pierce said, as described in Delgado's testimony quoted above, invites an employee to provide information about his or other employees' union membership, activities or sympathies. Therefore, nothing he said violates the Act.

However, it remains unclear whether complaint subparagraph 6(kk) is referring to this May 5, 2022 conversation in the walk-in refrigerator. It is true that counsel for the General Counsel announced that his questions would pertain to complaint subparagraph 6(kk) before asking Delgado about this conversation. But, when counsel for the General Counsel asked Pierce questions concerning this same complaint subparagraph, he did not ask about Pierce's conversation with Delgado.

As noted, the General Counsel's posthearing brief does not identify or discuss allegations by complaint paragraph or subparagraph number, and the fact that this brief does not mention Pierce's May 5, 2022 conversation with Delgado reveals little about the relevance of this conversation to complaint subparagraph 6(kk). However, the Respondents' brief, which does refer to and discuss allegations by complaint subparagraph number, also does not mention this conversation in the refrigerator.

The Respondent's brief discusses complaint subparagraph 6(kk), together with a number of other complaint subparagraphs, in a section titled "McKinnon, Blake and Pierce's Conduct in May 2022 Did Not Violate Section 8(a)(1)." But, as already noted, the brief does not mention Pierce's May 5, 2022 conversation with Pierce.

> Two factors lead me to conclude that complaint subparagraph 6(kk) is, in fact, about Pierce's May 5, 2022 conversation with Delgado. First, counsel for the General Counsel specifically stated that his questions were about this complaint subparagraph before eliciting Delgado's testimony about the conversation. Second, complaint subparagraph 6(kk) specifically mentions the May 5, 2022 date, the conversation occurred on that date, and the record reveals no other event which took place on that date.

However, counsel for the General Counsel did not refer to this conversation when he asked Pierce questions pertaining to complaint subparagraph 6(kk). Rather, he asked Pierce questions about other matters, notably, what Pierce said to employees during the meetings called "huddles." Therefore, in the interest of completeness, I will discuss them below.

As noted, during his testimony, Pierce did not specifically refer to any meeting on about May 5, 2022. However, Pierce did state that he gave employees copies of a notice (General Counsel's Exhibit 45) discussing a decertification petition which had been filed on May 2, 2022. (Tr. 5375.) He also gave employees another notice on about May 26, 2022. (General Counsel's Exhibit 64) This notice stated that there would not be a decertification election. (Tr. 5376)

After the distribution of the May 25, 2022 notice, Pierce did not speak any further with employees about the Union. It appears that he may have received word from higher management not to discuss the Union but his testimony does not confirm that speculation. Pierce did not provide a responsive answer to the question "who told you not to talk about the union anymore after the 25th of May?" (Tr. 5378.)

During the period between about May 2, 2022 and about May 25, 2022, Pierce did discuss the Union with employees during at least some of the huddles. Counsel for the General Counsel asked him about the number of huddles in which he had "communicat[ed] with employees about the vote" and Pierce answered "a couple." (Tr. 5373.)

Pierce's testimony that he had "a couple" of huddles at which he talked about "the vote" does not rule out the possibility that he spoke with employees about the Union - but not specifically about the election — during other meetings. Pierce testified that the "conversations would be to let the employees know what their options were is all. So there -- the hospital had benefits. We just talked about that. But other than that, I mean we didn't go into depth about benefits." (Tr. 5374.)

It seems likely that some employees, considering whether to decertify the Union, were curious about the benefits, such as a 401(k) plan and health insurance, which hospital personnel not in the bargaining unit received. Pierce further testified about discussions during these meetings:

> So we had employees that had, at that time could openly talk about their concerns and whether they wanted to, you know, how they felt, what they wanted to do. I didn't ask them how they were going to vote, what way or any of that. But they just had concerns. There were concerns from hospital staff rightly so that those who, you know, wanted the union there and those who, who, you know, thought the department would be better off

> without the union. There were two sides to, and everyone had an opinion on those two sides. So they had voiced some concerns and, you know, it was just like I can't talk to you about that now. So things had changed. But the employees, it was they were in the middle, a lot of them, and you know, I felt bad for them. Whatever side they were on, I felt bad for them because it was just kind of up in the air. So it was concerning at that time. But, you know, after the 25th we just couldn't speak openly about the union anymore and where it was going and how it was going down. It's just we couldn't talk about it.
>
> (Tr. 5377–5378.)

Pierce's somewhat vague testimony does not establish that he engaged in unlawful interrogation, as alleged in complaint subparagraph 6(kk). It does not suggest that Pierce asked any employee either about the employee's own union or protected activities or about the union or protected activities of other employees. Similarly, this testimony does not indicate that Pierce questioned any employee about the union sympathies of that employee or other employees.

Under *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), to determine if a supervisor's statements constitute an unlawful interrogation, the Board considers whether, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees' Section 7 rights. See, e.g., *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). However, it is not possible to apply a *Rossmore House* analysis to the questions a supervisor asked if there is no evidence that the supervisor asked questions.

The General Counsel has not presented any evidence of specific questions Pierce asked, if he asked questions, either during the huddles or at other times, such as during his May 5, 2022 conversation with Delgado. The evidence does not establish that Pierce interrogated employees concerning their Union membership, activities or sympathies. Therefore, the General Counsel has failed to carry the government's burden of proving that Pierce's words reasonably would interfere with, restrain or coerce employees in the exercise of Section 7 rights. Accordingly, I recommend that the Board dismiss the allegations raised by complaint subparagraph 6(kk).

Complaint Subparagraphs 6(ll) and 9(r)

Complaint subparagraph 6(ll) alleges that on "about May 6, 2022, Respondent Valley and Respondent UHS, by McKinnon, during a meeting with employees at Respondent Valley's facility: (1) blamed Culinary Local 226 for Respondent Valley . . . maintaining an unfavorable 8-point attendance system; (2) blamed Culinary Local 226 for employees having a 10-minute break with no walk time to get to the cafeteria; (3) blamed Culinary Local 226 for the discharge of an employee; and (4) promised employees more flexibility with respect to discipline and attendance if employees remove Culinary Local 226 as their collective-bargaining representative.

Complaint subparagraph 9(r) alleges that, by this conduct, Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees in the Valley Culinary unit. The Respondents deny these allegations.

Once during the hearing, counsel for the General Counsel announced that he was asking questions relevant to complaint subparagraph 6(ll). During his examination of Environmental Services Director Glenn McKinnon, counsel for the General Counsel stated he would be asking questions about a number of complaint allegations and then listed 24 different complaint subparagraphs, including complaint subparagraph 6(ll). Although I then requested that counsel identify each complaint subparagraph when asking questions about that subparagraph, he did not thereafter mention complaint subparagraph 6(ll).

McKinnon's testimony includes no reference to a May 6, 2022 meeting. Because complaint subparagraph 6(ll) alleges that McKinnon blamed the Union for "an unfavorable 8-point attendance system," I searched his testimony for any reference to such a system. One such reference occurred when the General Counsel asked about McKinnon's communications with employees:

> Q. Have you ever—have you ever had communications where you've interpreted the CBA with employees without a union representative?
> A. My interpretation, sir, is solely what I have is I will quote—I will read it with them. That's it. I don't go in and try to define it for any employee.
>
> Q. You don't explain to them what the language says in the CBA?
> A. I will read it, and if it says that you have eight attendance points before a separation, I will specifically read it as that from the contract.
>
> (Tr. 148.)

A second reference appeared later in McKinnon's testimony. The General Counsel again was inquiring into what McKinnon told employees about the collective-bargaining agreement ("CBA"):

> Q. Now, you've spoken about the -- Or, you've spoken about the CBA with employees, correct?
> A. Multiple times. Yes, sir.
>
> Q. Okay. And when you talk to the employees about the CBA, you do that both in your huddles and in one-on-one meetings?
> A. So one-on-one meetings would be vague. I don't discuss it on a one-on-one meeting, unless it's specific to a cause that is directly related of a situation which involves them or safety of a hospital that involves them or in a huddle that we're generalizing that you must have -- for example, lunch breaks within a four-hour window. The attendance, for example, is eight points, maximum, 15.02 of the CBA, that type of, it, would be discussed.
>
> Q. Okay. Now, you remember instances in which employees from a huddle mention to you that they want to talk to you about the contract?
> A. Oh, that's not uncommon, for clarification. I'm sorry, sir?
>
> Q. You said, for clarification?
> A. Yeah. There's employees that often will come and ask for clarification,

like, how many points? Well, where does it say we have to have a lunch break in four hours? You know, a four-hour window, I should say, from start, and stuff like that. So we definitely will help them out and say, "Hey, look, this is where it is," you know, and show them. We don't have an issue with that at all. It's our collective bargaining agreement. It's not theirs and ours. It's all of ours that we have to comply with.

Q. So you simply point them to the right article or the right page on the CBA, correct?

A. Only specifically if they say attendance, then I will go to article 15.02, and say, here you go. Here's a breakdown on the points. Here's the attendance policy and procedures. It's up to them to interpret it.

(Tr. 5165–5166.)

McKinnon further testified that for clarifications, he always referred employees to the Union or human resources. (Tr. 5166.)

Nothing in McKinnon's testimony, quoted above, describes any communication resembling the allegations in complaint subparagraph 6(ll). Because this complaint subparagraph also alleges that McKinnon promised employees "more flexibility" if they removed the Union as collective-bargaining representative, I searched his testimony for the word "flexibility." It did not appear.

The General Counsel's posthearing brief also proved unilluminating. Because the brief does not identify or discuss allegations by complaint paragraph or subparagraph, I searched the brief for any reference to May 6, 2022, the date given in complaint subparagraph 6(ll). That search was unsuccessful.

Then, I searched the General Counsel's brief for other terms found in complaint subparagraph 6(ll). First, I searched the brief for any reference to "8-point" but found no such reference.

Then, I searched the brief for "attendance system." Again, the search was unsuccessful.

Then, I searched the General Counsel's brief for "10-minute break." This search, too, was unsuccessful.

Then, I searched the General Counsel's brief for "walk time," but did not find that phrase.

Then, I searched the General Counsel's brief for "flexibility" but that search also turned up no results.

If the General Counsel has offered any evidence to prove the allegations in complaint subparagraph 6(ll) it is well hidden. Certainly, McKinnon's testimony, quoted above, does not establish any violation of Section 8(a)(1).

Complaint subparagraph 9(r) alleges that, by the conduct alleged in complaint subparagraph 6(ll), Respondent Valley and Respondent UHS bypassed the Union and engaged in direct dealing with employees in the Valley Culinary unit. However, management certainly has a right to discuss the collective-bargaining agreement with employees. Discussing what the contract does and doesn't allow hardly constitutes trying to reach a deal with employees in contravention of the collective-bargaining agreement.

In *The Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000), the Board described the criteria to be applied in determining whether a supervisor's conversation with an employee constitutes unlawful direct dealing. The Board considers whether (1) the supervisor was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the Union.

McKinnon's testimony establishes that his conversation was with union-represented employees. However, it does not prove that the discussion was for the purpose of establishing or changing wages, hours or other terms and conditions of employment. It also does not establish that there was any attempt to exclude a union representative. The General Counsel has not identified any other evidence relevant to the allegations raised by complaint subparagraph 6(11).

Accordingly, I conclude that the General Counsel has not carried the government's burden of proof with respect to either complaint subparagraph 6(ll) or 9(r), Therefore, I recommend that the Board dismiss these allegations.

Complaint Subparagraphs 6(mm) and 9(r)

Complaint subparagraph 6(mm) alleges that on about May 14, 2022, Respondent Valley and Respondent UHS, by [Dietary Department Manager Alison] McCain, at Respondent Valley's facility: (1) threatened employees with unspecified reprisals for engaging in union and protected concerted activities; (2) interrogated its employees about their union membership, activities, and sympathies; and (3) promised increased wages and other unspecified benefits if employees removed Culinary Local 226 as their collective-bargaining representative.

Complaint subparagraph 9(r) alleges that, by the conduct alleged in complaint subparagraph 6(mm), the Respondent bypassed the Union and dealt directly with employees in the Valley Culinary unit. The Respondents deny these allegations.

Counsel for the General Counsel twice announced that he was asking questions relevant to this complaint subparagraph. Once was during the examination of Florence Slade, who worked at Valley Hospital from October 19, 2015, to about August 10, 2022. (Tr. 2186.) She was a cafeteria employee in the bargaining unit represented by Culinary Local 226 and a member of that Union. (Tr. 2187.) Counsel for the General Counsel, after stating that the questions pertained to complaint subparagraph 6(mm), asked Slade the following:

> Q. Okay. Now, do you remember any interaction or meeting with Alice McCain?
> A. Yeah. One—the first, it was in May also actually, the first time she

talked to me during May, I believe if it was May 14th if I'm—if I'm not mistaken and she called me into her office actually.

Q. And what did she talk to you about? Well, first of all, was there anybody else when she called you to the office?
A. Just the workers that run the tray line, that are working in the kitchen usually, but no.

Q. Were you alone in the office with her?
A. Yeah, she—she asked me to come into her office and to close the door.

Q. Okay. And what did you talk to her about when you met with her?
A. While her question was, what is it about the Union, is how she put it.

Q. Okay. And what did you respond?
A. I just Respondent [sic] that I was told that we're not supposed to have this conversation, was my first response.

Q. And did she clarify what did she mean by that question? Did she ask more?
A. She said no, it's nothing personal, it's just -- no. She said it's -- we're not going to get in trouble, she is just—I don't know if she said it's not personal or it's just a question. I don't remember how she stated it actually, but she wanted to know what is it that I liked so much about the Union. Like why do I fight so hard for the Union.

Q. Okay. And what did you tell her?
A. I don't want to have the conversation, was my sentence then.

Q. Okay. And how did it go, what was her response?
A. She asked again and I just told her again that I don't want to have a conversation.

Q. What happened next?
A. She said she's going to have to change my thinking.

Q. Okay. Did she clarify, you're thinking about what?
A. No, she seen the aggravation in my face and just said she—just don't worry about it, she's going to have to changed my thinking, and she let me leave the office.

(Tr. 2192–2194.)

Although McCain testified, she wasn't asked about this matter. Slade's testimony is uncontroverted.

The test set forth in *Rossmore House*, above, will be used to determine whether this questioning was unlawfully coercive, That test involves weighing five factors.

The first factor concerns whether there is a history of employer hostility and discrimination. The answer is yes. Previously, the Board found that in 2017, the Respondents had unlawfully withdrawn recognition from the SEIU Local 1107 as the representative of a bargaining unit of nurses at Valley Hospital and the representative of two bargaining units at Desert Springs Hospital. *Valley Health System LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 (2020).

In another prior case, the Board found that the Respondents unlawfully ceased dues-checkoff deductions after their collective-bargaining agreements with SEIU Local 1107 expired. *Valley Health System LLC d/b/ Desert Springs Hospital Medical Center*, 372 NLRB No. 33 (2022). The Respondents' prior history of violating the Act weighs in favor of finding that the interrogation of Slade was unlawfully coercive.

The second *Rossmore* factor concerns the nature of the information sought? More specifically, did the interrogator appear to be seeking information on which to base taking action against individual employees? Essentially, McCain asked Slade why she favored the Union.

McCain's question did not concern other employees' union activities but only Slade's. However, it was part of McCain's attempt to change Slade's thinking. Presumably, the change in thinking would be from being for the Union to being against it. Therefore, the second factor weighs in favor of finding a violation.

The third factor concerns McCain's position in the management hierarchy. As patient services manager, McCain was relatively low in the hierarchy. It appears from the record that McCain was Slade's immediate supervisor but there is some uncertainty.

The fourth question factor concerns the place and method of interrogation. McCain conducted the questioning in her office, after calling Slade away from work. An interrogation in a supervisor's office tends to be more coercive, so this factor weighs in favor of finding a violation.

The fifth question: Were Slade's replies truthful? Slade declined to answer why she favored the Union. Moreover, Slade's facial expression conveyed such hostility to the questioning that McCain did not press the matter but rather allowed Slade to return to her work. An employee's refusal to answer the supervisor's questions weighs in favor of finding the interrogation coercive. *Nestlé USA, Inc.*, 370 NLRB No. 53, slip op. at 14 fn. 47 (2020).

At least four of the five Rossmore House factors weigh in favor of finding a violation. The Respondents have admitted McCain's supervisor status.

For the reasons discussed above and considering the totality of circumstances, I conclude that McCain's interrogation of Slade violated Section 8(a)(1) of the Act. *Garten Trucking LC*, 373 NLRB No. 94 (2024). Therefore, the General Counsel has proven the unlawful interrogation alleged in complaint subparagraph 6(mm)(2).

Complaint subparagraph 9(r) alleges that, by the conduct alleged in complaint subparagraph 6(mm), the Respondents have bypassed the Union and dealt directly with employees. However, McCain's question to Slade is too vague to constitute, or be regarded as, an attempt to deal with employees concerning their terms and conditions of employment.

Slade's credited testimony carries the General Counsel's burden of proving an unlawful interrogation, as alleged in complaint subparagraph 6(mm)(2). However, Slade's testimony does not prove either a threat of unspecified reprisals, as alleged in complaint subparagraph 6(mm)(1), or a promise of increased wages and other unspecified benefits, as alleged in complaint subparagraph 6(mm)(3).

However, Counsel for the General Counsel also elicited testimony from another witness concerning this complaint subparagraph. Specifically, he announced that he was asking questions pertinent to complaint subparagraph 6(mm) during his examination of Susan Cisnero. (Tr. 2241.) She testified that during a huddle in May 2022, McCain described the 401(k) plan available to employees outside the bargaining unit. (Tr. 2242-2243.)

However, Cisnero's testimony does not indicate that McCain went beyond describing the existing benefits received by employees outside the bargaining unit. Therefore, this testimony does not establish that McCain made an unlawful promise of benefits.

Cisnero also testified that on another occasion, on a date she could not recall, she spoke with McCain while both of them were in the storage room. Only the two of them were present.

According to Cisnero, McCain asked her what kind of retirement plan she had and she replied that she did not have one, except for the Union's retirement plan. Cisnero testified that McCain "told me that the retirement plan from the Union is not enough, I need to have a 401K so that the company will match it." (Tr. 2244) This conversation did not proceed further because someone else came in.

The General Counsel's brief does not discuss this testimony. It does not mention Cisnero at all.

Cisnero's testimony, quoted above, does not establish any violation of the Act. Counsel for the General Counsel did not ask any other witnesses, besides Cisnero and Slade, questions relevant to the allegations in complaint subparagraph 6(mm).

Therefore, I conclude that the General Counsel has not carried the government's burden of proof with respect to either complaint subparagraph 6(mm)(1) or subparagraph 6(mm)(3). Additionally, I conclude that the General Counsel has not proven unlawful direct dealing, as alleged in complaint subparagraph 9(r).

Accordingly, I recommend that the Board find that Respondent Valley Hospital violated the Act by the conduct alleged in complaint subparagraph 6(mm)(2) but dismiss the allegations raised by complaint subparagraphs 6(mm)(1), 6(mm)(3), and 9(r).

Complaint Subparagraph 6(nn)

Complaint subparagraph 6(nn) alleges that on about May 31, 2022, Respondent Valley and Respondent UHS, by Pierce, during a captive-audience meeting at Respondent Valley's facility: (1) by blaming Culinary Local 226 for employees' terms and conditions of employment being in limbo, threatened employees that union representation was futile; (2) by blaming Culinary Local 226 for employees' terms and conditions of employment being at square one, threatened employees that union representation was futile; and (3) threatened employees with loss of raises because they expressed exuberance concerning the dismissal of a decertification petition. The Respondents denies these allegations.

The complaint alleges the conclusion that the Respondent "threatened" employees. Pleading a conclusion is appropriate in a complaint. However, the conclusions in a complaint are merely "proposed" conclusions, namely, the conclusions sought and advocated by the General Counsel (and opposed by the Respondent). The authority to make dispositive conclusions rests with the Board.

The Board bases its conclusions on facts. Tell the Board what was said and the Board will determine whether that statement is a "threat," within the meaning of the law. The Board's work may be likened to that of a geologist determining whether a particular mineral sample is gold or iron pyrite, "fool's gold." The geologist cannot reach a conclusion without first looking at the rock.

If a prospector wants a geologist to determine that a sample is gold, the prospector must bring the sample to the geologist for examination. Likewise, if the General Counsel wishes the Board to determine that an employer made a statement which is a threat, the General Counsel must bring those words before the Board for assay. Only then can the Board examine the statement and reach a conclusion.

Here, the General Counsel has not presented the words in question for examination. Even if the record includes testimony about what was said, the General Counsel must identify a specific statement for the Board to assay. That is particularly important because the difference between a lawful statement and an unlawful threat can be subtle.

To determine whether a statement constitutes a threat under Section 8(a)(1), the Board considers whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *El Paso Electric Co.*, 350 NLRB 151, 152 (2007); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). Such a determination - whether a statement reasonably tends to restrain, coerce or interfere with employees' rights - cannot be made without examining the statement.

However, the General Counsel has not pointed to any specific statement for the Board to examine. Although the General Counsel's brief describes Pierce speaking to employees at huddles, it

says nothing about the specific allegations raised in complaint subparagraph 6(nn). It does not identify any particular utterance which the General Counsel claims to violate the Act.

During the hearing, counsel for the General Counsel asked only one witness questions about complaint subparagraph 6(nn). (Tr. 1266 et seq.) This witness was Dietary Department Director Pierce. None of Pierce's testimony establishes the allegations. For example, the General Counsel did not even ask him whether he made a statement that employees' terms and conditions of employment were at "square one," as alleged in complaint subparagraph 6(nn)(2).

The General Counsel did ask Pierce if he remembered "telling anything about I guess things were looking in limbo" because the decertification petition had been dismissed. Pierce answered that "the dismissal would still be in limbo because we were still negotiating. Nothing had changed. The department has been in limbo for -- for seven years." (Tr, 1280.)

However, the General Counsel did not ask Pierce if he said anything *BLAMING THE UNION* for conditions being "in limbo." The gravamen of complaint subparagraph 6(nn)(1) is not that Pierce said that conditions were in limbo but that he blamed the Union.

Indeed, both complaint subparagraph 6(nn)(1) and subparagraph 6(nn)(2) allege that Pierce blamed the Union. However, the General Counsel has not held up for inspection any particular sentence or utterance and said "here is where he blamed the Union."

The need for the missing information is particularly apparent when considering the third allegation in complaint subparagraph 6(nn). Complaint subparagraph 6(nn)(3) alleges that the Respondents "threatened employees with loss of raises because they expressed exuberance concerning the dismissal of a decertification petition."

That is the General Counsel's conclusion, but upon what is it based? Whether or not a statement is a threat very much depends on the exact wording.

For reasons discussed earlier in this decision, the judge is not free to rove through the record prospecting for unfair labor practices. Doing so would intrude upon the General Counsel's authority granted by Section 3(d) of the Act. 29 U.S.C. § 153(d).

Because the General Counsel has not identified the statements which allegedly violate the Act, the government has not carried its burden of proof. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(nn).

Complaint Subparagraph 6(oo)

Complaint subparagraph 6(oo) alleges that about July 22, 2022, Respondent Valley and Respondent UHS, by McKinnon and Pierce, at Respondent Valley's facility, engaged in surveillance of employees engaged in union activities. The Respondents deny this allegation.

Valley Hospital Medical Center operates a cafeteria and reserves one table for use by representatives of Culinary Local 226, who meet there with bargaining unit employees. The complaint does not allege that the Respondents violated the Act by requiring union representatives to use this

table.

In the summer of 2022, Timothy Mertikas was working for the Union as a law clerk. His duties included going to the hospital to speak with employees. Mertikas described such a meeting, sometime in July 2022, when he and another representative of Culinary Local 226 named Alber Mora, and two employees sat at the Union's table in the cafeteria. The two employees, Mertikas stated, were on the Union's bargaining committee. (Tr. 2091.) He identified them as Brenda Reyes and an employee named Alberto, whose last name Mertikas did not know. Reyes testified that the employee's name was Alberto Ayala. (Tr. 3664.)[46]

According to Mertikas, while they were sitting at the table, Dietary Department Director Rick Pierce "came out from the back of the house and stared at us and made it known that he was there." (Tr. 2071.) However, Mertikas did not recall Pierce saying anything to him or the others sitting at the Union table. (Tr. 2072)

Rather, Mertikas testified, "both Alber and I both made eye contact with him. It was clear he was looking at us. And so, he came out that first time, kind of went back around, then walked through a few more times while we were there with workers." (Tr. 2071.)

Mertikas did not recall either he or Alber Mora saying anything to Pierce. Mertikas further testified:

> Q. Could you tell us, what, if anything else, happened?
> A. And so we were meeting with workers, talking about organizing. And then a few minutes after that first interaction with Rick, Glenn McKinnon came out and sat at the adjacent table to us with a few of his either leads or kind of supervisors -- yeah, they sat next to us.
>
> Q. You say they sat next to you. So this was at—can you explain to us, was this at a table next to you?
> A. Yeah, so there was a table. It was about 10 to 15 feet away. It was the adjacent table. The rest of the cafeteria was [inaudible] at the time, so there were many booths open and also lots of other tables in other corners, and they chose to sit next to us.
> Q. When Mr. McKinnon and these other two individuals sat at that table, do you happen to remember which way they were facing when they sat down?
> A. It was a circular table, so they all were kind of facing each other. So probably one of them was looking at us. The other two were looking at each other.
>
> Q. What, if anything, happened next?
> A. So we were talking with the workers still. We tried to keep our voices down since management was right there and Rick was walking through.

[46] Ayala did not testify. Neither did the union representative, Alber Mora.

> Glenn McKinnon, after this meeting with the workers that we had was probably, approximately 40 minutes to an hour, and Glenn was there probably about 25 of those minutes. He then got up and left the cafeteria. He sort of came by a few times more walking past the entrance to the cafeteria while we were still meeting and looked in. Alber was kind of paying attention to that and was kind of letting me know when he was coming by so that we know to make sure to not talk too loud so the management could hear.
>
> Q. Now the other two individuals that were with Mr. McKinnon, do you happen to remember who they were?
> A. I don't recall their names. They were two female leads or supervisors.
>
> Q. And when Mr. McKinnon got up and left, did those two other female leads or supervisors, did they stay at the table?
> A. No, they left with him.
>
> (Tr. 2072–.2072)

On direct examination, Mertikas did not mention a fact that he later admitted on cross-examination: McKinnon was having lunch. (Tr. 2089.) Also on cross-examination, Mertikas stated that he did not know the identities of the two people with McKinnon and did not know their job titles. (Tr. 2089) Mertikas further testified on cross-examination as follows:

> Q. Now you also indicated that this situation that you've described for us only occurred on the one occasion out of the four or five or six that you were at Valley Hospital. Correct?
> A. Yes.
>
> (Tr. 2090–2091.)

During cross-examination, Mertikas admitted that he did not know the duties of the two supervisors, McKinnon and Pierce, whom he saw in the cafeteria while he was speaking with the two employees. However, he did acknowledge that supervisors generally make rounds in their departments to make sure their operations are running smoothly. (Tr. 2090.)

Pierce, who was director of the dietary department in July 2022, oversaw operation of the kitchen and cafeteria, and his office was in that area. (Tr. 1176.) His supervision of the cafeteria necessarily entailed being in the cafeteria at various times.

Environmental Services Director McKinnon was, as Mertikas admitted, having lunch in the cafeteria. According to Mertikas, "there were many booths open and also lots of other tables in other corners, and they chose to sit next to us." (Tr. 2073.)

The words "sit next to us" may suggest a more intimate proximity than warranted by the facts. Mertikas estimated that the two tables were separated by 10 to 15 feet. (Tr. 2072–2073.)

However, the fact that a manager chose to have lunch at a table relatively close to the Union's table does not, by itself, establish that management was engaged in unlawful surveillance of employees' union activities. More important is what the manager was doing and particularly which way he was facing.

Mertikas testified that McKinnon and the two people with him were sitting at "a circular table, so they all were kind of facing each other. So *probably one of them was looking at us*. The other two were looking at each other." (Tr. 2071, italics added.) Thus, Mertikas could not even say for sure that one of the three people at McKinnon's table was watching him. He only testified that one of them *probably* was looking at his group. Moreover, he did not identify this person as McKinnon.

Mertikas's testimony that "they all were kind of facing each other" certainly does not suggest that McKinnon and his group had any interest in what the people at the Union table were doing. The General Counsel's claim that McKinnon was engaged in surveillance boils down to nothing more than McKinnon sitting at a table having lunch.

Mertikas testified that McKinnon and the people with him were at their table about 25 minutes and then left. (Tr. 2073.) This fact, too, suggests that McKinnon's purpose in the cafeteria was simply to eat lunch. Employees have a 30-minute lunch break. (Tr. 2092.)

Mertikas further testified that after McKinnon left the cafeteria, he walked by the cafeteria entrance a few times and looked in. (Tr. 2073.) But on cross-examination, Mertikas admitted that McKinnon wasn't pacing back and forth. Mertikas also acknowledged that the human resources office was on the same floor as the cafeteria, as was the elevator to the basement, where McKinnon's office was located. (Tr. 2096.) To go to or from the human resources office, McKinnon would pass by the cafeteria entrance.

Mertikas also testified that he saw McKinnon stop "at the doorframe" - presumably the doorframe to the cafeteria entrance - "and sort of ran his finger along the top of the doorframe like he was checking for dust or something and looked inside the cafeteria." (Tr. 2075.) However, there is nothing suspicious or out of the ordinary when the environmental services manager, responsible for cleanliness, checks for dirt.

After Mertikas and the other union representative finished speaking with the employees, they left the cafeteria and went downstairs to check on work schedules. They took the elevator back to the first floor. According to Mertikas, they turned towards the door and the other Union representative, Alber Mora, "said to me that Rick is right behind us." (Tr. 2083.)

Mertikas testified that they turned toward Pierce, made eye contact but said nothing, and "then Rick Pierce just sort of went the other way." (Tr. 2083.) It isn't clear whether the General Counsel asserts that this encounter is part of the allegedly unlawful surveillance. However, it hardly seems unusual that, when Mertikas and Mora got off the elevator on the floor where Pierce worked, they might happen to see him.

The General Counsel seeks to turn perfectly ordinary behavior—one manager eating lunch in the hospital cafeteria and another manager going about his job supervising the cafeteria—into unlawful conduct. The evidence does not establish either surveillance or the appearance of surveillance.

Therefore, I recommend that the Board dismiss the allegations raised in the complaint subparagraph 6(oo).

Complaint Subparagraph 6(pp)

Overview: The first two subparagraphs of complaint subparagraph 6(pp), as amended, allege that employee Shanlee Gouveia engaged in certain protected, activities, namely, making concerted claims about wages, hours and working conditions, and that these claims related to a collective-bargaining agreement allegedly in effect between Culinary Local 226 and Respondents Valley and UHS during the period January 1, 2013 to December 31, 2016.

The next 10 subparagraphs alleges that certain of the Respondents took various disciplinary actions against her. The final subparagraph alleges that the Respondents took these disciplinary actions because she engaged in the specified protected activities and to discourage other employees from doing so.

Complaint subparagraph 7(j) alleges that Respondent Valley and Respondent UHS engaged in the conduct described in subparagraphs 6(pp)(3) through 6(pp)(11) because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities.

Later paragraphs in complaint allege that the described conduct violates the Act. The Respondents deny all these allegations, which are described in more detail below.

Allegations

The alleged protected activities**:** Complaint subparagraph 6(pp)(1) alleges that between about December 2019 and May 10, 2021, Gouveia, with other employees, concertedly complained to Respondent Valley and Respondent UHS regarding the wages, hours, and working conditions of Respondent Valley and Respondent UHS's employees, and that these claims included Respondent Valley's and Respondent UHS's incorrect handling of leave requests, incorrect application of their attendance policy, retaliation against employees for raising legal complaints, failure to pay employees meal pay, failure to give Bluetooth headphones to employees represented by Culinary Local 226 as a Christmas gift, and asking Gouveia to write false statements about the conduct and performance of other employees.

Complaint subparagraph 6(pp)(2) alleges that the claims raised by Gouveia, described in subparagraph 6(pp)(1), relate to a collective-bargaining agreement described earlier in the complaint and allegedly in effect between Culinary Local 226 during 2013, 2014, 2015, and 2016.

The alleged discrimination against Gouveia: Complaint subparagraph 6(pp)(3) alleges that during about October and November 2020, Respondent Valley and Respondent UHS failed to pay their employee Gouveia meal pay.

Complaint subparagraph 6(pp)(4) alleges that about November 25, 2020, Respondent Valley, Respondent USHDI, and Respondent UHS changed Gouveia's schedule.

Complaint subparagraph 6(pp)(5) alleges that about January 8, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS disciplined Gouveia.

Complaint subparagraph 6(pp)(6) alleges that about February 1, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS demoted Gouveia from a lead attendant position to an attendant position.

Complaint subparagraph 6(pp)(7) alleges that about February 1, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS changed Gouveia's work schedule.

Complaint subparagraph 6(pp)(8) alleges that on about February 11, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS disciplined Gouveia.

Complaint subparagraph 6(pp)(9) alleges that on about February 12, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS disciplined Gouveia.

Complaint subparagraph 6(pp)(10) alleges that on about March 15, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS disciplined Gouveia.

Complaint subparagraph 6(pp)(11) alleges that on about March 25, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS disciplined or attempted to discipline Gouveia.

Complaint subparagraph 6(pp)(12) alleges that from about March 25, 2021, to about May 10, 2021, Respondent Valley, Respondent USHDI, and Respondent UHS more closely supervised Gouveia's work.

Complaint subparagraph 6(pp)(13) alleges that on about May 10, 2022, Respondent Valley, Respondent USHDI, and Respondent UHS discharged their employee Gouveia.

The alleged motivation: Complaint subparagraph 6(pp)(14) alleges that Respondent Valley, Respondent USHDI, and Respondent UHS engaged in the conduct described in subparagraphs 6(pp)(3) through 6(pp)(13) because Gouveia engaged in the activities described above in paragraph 6(pp)(1), and to discourage employees from engaging in these or other concerted activities.

The alleged legal conclusions: Complaint paragraph 10 alleges that the actions described above violate Section 8(a)(1) of the Act. Complaint paragraphs 11 and 12 allege that the actions described in complaint subparagraphs 6(pp)(4) through 6(pp)(11) also violate Sections 8(a)(3) and 8(a)(4) of the Act, respectively.

Facts

Shanlee Gouveia began work in the environmental services department of Valley Hospital Medical Center in April 2019. She claims to have been hired as a lead attendant. One document placed in evidence by the General Counsel is consistent with that claim.

General Counsel's Exhibit 237 is an "Overtime Payment Agreement" form which Gouveia signed and dated on March 27, 2019, several weeks before her first day of work in mid-April 2019. In

the blank space for job title, she wrote "Lead - AVIS." After testifying that she filled out this form during her employee orientation, Gouveia explained, "They promised me lead, so that was my title." (Tr. 4141)

Because Gouveia herself wrote the word "lead" in the space for her job title, the form does not establish that the Respondent offered her a job as a lead when it hired her. In fact, the Respondent denies doing so.

It is possible that when Gouveia applied for work, someone told her she would be eligible to become a lead employee, a position which requires the candidate to complete a training period. If someone made that statement to her, she might have interpreted it as a promise. However, Gouveia never identified the individual who supposedly made such a statement. Her testimony, even if credited, would fall short of establishing that a supervisor or agent of the Respondent promised to place her in a lead position, either when hired or later.

Moreover, it seems unlikely that someone promised Gouveia that she would become a lead attendant immediately because initially, the Respondents offered Gouveia only parttime employment, as a "per diem" employee. She did not become a full-time employee until later.

The director of the environmental services department, Glenn McKinnon, testified that Gouveia was never a lead employee, but was in training to become a lead. (Tr. 287.) For the following reasons, I do not credit Gouveia's testimony and instead credit that given by McKinnon.

Gouveia's Credibility

My observations of the witness lead me to the strong conclusion that her testimony is unreliable. Even mild questions, with no obvious emotional import, caused her either to be genuinely and inexplicably distressed or to act as if she were. One such instance occurred when Respondents' counsel, Patricia Griffith, was cross-examining Gouveia about her requests for time off work, which Gouveia stated had been denied:

> Q. Do you recall asking for time off in April of 2020?
> A. April of 2020? I don't remember asking time off because I wasn't—I wasn't working. I wasn't working in April of 2020. I wasn't working. I was still trying to get my like my job back.
>
> Q. Wasn't that in 2021?
> A. No, it was 2020. There was like a period in 2021 I—oh my God. I didn't work for a while. And I didn't ask for time off because I was already getting sick from working in the—in the ER department—oh my gosh. I'd never—I didn't work. I did work too much in April, so I didn't request any time off, ma'am. I'm getting so frustrated. [Long pause]
>
> JUDGE LOCKE: You doing okay?
>
> THE WITNESS: Not really, Your Honor. I'm just trying—I can be so frustrated or breakdown and cry or get angry. I'm trying to keep it together right now.

JUDGE LOCKE: Very well. Ms. Griffith—

THE WITNESS: I'm so stressed out right now.

(Tr. 3943–3954.)

At one point during cross-examination, the Respondents' counsel asked questions concerning Gouveia's testimony that management had denied some of her requests for time off. The Respondents' attorney showed the witness one request, from March 2020, which appeared to bear Gouveia's signature. (R.Exh. 176.) However, Gouveia testified that the signature was not hers. (Tr. 3955.) She likewise denied that signatures on several other documents were hers, even though they appeared to be.)

In March 2020, Gouveia had worked at Valley Hospital for less than 1 year. The Respondents' counsel, apparently seeking to show that more senior employees had requested to take off work on the days sought by Gouveia, asked about her anniversary date:

Q. And you would agree with me, would you not, Ms. Gouveia, that April of 2020 would have been your first year anniversary at the hospital?
A. Yes.

Q. And was there any significance to that in terms of how much time you had available to take off?
A. No. No, because I never—oh, and April—oh, excuse me.

THE WITNESS: I'm sorry, Your Honor, I'm so overwhelmed right now.

JUDGE LOCKE: What was the question again?

MS. GRIFFITH: I think it was whether the fact that April was her first year anniversary whether that impacted at all how many days that she was -- had available to take off. That's a paraphrase.

JUDGE LOCKE: It doesn't seem like a too stressful question.

THE WITNESS: I understand and I did make a year with Valley, but it's just that whole year, you're not understanding was real hard. And yes, I—yes, you have to maintain how much points -- how much time you can take off. Yes, you're correct on that, ma'am.

JUDGE LOCKE: You said earlier that you didn't want to come back tomorrow.

THE WITNESS: I don't want to re-testify. It's hard enough for me to do it the second -- the second time.[47] My mental health is not the best, Your Honor, and I've been

[47] Gouveia gave testimony in a previous unfair labor practice proceeding, *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 28-CA-234647. The judge characterized

> struggling with that. And I—I am trying so hard to keep it together. I took my medication and everything and I can't—I can't seem to calm myself down.
>
> (Tr. 3955–3957.)

After a 5-minute recess, Gouveia stated that she did not wish to testify further: "For my own mental health, I prefer not to continue right now." (Tr. 3957.) Although I recessed the hearing for the rest of that afternoon, when it resumed the next day, counsel for the General Counsel stated that Gouveia had told him "she's still not in the right state to continue with her testimony today." (Tr. 3967.) She returned to complete her testimony several weeks later.

At times, Gouveia testified while hiding her face behind her upraised arms. The questioning was not harsh and would not be expected to elicit such a reaction.

However, more than unusual sensitivity affected Gouveia's perception. She believed that one or more people were altering documents about her. Gouveia neither identified these individuals nor provided a reason why they would take such extraordinary actions.

Some of the documents Gouveia believed altered were her medical records. She testified as follows on cross-examination:

> Q. And do you recall telling the National Labor Relations Board that when you went to the hospital emergency room to get your records, that you believe that the hospital had falsified your medical records by changing the names of the nurses who had provided treatment to you?
>
> A. Yes, because I worked at Valley, I got treated at Valley Emergency Hospital Room. That's why I knew my records were altered because I knew the people that took care of me that day was not the same as when they gave me my medical records. I don't --
>
> Q. And do you know why anyone would bother to falsify your medical records to change the name of the health care provider?
>
> A. I don't know, ma'am. I don't know. I just when I got it everything wasn't -- they said that I never got sick at Valley. I got sick at Valley; I don't understand why all my medical records were changed. The notes that were previously taken when I was inside the emergency room, was different from what I had received for the medical records.
>
> Q. And are you claiming, Ms. Gouveia, that somebody in the Environmental Services Department management changed your medical records from the emergency room?

Gouveia's testimony as "confusing and unfocused. Even more suspicious was her inability to get through her direct examination without breaking down several times due to her emotions but during cross-examination she suddenly became steely and could not recall events. I cannot credit Gouveia's testimony." *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, JD(SF)-25–21, slip op. at 32 (2021)(footnote omitted).

A. Yes, ma'am. Because they took them forever for them to give me my medical records when I constantly asked Glenn and HR. Like I said, it was a back and forth for a while before I could even get my job back.

(Tr. 3914–3915.)

It seems rather improbable that an environmental services department manager would have access to medical records in the hospital's emergency room. However, even assuming such access, it seems even more unlikely that any manager would use such access to modify a patient's treatment record. That is particularly true in light of the penalties imposed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[48]

Because of the potential penalties, only some compelling reason would motivate a manager to take the risk. Gouveia has not shown that any manager had such a reason. Rather, she concluded that an environmental services department manager had changed her medical records because "they took them forever for them to give me my medical records when I constantly asked Glenn and Human Resources." (Tr. 3915.)

Gouveia's reasoning—inferring that a manager had altered her medical records from the fact that she did not receive them quickly—suggests a tendency to leap to unfounded conclusions. Gouveia also believed that someone else was signing her name on documents.

When an employee receives a disciplinary action, such as a warning or suspension, the supervisor asks the employee to sign a form. Gouveia testified that someone had forged her signature on several such forms. (Tr. 3925–3930; R. Exhs. 60, 63–65.) For example, on cross-examination, the Respondent showed Gouveia a form, Respondents' Exhibit 64, pertaining to her failure to complete mandatory training:

Q. Okay. And if we go down to the bottom by employee signature, there's a date of November the 11th of 2020, correct?
A. Correct.

Q. Is that your signature, Ms. Gouveia?
A. I do not recognize that signature.
Q. And when you say that, do you mean to say that someone else handwrote on that document above of employee signature?
A. Yes. I did not sign that document, ma'am.

Q. Any idea who might have done so?
A. No.

[48] Public Law 104-191. Under Section 1177 of that law, a person who wrongfully and knowingly obtains individually identifiable health information may be fined not more than $50,000, imprisoned for not more than 1 year, or both. There are greater penalties when the information is obtained under false pretenses, and still greater penalties when the information is obtained with intent to sell or to use for certain specified purposes. See 42 U.S.C. § 1320d-6.

Q. Any idea why they might have done so?
A. I wouldn't know why.

(Tr. 3927–3928.)

No evidence, apart from Gouveia's testimony, establishes or even suggests that anyone else signed her name to the discipline forms. However, she held this belief—or professed to hold it—even though she could not say who had forged her signature or why. Gouveia's testimony therefore suggests either an irrational thought process or a lack of candor.

Gouveia testified that, before beginning work at Valley Hospital, she "was with the food and beverage industry for over 20 years, management." (Tr. 4153.) Gouveia was in her early 30s when she began work for the Respondent in 2019. If she had 20 years of management experience at that time, she would have become a manager at about the age of 13.

In sum, Gouveia's testimony never made close friends with reality. Instead, it appeared that, in Gouveia's memory, truth grappled with confabulation. At any given moment it was difficult to know which was winning, but confabulation had truth on the ropes often enough that none of her testimony can be deemed trustworthy. Accordingly, I have no confidence in Gouveia's testimony, and do not credit even that part which she gave while not hiding her face.[49]

Likewise, I do not believe Gouveia when she attributed to managers Millet and McKinnon a number of statements which either would constitute violations of Section 8(a)(1) or at least evidence of animus. For example, she testified that McKinnon told her if he caught her outside protesting (with other union supporters) he would "automatically fire me" (Tr. 3769, 36775); that he called Union supporter Sandra Villalobos a "crybaby" who reported "too much incidents to the Union" (Tr. 3770); that he wanted to get rid of Union supporters (Tr. 3771); that he tried to get Gouveia to "sign papers to leave the Union and to get the Union out of the hospital" (Tr. 3772); and that he was using a computer to tamper with Family Medical Leave Act records to get employee Villalobos fired (Tr. 3774–3775). Gouveia testified that Millet told her to stop telling employees to check their paychecks to see if they received a meal allowance (Tr. 3783). I do not credit her testimony regarding these statements, which I believe to be fabrications, or about any other statements which Gouveia attributes to managers or supervisors.

Gouveia's Protected Activity

Complaint subparagraph 6(pp)(1) alleges that Gouveia engaged in various protected activities, including protesting the Respondents' attendance policies and handling of leave requests,

[49] Therefore, I do not credit her testimony that she was hired as a lead. Rather, based on the credited testimony of Environmental Services Director McKinnon (see, e.g., Tr. 287) and the documentary evidence, I find that Gouveia did not begin work with the Respondents as a lead employee but later, around November 2019, began training for that position.

complaining about the Respondents' asserted failure to pay employees a meal allowance, and objections to the Respondents' supposed retaliation against employees "for raising legal complaints." This complaint subparagraph also includes a reference to an unidentified person asking Gouveia to write false statements about the conduct and performance of other employees.

Complaint subparagraph 6(pp)(2) alleges that these protected activities related to a 2013-2016 collective-bargaining agreement which Valley Hospital had entered into with Culinary Local 226.[50] Presumably, the General Counsel is referring to Gouveia's testimony that she told other workers to check their paychecks to be sure they were receiving the meal allowance. However, because I do not credit any of Gouveia's testimony, I find that the General Counsel has failed to prove that Gouveia made such statements.

Gouveia stated that she testified against the Respondent on March 24, 2024, at a Board hearing. (Tr. 3831-3832) The Board's own records are consistent with this testimony. Based on the decision[51] of the Hon. Amita Bayman Tracy, who presided in *Valley Hospital Medical Center*, Case 28–CA–-234647 et al., I find that Gouveia testified as a rebuttal witness for the General Counsel on or about March 24, 2021.

Testifying in a Board proceeding certainly is protected activity, indeed, activity specifically protected by Section 8(a)(4) of the Act.[52] Accordingly, I find that Gouveia did engage in protected activity on or about March 24, 2021. However, based on the credited evidence, I find that she did not engage in protected activity before that date.

The 8(a)(3) and (4) Allegations

To analyze allegations that Respondents discriminated against employees because of their protected activities, I follow the framework described by the Board in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To prove a violation, the General Counsel first must establish that employees' protected activities were a motivating factor in an employer's decision to take an adverse employment action. If the General Counsel does, it creates a presumption that the employer has violated the Act. To rebut this presumption, the employer must prove that it would have taken the same action even in the absence of protected activity.

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[50] Presumably, the General Counsel included this allegation because an employee's invocation of a right arising out of a collective-bargaining agreement constitutes protected activity even if the employee acted alone. See *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495, 500 (2d. 1967); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

[51] JD(SF)-25–21.

[52] Sec. 8(a)(4) of the Act makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4).

To prove that employees' protected activities were a motivating factor in the employer's decision, the General Counsel must prove 4 things: (1) The existence of protected activity by employees; (2) that the employer knew about the protected activity; (3) that the employer harbored animus towards union or other protected activity; and (4) that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

First, I will use this analytical framework to examine the allegations in complaint subparagraphs 6(pp)(3) through 6(pp)(10). These subparagraphs allege that the Respondents took actions against Gouveia on various dates between about October 2020 and March 15, 2021. This time period ended before Gouveia testified in the Board hearing conducted by Judge Tracy. Therefore, none of the actions alleged in complaint subparagraphs 6(pp)(3) through 6(pp)(10) could constitute retaliation for Gouveia's later protected activity, testifying in a Board proceeding.[53]

However, Gouveia did not engage in any protected activity until after the events described in complaint subparagraphs 6(pp)(3) through 6(pp)(10). The Respondents clearly could not have been motivated to retaliate against Gouveia for her protected activity before she engaged in that activity.

Even should the General Counsel prove that other employees engaged in protected activity, and even should such activity be considered in the *Wright Line* analysis, such protected activity, by itself, would not carry the government's initial burden. To satisfy the initial *Wright Line* requirements, the General Counsel also would have to prove both the existence of animus and a causal link between Gouveia's protected activity and the adverse action.

The violations found in this case, and violations found by the Board in previous decisions, suffice to satisfy the third *Wright Line* element, animus. However, the General Counsel also must establish a causal connection between the protected activity and the adverse employment action. *Tschiggfrie Properties, Ltd.*, above.

One indication of such a link would be evidence that the managers who made the decisions concerning Gouveia's employment, more specifically, the actions alleged to be violative, harbored animus. However, no credible evidence establishes the presence of animus in any such manager.

Certainly, Gouveia gave testimony which, if credited, would indicate that McKinnon harbored animus. However, I do not believe any of Gouveia"s testimony because, in my view, she makes things up.

After observing both McKinnon and Gouveia while they testified, I conclude that they are on opposite poles of the credibility spectrum. In terms of reliability, McKinnon's testimony differs from

[53] The General Counsel does not contend that the Respondents took any actions against Gouveia because employees *other than* her engaged in protected activity. To the contrary, complaint subpar. 6(pp)(14) alleges that "Respondent Valley, Respondent USHDI, and Respondent UHS engaged in the conduct described above in paragraphs 6(pp)(3) through 6(pp)(13) *because their employee Gouveia* engaged in the activity described above in paragraph 6(pp)(1), and to discourage employees from engaging in these or other concerted activities." (Emphasis added.)

Gouveia's as much as "factual" differs from "factitious."

Additionally, with respect to subparagraphs 6(pp)(e) through 6(pp)(10), a causal connection between Gouveia's protected activity and an adverse employment action cannot be established because, at the time of such a decision, Gouveia had not engaged in any protected activity. Moreover, the evidence fails to establish that animus towards any other employee's protected activity entered into a manager's decision concerning Gouveia's employment.

Complaint subparagraphs 6(pp)(11) and 6(pp)(12), respectively, allege that on or about March 25, 2021, the Respondents "disciplined or attempted to discipline" Gouveia and, from that date forward, more closely supervised her work.

Never before have I seen in a complaint an allegation that an employer *attempted* to discipline an employee and the meaning of "attempted" isn't clear. Conceivably, it might mean that an employer imposed discipline - for instance, a suspension without pay—but the employee filed a grievance resulting in the discipline being withdrawn. However, that is not the case here.

Apart from a supervisor imposing discipline later rescinded, it is unclear what else the phrase "attempted to discipline" might mean. An employer obviously has the power to warn, suspend or discharge an employee and any "attempt" will succeed. The General Counsel's brief sheds little light. It states:

> The day after testifying, Gouveia returned to work. When she returned to work, on March 25, 2021, Millet embarrassed Gouveia by discussing her private life in front of all her coworkers during a huddle meeting. Gouveia wrote a statement and gave the statement to McKinnon. TR34:3834-35. McKinnon and Blake then made fun of Gouveia because she had gotten a DUI. TR34:3835.[54](General Counsel's Exhibit 227) Later that day, McKinnon and Cox were attempting to issue discipline to Gouveia for her attendance. Gouveia and Cox went back and

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[54] Although the General Counsel's brief states that Environmental Services Manager Millet "embarrassed Gouveia by discussing her private life in front of all her coworkers during a huddle meeting" and further asserts that Managers McKinnon and Blake "then made fun of Gouveia because she had gotten a DUI," credible evidence fails to support the General Counsel's claims.

The evidence does suggest that Millet may have mentioned Gouveia's DUI to her in the presence of other employees but a mention does not rise to the level of a discussion or of making fun of someone. Gouveia described the events as follows in a contemporaneous note:

> My statement on what happened today after the huddle. I didn't get a chance to sign in yet. So after the huddle I went to sign in and Darryl [sic] made a comment about my DUI classes. When Darryl [sic] made the comment about my DUI classes there was employees around me. I got embarrassed because there was employees around me.

forth, and the conversation got heated until McKinnon looked directly at Cox and said, "this is why we're winning everything." TR34:3836. Gouveia understood McKinnon's comments to relate to the hearing in which she had testified, and Gouveia told them that she had taken pictures every time she clocked in and out. TR34:3836-37; 3839. McKinnon then told Gouveia that he would wipe her attendance record clean.TR34:3837. [Footnotes omitted.]

What the General Counsel described as an "attempt to discipline" was really just a discussion between Gouveia and two managers concerning whether she had clocked in late. She testified that she and Manager Glenn McKinnon were "going back and forth" concerning time records, which are kept by a computerized system called Kronos.[55] According to Gouveia, she told McKinnon that she had taken a picture of the Kronos display whenever she had clocked in or out. McKinnon then "backpeddled." (Tr. 3836)

Gouveia testified that McKinnon tried to "say it was an error" and told her he was going to look into the matter. Later that same day, she spoke with McKinnon by phone. According to Gouveia, "Glenn said that he was going to wipe my record clean, everything was going to be taken care of. I wasn't going to have no attendance points and I was going to have no discipline on my record." (Tr. 3837.)

McKinnon does not recall having the discussion Gouveia described. (Tr. 397) However, neither Gouveia's testimony nor any other evidence establishes that she suffered any adverse employment action on this occasion. A discussion about when an employee clocked in and about the accuracy of timeclock records does not, by itself, affect a worker's employment in any significant way, There s no need for a *Wright Line* analysis concerning an employer's motivation for taking an action when there is no action.

The complaint should not have alleged acts of discrimination when even the testimony of the government's witness fails to show that there was any act or any discrimination. It is inexplicable why the General Counsel would characterize this incident as "discipline" or "attempt to discipline." Manager McKinnon and Gouveia merely had a discussion about when she had clocked in and, after investigating, the manager removed the attendance points from her record.

In sum, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(pp)(11).

Complaint subparagraph 6(pp)(12) alleges that the Respondents, starting on March 25, 2021, subjected Gouveia to closer supervision. As discussed above, during the hearing, even innocuous questions caused Gouveia to feel "overwhelmed."[56] A similar sensitivity in the workplace would make any supervision at all feel like too much. Therefore, her subjective feelings alone would not provide a reliable indication of whether she was being supervised

[55] Another manager, Robert Cox, was nearby.

[56] See, e.g., Tr. 3797, 3882–3883, 3956–3958, 3999, 4099 and 4122.

more closely than other workers.

However, the General Counsel has not identified any evidence which would establish that management gave Gouveia's work any stricter scrutiny than other employees received. In fact, the General Counsel's brief does not address this "more closely supervised" allegation at all.

No credible evidence establishes that the Respondents more closely supervised Gouveia's work. Therefore, I recommend that the Board dismiss the allegations raised by complaint subparagraph 6(pp)(12).

Complaint subparagraph 6(pp)(13) alleges that the Respondents discharged Gouveia on about May 10, 2022. Complaint subparagraph 6(pp)(14) alleges that the Respondents discharged Gouveia because she engaged in the protected activities described in complaint subparagraph 6(pp)(1) and to discourage employees from engaging in such activities.

The evidence clearly establishes that the Respondents terminated Gouveia's employment but the discharge took place in 2021, not in May 2022, as alleged in the complaint. The General Counsel's brief contends that the discharge took place in May 2021, which is consistent with Gouveia's testimony.

Gouveia admitted that the last day she worked at the hospital was April 24, 2021. (Tr. 4089.) She also claims that on May 6, 2021, she spoke by phone with Leslie Irwin, who works as a generalist in the Valley Health System's human resources department. Gouveia testified:

> It took me several attempts to finally get a hold of her, but I got hold of her on that day, on the—on May—May 6, she told me that I was no longer with—she was very short with me. I was no longer employed with the company and hung up on me. And I was confused on what was going on. I called back, I tried calling and calling back and nobody wanted to answer my phone calls.

(Tr. 38–49.)

However, a June 4, 2021 letter, discussed below, contradicts Gouveia's testimony. So does Irwin's testimony.

As noted above, Gouveia admitted not coming to work after April 24, 2021, and at some point after that date, Irwin began trying to contact Gouveia by telephone. Irwin credibly testified that her multiple attempts to reach Gouveia failed.

Irwin also denied receiving a call from Gouveia. Likewise, Irwin denied telling Gouveia that her employment had been terminated. (Tr. 4887.)[57] Based on my observations of the witnesses, I

[57] Irwin also denied hanging up on Gouveia. "I get hung up on a lot," she said, "but I do not hang up on people. It's important for them to be able to voice their concerns or issue. No, I do not hang up on

conclude that Irwin's testimony is reliable and credit it. Therefore, I find that the telephone call described by Gouveia did not occur.

When Gouveia did not show up for work and Irwin was unable to contact her, Human Resources Director Dana Thorne sent Gouveia a letter. The letter, dated June 4, 2021, stated:

> You have been absent from work since April 25, 2021 and do not have approval for a continuous leave of absence (or even a request for a continuous absence). Despite numerous attempts by Leslie Irwin and your supervisors to contact us about your absence, you have not responded.
>
> If we do not hear from you by June 11, 2021, we will presume you have voluntarily resigned your position. Please contact Leslie Irwin at 702-388-7842 no later than this date if you wish to continue your employment. If we do not hear from you, we will accept your resignation effective this date.
>
> (GC Exh. 232)

For the reasons discussed earlier, I do not believe that Gouveia's testimony is reliable and do not credit it. At one point during that testimony, she appears to claim that she did not return to work after April 24, 2021, because she was on family medical leave. (Tr. 4093.) However, although Gouveia took some family medical leave in 2020, the credited evidence does not establish that she either was entitled to or had been approved for such leave in April, May and June of 2021. I find that she was not.

Based on the credited evidence, I find that her employment ended in June 2021 because she did not show up for work.

Termination of employment is an adverse employment action, so a *Wright Line* analysis is appropriate. As discussed above, under *Wright Line*, the General Counsel must establish (1) the existence of protected activity, (2) employer knowledge of that activity, (3) the existence of animus, and (4) a causal connection between the protected activity and the adverse employment action.

As discussed above, Gouveia testified at a Board hearing on March 24, 2021. This testimony clearly constituted protected activity.

The Respondent in that case, Valley Hospital Medical Center, was her employer at the time. The General Counsel thus has satisfied the first two *Wright Line* requirements.

The unfair labor practices found in the present case constitute evidence of animus. Additionally, the General Counsel argues that the Board has found animus in previous cases and that this animus may be considered in the present case.

One of those prior cases is the one in which Gouveia testified, *Valley Hospital Medical*

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people." (Tr. 4981.)

Center, Inc., d/b/a Valley Hospital Medical Center, Case 28-CA-234647 et al., JD(SF)-25–21 (December 22, 2021). However, although the judge found that Valley Hospital Medical Center had violated the Act, the Board has not yet issued a decision in that matter. But in other, relatively recent decisions, the Board found that Respondents in the present case committed unfair labor practices.

In *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 (January 30, 2020) the Board found that the Respondents had committed numerous unfair labor practices, including withdrawing recognition from Service Employees International Union, Local 1107, the exclusive bargaining representative of employees in three separate bargaining units.[58] The Respondents had taken these unlawful actions in February and March 2017. In this same decision, the Board found that the Respondents also had violated Section 8(a)(5) and (1) of the Act by making changes in the working conditions of employees and also engaged in conduct which independently violated Section 8(a)(1) of the Act.

However, relying on a recent precedent, the Board found that the Respondents had acted lawfully when, after the expiration of a collective-bargaining agreement which included a dues-checkoff clause, they stopped giving effect to that clause. The Union appealed this finding to the Court of Appeals for the Ninth Circuit, which remanded the case to the Board.

While this case was pending on remand, the Board overruled the precedent which had allowed employers to cease honoring a dues checkoff clause after contract expiration.[59] Because of this change in the caselaw, an employer does have an obligation to continue deducting union dues from the paychecks of requesting employees and remitting those dues to the union. The Board followed this new precedent when it reconsidered the case remanded by the court of appeals. The Board therefore found that the Respondents' failure to continue dues checkoff did violate the Act. *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 372 NLRB No. 33 (2022).

The Respondents' unlawful cessation of dues checkoff took place more than 4 years before the events alleged in complaint subparagraph 6(pp). By itself, that one unfair labor practice in September 2016 would not be evidence of animus sturdy enough to persist into the time period relevant to complaint subparagraph 6(pp). That complaint subparagraph, under consideration here, alleges unlawful acts against Gouveia beginning in October 2020.

However, as noted, in the earlier case, the Board also found that the Respondents violated the Act by unlawfully withdrawing recognition from Service Employees International Union, Local 1107, in all three units of employees which it represented. The Board also found that the Respondents had

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[58] Service Employees International Union, Local 1107, represented a bargaining unit of registered nurses and a separate bargaining unit of technicians and licensed practical nurses, at Desert Springs Hospital Medical Center. It also represented a unit of registered nurses at Valley Hospital Medical Center. The Respondents unlawfully ceased to recognize Local 1107 as the bargaining representative of employees in all three units.

[59] The case in which the Board overruled its dues checkoff precedent happened to involve the Respondents in the present case. *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 371 NLRB No. 160 (2022).

made unlawful unilateral changes (in addition to stopping dues checkoff) and committed independent 8(a)(1) violations. See *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16, above.

The present complaint also includes allegations that the Respondents changed terms and conditions of employment of employees represented by SEIU Local 1107. Thus, the events in the previous case are not irrelevant to present one. Moreover, considering the seriousness of the unfair labor practices found by the Board, the violations are recent enough to be considering in assessing the Respondents' motivation here.

Taking those previous violations into account, I conclude that the General Counsel has established sufficient animus to satisfy the third of the four initial *Wright Line* requirements. However, the government must also prove a causal connection between the alleged discriminatee's protected activities and the adverse employment actions she suffered. *Tschiggfrie Properties, Ltd.*, above. The General Counsel has not proven such a connection.

The facts are simple: Gouveia stopped coming to work, the Respondents, after unsuccessful attempts to reach her by phone, sent her a letter and, when she still didn't reply, deemed her to have quit. There is no link at all between her protected activity and the termination of her employment.

Accordingly, the government has not carried its initial *Wright Line* burden for any of the unfair labor practice allegations raised in complaint subparagraph 6(pp). Therefore, I recommend that the Board dismiss all of these allegations.

Complaint Subparagraph 6(qq)

Complaint subparagraph 6(qq) alleges that one of the Charging Parties in this case, June Edwards, engaged in concerted activity on two occasions and that because of this protected activity the Respondents issued Edwards written warnings. More specifically, complaint subparagraph 6(qq)(3) alleges that the Respondents issued Edwards a level 1 written warning on a date in mid-February 2022 and complaint subparagraph 6(qq)(4) alleges that the Respondents issued Edwards a level 2 written warning on February 18, 2022.[60] Complaint subparagraph 7(j) alleges that

[60] In its entirety, complaint subparagraph 6(qq) alleges the following: (1) About January 29, 2022 and about February 17, 2022, Respondent Valley and Respondent UHS's employee Edwards engaged in concerted activities with other employees for the purposes of mutual aid and protection and concertedly complained to Respondent Valley and Respondent UHS regarding the wages, hours, and working conditions of Respondent Valley and Respondent UHS's employees, by raising claims with other employees and with Respondent Valley and Respondent UHS about terms and conditions of employment, including assignment of overtime and race discrimination. (2) The claims of Respondent Valley and Respondent UHS's employee Edwards described above in par. 6(qq)(1) relate to the collective-bargaining agreement described above in par. 5(b). (3) On a date in mid-February 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS issued a level 1 written warning to their employee Edwards. (4) On February 18, 2022, Respondent Valley and Respondent UHS issued a level 2 written warning to their employee Edwards, and (5) Respondent Valley and Respondent UHS engaged in the conduct described above in pars. 6(qq)(3) and 6(qq)(4) because their employee Edwards engaged in the

Respondent Valley and Respondent UHS engaged in the conduct described in complaint subparagraphs 6(qq)(3) and 6(qq)(4) because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities. The Respondents deny these allegations.

Complaint subparagraph 7(j) alleges that the Respondents engaged in this conduct issuing Edwards a level 1 warning in mid-February 2002 and a level 2 warning on February 18, 2022 – "because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities."

Complaint paragraph 11 alleges that the warnings violated Section 8(a)(1) and 8(a)(3) of the Act. The Respondents deny these allegations.

June Edwards began working at Valley Hospital Medical Center in 1997 and continued to work there when she testified in this case. She works in the hospital's kitchen and is a member of Culinary Workers Union, Local 226.

Although complaint subparagraph 6(qq)(3) alleges that the Respondents issued a level 1 written warning to Edwards on a date in mid-February 2022, the evidence establishes that the Respondents issued the warning (General Counsel's Exhibit 136)[61] on February 3, 2022. It concerned events which it said occurred 5 days earlier.

The warning includes a narrative but as will be discussed below, it is unclear who wrote the narrative. Although it would seem reasonable that the management officials who signed the warning would give testimony about the facts it described, that proved not to be the case.

The warning bears the signature of the Valley Hospital human resources director, Dana Thorne, and of someone who signed on the line designated for the supervisor. However, this person's signature is illegible[62] and the identity of this person is in doubt.

Although Human Resources Director Thorne testified, she said nothing about the February 3, 2022 warning given to Edwards or about Edwards' actions which resulted in the warning. The General Counsel did not ask her any questions about this matter.

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activity described above in par. 6(qq)(1), and to discourage employees from engaging in these or other concerted activities.

[61] As it appears in the exhibits file, General Counsel's Exhibit 136 is marked "received." However, the hearing transcript for June 23, 2023 only indicates that it was marked as an exhibit. **It is hereby received.**

[62] Below the line purportedly signed by the supervisor are these instructions: "Supervisor Print Name & Signature." However, no printed name appears, only the illegible signature.

Edwards' supervisor, Dietary Department Manager Allison McCain, did testify, but provided no information about the warning or the conduct which gave rise to it. To the contrary, McCain testified that the illegible signature on the warning was not hers.

When shown the warning and asked whether the facts it described sounded familiar, McCain asked to read it. After doing so, she testified: "I think I might slightly remember the issues, maybe." (Tr. 1071)

That is decidedly odd because the narrative on the warning is written in the first person by someone who clearly was Edwards' supervisor. It described a conversation which the supervisor had with Edwards on June 29, 2022, and the conversation took place in the supervisor's office. When Edwards testified about the warning, she described a conversation she had with McCain in McCain's office.

So, it would be logical to assume that McCain prepared the warning and would recall the incident. However, as mentioned above, McCain denied signing it and provided no testimony about the events. The written warning itself states:

> On Saturday 1-29-2022 June came to me questioning about another employee getting overtime before her. I explained to her that the other employee was not on overtime and that it was not scheduled that it was a last minute ask because we didn't have a person to serve. She walked thru the kitchen complaining about she worked here 25 years and she know the rules and just complaining. I went back to the cold room and explained to her again that if she felt we were not compliant to fill out what ever paper she needed to, give it to me and I will research if we were incorrect. She was becoming loud and argumentative. I stated If you have a concern about anything just come to the office and talk about, it is inappropriate to walk thru the kitchen just loudly complaining about a concern, and that I was not going to argue with her concerning the issue.
>
> (GC Exh. 136)

This narrative is hearsay if considered to establish what actually occurred. Indeed, it is rather dubious hearsay because of the uncertainty concerning what supervisor wrote and signed it.

However, it is not hearsay if used to prove that the Respondents' issued a warning to Edwards. The warning also is not hearsay when used to prove the Respondents' stated reason for the discipline. The Respondents are parties to this case and the reason for the discipline which appears on the warning constitutes an admission by a party opponent which is admissible under Rule 801(d)(2) of the Federal Rules of Evidence.

Moreover, the narrative is not hearsay when used to infer what management *believed* happened. Whoever wrote the narrative appeared to believe that Edwards had walked through the kitchen "just loudly complaining about a concern." If management acted on that belief, it does not matter whether the belief was mistaken. *United States Service Industries, Inc.*, 314 NLRB 30 (1994).

The warning provides the sole evidence concerning the conduct which the Respondents sought to reprove and discourage. Although the description in the warning will not be relied upon to

determine what Edwards actually said and did,[63] it is not hearsay when used to ascertain what conduct the Respondent sought to punish.

The warning did not discipline Edwards for her discussion in the supervisor's office, but rather for what she did after that discussion. According to the warning, Edwards "walked thru the kitchen complaining about she worked here 25 years and she know the rules and just complaining."

A compelling reason to conclude that the warning did not concern what Edwards said in the supervisor's office is that the warning did not forbid Edwards from repeating this conduct. To the contrary, the warning stated "If you have a concern about anything just come to the office and talk about, it is inappropriate to walk thru the kitchen just loudly complaining about a concern. . ." In other words, the warning defined correct behavior as coming to the supervisor's office and discussing the concern and incorrect behavior as walking through the kitchen complaining loudly.

The fact that the warning did not concern Edwards' conduct is important because what she said in the supervisor's office, or at least part of it, does constitute protected activity. When Edwards complained to the supervisor about not receiving overtime and cited her seniority rights, she clearly was engaging in protected activity. Invoking a provision of the collective-bargaining agreement clearly constitutes protected activity. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495, 500 (2d. Cir.).

However, the language on the written warning itself indicates that Edwards' was not punished for what she said in the supervisor's office. Rather, the warning concerns what Edwards did after leaving the supervisor's office and it must be determined whether this conduct enjoyed the protection of the Act.

In deciding whether Edwards' supposedly loud complaints to other employees in the kitchen constituted protective activity, it is necessary to know what she said. More specifically, was Edwards trying to get other employees to join with her in protest?

The Act protects a lone employee speaking to other workers about terms and conditions of employment if her object is to initiate, induce or prepare for group action. However, determining whether an employee's speech constitutes such a solicitation requires a careful examination of the words spoken and the circumstances. The difference between protected and unprotected speech can be subtle. Compare *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), with *Davis Defense Group, Inc.*, 373 NLRB No. 132 (2024).[64]

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[63] As stated in *Dauman Pallet, Inc.*, 314 NLRB 105, 106 (1994), the "Board has long held that it will admit hearsay evidence 'if rationally probative in force and if corroborated by something more than the slightest amount of other evidence.' *RJR Communications*, 248 NLRB 920, 921 (1980); *Livermore Joe's, Inc.*, 285 NLRB 169 fn. 3 (1987)." However, the written warning's description of Edwards' behavior in the kitchen is not corroborated by any evidence and therefore I will not rely on the warning to determine what Edwards said and did after leaving McCain' office.

[64] In *Davis Defense Group, Inc.*, above, the Board agreed with the judge that an employee who sent emails and made remarks about "core hours requirements" was neither seeking to initiate, induce or prepare for group action nor bringing truly group complaints to the attention of

The General Counsel bears the burden of proving that Edwards was engaging in protected activity or at least that management thought she was. But the warning itself provides little information about what management believed that Edwards said. The warning merely states that Edwards "walked thru the kitchen complaining about she worked here 25 years and she know the rules and just complaining."

Edwards' testimony also provides little information about what she said when she returned to the kitchen. Her version of what took place does not indicate that she complained, loudly or otherwise, after leaving McCain's office.

In the following testimony, Edwards refers to Alice McCain as "Alice." The described events begin while Edwards is still in McCain's office:

> I said [to McCain] it's been in the contract since I've been here like 25 years. It's just been like that and then she just started talking like going back and forth, back and forth, and I just said Alice, I have to go back now and do my work. So as I was walking back to the kitchen, by the time I get to my station, I hear somebody behind me huffing and puffing and I just turned around and I said Alice, it's okay, I'm going back to work and she just threw her hands up and I'm done. I'm done and she walked back in the kitchen. The next thing I know, a couple days, I'm getting wrote up and I don't even know why I'm getting wrote up.
>
> (Tr. 2655–2656.)

Edwards' testimony thus falls short of establishing that she attempted to enlist other employees in any group action. No other evidence suggests that she spoke with such a purpose. Likewise, no evidence indicates that management thought that Edwards was soliciting employees to engage in such action.

In sum, I conclude that the General Counsel has failed to prove either that Edwards' engaged in protected activity after leaving McCain's office or that management thought she had engaged in such activity.

The Respondents' counsel established, while cross-examining Edwards, that there is a rule against loud talking which distracts workers in the kitchen. Edwards acknowledged that the rule lessens the chance that a worker will prepare the wrong meal for a patient on a restricted diet.

During cross-examination, Edwards also admitted that the Respondent had disciplined her a number of times either for talking or arguing with other employees while working on the "tray line" in the kitchen. (Tr. 2672–2702.) These instances happened on or before 2009 and they are too remote in the past to suggest that, 13 or more years later, Edwards had a habit of breaking the rule. However, this testimony does establish that the rule against talking is longstanding and enforced.

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management, and therefore was not engaged in protected activity. *Davis Defense Group, Inc.*, 373 NLRB No. 132, slip op. at 2.

In sum, I find that the Respondent maintained and enforced a rule against talking in the kitchen, that management believed Edwards had violated that rule and gave her a written warning.[65] However, I do not find either that Edwards engaged in protected activity or that management believed that she had.

The General Counsel's brief does not offer any legal analysis specific to this allegation and the General Counsel has not stated whether the facts should be examined using the *Wright Line* framework or using the test applied by the Board in *Lion Elastomers, LLC*, 372 NLRB No. 83 (2023). However, under either standard, the evidence does not establish a violation.

With respect to *Wright Line*, the record does not prove any connection between protected activity and the discipline. As stated above, I do not find that Edwards was engaged in protected activity when she spoke loudly in the kitchen and the General Counsel has not established any link between any other protected activity, either of Edwards or others, and the disciplinary action.

With respect to *Lion Elastomers*, the record does not establish that Edwards was punished for misconduct that occurred while she was engaged in protected activities. Accordingly, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(qq)(3).

Complaint subparagraph 6(qq)(4) alleges that on February 18, 2022, Respondent Valley and Respondent UHS issued a level 2 written warning to their employee Edwards. Complaint paragraph 11 alleges that the Respondents thereby violated Section 8(a)(3) of the Act.

The February 18, 2022 warning is in evidence as General Counsel's Exhibit 153.[66] It states, in pertinent part, as follows:

> Pursuant to Article 7 -(7.01,#9) of the CBA, June said to coworkers and a manager on Thursday, 2/17/2022 that Alice was an Uncle Tom and a liar and that the Director was a racist. This inappropriate behavior is abusive, seriously improper behavior or discourtesy toward a patient, visitor, supervisor or a fellow employee.

The person referred to in the warning as "June" is June Edwards and "Alice" refers to Dietary

[65] Edwards, who still works for the Respondents, testified that the warning has now been removed from her record because of a provision in the collective-bargaining agreement. (Tr. 2661.) Art. 7.02 of that agreement (GC Exh. 4) provides, in part, as follows: "Warning notices, individual complaints, and reports of outside agencies or of the Employer's own security force concerning conduct of an employee shall become null and void twelve (12) months after the date of issuance and may not thereafter be used as a basis for or in support of any subsequent discharge of disciplinary action."

[66] The Respondents also introduced this document into evidence as Respondent's Exhibit 86. The warning is signed by Human Resources Director Dana Thorne, by Sarah Bannoura, who was then a dietician supervisor/manager, and by Executive Chef Joseph Shellmire, who placed the word "witness" after his name. Edwards refused to sign.

Department Manager Allison McCain. The person referred to as the "Director" is Director of Food and Nutrition Services Richard Pierce. (Tr. 1232–1233.)

Article 7 of the collective-bargaining agreement, referred to in the warning, establishes a progressive discipline system in which the severity ranges from a level 1 "preventive counseling" up to level 4, discharge. Section 7.01(a) includes a list of offenses which may result in the discharge of an employee even if that person has not been disciplined previously. The offense listed as #9 is "abusive, seriously improper behavior or discourtesy toward a patient, visitor, supervisor or a fellow employee."[67]

The warning thus cites the contractual provision allowing immediate discharge for this offense alone. However, instead of discharging Edwards, management only issued a written warning.

The warning does not identify the coworkers or manager who supposedly heard Edwards. However, the record establishes that the manager was Executive Chef Joseph Shellmire. He testified as follows when questioned by counsel for the General Counsel:

> Q. And what was the location talking to her? Were you in the office? Were you outside? Where was it?
> A. Outside. I was actually on the kitchen floor.
>
> Q. And how did the conversation start?
> A. It was just a general conversation and it came up about pretty much I want to say someone getting disciplined or something and it was just pretty much that Rick was a, Rick was a racist and Alice was an Uncle Tom for listening to him. So I said well I work with these people so I need to find out. So that's pretty much how it came to light. You know, by me being an African-American, I want to know, you know, what type of people I'm dealing with. So to be honest with you I just pretty much asked them, you know, hey this is what's going on, this is what was said, you know, if we're going to work together hand-in-hand, I need to know what's going on. So you know, they were in shock and everything and, you know, I just brought it to their attention on what pretty much was being said.
>
> (Tr. 1610.)

The General Counsel did not ask for further details about this conversation and Shellmire did not provide any. Shellmire did not even specifically quote Edwards as making the statements described on the written warning. Rather, when shown the warning, he said "I'm the one that heard the statement." (Tr. 1609.) However, he neither quoted directly nor paraphrased what he heard Edwards say.

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[67] The collective-bargaining agreement is in evidence as GC Exh. 4. Art. 7 begins on page 8 of that contract, which also bears the stamp "GC Exhibit 4, Page 13 of 54." Sec. 7.01(a)(9) appears on this same page.

Shellmire did not describe either what prompted the conversation or the subject under discussion. When asked who else was present, he said he did not recall. (Tr. 1609.)

Edwards specifically denied ever calling Richard Pierce a racist and also denied calling Allison McCain either an "Uncle Tom" or a liar. On cross-examination by the Respondents' counsel, Edwards gave the following testimony:

> Q. Ms. Edwards, have you ever said that to anybody?
> A. To anybody—I said to anybody that Rick was racist?
>
> Q. Yes, ma'am.
> A. No.
>
> Q. Okay, and what about did you ever tell anyone that you believed Ms. McCain was an Uncle Tom?
> A. Never.
>
> Q. And did you ever tell anyone that you thought Ms. McCain was a liar?
> A. No, but we all know she don't tell the truth, but I didn't tell the write up—.I did not say none of these things in this write up.
>
> (Tr. 2716.)

The lack of specific information about what Edwards supposedly said, and in what context, makes it difficult even to decide what analytical framework should be used to evaluate whether the Respondents committed an unfair labor practice. If Edwards had been engaging in protected activity—for example, speaking out on behalf of other employees about working conditions - and called Pierce a racist or McCain a liar while doing so, then the 4-factor test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), should guide the analysis.

However, if Edwards had not been engaged in protected activity when she supposedly used derogatory words, then the framework set forth in *Wright Line*, above, should guide the analysis. That framework provides the appropriate lens to use in determining whether the stated reason for a disciplinary action is pretextual.

Assuming for the sake of analysis that Edwards did call Pierce a racist, it is quite possible that she did so while expressing concerns shared by other employees. According to Edwards, years earlier, employees had circulated a petition protesting that the previous director was racist. (Tr. 2683–2684.)

Additionally, Edwards did have concerns that Pierce treated two white employees, whom she identified as Ashley and Charlotte, differently than he treated black employees. (Tr. 2658.) However, it is not clear from Edwards' testimony whether she raised this concern during a meeting to discuss the grievance she filed after receiving the written warning, or earlier, when she was speaking to Executive Chef Shellmire.

The General Counsel did not state a position concerning which Board precedent, *Atlantic Steel* or *Wright Line*, should guide the analysis. In fact, the General Counsel's brief provides no legal

analysis at all concerning this allegation. The brief devotes only the following two paragraphs to it:

> During the meeting in which Edwards received the Level 1 discipline, Edwards brought up to management that she felt racial bias from how management spoke and treated black employees like her. TR21:2657-58. After confronting management about the disparate treatment she and other black employees received, Edwards broke down and was crying and mourning in the locker room. TR21:2658. Shellmire saw Edwards distraught and asked her what had happened at the meeting, so Edwards shared what had happened. TR21:2658. The following day, Edwards, still emotional, went to speak with COO Erin Swenson and HR Director Dana Thorne and Edwards explained to them what had happened. TR21:2659. Edwards then filed a grievance, but then Pierce accused Edwards of being racist toward McCain. TR21:2659.
>
> About February 18, 2022, Respondents issued Edwards a Level 2 Written Warning in which Respondents accuse Edwards of being racist toward McCain and violating Article 7 of the CBA.[40] TR21:2661.
>
> _____
> [40] RX86.

The General Counsel's brief says nothing else relevant to the allegations raised in complaint subparagraph 6(qq)(4) and what it does say, quoted above, makes no sense. For example, in the second paragraph, the General Counsel claims that, in the allegedly unlawful written warning, "Respondents accuse Edwards of being racist toward McCain. . ." However, absolutely nothing in the warning accuses Edwards of being racist towards McCain.

The brief's statement about the content of the written warning is flatly wrong and the rest of the discussion is, at best, confusing. For example, the General Counsel refers to a "meeting in which Edwards received the Level 1 discipline. . ." Such a meeting would have been on February 3, 2022, when Edwards received the warning discussed above in connection with complaint subparagraph 6(qq)(3).

However, the meeting in question appears to have been a later one, held to discuss the grievance which Edwards filed to contest the warning. In that meeting, Edwards testified, she asked Dietary Department Director Pierce why he talked to two white employees, Ashley and Charlotte, in a different manner than when he talked with other workers. (Tr. 2657.) According to Edwards, the meeting became hostile. After the meeting, by the time she went to her locker, Edwards said, she was "crying and mourning." (Tr. 2658)

The General Counsel's brief states that "Edwards broke down and was crying and mourning in the locker room. TR21:2658. Shellmire saw Edwards distraught and asked her what had happened at the meeting, so Edwards shared what had happened. TR21:2658."

However, Edwards' testimony does not mention a locker room and does not suggest she had a conversation with Shellmire in a locker room. Rather, Edwards testified that after she went to her locker, she was walking back to her area when Shellmire asked her "what happened in the meeting." (Tr. 2659)

The General Counsel's brief states that Edwards then "shared what had happened." It does not refer at all to the claim, in the February 18, 2022 written warning, that Edwards called Pierce a racist and McCain an "Uncle Tom" and a liar.

The brief also does not mention that Edwards testified that Shellmire took her into his office and that, while in his office, she described how Pierce and McCain had acted at the grievance meeting. (Tr. 2658) This testimony contradicts Shellmire, who testified that he heard Edwards make the derogatory remarks while they were in the kitchen. (Tr. 1609)

Under the *Atlantic Steel* framework, the General Counsel bears the burden of proving that Edwards was engaged in protected activity at the time she supposedly used derogatory language. The General Counsel has not carried that burden.

Should *Wright Line* be followed, the General Counsel's burden includes proving that the Respondents harbored animus and that there was a causal connection between Edwards' protected activity and the discipline. The Board's findings in prior cases involving the Respondents, and the unfair labor practices found in this case, likely suffice to prove the existence of animus. However, the General Counsel has not proven the necessary link between protected activity and discipline.

For these reasons, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(qq)(4). Moreover, I recommend that the Board dismiss the allegations raised in complaint subparagraph 6(qq) in their entirety.

Complaint Subparagraph 6(rr)

Complaint subparagraph 6(rr) alleges that about April 27, 2023, Respondent Valley and Respondent UHS, by Glenn McKinnon, at Respondent Valley's facility, solicited employees to sign letters or other materials stating they submitted their resignation from the Union, Culinary Local 226, for the purpose of collective bargaining with Respondent Valley. The Respondents deny this allegation.

To prove this allegation, the General Counsel relies on the testimony of bargaining unit employee Judge. The General Counsel's brief states:

> On April 27, 2023, Judge was called into McKinnon's office and McKinnon solicited her to resign from the union.[77] TR22:2804-05. McKinnon also gave Judge a letter from Respondent Valley's CEO and COO which solicited employees to resign from the union.[78] TR22:2809-10. Judge signed the paper that McKinnon had given her, and she took a copy to HR to give to Thorne. TR22:2806.

[77] GCX190

[78] GCX191

However, that summary omits a material fact. The Union had given notice that it was going to

strike. Because of that strike notice, McKinnon had meetings with employees in the environmental services department to inform them of their options.

Nothing in the record supports the statement in the General Counsel's brief that McKinnon solicited an employee to resign from the Union. The word "solicit" means to ask or invite. No testimony indicates that McKinnon made such a request.

To prove the allegation raised in complaint subparagraph 6(rr), the General Counsel relies on the testimony of Joanne Judge. Judge testified as follows about her meeting with McKinnon:

> Q. Okay. And what happened at Glenn McKinnon's office?
> A. We were -- I noticed that we were being called one by one, because as I walked into Glenn McKinnon's office, there was another employee who was waiting to go in. Her name is Lizet Oviedo. She was waiting outside. I walked into Glenn McKinnon's office and I was greeted by him and Darrell Millet. They were both in the office. And I was explained, because during that time in April the Culinary Union 226 was going to go on strike, and we were informed that that was happening really soon, so Glenn McKinnon explained to me that he had no problem if we went on strike or we stayed at Valley Hospital as workers, but if we went outside on strike, our position and our job, we will be replaced. And if we stayed at Valley Hospital working and crossed the picket line, we would have to resign from the union. But he also said that even though you resign from the union, you will still be a culinary member, which I didn't understand that. . .
>
> (Tr. 2806–2807.)

McKinnon testified that he never asked any employee to resign from the Union (Tr. 5038) or to sign a "resignation from the union" paper. (Tr. 5026.) Judge's testimony does not contradict McKinnon's testimony, which I credit.

Judge's testimony only establishes that McKinnon told her that if she crossed the picket line she would have to resign from the Union, not that he asked her to resign. McKinnon also gave Judge a letter to employees which explained the reason for this advice: The Union could fine any of its members who crossed a picket line and worked during a strike.

Both Collin McLaughlin, chief executive officer, and Erin Swenson, signed the April 27, 2022 letter, which stated as follows:

> Dear Culinary-represented Employees:
>
> On April 26, 2023 the Culinary Union notified the Hospital that a strike will commence on Tuesday, May 9, 2023 at 6 a.m. The strike is for an indefinite period of time.
>
> Important things for you to know:

- It is completely your choice as to whether you choose to stay away from work during the strike or come in to the Hospital and work during the strike.

- If you choose to come to work and receive your regular pay, you most certainly can do so.

  - If you are a union member, you must resign your union membership before you come into work during the strike. Otherwise, the union can fine you for working during the strike.

    - If you resign your membership, you are still represented by the union and you are still in the bargaining unit. You cannot lose your job or benefits just because you resign your membership,

  - If you are not a union member, you can come to work at any time and not be fined by the union. You also cannot lose your job or benefits if you come into work.

Keep in mind that if the union is telling you that it will provide you with another job or pay you from a "strike fund" you should ask:

- if those jobs are guaranteed, how much do they pay and when can I start work?

- how long you must be on strike before you can receive any strike fund money, and how much money will that be?

If there is a strike here, the Hospital will bring in people to staff the EVS and Dietary functions during the strike. Patient care services will not be interrupted or compromised.

Please let me or your Director know if you have any questions.

(General Counsel's Exhibit 191, signatures omitted)

Judge testified that she signed a letter, provided to her by Environmental Services Manager Monica Griego, resigning her Union membership. (Tr. 2806.)

In sum, the Union announced that it intended to strike and the Respondent then informed employees that they could go on strike or they could continue to work during the strike. It also informed them that the Union could fine an employee who worked during the strike but could not fine a nonmember. This information merely advised employees of the law. However, neither McKinnon nor the April 27, 2022 letter requested employees to resign from the Union.

Therefore, I conclude that the General Counsel has not proven the allegation raised in complaint subparagraph 6(rr) and recommend that the Board dismiss this allegation.

Complaint Subparagraph 6(ss)

Complaint subparagraph 6(ss) alleges that about April 27, 2023, Respondent Valley, Respondent USHDI, and Respondent UHS, by distribution of a letter to "Culinary-represented employees" at Respondent Valley's facility, solicited employees to resign from the Union, Culinary Local 226. The Respondents deny this allegation.

The General Counsel's brief states: "In a letter to employees, on April 27, 2023, McLaughlin and Swenson communicated to employees that they must resign their Culinary 226 membership before going to work." A footnote identifies General Counsel's Exhibit 191 as the letter. This is the same letter that is quoted in full, above, in connection with the discussion of complaint subparagraph 6(rr).

After Culinary Local 226 gave notice that it intended to strike, management sent this letter to bargaining unit employees. The letter informed the employees that "[i]t is completely your choice as to whether you choose to stay away from work during the strike or come in to [sic] the Hospital and work during the strike."

The letter then provided information relevant to each of the alternatives. After assuring employees that they could come to work if they chose to do so, the letter stated:

> If you are a union member, you must resign your union membership before you come into work during the strike. Otherwise, the union can fine you for working during the strike.

It is true, as stated in the General Counsel's brief, that the letter informed employess that they "must resign your union membership before you come to work during the strike." However, the next sentence explained why: "Otherwise, the union can fine you for working during the strike."

An employee would not read the sentence quoted by the General Counsel and then stop. Rather, the employee reasonably would read the next sentence as well. It is in the same paragraph.

This sentence makes clear that the Respondents are not requiring the employee to resign as a condition of working. An employee reasonably would understand that he or she must resign from the union to avoid being fined for working during the strike.

Moreover, the April 27, 2023 letter neither threatened employees with retaliation if they remained in the Union nor promised them a benefit if they resigned. The letter merely informed employees of the law.

For these reasons, I recommend that the Board dismiss the allegations raised by complaint subparagraph 6(ss).

Complaint Subparagraph 7(a)

Complaint subparagraph 7(a) alleges that (1) about August 19, 2020, Respondent Valley and

Respondent UHS required their employee Silvia Franco to complete English-language UV light testing; (2) about August 20, 2020, Respondent Valley and Respondent UHS issued a final written warning to their employee Franco; (3) about August 26, 2020, Respondent Valley and Respondent UHS discharged its employee Franco, and (4) about August 26, 2020, Respondent Valley and Respondent UHS rejected a Spanish-language statement written by its employee Franco about her discharge.

Complaint subparagraph 7(j) alleges that Respondent Valley and Respondent UHS engaged in this conduct "because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities."

Complaint paragraph 11 alleges that this conduct violated Section 8(a)(1) and (3) of the Act. The Respondents deny all these allegations.

Franco began working at Valley Hospital in 2015, as an attendant in the environmental services department. Attendants perform housekeeping duties somewhat similar to those of a maid in a hotel but must meet the more stringent standards necessary in an environment where patients weakened by sickness may be more susceptible to contagious diseases. Supervisors sometimes check surfaces using a special instrument which detects the presence of bacteria.

In addition to the usual cleaning tools, attendants must operate a large device on wheels which, when activated, irradiates a room with powerful ultraviolet light. Used improperly, the machine can be hazardous and/or ineffective. Therefore, attendants must take a course concerning its proper operation and then pass a test.

Franco took the training and the subsequent test a number of times but could not pass it. On August 20, 2020, Valley Hospital discharged her.

The allegations in complaint paragraph 7 appear to rest on the premise that Franco is unable to communicate in English and that forcing her to take the test in English resulted in her failing it, which led to the final warning and then to her discharge. However, even assuming that the government could prove these allegations, such proof alone would not establish that issuing Franco a final warning and then discharging her violated the Act.

The General Counsel has not stated a theory of violation. The General Counsel's brief devotes only the following two paragraphs to these allegations:

> In addition to requiring LMS training in English only, [Environmental Services Director] McKinnon also requires employees to complete training for the UV light and the certification test in English only. Silvia Franco (Franco) started working for Respondent Valley in the EVS Department in 2015. Franco was a Culinary 226 supporter and would wear her union button at work, would attend union rallies, and filed grievances with the union.[55] TR19:2446-49. Franco's primary language is Spanish.
>
> On July 23 and 26, 2020, Franco was required to certify on the UV light by Millet. TR19:2456. Millet does not speak Spanish and the exam to certify was in English.

Millet did not provide Franco with an interpreter for the exam. TR19:2457. On July 23, 2020, Millet tested Franco on the UV light twice without a translator.[56] On July 26, 2020, Millet retested Franco twice, once without a translator and once with a novice Spanish speaker.[57] On August 19, 2020, Franco was retested on the UV light in English.[58] She failed each exam. Prior to testing, Franco was made to watch an English language training video about the UV light.[59] Each time that Franco was made to re-test and watch the video, she requested a translator. After failing the test on August 19, 2020, Franco was terminated on August 20, 2020.[60]

_____

[55] GCX198.
[56] GCX200.
[57] GCX200.
[58] GCX200.
[59] GCX97.
[60] GCX203.

These paragraphs leave many questions unanswered. They do not address a very basic question: Has there even been an act of discrimination?

The General Counsel's brief states that "McKinnon also *requires employees* to complete training for the UV light and the certification test in English only." (Emphasis added.) However, the brief did not claim, and the record does not suggest, that McKinnon ever gave any employees the training and test in a language other than English. The record does not even establish that the training materials and test are available in another language.

So, it must be asked, how does requiring Franco to take the training and test in English, the same requirement uniformly imposed on other employees, constitute disparate treatment? The General Counsel's brief does not address this question.

The brief does not discuss what evidence is offered to carry the government's initial burden under *Wright Line*. Clearly, though, the record establishes that the government has satisfied the first two *Wright Line* elements, protected activity and employer knowledge of that activity.

Franco was a member of the Culinary Local 226. Although she never held Union office, she did sometimes wear a union button at work. (Tr. 2446.) She also filed grievances. (Tr. 2448-2449; GC Exh. 198.) Management clearly would be aware of these activities.

The Board's findings in earlier cases[68] involving Valley Hospital may be taken into account in

[68] The General Counsel cites previous cases in which the Board found that the hospital had violated the Act. In *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019), the Board found that the hospital had not violated the Act by failing to continue in effect a dues checkoff provision in a collective-bargaining agreement which had expired. However, after the Court of Appeals for the 9th Circuit remanded this case, the Board reversed its earlier decision and decided that the hospital's failure to continue deducting union dues from employees' paychecks did violate the Act. *Valley Hospital Medical Center*, 371 NLRB No. 160 (2022). In *Valley Health Systems, LLC d/b/a Desert*

deciding whether the General Counsel has carried the government's burden of establishing the existence of animus. They may suffice to carry the government's burden of proving the existence of animus somewhere in the organization, but no credible evidence proves that any manager or supervisor who made decisions about Franco's employment acted with animus. The General Counsel must establish a causal connection between Franco's protected activities and the adverse employment actions taken against her. *Tschiggfrie Properties, Ltd.*, above. However, the General Counsel's brief does not point to any evidence of such a link and the record does not establish such a link.

Therefore, I conclude that the General Counsel has not carried the government's initial *Wright Line* burden.

It should be noted that there is another, more fundamental reason, for rejecting the government's argument. That argument rests on the premise that Franco cannot read or write English and that, accordingly, requiring her to read training materials written in English and to take a test written in English doom her to failure. But one fact makes that premise collapse.

Franco can read and write English.

Abundant evidence establishes that fact. Such evidence includes the following testimony which Franco gave during cross-examination:

Q. And, Ms. Franco, when you applied for work at Valley Hospital, you applied in English, correct?
A. Yes.

Q. And you interviewed in English, didn't you?
A. Yes.

Q. And you were told when you were hired that you would need to speak English at work, correct?
A. Yes.

Q. And you can speak English, correct?
A. Only the basics.

Q. And you did, in fact, speak English at work, correct?
A. Yes.

Q. And you can also read English, can't you?
A. Very little.

Springs Medical Center, 369 NLRB No. 16 (2020), the Board found that this Respondent committed a number of serious unfair labor practices, including withdrawal of recognition from Service Employees International Union, Local 1107, as the exclusive representative of Respondent's employees in three different bargaining units.

Q. You were able to read your disciplines that you received, correct?
A. Yes.

(Tr. 2637.)

On performance appraisals, Franco consistently received grades of "M" (met standards) for verbal and nonverbal communication. (R Exhs. 142 through 144)

Franco wrote in English on forms she submitted in connection with grievances she had filed. (R Exh.) Likewise, she wrote a statement in English on a grievance form concerning her discharge. (R Exh. 38) Franco's grammar occasionally was awkward but the message was understandable.

However, it would be difficult, in the absence of testimony from a reading expert or psychologist, to determine whether Franco was proficient enough in English to learn facts communicated in English and to take a test written in English. The training consisted of videos explaining the operation of the UV machine, which is called an "RD" unit. The ultraviolet radiation it emits, deadly to germs, can seriously injure people, so a major focus of the training is safety.

The test consists of 15 multiple choice questions and 10 true/false questions. One of the true/false questions states: "Persons may enter a room while RD unit is turned on." The correct answer is "false" because whoever was in the room while the unit was operating would be exposed to the dangerous rays. However, on a test Franco took on July 23, 2020, she circled "true."

Another question stated that when the unit is energized, the door safety light turns green. Although the correct answer is "false," Franco circled "true." (General Counsel's Exhibit 200) She was having trouble learning the basic rules necessary to keep her safe.

The record does not establish that Respondents wanted Franco to fail but precisely the opposite: Management gave her six chances to take the training and pass the test. It also gave Franco individualized help.

About two and a half weeks before Franco's discharge, two environmental services managers worked with her to help her learn the necessary material. (Tr. 4685–4686.) The managers were Darrell Millet and Monica Griego. Afterwards, Millet wrote a memo to Environmental Services Director Glenn McKinnon. The memo stated:

> On 7/23/20 Monica initiated a further UV Light training with Silvia Franco.
>
> Monica had Silvia watch both training videos and issued Silvia the RD Quiz. Silvia failed the first Quiz. Monica went over it with her and issued her another quiz and Silvia failed that quiz as well.
>
> Today 7/26/20 at the beginning of the shift I had Silvia watch the training videos again and also issued her a RD Quiz. Silvia failed that quiz.
>
> Silvia asked if we had the training in Spanish so I asked Jennifer Parada to translate both videos and the quiz to her.

I stayed with them and observed Jennifer and Silvia.

When asked if she was understanding the translation throughout the videos, Silvia always responded that she did understand.

I then issued the RD Quiz to Silvia and Jennifer also translated the quiz to her in Spanish.

Silvia failed the RD Quiz for a 4th time.

(Respondents' Exhibit 280)

Even though Franco had failed the test 4 times, the Respondent did not discharge her. However, after she took and failed the test a fifth time, on August 19, 2020, the Respondent did.

Complaint subparagraph 7(a)(2) alleges that the Respondents issued a final warning to Franco on August 20, 2020, and complaint subparagraph 7(a)(3) alleges that the Respondents discharged her on the same date. Counsel for the General Counsel has not cited any evidence to prove a causal connection between Franco's protected activity and the adverse employment actions taken against her. Neither do I find any in the record. Accordingly, I conclude that the General Counsel has failed to carry the government's initial *Wright Line* burden. *Tschiggfrie Properties, Ltd.*, above.

Complaint subparagraph 7(a)(4) alleges that, about August 26, 2020, Respondent Valley and Respondent UHS rejected a Spanish-language statement written by its employee Franco about her discharge. The General Counsel's brief does not discuss this allegation at all. Thus, the General Counsel has not even attempted to explain how an employer can violate someone's Section 7 rights six days after that person ceased being an employee.[69]

Additionally, the evidence clearly establishes that the Respondents discharged Franco "for cause," as that term is used in Section 10(c) of the Act. The cause was Franco's inability to pass a required test demonstrating that she understood the safety hazards inherent in the operation of dangerous equipment and thereby showing her ability to perform the job safely. On August 26, 2020, Franco's status was not even equivalent to that of a qualified job applicant because she already had shown herself unable to meet the job's requirements.

In sum, I recommend that the Board dismiss the allegations raised in complaint subparagraph

[69] The General Counsel's brief does not cite any evidence to establish that the Respondents actually refused to accept a statement in Spanish. However, even assuming for the sake of analysis that the government could prove that the Respondents did so, and also leaving aside the issue of Franco no longer being an employee (and the refusal therefore not being an adverse employment action), the General Counsel would still have to show a causal link between her protected activity and the refusal. Rather than establishing such a link, the credible evidence proves that the Respondents discharged Franco because she repeatedly failed to pass a test required to demonstrate that she could operate dangerous equipment safely.

7(a) in their entirety.

Complaint Subparagraph 7(b)

Complaint subparagraph 7(b) alleges that (1) about September 10, 2020, Respondent Valley and Respondent UHS issued a final written warning to their employee Villalobos; (2) Between about September 10, 2020, to about October 14, 2020, Respondent Valley and Respondent UHS subjected their employee Villalobos to closer supervision; (3) About October 5, 2020, Respondent Valley and Respondent UHS required their employee Villalobos to complete English-language LMS testing, and (4) About October 14, 2020, Respondent Valley and Respondent UHS discharged their employee Villalobos.

Complaint subparagraph 7(j) alleges that Respondent Valley and Respondent UHS engaged in this conduct "because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities."

Complaint paragraph 11 alleges that this conduct violates Section 8(a)(1) and(3) of the Act. The Respondents deny all these allegations.

As an attendant in Valley Hospital's environmental services department, Sandra Villalobos cleaned patients'rooms. However, her work repeatedly fell below the hospital's standards of cleanliness.

Those standards required a particularly thorough cleaning of a patient's room on the day the patient leaves the hospital so that the next patient to use the room will not be welcomed by germs from the previous occupant.

On January 28, 2019, a supervisor inspected a room which Villalobos had cleaned after its occupant had been discharged from the hospital. The inspector found a hole in the fitted sheet, tape on a bedrail, grime on the floor and the trash can liner loose. As a result, Villalobos received a level 1 "preventive counseling," but she refused to sign the disciplinary notice. (Respondents' Exhibit 50)

In February 2020, Villalobos received a written warning after a supervisor found a number of deficiencies. The warning stated, in part:

> On February 5, 2020 an inspection of your discharge room # 399-A showed multiple areas of violations and sub-standard Performance.
>
> Included were safety and performance violations of your assigned cart.
>
> A check of your log showed the following violations:
>
> Cart top and side doors facing the corridor were not secured as required.
>
> An open bottle of Clorox Bleach was inside her cart and against unwrapped toilet tissue to be used for replenishing restrooms.

Cleaning wipes were cross contaminating another container of chemicals.

She had her issued phone left unattended on the cart and not secured on her person.

Her keys were also left on top of the cart allowing for potential loss and breach of security.

An inspection of room # 393-A (Discharge) showed that she failed to clean the room to sanitation standards of a discharge room.

Heavy dust build up on the restroom ceiling vent easily cleanable with a wipe.

The toilet showed multiple areas of debris and liquids, primarily the side of the bowl with dripped liquid believed to be urine from the seat to the base. IT was not wiped or sanitized

The shower was littered with debris and soil not wiped or cleaned with sanitizer. A matter found also appeared to be human skin. All easily removable with a wipe.

Shower and restroom baseboards showed a multiple build-up of scuff marks not cleaned off.

Other dusting and cleaning violations were catalogued in this room.

(GC Exh.220.)

In March 2020, Villalobos received a level 2 warning for failing to follow a number of hospital rules and procedures including the possible contamination of gloves used in cleaning and sanitizing areas where patients would be present. According to the warning, Villalobos did not react well when the supervisor pointed out these problems. The warning stated: "Throughout the conversation inquiry, you repeatedly interrupted and were loud, and would not allow for communication regarding the concerns found. You had to be asked three (3) times to please be patient, listen and discuss afterwards." (R Exh. 52.)

In September 2020, Villalobos received a level 3 final warning which stated, in part:

Since your last Corrective Action Level-2 Performance issuance, you have continued to perform to unacceptable standards.

On September 09, 2020 I inspected patient rooms on your assigned area and noted multiple areas of major concern for patient safety. Of these areas, 1 have noted three (3) of the four (4) rooms containing alarming unsanitary conditions.

Room # 391: Employee entry shows started room at 2:34pm and completed at 2:40pm

•Foreign matter and debris under patient room trash container. Floor not swept or

mopped to standard.
•Patient Room Soiled Linen bag not emptied containing approximately 75% capacity of soiled linen. Not emptied as required.
•Patient restroom shower heavy soil matter and foreign debris throughout. Soiled foot prints. Not cleaned or sanitized to standard.

Room # 394: Employee entry shows started room at 2:55pm and completed at 3:24pm

•Foreign matter splattered multiple areas on the patient's room wall appearing to be human feces. Not cleaned & sanitized to standard.
•Patient room flooring not swept or mopped as required with areas showing heavy debris.
•Patient Room Restroom heavily soiled with debris such as hair, dried liquids appearing to be urine and other foreign matter. Not cleaned & sanitized to standard.
•Patient Room Restroom toilet and sink piping/hosing with heavily soiled crusty dried water and alkaline build up. Not cleaned & sanitized to standard.
*Patient Room Shower heavily soiled crusty dried water and alkaline build up. Not cleaned & sanitized to standard.

Room # 355-B Discharge: Employee entry shows started room at 9:53am and completed at 10:54am

•Heavy dust build up closet. Not wiped, dusted & sanitized.
•Patient Bed Rail with multiple areas of foreign matter believed to be human blood. Not cleaned & sanitized to standard.
•Bedside table heavily littered with soil debris and dried foreign liquid matter. Not cleaned & sanitized to standard.

(R Exh. 54)

The supervisor who issued this disciplinary warning, Environmental Services Manager Darrell Millet, signed it on September 10, 2020. Villalobos signed it on the same day. Complaint subparagraph 7(b)(1), together with complaint paragraph 11, allege that by issuing this warning, the Respondents violated Section 8(a)(1) and (3).

Under *Wright Line*, the General Counsel initially must prove the existence of protected activity, that the employer knew about the protected activity and that the employer harbored antiunion animus. The General Counsel also must show a causal connection between the protected activity and the discipline. *Tschiggfrie Properties, Ltd.*, above.

With respect to the first requirement, the General Counsel states that Villalobos participated in Union rallies in 2019 and 2020 and filed several grievances. The General Counsel's brief also states that Villalobos gave testimony in another Board proceeding. However, the complaint does not allege that the discipline and discharge of Villalobos violated Section 8(a)(4).

The General Counsel does not address the second *Wright Line* requirement, employer

knowledge of the protected activity. However, the Respondents certainly would be aware that the Respondent filed grievances.

The General Counsel also must prove both the existence of animus and a connection between Villalobos' protected activity and the adverse employment action which constitutes the alleged unfair labor practice. The present record presents minimal credible evidence of animus. However, as noted above, the Board has found animus in *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 (2020), and the findings in that case add to the evidence of animus here. But the General Counsel still must prove a causal link between Villalobos' protected activity and the adverse employment action. *Tschiggfrie Properties, Ltd.*, above.

For reasons stated earlier in this decision, in the discussion of the allegations raised in complaint subparagraphs 6(c) through 6(h), I do not believe that Villalobos gave reliable testimony. For the reasons discussed above, because I believe her testimony had only an occasional congruence with reality and cannot be trusted, I do not credit it here.

No credible evidence connects Villalobos' protected activity with the September 10, 2020 final warning which she received. Therefore, I conclude that the General Counsel has failed to carry the government's initial *Wright Line* burden.

Credible evidence establishes that Villalobos received the September 10, 2020 warning because she did not meet the Respondents' standards, to put it politely. The manager who inspected rooms she cleaned found what appeared to be feces, dried urine and dried blood.

Villalobos claimed that a patient asked her not to clean. However, I do not credit her testimony. Moreover, the disciplinary notice she signed on September 10, 2020 states that there were unsanitary conditions in 3 rooms, not just one. In one of the rooms, the inspecting supervisor found what appeared to be feces and dried urine. In another room the supervisor found what appeared to be dried blood. Even if a patient had asked Villalobos not to clean the patient's own hospital room, it is highly unlikely the patient would request that Villalobos not clean other rooms.

Finding no violation, I recommend that the Board dismiss the allegations raised in complaint subparagraph 7(a)(1).

Complaint subparagraph 7(a)(2) alleges that between September 10, 2020 and about October 14, 2020, Respondent Valley and Respondent UHS subjected their employee Villalobos to closer supervision. The Respondents deny doing so.

The record suggests that closer-than-ordinary supervision would not be needed because, to reduce the risk of nosocomial infections, the hospital closely monitors the work of *all* employees who clean and sanitize. Supervisors routinely inspect patients' rooms after they have been cleaned and take photographs to document unsatisfactory work. They have strong incentives to do so. A failure to maintain cleanliness carries medical and legal consequences.

Considering that Villalobos had received previous warnings about unsatisfactory performance, and considering that she had failed to clean thoroughly rooms contaminated with feces, urine and blood, it would not be surprising if the hospital had, in fact, checked her work more carefully.

However, it bears repeating that no credible evidence establishes that management supervised Villalobos more closely than necessary.

Likewise, no credible evidence indicates either that those who supervised Villalobos harbored animus or that animus was a factor in any of management's decisions about her. Moreover, no evidence establishes a link between Villalobos' protected activity and the extent of supervision. Concluding that the General Counsel has failed to carry the government's initial *Wright Line* burden, I recommend that the Board dismiss the allegations raised in complaint subparagraph 7(b)(2).

Complaint subparagraph 7(b)(3) alleges that about October 5, 2020, "Respondent Valley and Respondent UHS required their employee Villalobos to complete English-language LMS testing."

At the outset, it must be determined what this allegation means. The meaning of the words in the complaint, quoted above, is not self-evident.

The acronym "LMS" stands for "Learning Management System." It may be thought of as a machine - software running on a computer - that delivers training to employees. It is analogous to a movie projector and the training modules it presents are analogous to various reels of film.[70]

The Valley Health System requires all employees to take training each year and the training is presented through the LMS. However, the "reels" shown to a particular employee—the training modules - vary depending on the employee's job.

The Valley Health System has a written policy concerning its "Annual Mandatory Education Requirements." The policy states that non-compliance "may have an impact on performance evaluations for both employees *and their supervisors* and may include corrective action." (GC Exh. 56, emphasis added) The fact that a supervisor's rating can suffer because an employee failed to pass the training provides a potent motivation to enforce it.

So, supervisors keep track of whether their employees have taken the annual training mandated for the relevant job classification. In the case of Villalobos, that meant the training required for attendants in the environmental services department.

A literal reading of complaint subparagraph 7(b)(3)—that Respondents "required their employee Villalobos to complete English-language LMS testing" - could suggest that management had required her to take a test about the English language. However, the record does not establish that the Respondents required employees to take training about the English language.

More likely, the General Counsel intended complaint subparagraph 7(b)(3) to allege that the Respondents required Villalobos to take a test, written in English, about some mandatory subject such as one concerning what to do if a hospital visitor appeared to be suffering a stroke or heart attack.

But that is only part of the puzzle. Complaint subparagraph 7(b)(3) alleges that this event took place "about October 5, 2020." However, the record does not describe anything happening to

[70]Human Resources Director Dana Thorne described the "Learning Management System" during her testimony. (Tr. 491–495.)

Villalobos on or about October 5, 2020. The date "October 5" does not appear at all in the General Counsel's brief.

The brief does state that "on September 14, 2020, Villalobos was told to go to the basement, and she was given the Respondent UHS EVS[71] Department Training Manual to review in English." Because the manual was in English, the brief claims, Villalobos "struggled to complete her review." However, the brief refers to a manual written in English, not to the LMS or to a test. Therefore, I do not believe that this portion of the brief concerns the allegations in complaint subparagraph 7(b)(3).

In sum, the General Counsel has failed to identify any evidence pertaining to the allegations in complaint subparagraph 7(b)(3). Therefore, I recommend that the Board dismiss these allegations.

Complaint subparagraph 7(b)(4) alleges that about October 14, 2020, "Respondent Valley and Respondent UHS discharged their employee Villalobos." There is no doubt that the Respondents discharged Villalobos. The parties do disagree about why.

The General Counsel's brief provides no *Wright Line* analysis and does not identify any evidence which would suggest a causal connection between Villalobos' protected activity and her discharge. Absent proof of such a link, the government has not carried its initial burden and has not demonstrated that animus was a motivating factor in the decision to discharge her. *Tschiggfrie Properties, Ltd.*, above.

Credible evidence establishes that management discharged Villalobos because it believed she had been dishonest. Management concluded that she had violated hospital policy by allowing another employee to take an LMS training module for her and then failed to tell the truth during an investigation.

The chain of events leading up to the discharge began on September 23, 2020, when a lead attendant, Wanda Wong Chong, was doing her "rounds," going from room to room to find out which had been cleaned had which had not. Wong Chong[72] stopped to talk with an employee, Gloria Rios, who was working at a computer. On the computer's screen appeared the name "Sandra."

Wong Chong testified that when she asked about the name, the employee replied, "Sandra asked me to help her because she don't understand English, to do the LMS. And so she doing—helping Sandra doing the LMS." (Tr. 3738) The record indicates that "Sandra" referred to Sandra Villalobos.

As noted above, hospital policy prohibits one employee from taking another employee's LMS training. Wong Chong told Environmental Services Director Glenn McKinnon, who sent her back to get the computer number. Wong Chong did so. (Tr. 3733.)[73] Wong Chong testified that McKinnon

[71] Presumably, "EVS" refers to the environmental services department, in which Villalobos worked.

[72] Ms. Wong Chong testified that her last name was "Wong Chong," not merely "Chong." (Tr. 3705.)

[73] According to Wong Chong, when she returned with the computer number, McKinnon called

had instructed leads and supervisors to make "paper trails" so that if an employee who had been disciplined complained to the Union, "[w]e're going to say, hey, we have a paper trail." (Tr. 3723.) However, even if McKinnon made the statements Wong attributed to him, they do not constitute evidence of animus. McKinnon was telling the leads and supervisors to document any problem which resulted in an employee being disciplined so that management could prove later, during a grievance proceeding, that there was a sufficient basis for the discipline. The record establishes, for example, that supervisors routinely took pictures of dirt and stains left in a room after an employee had cleaned it.

McKinnon reported the matter to human resources but did not take part in the resulting investigation. That task fell to Human Resources Generalist Leslie Irwin, who interviewed Villalobos at least twice, examined computer records and viewed security camera recordings.

Villalobos had taken a sick day on September 23, 2020. Nonetheless, she had come to the hospital that day, had completed the LMS training module and also had sought treatment in the hospital's emergency department.

At least, that is what she told Irwin, but the Kronos timekeeping system had not recorded her clocking in or out that day. If Villalobos had, in fact, come to the hospital, logged into the LMS and taken the training, she had done so without clocking in, which was a violation of a hospital policy requiring employees to clock in before doing any work. Taking the mandatory training counted as work.

But Villalobos' violation of this policy wasn't the only problem. As Irwin investigated, she discovered that parts of Villalobos' story couldn't be verified.

Irwin interviewed Villalobos twice. Both times, Villalobos said that she had arrived at the hospital between 3:00 and 3:30 p.m. on September 23rd. Irwin decided to check the security camera recordings to find out if Villalobos really had entered the hospital at that time.

The COVID pandemic made that task easier. Because of the pandemic, the hospital had limited entrance to two doors, where staff could ask visitors questions about their health and take their temperatures. People could enter the hospital only through the main entrance or through the door to the emergency department.

Environmental Services Manager Michael Blake into the room and said "Hey, we got it. We got it. We finally got it." Wong Chong testified that McKinnon was "ecstatic." When asked what she meant by "ecstatic," Wong Chong answered "Well, he was happy. I mean, like, how he said, he finally got it. We finally got her." (Tr. 3733.)
When McKinnon testified, he was not asked whether he made these statements. Even assuming that he had, they do not establish that he wished to discharge Villalobos for Union or other protected activities or to discourage other employees from engaging in Union or other protected activities rather than for her poor job performance. As discussed above, Villalobos had failed to perform her job properly and recently had received a final warning for leaving traces of feces, urine and blood in rooms assigned to her for cleaning.

Irwin's notes state that during one interview, Villalobos had said that she had used the main entrance. During the other interview, Villalobos wasn't sure which door she had used. However, security camera recordings did not show Villalobos coming in through either entrance.

Yet Villalobos definitely was in the hospital at some point. Environmental Services Manager Monica Griego encountered her. According to Irwin's notes, Griego said that Villalobos was not in uniform and told her that she was "registered in ER."

Because Villalobos had called in sick that day, her coming to the emergency room for treatment didn't sound all that strange. However, Villalobos reportedly had said something to Griego which did sound strange.

Irwin's notes of her interview with Griego included the following: "Sandra [Villalobos] stated to Monica [Griego] that she completed her LMS in the ER." (GC Exh. 119.) That statement about where Villalobos had used the LMS is inconsistent with the information provided by Wong Chong, who had seen a nursing employee, Rios, apparently accessing the LMS using Villalobos' password. It is also inconsistent with Rios' statement to Irwin that she, Rios, was just helping Villalobos access the system. But Rios was on one of the patient floors, not in the emergency department.

Besides this inconsistency concerning where Villalobos supposedly took the training, there is also an inconsistency regarding *when* she took it. Irwin testified that Villalobos had said, during one of the interviews, that she had gone to the emergency room around 6:00 p.m. (Tr. 1320) That was consistent with what Griego had said. Griego told Irwin the encounter with Villalobos had taken place around 6 p.m. (GC Exh. 119.)[74] Therefore, I have some doubts about the accuracy of Griego's recollection. However, the actual time when Griego encountered Villalobos is not as important as Irwin's belief as to the time of the encounter. Management made its decision to terminate Villalobos based on the information Irwin had gathered. Yet the LMS records indicated that Villalobos had

[74] At the hearing, counsel for the General Counsel asked Griego about the time of her encounter with Villalobos "around September." Griego testified: "I believe it was probably between 3 and 4, maybe 4 or 5, somewhere around there because that's when she's starting to shift. . ." (Tr. 1023.)

According to Irwin's notes, Griego placed the encounter at about 6 p.m. Because memories typically fade over time, I do not believe that Griego's testimony at hearing was as reliable as the information she provided to Irwin. Irwin interviewed Griego in early October 2020, about 2 weeks after Griego's encounter with Villalobos. Griego testified at the hearing more than two and one-half years later and the events were not as fresh in her recollection.

At the hearing, when counsel for the General Counsel asked if the event took place 2020, Griego stated that she did not remember the date. Additionally, from her testimony, quoted above, it appears that Griego did not have an actual memory of the time of the encounter but rather was guessing. Her use of the qualifier "probably" indicates some uncertainty. Additionally, she explained that she estimated the time as "somewhere around there because that's when she's starting to shift," which suggests that Griego was guessing about the time based upon when shifts change.

completed all the training by 5:14 p.m.

Even aside from the inconsistencies, Villalobos' explanation was inherently implausible. Irwin testified that Villalobos had said she had gone to the emergency room because of "pressure in her chest." If she were feeling bad enough to seek immediate treatment in the emergency department, would she be able to sit at a computer for upwards of an hour taking the training?

The explanation which causes the least friction with fact is simply that Rios took the training while logged in on the LMS system using Villalobos' password and did so on Villalobos' behalf. Then, later in the afternoon, Villalobos came to the emergency room for treatment.

If so, that meant that Villalobos not only violated the hospital's policy about working without checking in but also had been untruthful. Irwin concluded that Villalobos had been dishonest. In view of my own assessment of Villalobos' credibility, Irwin's conclusion does not strike me as being a pretext.

Villalobos already had received a final warning for her failure to clean the traces of human excreta from patients' rooms. The decision to discharge her comported with the Respondents' progressive discipline system.

As noted above, the General Counsel has failed to establish any causal connection between protected activity and the decision to discharge Villalobos. Therefore, the government has not carried its initial burden under the *Wright Line* test and has not established that Villalobos' discharge violated the Act.

In sum, I recommend that the Board dismiss all the allegations raised in complaint subparagraph 7(b).

Complaint Subparagraphs 7(c) and 7(k)

Complaint subparagraph 7(c) alleges that since about October 2020, a more precise date being unknown to the General Counsel, Respondent Desert Springs and Respondent UHS withheld wage increases from employees in the Desert Springs Technical Unit. Complaint subparagraph 7(k) alleges that Respondent Desert Springs and Respondent UHS did so "because the employees in the Desert Springs Technical Unit joined and assisted SEIU Local 1107 and engaged in concerted activities, and to discourage employees from engaging in these activities."

Complaint paragraph 11 alleges that this action violated Section 8(a)(1) and 8(a)(3) of the Act. The Respondents deny these allegations.

For clarity, it may be noted that the complaint does not allege that the conduct described in complaint subparagraph 7(c)—withholding wage increases - to be a violation of Section 8(a)(5). It only alleges this conduct be a violation of Section 8(a)(1) and 8(a)(3).[75] Specifically, complaint

[75] The complaint does include an allegation that Respondent Desert Springs violated Sec. 8(a)(5) by ceasing to grant wage increases to employees in the Desert Springs technical employee unit. This allegation appears in complaint subpar. 9(d), discussed later in this decision. However, the alleged

subparagraph 7(c) alleges that Respondent Desert Springs withheld a wage increase in October 2020 whereas complaint subparagraph 9(d) alleges that about December 11, 2020, Respondent Desert Springs ceased granting wage increases to employees in the technical unit. It isn't clear why the complaint alleges the first withholding of a wage increase to violate Section 8(a)(3) and the second to violate Section 8(a)(5).

The General Counsel's brief does not address these allegations. It neither states a theory of violation nor identifies any evidence offered to support such a theory. Similarly, the General Counsel does not discuss whether the allegations should be analyzed using the *Wright Line* framework or some other standard. The brief also cites no case authority.

To prove that an employer withheld a wage increase from employees, the government must first prove that employees were due a wage increase. For example, the General Counsel might point to a collective-bargaining agreement which provided that employees would receive a wage increase on a specified date and then offer evidence that they did not receive it. Or the General Counsel might prove that there was an established practice of granting raises on a particular date.

The General Counsel has not identified any provision in a collective-bargaining agreement which obligates the Respondents to increase wages in about October 2020. Likewise, the government has not shown that there was a past practice of granting wage increases in October. The General Counsel also has not shown that Respondent Desert Springs was obligated, by any other contract, agreement or law, to raise wages. Additionally, the General Counsel has failed to state the amount of the alleged wage increase which employees were supposedly denied.

If the government has abandoned this allegation, the General Counsel should have said so. If the government has not abandoned the allegation, the General Counsel should have identified the source of the alleged obligation to increase wages and the amount of the alleged increase, stated the date on which the increase was due and identified which employees or which categories of employees should have received it.

This information isn't merely nice to have, it is essential. Obviously, such information would be needed to fashion a remedy but it is also necessary to prove liability. Unless the government carries its burden of proving that certain employees were legally entitled to a wage increase, it cannot carry the burden of proving that any wage increase was withheld. And if the government cannot prove that a wage increase was due but withheld, it cannot even prove that there was an adverse employment action.

Because the General Counsel has failed to prove the conduct alleged in complaint subparagraph 7(c), it is neither necessary nor possible to prove the motivation alleged in complaint subparagraph 7(k).

In sum, the General Counsel has not carried the government's burden of proof. I

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failure to grant a wage increase described in complaint subpar. 9(d)supposedly took place two months after the withholding of a wage increase alleged in complaint subpar. 7(c).

recommend that the Board dismiss the allegations raised by complaint subparagraph 7(c).

Complaint Subparagraph 7(d)

Complaint subparagraph 7(d) alleges that about August 20, 2021, Respondent Valley and Respondent UHS ceased granting SEIU Local 1107 access to Respondent Valley's facility. Complaint subparagraph 7(l) alleges that these Respondents did so because their employees joined and assisted SEIU Local 1107 and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint paragraph 11 alleges that this conduct violated Sections 8(a)(1) and 8(a)(3) of the Act. The Respondents deny these allegations.

Both this subparagraph and complaint subparagraph 9(j) describe the same alleged conduct. The description appears in two places because the complaint alleges that the conduct violated both Section 8(a)(5) of the Act, to be discussed later in this decision, and Section 8(a)(3) of the Act, discussed here.

Section 8(a)(3) prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination *in regard to hire or tenure of employment or any term or condition of employment*. See *29 U.S.C. § 158(a)(3).* Thus, to violate Section 8(a)(3), an employer must take some action which adversely affects an employee's terms and conditions of employment. However, the complaint does not identify any specific employee whose terms and conditions of employment were affected by this action. The complaint does not allege that any particular employee was a "discriminatee.'

Additionally, it is not clear that the General Counsel's brief even addresses the allegations raised in complaint subparagraph 7(d). The brief does not describe any particular action by which the Respondents communicated "stay out" to the Union.

In a section of the brief titled "Introduction," the General Counsel states "Respondents restricted SEIU Local 1107 access while fomenting disaffection for the union among employees while angling for decertification as it had previously done." However, the General Counsel's brief does not provide further details.

The Respondents' brief does discuss complaint subparagraph 7(d), explaining what happened and why. It shows that the wording of complaint subparagraph 7(d) told the truth but not the whole truth, making an innocent action appear to be an unfair labor practice. The Respondents' brief describes a spike in COVID-19 cases, due to a new variant of the virus, in July and August 2021. To protect patients, the hospital limited visitors.[76]

[76] The wording of complaint subpar. 7(d) raises concerns. By omitting the fact that the hospital adopted a no-visitors policy as an emergency measure during a pandemic, the wording implies that the Respondent singled out the Union. It is certainly true that notice pleading, which has been the standard for many decades, does not require extravagant detail. However, when it is foreseeable that the wording likely would create a misleading impression, the language should be revised for two reasons. The first reason, of course, is fairness to the Respondents. The second is that government documents accusing someone of breaking the law should be drafted with particular care.

The first limitation, announced on July 29, 2021, allowed some visitors under some circumstances. (R Exh. 284) However, the number of COVID-19 cases continued to climb, so the hospital took more drastic action. On August 19, 2021, hospital management decided that the existing policy was insufficient and that no visitors should be allowed. That same day, the hospital notified the Union by email (GC Exh. 147) and the policy went into effect the next day. Valley Hospital was not alone in instituting a no-visitor policy. So did the other five acute care hospitals in the Valley Health System.

Although the General Counsel has not identified the conduct to which complaint subparagraph 7(d) refers, it seems clear that the implementation of the no-visitors policy was that conduct. This conclusion is based on the fact that the no-visitors policy went into effect on August 20, 2021, the same date alleged in complaint subparagraph 7(d), and on the absence of evidence that the Respondents did anything else which would constitute a denial of access.

The complaint alleges that the hospital's action violated Section 8(a)(1) of the Act as well as Section 8(a)(3). Every violation of Section 8(a)(3) is also a violation of Section 8(a)(1) because any discrimination proscribed by Section 8(a)(3) also constitutes interference, restraint or coercion made unlawful by Section 8(a)(1). But not every violation of Section 8(a)(1) involves an act of discrimination. So, before analyzing whether the conduct alleged in Section 7(d) constitutes unlawful discrimination in violation of Section 8(a)(3), I will consider whether, even absent discrimination, it violates Section 8(a)(1).

In determining whether the no-visitor policy violates Section 8(a)(1) by interfering with, restraining or coercing employees in the exercise of their Section 7 rights, I will begin by assuming for purposes of analysis that non-employee Union representatives have the same rights of access that non-employee union organizers would possess.

Las Vegas, where the hospital is located, is not one of those rare, very isolated locations where a non-employee Union representative has no reasonable alternative means of contacting employees except by going on their employer's premises. The special rules applicable in those unusual cases do not apply. *Lechmere v. NLRB*, 502 U.S. 527 (1992).

Additionally, the General Counsel has not argued that the hospital has disparately enforced its no-visitor policy by allowing other visitors while excluding Union representatives. No evidence indicates that the hospital allowed *any* visitors.

Even more than the public generally, employees who work in hospitals recognize the need to protect patients, already weakened by other medical conditions, from exposure to a deadly virus. No hospital employee reasonably would understand a generally applicable no-visitors policy, adopted during a pandemic, to convey any message about unions or union representation.

Therefore, I conclude that the Respondents' no-visitor policy does not constitute an independent violation[77] of Section 8(a)(1) of the Act. Cf. *Great Scot, Inc.*, 309 NLRB 548 (1992).

[77] An independent violation of Sec. 8(a)(1) is a violation which exists even in the absence of an

With respect to the alleged violation of Section 8(a)(3), it is significant that the complaint does not identify any particular employee who was subjected to discrimination which caused an adverse employment action. As noted above, to prove a violation of Section 8(a)(3), the government must present evidence that an employer committed an act of discrimination which affected an employee's "hire or tenure of employment or any term or condition of employment." See 29 U.S.C. § 158 (a)(3). The absence of any discriminatee suggests there has been no act of discrimination.

The General Counsel has not shown that the no-visitors policy affected any worker's terms and conditions of employment in any significant way. There is no evidence that it resulted in any employee's discharge, or that it caused any demotion or reduction in pay or benefits. Likewise, the government has not established that the policy had any other adverse effect on a term or condition of employment.

Even assuming that being able to meet with a Union representative inside the hospital was a term or condition of employment, the General Counsel has not shown a causal connection between any employee's protected activity and the decision to adopt a no-visitor policy. To the contrary, the evidence clearly establishes that the Respondents implemented this policy to protect patients from the COVID-19 virus. The Respondents had a compelling reason to minimize the risk that patients, already weakened by illness, would be exposed to the dangerous contagion.

Additionally. no credible evidence establishes that the Respondents were using the COVID-19 epidemic as a pretextual reason for implementing the no-visitors policy. To the contrary, I conclude that the Respondents' motivation first and foremost was to save patients lives and protect the health of staff. Further, I conclude that antiunion animus did not enter into the decision-making process. For these reasons, I conclude that the General Counsel has failed to carry the government's initial *Wright Line* burden.

In sum, concluding that the General Counsel has not carried the government's initial *Wright Line* burden, I recommend that the Board dismiss the allegations raised in complaint subparagraph 7(d).

Complaint Subparagraph 7(e)

Complaint subparagraph 7(e) alleges (1) that since about June 24, 2021, Respondent Valley and Respondent UHS have engaged in closer supervision of their employee [Joann] Judge; (2) that about July 15, 2021, Respondent Valley and Respondent UHS issued a level 1 preventive counseling to Judge; and (3) that about July 29, 2021, Respondent Valley and Respondent UHS issued a level 2 written warning to Judge.

Complaint subparagraph 7(j) alleges that Respondent Valley and Respondent UHS engaged in this conduct "because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities."

8(a)(3) violation.

Complaint paragraph 11 alleges that this conduct violates Section 8(a)(1) and 8(a)(3) of the Act and complaint paragraph 12 alleges that it also violates Section 8(a)(4). The Respondents deny all these allegations.

Judge is an attendant in the environmental services department. She has worked for Valley Hospital for about 19 years and was still working there when she testified in the hearing in this case. Her duties include cleaning patient rooms.

She is a member of Culinary Local 226, served briefly on the Union's bargaining committee, and has worn Union buttons at work. Judge also testified in a previous unfair labor practice case in which Valley Hospital was a respondent.

Although complaint subparagraph 7(e)(1) alleges that the Respondents "have engaged in closer supervision" of Judge since July 15, 2021, it isn't clear whether the complaint is alleging that management began supervising Judge more closely than they had supervised her before, or that management began supervising Judge more closely than it supervised other employees doing the same kind of work.

The General Counsel's brief does not discuss either possibility. It does not compare the way management supervised Judge before July 15, 2021 with the way it supervised her after that date. Likewise, the General Counsel does not compare the way management supervised Judge with the way management supervised other employees doing similar work.

Apart from the question of whether the General Counsel is comparing the way management supervised Judge before and after July 15, 2021, or comparing the way management supervised Judge with the way it supervised others, is the matter of how the amount of supervision is measured. The General Counsel has not claimed, or produced any evidence that, after July 15, 2021, supervisors inspected the rooms Judge had cleaned more often than before. The General Counsel also has not argued, or offered evidence to support an argument that supervisors inspected the rooms Judge had cleaned more than they inspected rooms cleaned by others.

The government also has not proven that, after July 15, 2021, supervisors changed the way they interacted with Judge, such as by following her around. Similarly, the General Counsel has not shown that, after July 15, 2021, supervisors treated Judge in a manner different from the manner they treated other employees.[78] McKinnon did not recall the incident (Tr. 431) and neither Blake nor

[78] The General Counsel's brief does describe an incident which allegedly took place *before* July 15, 2021. The brief states that in "May 2021, McKinnon followed Judge into the break room and slammed her locker door shut to intimidate her. TR22:2839"

However, even Judge's testimony cited in the brief does not support the General Counsel's claim that McKinnon *followed* her into the break room and slammed the locker door shut *to intimidate her*. Judge's testimony does not indicate exactly when McKinnon came into the break room but it certainly does not suggest he was following her. Moreover, although Judge's testimony is not entirely clear on this point, it appears that she was having a conversation with two individuals, Michael Blake and Darrell Millet, and not facing her locker when McKinnon shut the locker door. It

Millet was asked about it when they testified.

Additionally, it is unclear why the government chose July 15, 2021, as the date on which the allegedly greater supervision began. The General Counsel's brief does state that management gave Judge a preventive counseling session, the least serious form of discipline, on that date. This warning described problems supervisors found when they inspected two rooms Judge had cleaned. (GC Exh. 82.) However, the General Counsel's brief does not argue that this inspection marked the start of closer supervision.

In sum, the General Counsel has identified no evidence which would support the allegation that the Respondents increased their supervision of Judge. Accordingly, the government has failed to prove that Judge suffered the adverse employment action alleged in complaint subparagraph 7(e)(1).

Because there has been no adverse employment action, it is not necessary to engage in a *Wright Line* analysis. There is nothing to analyze. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 7(e)(1).

Complaint subparagraph 7(e)(2) alleges that on about July 15, 2021, the Respondents "issued a level 1 preventive counseling to Judge." That fact is undisputed. However, the Respondents deny that doing so violated the Act.

As discussed above, no credible evidence establishes that management singled Judge out for special scrutiny. However, her cleaning did receive the same scrutiny as that of other attendants. The record establishes that the Respondents took seriously the duty to prevent the transmission of disease and routinely conducted inspections of rooms after cleaning.

On July 14, 2021, a supervisor, inspecting two rooms which Judge had cleaned, found unsanitary conditions. In one room, a drawer by the patient's bed had not been cleaned and there was a soiled bandage in it. In the same room, the patient's bedding was soiled "with moderate visible unknown dried liquid stains." The flooring had not been swept or mopped to standard and there was a used Q-Tip on the floor. In the patient's bath, the shower head was "heavily soiled with built-up hard water crust turned green." The inspector also found large build-ups of debris and dirt." The inspector's report also included photographs.

In the other patient's room, the inspector also found soil, dirt, hair and stains and there was adhesive and tape build-up on the furniture. In the bathroom, the floor had not been mopped or sanitized and the hand towel dispenser had not been replenished. There were stains on the privacy curtain which, the inspector reported, should have been changed. Additionally, the self-care board in the bathroom had not been cleaned or sanitized. (GC Exh. 82)

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also appears that McKinnon might have been unaware that Judge was using the locker. According to Judge, after McKinnon slammed the locker door shut, Blake asked "why did you do that, she was about to put her purse in there." (Tr. 2839.) This suggests that McKinnon had merely seen a locker door open and shut it. No credible evidence establishes that McKinnon slammed the locker door shut to *intimidate* Judge.

For these multiple problems, Judge received only the lowest level of discipline. She wrote on the discipline form that she disagreed with the "heavy buildup on shower head and corners" and stated she needed more time. GC Exh. 82)

Although Judge received the lowest level of discipline, it was still discipline which counted against her in the Respondents' progressive discipline system. It certainly constitutes an adverse employment action warranting analysis under the *Wright Line* framework.

Judge clearly engaged in protected activities, including wearing a Union button, serving on the Union's bargaining committee, and testifying in a Board proceeding. The Respondents obviously were aware of these activities. Therefore, I conclude that the General Counsel has established the first two *Wright Line* elements.

In view of the other violations in this case, and those found in other relatively recent Board decisions,[79] I conclude that the General Counsel has satisfied the third *Wright Line* requirement, proof of animus. However, the government also must establish a connection between the employee's protected activities and the adverse employment action. *Tschiggfrie Properties, Ltd.*, above. The General Counsel has not proven such a link.

To the contrary, the evidence points to only one reason for the warning: The unsanitary condition of the rooms cleaned by Judge resulted in the discipline imposed. Because the General Counsel has not carried the government's initial *Wright Line* burden, I recommend that the Board dismiss the allegations related to complaint subparagraph 7(e)(2).

Complaint subparagraph 7(e)(3) alleges that about July 29, 2021, Respondent Valley and Respondent UHS issued a level 2 written warning to Judge. The General Counsel's brief does not refer to any disciplinary action taken against Judge on July 29, 2021. However, the record does include a written warning signed by Environmental Services Manager Monica Griego and by Judge on July 29, 2021. The "level 2" warning concerned Judge taking too long to complete her cleaning assignments.[80]

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[79] *Valley Health System, LLC, d/b/a Desert Springs Hospital Medical Center*, 372 NLRB No. 33 (December 16, 2022); *Valley Health System, LLC, d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 (2020).

[80] The warning also cautioned Judge about taking too long to acknowledge cleaning assignments. The Respondent had introduced a new means of informing attendants of which rooms they were to clean. This new method was an app, called "CapMan," on iPhones which the Respondents issued to employees. When a room cleaning assignment appeared on an attendant's iPhone, she was supposed to acknowledge it promptly through the app. The employee would then use the app to record when she began cleaning the room and again when she finished. The July 29, 2021 disciplinary warning faulted Judge both for taking too long to acknowledge the assignments and for taking too long to complete them. Complaint subparagraphs 9(f) and 9(g), discussed below, concern the Respondents' implementation and use of the CapMan app.

For the same reasons discussed above in connection with complaint subparagraph 7(e)(2), I conclude that the General Counsel has proven the existence of protected activity, employer knowledge and animus. However, credible evidence does not establish any link between Judge's protected activity and the disciplinary action. Concluding that the government has failed to carry its initial *Wright Line* burden, I recommend that the Board dismiss the allegations raised by Section 7(e)(3) of the Complaint.

In sum, the General Counsel has not carried the government's burden of proof with respect to any of the allegations raised in complaint subparagraph 7(e). Therefore, I recommend that the Board dismiss all of these allegations.

Complaint Subparagraph 7(f)

Complaint subparagraph 7(f) alleges (1) that about February 22, 2022, Respondent Valley and Respondent UHS issued a level 1 written warning to their employee Betty Williams; (2) that about March 2, 2022, Respondent Valley and Respondent UHS issued a level 2 written warning to Williams; (3) that about April 28, 2022, Respondent Valley and Respondent UHS issued a level 3 written warning to Williams, and (4) that about June 28, 2022, the Respondents discharged Williams.

Complaint subparagraph 7(j) alleges that the Respondents engaged in this conduct "because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities."

Complaint paragraph 11 alleges that these actions violated Sections 8(a)(1) and 8(a)(3) of the Act. The Respondents deny these allegations.

The General Counsel's brief mentions Williams' name only once, in the following sentence: "Respondent retaliated against union supporters Judge, Gouveia, Villalobos, Franco, Edwards, and Williams." The brief does not refer at all to any of the dates—February 22, 2022; March 2, 2022; April 28, 2022 and June 28, 2022— on which the unlawful actions allegedly occurred. It also does not discuss the facts relevant to any of the allegations in complaint subparagraph 7(f) and does not offer any legal analysis of those allegations.

Williams began work at Valley Hospital in 1981 and worked as an attendant. She was a Union member, had served as a shop steward, and had distributed leaflets on behalf of the Union.

Her duties as an attendant included cleaning operating rooms. For the protection of patients undergoing surgery, such cleaning must be thorough. On February 18, 2022, Environmental Services Manager Monica Griego inspected operating rooms which Williams had cleaned and found them unsatisfactory. Griego wrote:

> On February 18,2022 I Monica Griego conducted 2 inspections in Surgical Services. in Room OR 1 the following discrepancies, blood under bed, silver tool under bed frame, blood underneath stainless table, blood on bottom of small stainless table, under counter floor dusty, cords dusty, crumble paper on the bottom of anesthesia machine.

> OR 4 had the following discrepancies, blood on soiled hamper lid, IV pole had yellow residue and cords had tape hanging. I followed up with Surgical Services and ask what time the last surgeries were in both rooms, Deborah said both rooms did not have any more case after 12pm, I pulled OR's assignment sheet for February 18, 2022, and it is Betty Williams she cleaned both rooms.
>
> (R Exh. 40)[81]

Additionally, Griego discovered that Williams had failed to turn in required assignment reports. On February 22, 2022, Williams received a "preventive counseling," the lowest level of progressive discipline. Presumably, this is the discipline referred to in complaint subparagraph 7(f)(1).

Analyzing the facts using the *Wright Line* framework, it is clear that the General Counsel has satisfied the first two elements. Williams' protected activities included serving as a union steward and distributing union flyers. Both those activities were in plain sight of supervisors. Therefore, the General Counsel has proven both the existence of protected activity and employer knowledge of that activity.

The Respondents' unfair labor practices found in this case and found by the Board in previous cases suffice to establish the third *Wright Line* requirement, the existence of antiunion animus. However, the General Counsel has not proven that a causal connection exists between Williams' protected activity and the discipline.

Nothing in the record indicates that management focused on Williams because of her previous union activities. From the report of Manager Griego, quoted above, it is clear that the manager did not even know who had cleaned the operating rooms when she saw the unsanitary conditions. Only when she checked the assignment sheets did Griego discover that Williams was responsible.

No evidence suggests that management took Williams' protected activity into account in deciding to give her a "preventive counseling." The General Counsel has failed to prove any connection between Williams' union activity and the decision to impose discipline and therefore has failed to carry the government's initial burden of proof. *Tschiggfrie Properties, Ltd.*, above.

Complaint subparagraph 7(f)(2) alleges that Williams received a written warning on March 2, 2022. That fact is not in dispute. The warning is in evidence as Respondents' Exhibit 41. Attached to the warning itself was a statement by Environmental Services Manager Michael Blake.

According to the statement, on March 1, 2022, Blake had seen Williams enter the cafeteria at about 9:00 a.m. on March 1, 2022, and leave the cafeteria with food about 6 minutes later. Then, at 9:25 a.m., he saw her in the operating room staff lounge, eating.

Knowing that employees only had a 10-minute break, Blake asked Williams why she was eating so long after she had left the cafeteria. Williams said she had done a "turnover" in operating room 3. A "turnover" is cleaning the operating room in the time period between when one patient

[81] Punctuation and capitalization appear as in the original document.

leaves and the next patient arrives for surgery. (Tr. 2368) Blake checked Williams' assignment sheet, which showed that she had cleaned the operating room in 5 minutes, from 9:15 to 9:20 a.m. (Respondents' Exhibit 41) When asked during cross-examination about whether these times were accurate, Williams testified "[t]hat's probably about right." (Tr. 2366)

The March 2, 2022 written warning stated that Williams had taken an unauthorized break. Williams did not write anything in the warning form's space for employee comments.

As discussed above, the government has established the first three *Wright Line* elements. However, the General Counsel has not shown that any causal connection exists between Williams' protected activity and the decision to give her a written warning. Therefore, I recommend that the Board dismiss the allegations relating to complaint subparagraph 7(f)(2).

Complaint subparagraph 7(f)(3) alleges that about April 28, 2022, the Respondents issued a level 3 written warning to Williams. On that date, Environmental Services Managers Darrell Millet and Michael Blake inspected Operating Room 4. They discovered unsanitary conditions which Millet described in a statement:

> On April 28, 2022 at approximately 11:50 a.m. EVS Manager Michael Blake and myself were rounding in the operating room.
> We performed an Inspection of O.R. 4.
>
> We confirmed this room had been cleaned by EVS Attendants Betty Williams and Terry Jackson, as confirmed by both of their daily assignment sheets.
>
> There were several deficiencies of sanitation requirements found.
>
> During the inspection of O.R. 4 we found a dried red liquid that appeared to be blood on the bottom of the operating table,
>
> A sticky substance on one of the operating room monitors.
>
> We performed ATP testing, which tests the proper sanitation of a surface by reading live biological/bacterial materials left on a surface.
>
> A passing reading during ATP Testing Is a reading of 399 or lower for all surfaces. The doorknob had a reading on the ATP of 551 and the bed rail had a reading of 425.
>
> During the inspection we had Betty come in the room with us to show her that there was a significant amount of blood left on the bed.
>
> Before we could actually show her what was on the bed Betty made the statement "Oh, you must be trying to write me up
>
> When we explained to her that no we are not trying to write her up we are ensuring that the rooms are safe for both the patients and staff, and that this is a very serious health concern for the following patient and staff that will be in the room.

> Betty then made the statement "Well, I wasn't the only one in here, Terry was cleaning this room with me as well"
>
> I explained that we are and will follow up to confirm all who cleaned because each person is to assure the room is clean and sanitized
>
> I asked Betty why she did not inspect the bed after cleaning It, Betty then replied "because there was a lot of people in there."
>
> Betty Then stated "You'll have to blame me for the door knob and the monitor because all Terry did was make the bed"
>
> Betty acknowledged that she cleaned and failed to inspect the above areas
>
> (R Exh. 42)[82]

Later that same day, Blake, Human Resources Director Dana Thorne and Human Resources Generalist Leslie Irwin met with Williams. They discussed the unsanitary operation room conditions and also Williams' failures to log in and out of the timekeeping system properly two days earlier. They issued Williams a final written warning. (R Exh. 42)

Photographs support the warning's description of deficiencies. To the extent that Williams' testimony is inconsistent with that description, I do not credit the testimony.

In this instance, the General Counsel again has failed to prove a causal connection between Williams' protected activity and the decision to issue her this final warning. The record does not suggest that management had any reason for issuing Williams this warning except for her failure to use the timekeeping system properly and her failure to clean the operating room properly. Therefore, I recommend that the Board dismiss the allegations related to complaint subparagraph 7(f)(3).

After this final warning, Williams received additional training on proper cleaning procedures.[83] However, her work continued to fall below the hospital's standards. After her work failed inspection on three different occasions, Human Resources Director Dana Thorne and Environmental Services Director Glenn McKinnon, on June 28, 2022, told Williams that her employment was terminated. The termination notice describes the problems:

> **May 13, 2022**—After Betty indicated Major Treatment Room #1 was clean, inspection found heavy splatter of unknown substances and soiled area. Patient bedside table failed ATP test showing it had significant amount of pathogens.
>
> **June 10, 2022**—After marking that MICU, Room #8 was completed as a terminal clean,

[82] Punctuation as in original.

[83] Williams testified that this retraining consisted of giving her a booklet to read. (Tr. 2396–2397.)

> Betty left the Caution UV Cleaning sign on the door preventing access and use of the room, At 6 pm, 2.5 hours after Batty left her shift and 7 hours after Betty indicated the room was clean, Monica inspected the room and found the restroom was not UV'd despite Betty signing off that it had been completed. The toilet was soiled with dried urine. Monica found adhesives left on multiple areas (patient room information board, sanitizer dispenses, patent mattress and bio-dispenser top), dried body fluid spatters and unknown thick foreign substances on the bed and floors. The entire room and bathroom had to be re-cleaned and UV'd,. Additionally, the room had an empty sanitizer dispenser, which is used by clinical staff before, in-between and after dawning gloves. It was completely empty and collapsed, allowing immediate visual awareness of the need to change it.
>
> June 23, 2022–Betty's performance was again inspected. After she recorded 381A was clean, the supervisor found toilet seat covers ripped, soap dispenser empty, previous patient's IV tubing left in room, and dried debris left on floor. This continued failure to ensure appropriate cleaning and sanitizing of patient rooms is a patient safety issue that can no longer be tolerated. Betty's employment is, therefore, being terminated.
>
> (R Exh. 43)[84]

Williams refused to sign the discharge notice. When she testified, she denied at least some of statements in the termination notice. However, at times her testimony was ambiguous or confusing. For example, with respect to the description of a room cleaned by Williams, and inspected on June 10, 2022, she testified, in part, "I just did not understand how that room could be like that." (Tr. 2407)

With respect to the problems the inspector found on June 23, 2022, such as an empty soap dispenser and debris on the floor, Williams testified, in part: "You know, when I cleaned that room I was sure I had did all of that. There was — it didn't need any soap in there, in that room was clean. That room was clean. And that room it looked good to me when I got done with it." (Tr. 2410)

However, the inspectors took photographs to document the problems. (R Exh. 43) No evidence suggests that these pictures were not actually taken at the time of the inspection and in the room being inspected. Based on these photographs, I conclude that the descriptions in the discharge notice accurately reflect conditions in the rooms which Williams cleaned. Therefore, I do not credit Williams' testimony to the extent it contradicts the inspectors' descriptions.

The General Counsel has failed to prove any connection between Williams' protected activities and the decision to discharge her. Therefore, the government has failed to carry its initial *Wright Line* burden.

In view of the hospital's legal and ethical duty to protect patients from nosocomial infections and considering Williams' repeated failures to meet standards of cleanliness, including her failure to remove dried bodily fluids and medical waste, I conclude that the Respondents discharged Williams for lawful cause, the compelling need to assure that the hospital's operating and treatment rooms are

[84] The spelling, punctuation and grammar have not been changed.

not contaminated by pathogens.

In sum, I recommend that the Board dismiss the allegations pertaining to complaint subparagraph 7(f) in their entirety.

Complaint Subparagraph 7(g), 7(h) and 7(i)

Complaint subparagraphs 7(g), 7(h) and 7(i) allege somewhat similar conduct, namely, that Respondent Valley Hospital and Respondent UHS did things to employees, such as subjecting them to stricter enforcement of work rules or giving them closer supervision. However, the employees allegedly affected by the conduct differ.

The conduct described in complaint subparagraph 7(g) - subjecting employees "to stricter enforcement and application of work schedules, eliminating previous flexibilities and deviations from employees' work schedules"— allegedly affected employees Vera Blanche, Brenda Reyes and possibly other, unnamed employees. (Complaint subparagraph 7(g) alleged that the Respondents' actions affected employees *including* Blanche and Reyes.)

The conduct alleged in complaint subparagraph 7(h) - subjecting an employee to closer supervision - allegedly affected only employee Reyes. The conduct alleged in complaint subparagraph 7(i)—changing an employee's work schedule and subjecting the employee to closer supervision— allegedly affected only employee, Blanche. Complaint subparagraph 7(j) alleges that the Respondents engaged in all of this conduct "because the named employees of Respondent Valley and Respondent UHS joined and assisted Culinary Local 226 and engaged in concerted activities, and to discourage employees from engaging in these activities."

Complaint paragraph 11 alleges that, by this conduct, the Respondents violated Sections 8(a)(1) and 8(a)(3) of the Act. The Respondents deny these allegations.

As noted above, complaint subparagraph 7(g) alleges that since about early June 2022, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS began subjecting their employees, including Vera Blanche and Brenda Reyes to stricter enforcement and application of work schedules, eliminating previous flexibilities and deviations from employees' work schedules.

Although the General Counsel's brief does not identify any allegations by complaint paragraph or subparagraph number, it does include a subheading titled "*Respondents subject Reyes and Blanche to stricter schedules and eliminates schedule flexibilities and subjected Reyes and Blanche to closer supervision in 2022.*"[85] The following paragraph, which appears under that subheading, apparently pertains to complaint subparagraph 7(g):

> In early June 2022, Pierce called Reyes into his office and started asking Reyes about her work hours. TR32:3657-58. Reyes explained that she had been authorized by

[85] The italicized language quotes verbatim the subheading as it appears in the General Counsel's brief.

Dietary Manager William Brinck to start her shift at 7:00 a.m. because of her childcare needs. TR32:3658. After Reyes explained her childcare needs and Brinck's approval, Pierce told Reyes that she had to come in at 8:00 a.m. as she had been scheduled, ending her schedule flexibilities. TR32:3659.

Brenda Reyes began work at Valley Hospital in April 2017. Initially, she worked as a cashier in the hospital's cafeteria but later became a "dish-up" employee, first working in the cafeteria and later being assigned to work in the doctor's lounge.

Reyes joined the Union in 2017 and became a committee leader in 2022. Reyes testified that committee leaders "update the workers about what's going on. We help as much as we can." (Tr. 3643.) She also wore a union button at work.

Reyes' assigned shift was 8 a.m. to 4:30 p.m. (Tr. 3638–3639.) However, she asked the retail manager, Will,[86] if she could begin at 6:00 a.m. and work until 2:30 p.m., which would allow her to leave work early enough to pick up her son. Although the manager did not agree to letting Reyes start work 2 hours early, they reached a compromise: Reyes would begin at 7:00 a.m. and work until 2:30 p.m. (Tr. 3658)

Sometime in late May or early June 2022, Dietary Department Director Rick Pierce asked Reyes why she started work at 7 a.m. if her work schedule was from 8 a.m. to 4:30 p.m. She explained that the retail manager had agreed to allow her to begin work an hour early and end work at 2:30 p.m. According to Reyes, Pierce replied that the manager had not told him about this arrangement and that he would speak to the manager.

Reyes told Pierce that her son was about to start summer camp, which would end June 17. Pierce allowed Reyes to continue starting work at 7 a.m. until after June 17, but said she would then have to work her assigned shift of 8 a.m. to 4:30 p.m. (Tr. 3659.)

This requirement, that Reyes work her assigned work schedule, is the conduct described in complaint subparagraph 7(g) as subjecting employees "to stricter enforcement and application of work schedules, eliminating previous flexibilities and deviations from employees' work schedules." Based on Reyes' testimony, I find that the General Counsel has proven that the Respondent did eliminate a previous "flexibility and deviation" from the assigned work schedule.

The complaint alleges this action to be a violation of Section 8(a)(3) of the Act, which prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. §158 (a)(3). Such discrimination occurs when an employer treats one employee differently from the way it treats other, similarly situated employees, and does so for the unlawful purpose.

So, proving discrimination necessarily entails showing some form of disparate treatment. However, the General Counsel has not pointed to any evidence indicating that Respondents were

[86] In her testimony, Reyes did not identify the retail manager by his last name.

allowing other employees to begin work at times other than their assigned starting times or permitting them to cease work at times other than their assigned quitting times. The record does not establish that the Respondents were allowing employees other than Reyes to deviate from their assigned schedules.

Absent an act of discrimination, it is not necessary to perform a *Wright Line* analysis. However, even assuming that the government could prove that discrimination occurred, the General Counsel still would not be able to prove all four of the initial *Wright Line* requirements.

Reyes' wearing of a Union button certainly would satisfy the first two elements. Wearing the button constitutes union activity and, because other people, including supervisors, can see the button, there is little doubt that management was aware of such activity. But even assuming that there is sufficient evidence of animus to satisfy the third *Wright Line* requirement, the General Counsel has not shown any causal connection between the protected activity and management's decision that Reyes must work her assigned shift.

Complaint subparagraph 7(g) also alleges that employee Vera Blanche was subjected to stricter enforcement and application of work schedules. However, although the General Counsel's brief includes the subheading, "*Respondents subject Reyes and Blanche to stricter schedules and eliminates schedule flexibilities and subjected Reyes and Blanche to closer supervision in 2022*," there are only two paragraphs under this subheading and neither refers to Blanche.

The General Counse's brief includes a later subheading titled "*Respondents subject Blanche to stricter schedules and eliminates schedule flexibilities and subjected Blanche to closer supervision in 2022.*"[87] However, it isn't clear whether the discussion under this subheading concerns the allegations in complaint subparagraph 7(g) or subparagraph 7(i)(1), which alleges that since about June 17, 2022, the Respondents changed the work schedule of employee Blanche. The brief=s discussion under this subheading does not precisely match the allegations in either of these complaint subparagraphs.

More specifically, complaint paragraph 7(g) alleges that Respondent subjected Blanche (and others) to stricter schedules "since about *early June 2022*, a more precise date being unknown to the General Counsel," whereas complaint subparagraph 7(i)(1) alleges that the Respondents changed the work schedule of Blanche "since *about June 17, 2022*." However, the following discussion in the General Counsel's brief concerns an alleged event which did not take place either in early June 2022 or on June 17, 2022:

> On June 23, 2022, Blake called Blanche and changed her schedule from starting at 7:00 a.m. to start at 6:00 a.m. TR30:3558-59. Blake also changed her job duties and told Blanche that she could no longer keep her own cart for work. TR30:3559. Additionally, Blake and McKinnon started visiting and checking Blanche's workstation three times a day, something they had not done before. TR30:360.

It appears more likely that this discussion concerns the allegations in complaint subparagraph 7(i)(1) because it concerns a change in the Blanche's regular hours of work rather than denying a

[87] The italicized text quotes the subheading verbatim.

request to deviate from those hours. The discussion also does not appear at the same place in the brief as the discussion, quoted above, concerning the change in Reyes' hours of work.

Therefore, it appears that the brief's discussion of the allegations in complaint subparagraph 7(g) focuses only on what happened to Reyes. The General Counsel has not shown that the conduct alleged in this complaint subparagraph affected any employee other than Reyes.

However, the General Counsel has failed to establish that the Respondents treated Reyes disparately and also has failed to show any causal connection between Reyes' protected activity and the decision to require her to begin work at 8:00 a.m. rather than 7:00 a.m. Therefore, I recommend that the Board dismiss the allegations related to complaint subparagraph 7(g).

As noted above, complaint subparagraph 7(h) alleges that since about mid-June 2022, the Respondents subjected employee Reyes to closer supervision. The General Counsel's brief states:

> Also in June 2022, Pierce began to look at Reyes while she was at her workstation. TR32:3661. Pierce would stand and watch Reyes for several minutes at a time, something he had never done before. TR32:3660–61. Reyes also worked in the doctor's lounge, EMT lounge, and resident's lounge during the month of June 2022. TR32:3662–63. Pierce started going to the lounges to check on Reyes during the month of June 2022. TR32:3663. Although Reyes had worked at the lounges before, Pierce had never gone to the lounges to check on her until June 2022. TR32:3663–64.

To support this allegation, the General Counsel cites only the testimony of Reyes:

> Q. BY MR. ZARATE-MANCILLA: Ms. Reyes, let me draw your attention, then, to the middle of June, still 2022. Besides the conversation you had with Rick Pierce, do you remember noticing anything about his behavior towards you in June 2022?
> A. Yes.
>
> Q. Okay. Can you tell us, what did you notice?
> A. He was checking my work more frequently, which he would never do before.
>
> Q. Can you tell us, what do you mean by checking your work?
> A. To check everything on the stock, of the dates on the salads, the drinks, my station.
>
> Q. And when he was checking your station, do you happen to remember where he was at?
> A. In the cafeteria.
>
> Q. Okay. Was he in front of you or behind you?
> A. To the side.
>
> Q. Okay. And when he would stand to the side looking at you in your workstation, about how long would he stay there looking at you?
> A. Maybe like two minutes.

Q. During these two minutes, would he say anything to you?
A. No.

Q. Prior to June 2022, had he done that before?
A. No.

(Tr. 3660–3661.)

On cross-examination, Reyes acknowledged that no discipline had resulted from Pierce watching her in the cafeteria. (Tr. 3674–3675.)

Because the complaint alleges this conduct violated Section 8(a)(3) as well as Section 8(a)(1) of the Act, it is appropriate to perform a *Wright Line* analysis. As noted above, Reyes did engage in open Union activities - serving on a Union committee and wearing a union button—of which the Respondents would have been aware. Additionally, from unfair labor practices found in this and previous cases, animus may be inferred. Thus, the General Counsel has carried the government's burden of proving three of the four initial *Wright Line* requirements.

However, the General Counsel has failed to demonstrate any causal connection linking Reyes' protected activity with Pierce's coming to the doctor's lounge, where she was working, and watching her for two minutes. Therefore, the General Counsel has failed to carry the government's initial burden of proof. *Tschiggfrie Properties, Ltd.*, above.

Moreover, there is nothing unusual about a supervisor watching employees while they work. "Supervise" literally means to oversee. When the work being supervised is manual work, supervision requires at least some watching, both to ensure that the work is being performed properly and to spot any developing problem. If a supervisor doesn't oversee, he is likely to overlook.

The amount of supervision necessarily varies from day to day, depending on numerous nondiscriminatory factors. Here, credible evidence does not establish that Pierce's supervision of Reyes fell outside the normal range.

Additionally, Pierce's presence for two minutes, looking at the items on Reyes' cart and watching her work, does not communicate any message related to union activity. An employee who saw Pierce near Reyes for this brief period reasonably would not interpret his presence as having anything to do with the Union or union activities.

Concluding that the Respondents violated neither Section 8(a)(3) nor 8(a)(1), I recommend that the Board dismiss the allegations related to complaint subparagraph 7(h).

Complaint subparagraph 7(i)(1) alleges that since about June 17, 2022, the Respondents changed the work schedule of employee Blanche. It appears likely that a paragraph in the General Counsel's brief, quoted in full above, pertains to this allegation. This paragraph stated that on June 23, 2022, Environmental Services Manager Michael Blake called Blanche and changed her schedule so

that she started work at 6 a.m. rather than 7 a.m.[88] (Tr. 3567–3568.)

To prove this allegation, the General Counsel relies on Blake' testimony:

> Q. Now, do you remember any manager talking about your schedule sometime in June 2022?
> A. Yes, I called in work on the 23rd of June, and they told me when I come back off of vacation that my schedule would be closed -- I mean, be changed from 7 -- I mean, from 6 a.m. to 2:30, to 7 to 3:30.
>
> Q. So just to clarify, you are starting earlier.
> A. Yes.
>
> Q. And who told you that?
> A. Mike called me at home and told me.
>
> Q. Okay. And what happened later?
> A. When I came back to work, they had changed my schedule from 6 to 3:30 -- I mean, from 7 -- from 6 to 3:30, to 7 to 3:30. I'm sorry. From 6 to 2:30 to 7 to 3:30. And they had took my cart away.
>
> (Tr. 3558–3559.)

However, on cross-examination, Blanche acknowledged that in March 2012, she bid on, and received, a shift starting at 7 a.m. and ending at 3:30 p.m. (Tr. 3569.) She also stated that she had changed to a shift starting at 6 p.m. because her previous supervisor had asked her to do so:

> Q. Are you saying that the hospital asked you to do that, or you asked to

[88] This paragraph in the General Counsel's brief also that states that Environmental Services Manager Blake "told Blanche that she could no longer keep her own cart for work." However, neither complaint subparagraph 7(g) nor complaint subparagraph 7(i)(1) alleges that such conduct violated the Act.
Moreover, this statement in the General Counsel's brief - that Blake told Blanche she could no longer keep her own cart for work - is inaccurate. Blanche acknowledged on cross-examination that she did, in fact, keep her own cart. Management merely required her to store it in the same place that other attendants put their carts while not on duty:

> Q. Now, with regard to your cart, you indicated that what you used to do is you stored your cart in the emergency department, but now you were going to store your cart in the basement with the other EBS carts, correct?
> A.Yes.
>
> Q. So it was the same cart; you were just storing it somewhere else, right?
> A. Yes.

do that?

A. It was the old supervisor that asked me. It didn't have nothing to do with the new supervisors.

Q. Your testimony is that the hospital asked you to do that and you agreed. Is that what you're saying?

A. Yes.

Q. And then when the new supervisors came along, they said they didn't need you to do that anymore, and wanted you to go back to your posted, vetted schedule, correct?

A. Yes.

(Tr. 3571.)

Performing a *Wright Line* analysis similar to those above, it is clear that although the General Counsel may prove the first three *Wright Line* elements, there is no evidence to establish a causal connection between Blanche's protected activities and the decision to change her shift.

Complaint subparagraph 7(i)(2) alleges that about early August 2022, the Respondents subjected employee Blanche to closer supervision. The General Counsel's brief makes no reference to Blanche being subjected to closer supervision in August 2022.

During the hearing, while questioning Blanche on direct examination, counsel for the General Counsel announced that he would be asking about complaint subparagraph 7(i). However, he did not ask any questions about events in August 2022.

The month of August came up only on cross-examination, when Respondents' counsel asked Blanche the following:

Q. Now, in the complaint in this case that was referred to during your direct examination, which I think is paragraph 7(i), it alleges that, starting in early August of 2022, you believed that you were subject to closer supervision. Is that your testimony that, beginning in August of 2022, you were subjected to closer supervision?

A. Yes.

Q. Well, isn't it true that the hospital had supervised your work throughout your employment?

A. No. Yes, but not like that.

(Tr. 3572.)

After that answer, the Respondents' counsel changed the subject. On redirect examination, counsel for the General Counsel could have asked Blanche about her reference to being more closely supervised starting in August 2022. He did not.

The government, not the Respondent, bears the burden of proving the allegations in the complaint. However, the General Counsel did not ask Blanche questions about complaint subparagraph 7(i)(2) during the hearing and did not discuss this allegation in the government's brief. Blanche's own short testimony, quoted above, does not suffice either to prove that she was more closely supervised or why.

In sum, the General Counsel has not proven any of the allegations related to complaint subparagraphs 7(g), 7(h) and 7(i). I recommend that the Board dismiss these allegations.

Complaint Subparagraph 9(a)[89]

Complaint subparagraph 9(a) alleges that about June 30, 2020, Respondent Valley and Respondent UHS ceased permitting Culinary Local 226 to visit Respondent Valley's facility for the purpose of communicating with employees and supervisors regarding union business. Complaint paragraph 9(l) alleges that this action involved a mandatory subject of collective bargaining.

Complaint paragraph 9(m) alleges that the Respondents engaged in the alleged conduct without prior notice to Culinary Local 226 and/or without affording Culinary Local 226 an opportunity to bargain about the conduct and/or its effects, and without first bargaining with Culinary Local 226 to an overall good-faith impasse for a successor collective-bargaining agreement. Complaint paragraph 13 alleges that this conduct violated Section 8(a)(1) and Section 8(a)(5) of the Act. The Respondent denies these allegations.

As noted above, I directed counsel to identify the complaint paragraph number when asking a witness questions about the allegations in that paragraph. My search of the record did not find any instance in which any attorney stated that he was asking questions about complaint subparagraph 9(a).

Additionally, the General Counsel's brief did not address this allegation. Complaint subparagraph 9(a) alleges only that the Respondents ceased permitting Culinary Local 226 to visit, but neither the complaint itself nor the General Counsel's brief describes either what the Respondents allegedly said or did to withdraw permission or the scope of the exclusion. Determining whether or not the Respondents violated the Act depends on the details, and those details are missing.

The Respondents, however, do offer a possible answer to the puzzle. The Respondents' brief states:

> On June 29, 2020, in response to an increase in COVID patients and overall increase in hospital capacity, Valley re-instated its "NO VISITOR" policy. (GC66) Valley informed Culinary Local 226 of this policy on June 30, 2020. (Id. at 4) Counsel presented no evidence that Culinary Local 226 objected to this policy, sought access during the restricted period, or requested to bargain over the policy and/or its effects.

[89] It is not necessary to have a separate subheading for complaint par. 8, which alleges that the Respondents engaged in the conduct described in complaint subpars. 6(pp)(3) through 6(pp)(11) and 7(e), because the employees named in those subparagraphs had testified in a Board hearing in anther case. The issues raised by complaint par. 8 are addressed in those complaint subparagraphs.

The date on which the hospital notified the Union of its no-visitors policy - June 30, 2020 - is the same date alleged in complaint subparagraph 9(a) as the date the violation began. The no-visitor policy did not allow non-employee Union representatives access to the facility, but the policy also turned all other visitors away.

In June 2020, the COVID-19 pandemic was raging, the virus was taking many lives, and no vaccine was yet available. At that time, governments at all levels were urging and often requiring extraordinary measures.

Governments forced businesses to close and sometimes prohibited people from assembling, even in houses of worship. But hospitals had to stay open to receive the influx of patients and keep them alive. In many places, the public cheered doctors, nurses and other hospital personnel as they put themselves at risk to save others.

The public, and the federal government, relied on information provided by Dr. Anthony Fauci, the Director of the National Institute of Allergy and Infectious Diseases. On June 30, 2020, the same day that Valley Hospital informed the Union of the no-visitor policy, Dr. Fauci told a Senate committee that, in the United States, the number of new COVID-19 cases soon could rise from 40,000 to 100,000 thousand new infections every day.[90]

It must be asked whether, on that day, June 30, 2020, the General Counsel of the National Labor Relations Board would have told Valley Hospital that it could not institute a no-visitors policy. Would the General Counsel have told the hospital's managers that they must give union representatives access which was denied to others, including the families of patients? Considering Dr. Fauci's warning, it seems unlikely that any government official would have been that incautious.

But if the General Counsel would not have prohibited the hospital from taking this emergency action at the time, how could it be fair to deem it unlawful retroactively? Rather than assuming that government would be so fickle as to condemn as unlawful an action it once deemed necessary to protect society, I will stop short of concluding that complaint subparagraph 9(a) refers to the no-visitors policy. But if this complaint subparagraph does not refer to the emergency no-visitors policy, then to what does it refer?

Due process requires the General Counsel to place the Respondents on notice of the conduct alleged to violate the Act. The General Counsel has not done so with respect to the allegations raised in complaint subparagraph 9(a). Moreover, even apart from due process concerns, the government, by failing to identify the specific conduct alleged to be violative, has failed to carry its burden of proof. Therefore, I recommend that the Board dismiss the allegations raised in this complaint subparagraph.

Complaint Subparagraph 9(b)

[90] COVID-19 Timeline prepared by the Centers for Disease Control. See https://www.cdc.gov/museum/timeline/covid19.html. It is appropriate to take notice of this document from an agency of the United States government.

Complaint subparagraph 9(b) alleges that in about July 2020, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS ceased providing language assistance to employees represented by Culinary Local 226 to aid them in understanding memoranda, testing, and other English-language information. Complaint paragraph 9(l) alleges that this action involved a mandatory subject of collectivebargaining.

Complaint paragraph 9(m) alleges that the Respondents engaged in the alleged conduct without prior notice to Culinary Local 226 and/or without affording Culinary Local 226 an opportunity to bargain about the conduct and/or its effects, and without first bargaining with Culinary Local 226 to an overall good-faith impasse for a successor collective-bargaining agreement. Complaint paragraph 13 alleges that this conduct violated Section 8(a)(1) and (5) of the Act. The Respondents deny these allegations.

To prove these allegations, the General Counsel first must establish that there was a term or condition of employment, enjoyed by employees in the bargaining unit represented by Culinary Local 226, that the hospital provide language assistance. Such a term or condition of employment might have originated in a collective-bargaining agreement or might have been established by past practice.

Second, the General Counsel must show that providing language assistance to employees is a mandatory subject of bargaining. Third, the government must show that the Respondents ceased the practice without satisfying its duty to bargain with Culinary Local 226.

It is not clear what evidence, if any, the General Counsel relies on to prove this allegation. During the hearing, counsel for the General Counsel announced that he would be asking Human Resources Market Director Wayne Cassard questions pertaining to complaint subparagraph 9(b). (Tr. 1691.) However, the questions which the General Counsel then posed to the witness had no obvious relevance to this complaint subparagraph.[91]

Counsel for the General Counsel also announced that he would be asking questions about complaint subparagraph 9(b) during his examination of Environmental Services Director Glenn McKinnon. (Tr. 404.) Then, he asked McKinnon questions about employee Silvia Franco, including the following:

> Q. Now you know that Sylvia's preferred language is Spanish right?
> A. She's never told me that, but she's spoken with me in English, so she's never said don't talk to me in English, I prefer Spanish. So my answer has to be no.
>
> (Tr. 405)

However, the General Counsel did not ask McKinnon questions either to establish that the

[91] Complaint subpar. 9(b) alleged that the Respondents ceased providing "language assistance," but the General Counsel's questions made no reference to language assistance. Rather, they were about the "bargaining briefs" which management prepared to update employees on the status of negotiations. See, e.g., GC Exh. 75.

Respondent had a practice of providing language assistance or that it had ceased this practice.

Counsel for the General Counsel also called Jeanne Schmid, the vice president of labor relations of UHS of Delaware, Inc. During this examination, counsel for the General Counsel announced that he would be asking questions about a number of complaint subparagraphs, including 9(b). (Tr. 1888.) However, he did not ask about any practice of providing language assistance.

The General Counsel's brief also does not reveal what evidence the government offered to prove these allegations. Although the brief includes a heading concerning whether the Respondents had made unilateral changes, nothing under that heading pertains to the change alleged in complaint subparagraph 9(b).

However, the General Counsel's brief also includes a heading titled, "Respondents use the English language as a weapon against union and other protected activity." But the discussion under this heading does not concern a policy or practice of providing language assistance. Likewise, it neither points to evidence proving the existence of the alleged policy nor to evidence that such a policy was terminated. The brief states:

> On July 23 and 26, 2020, Franco was required to certify on the UV light by Millet. TR19:2456. Millet does not speak Spanish and the exam to certify was in English. Millet did not provide Franco with an interpreter for the exam. TR19:2457. On July 23, 2020, Millet tested Franco on the UV light twice without a translator.[56] On July 26, 2020, Millet retested Franco twice, once without a translator and once with a novice Spanish speaker.[57] On August 19, 2020, Franco was retested on the UV light in English.[58] She failed each exam. Prior to testing, Franco was made to watch an English language training video about the UV light.[59] Each time that Franco was made to re-test and watch the video, she requested a translator. After failing the test on August 19, 2020, Franco was terminated on August 20, 2020.[60]

_____

[56] GCX200.
[57] GCX200.
[58] GCX200.
[59] GCX97.
[60] GCX203.

This portion of the General Counsel's brief does not concern any alleged unilateral change but rather the events discussed above in connection with complaint subparagraph 7(a). Additionally, the General Counsel's description of the facts, quoted above, is based only on Franco's testimony and makes no reference to conflicting testimony. However, for reasons discussed above, I do not consider Franco's testimony reliable and did not credit it.

In addition to Franco, employee Sandra Villalobos, testified about having to take training and tests in English, For reasons discussed above, I do not credit her testimony.

Credible evidence does indicate that Valley Hospital had a practice of providing a translator when an employee taking training or being tested needed one. However, no credible evidence

suggests that the Respondents changed this policy and I find that they did not. The record does not establish that the Respondents had any other program or practice of providing language assistance and I conclude that they did not. Accordingly, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(b).

Complaint Subparagraph 9(c)

Complaint subparagraph 9(c) alleges that in about October and November 2020, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS ceased providing meal pay to employees in the Valley Culinary Unit. Complaint paragraph 9(l) alleges that this action involved a mandatory subject of collective-bargaining.

Complaint paragraph 9(m) alleges that the Respondents engaged in the alleged conduct without prior notice to Culinary Local 226 and/or without affording Culinary Local 226 an opportunity to bargain about the conduct and/or its effects, and without first bargaining with Culinary Local 226 to an overall good-faith impasse for a successor collective-bargaining agreement. Complaint paragraph 13 alleges that this action violated Section 8(a)(1) and Section 8(a)(5) of the Act. The Respondents deny these allegations.

The evidence is uncontroverted that bargaining unit employees received a meal allowance, which was a negotiated provision in the collective-bargaining agreement. It appears clear that the meal allowance is a mandatory subject of bargaining. But what evidence proves that the Respondents discontinued it?

The General Counsel's brief states that, in October 2020, employee Shanlee Gouveia "noticed an inconsistency in her paychecks because it seemed like she was not getting paid meal pay. TR33:3776-3777." However, for reasons discussed above, I have concluded that Gouveia's testimony is wholly unreliable. Moreover, no evidence corroborates the claim that the Respondent failed to pay Gouveia the meal allowance.

The General Counsel introduced into evidence a number of Gouveia's paycheck stubs (General Counsel's Exhibit 222) and showed them to Gouveia. However, her testimony concerning these paycheck stubs fails to establish that they were incorrect. (Tr. 3779-3782)

The General Counsel did not ask questions to establish that the specific amounts shown on the paycheck stubs were less than what Gouveia should have received. The General Counsel did ask why certain parts of the paycheck stubs were highlighted. Gouveia answered that she did not remember why she had highlighted them. (Tr. 3781)

The record indicates that payroll errors do occur from time to time and that management corrects these errors when discovered. However, the record does not establish that the hospital ceased paying employees the meal allowance. Making a mistake and correcting it does not constitute an unlawful unilateral change. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(c).

Complaint Subparagraph 9(d)

Complaint subparagraph 9(d) alleges that about December 11, 2020, Respondent Desert Springs ceased granting wage increases to employees in the Desert Springs Technical Unit. Complaint subparagraph 9(n) alleges that this conduct relates to wages, hours and other terms and conditions of employment and that it is a mandatory subject of bargaining.

Complaint subparagraph 9(o) alleges that the Respondents engaged in the alleged conduct without prior notice to SEIU Local 1107 and/or without affording SEIU Local 1107 an opportunity to bargain with respect to the conduct and/or its effects, and without first bargaining with SEIU Local 1107 to an overall good-faith impasse for a successor collective-bargaining agreement. Complaint paragraph 13 alleges that this conduct violated Sections 8(a)(1) and (5) of the Act. The Respondents deny these allegations.

To carry the government's burden of proof, the General Counsel must establish that the Respondents had a duty to grant a wage increase on about December 11, 2020 but did not do so. That duty could have arisen because of a term in a collective-bargaining agreement or it might result from an established past practice of giving wage increases, around this date, to the employees in the Technical Unit.

What evidence establishes that Respondent had a duty to grant a wage increase around December 11, 2020? The General Counsel doesn't say. Neither at the hearing nor in the government's post-hearing brief does the General Counsel state why, in the government's view, the Respondents had an obligation to raise wages. Similarly, the General Counsel does not identify what testimony or other evidence would prove either a past practice of granting periodic wage increases or some obligation to do so.

To the contrary, the evidence is quite clear that there is no such past practice or obligation. As the Board found in an earlier case, *Valley Health System, LLC, d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. at 1, fn. 3 (January 30, 2020), the collective-bargaining agreement for the technical unit expired on May 31, 2016. That agreement had not obligated Respondent Desert Springs to grant wage increases after its expiration date.

On March 18, 2017, the Respondent withdraw recognition from Local 1107 as the exclusive bargaining representative of the technical employees' unit. Id., slip op. at 25. The next day, it granted employees in this unit a wage increase. Id., slip op. at 26.

In its January 30, 2020 Decision, the Board found that both the withdrawal of recognition and the grant of a wage increase violated the Act. Id., slip op. at 1. The Board ordered Respondent to recognize and bargain with Local 1107 as the exclusive bargaining representative of the technical employees. The Respondent complied, both restoring recognition of Local 1107's status as exclusive bargaining representative and bargaining with it.

In other words, at the time the Respondent resumed negotiations with the Union, it already had been told by the Board that it had violated the Act by withdrawing recognition from the Union and by increasing wages unilaterally. It had set out to remedy these violations by resuming its recognition of the Union and by engaging in bargaining with the Union. There is no evidence, and no

reason to believe, that the Respondent would repeat its earlier violation by again unilaterally raising wages. The General Counsel also has not identified any evidence suggesting that Respondent had any legal obligation to raise wages.

What the evidence does establish is that the Respondent resumed bargaining with the Union, as the Board had ordered it to do. The Respondents' chief negotiator was its attorney, Thomas Keim. Initially, attorney Nathan Ring represented the Union in these negotiations. Another lawyer, Paul Cotsonis, took Ring's place as chief negotiator in late November or early December 2020. (Tr. 3202)

The Counsel for the General Counsel called Cotsonis as a witness and, at one point during the examination, stated that the questions pertained to the allegations in complaint subparagraph 9(d). However, the resulting testimony by Cotsonis does not establish either of the facts which the General Counsel must prove. Cotsonis did not testify that the Respondent had a practice or a legal obligation to grant wage increases. Cotsonis also did not testify either that the Respondent failed to pay a wage increase when it was due or that the Respondent notified the Union that it was not going to implement such a wage increase.

Cotsonis testified that in August or September 2020,[92] former chief Union negotiator Ring had proposed to the Respondent that bargaining unit employees be given a wage increase similar to that which Respondent was giving to employees outside the bargaining unit:

> Q. You mentioned that wage increase was one of the subjects. Can you tell what was specifically discussed about wage increase?
> A. Yeah. My predecessor had made a proposal. So in August or September, my predecessor had made a proposal on behalf of the Union for Union members to receive an interim wage increase during negotiations because the Valley Health System's hospitals had instituted an interim wage increase. And essentially, he had proposed a Me Too provision that did give the Union the same wage increase that they gave nonunion employees. And so, when I talk about interim wage increase, that's what I'm talking about is the back-and-forth on trying to get the same wage increase for Union employees that were given to nonunion employees.
>
> (Tr. 3203)

This testimony does not refer to any existing practice of granting bargaining unit employees wage increases. It only reflects the Union's request for unit employees to receive a wage increase similar to that given non-unit employees.

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[92] From Cotsonis' testimony, I infer that the year was 2020. Cotsonis testified that he "took over the negotiations as chief negotiator for the Union from Nathan Ring from November, December -- late November, early December of 2020." (Tr. 3202) He then testified that "in August or September, my predecessor had made a proposal on behalf of the Union for Union members to receive an interim wage increase during negotiations. . ." (Tr. 3203) Thus, the proposal could not have been in a year later than 2020.

Additionally, no other evidence indicates that the Respondent granted bargaining unit employees any wage increases after expiration of the collective-bargaining agreement in 2016 except for the increase which the Board found unlawful. Likewise, no evidence establishes that the Respondent had any legal obligation to grant such increases.

There can be no cessation unless there was something to cease and the General Counsel has failed to identify any such "something." Likewise, the General Counsel has failed to prove that the Respondent, either by omission (failing to implement a scheduled wage increase) or commission (notifying the Union that it was not going to grant an increase) engaged in any conduct like that described in the complaint subparagraph.

The General Counsel also failed to state any theory of violation. By failing to explain either what happened or why it violated the Act, the General Counsel has failed to carry the government's burden of proof.

The conclusion that the government has failed to prove a violation leaves a question which piques curiosity and lingers, awaiting an answer: What actually happened - or at least what did the General Counsel believe happened - which caused the General Counsel to include subparagraph 9(d) in the complaint? Surely, there must have been some particular event or action which the General Counsel believed violative, but what was it?

Whatever it was, it must have occurred around December 11, 2020, the date alleged in complaint subparagraph 9(d). Also, it must have something to do with a wage increase.

The record includes email correspondence between Respondents' counsel Keim and the Union's attorney, Cotsonis, concerning a proposed staffing incentive plan to address the hospital's needs during the COVID pandemic. On December 10, 2020, Respondents' Attorney Keim wrote Union Attorney Cotsonis: "We have an agreement. We can roll this out immediately." (General Counsel's Exhibit 106)

Complaint subparagraph 9(d) alleges that the conduct occurred "about December 11, 2020" and December 10, 2020 - the date the parties agreed on a bonus plan - seems close enough to fit. Additionally, the subject - a shift bonus for working during the pandemic - arguably would fit within the definition of a "wage increase." However, the Respondent did not cease granting this "wage increase" but rather the opposite; it agreed to provide it. Accordingly, this agreement to grant a bonus cannot be the subject of complaint subparagraph 9(d).

The record did include one document bearing the date December 11, 2020. This document was a "bargaining brief," a flyer which Respondent prepared to inform employees about the status of negotiations with the Union. This document referred to the Respondents' agreement with the Union to provide the shift bonus to bargaining unit employees. (General Counsel's Exhibit 148)

However, announcing the shift bonus is the polar opposite of announcing that an expected wage increase would not be granted. The December 11, 2020 "bargaining brief" says nothing at all which would indicate that any practice of granting wage increases would cease. Therefore, issuance of this document cannot be the conduct described by complaint subparagraph 9(d).

Complaint subparagraph 9(d) describes the allegedly violative conduct in general, conclusory terms but, presumably, it refers to something that really happened. In other words, the General Counsel must have had a reason, based on some kind of evidence, to believe that a violation occurred. However, the General Counsel neither provided any details about the alleged violation nor identified the evidence offered to prove it.

In sum, for the reasons discussed above, I conclude that the General Counsel has failed to carry the government's burden of proof. Therefore, I recommend that the Board dismiss the allegations raised by complaint subparagraph 9(d).

Complaint Subparagraph 9(e)

Complaint subparagraph 9(e) alleges that about March 10, 2021, Respondent Valley and Respondent UHS implemented a requirement that employees in the Valley Culinary Unit on the day shift mop floors and perform floor care. Complaint paragraph 9(l) alleges that this action involved a mandatory subject of collective-bargaining.

Complaint paragraph 9(m) alleges that the Respondents engaged in the alleged conduct without prior notice to Culinary Local 226 and/or without affording Culinary Local 226 an opportunity to bargain about the conduct and/or its effects, and without first bargaining with Culinary Local 226 to an overall good-faith impasse for a successor collective-bargaining agreement.

Complaint paragraph 9(m) alleges that the Respondents engaged in the alleged conduct without prior notice to Culinary Local 226 and/or without affording Culinary Local 226 an opportunity to bargain about the conduct and/or its effects, and without first bargaining with Culinary Local 226 to an overall good-faith impasse for a successor collective-bargaining agreement. Complaint paragraph 13 alleges that this conduct violates Sections 8(a)(1) and 8(a)(5) of the Act. The Respondents deny these allegations.

The General Counsel sought to prove this allegation through the testimony of housekeeping employee Joanne Judge. In March and April 2021, her job classification was "Housekeeping Attendant II." (Tr. 2901-2902) The General Counsel's brief states:

> On April 1, 2021, Judge noticed a memo from McKinnon requiring all employees to mop the hallways on all the floors. TR22:2819. Utility attendants perform this type of floor care, so this was a new requirement for all EVS Attendants. TR22:2821 [Footnote omitted]

The memo which Judge noticed on April 1, 2021 actually had been issued on March 10, 2021 and posted for employees to read. It stated, in part, that "all floors will be swept and mopped in your areas first thing the morning before anything else is done. . ." (General Counsel's Exhibit 93, original in all capital letters). The memo did not include an "effective" date and I conclude that it was effective when posted.

Judge testified "I was surprised when I read this memo because we have floor care. So to me it was adding on more work to dayshift because then they wouldn't get to their daily rooms because they

have to mop floors before they touch any rooms or they work their area." (Tr. 2820)

The General Counsel's brief, quoted above, characterized the memo as adding "a new requirement for all [Environmental Services] Attendants." Although the brief does not elaborate, it is clear that the General Counsel is alleging that Respondent Valley Hospital breached its duty to bargain with the Union in good faith before making this change in working conditions.

As a general principle, when employees have an exclusive bargaining representative, their employer may not make a material, substantial and significant change in their terms and conditions of employment without first notifying the bargaining representative and affording it an opportunity to bargain about the decision and its effects. However, although a material, substantial and significant change triggers a bargaining duty, not every change is material, substantial and significant See, e.g., *Ead Motors Air Devices, Inc.*, 346 NLRB 1060 (2006); *Crittenton Hospital*, 342 NLRB 686 (2004).

The General Counsel bears the burden of proving both that an employer made a change in working conditions and that the change was material, substantial and significant. If the government carries this burden, it then has the further burden of showing that the employer made the change without first notifying the union and affording it the opportunity to bargain concerning the change and its effects.

Although the General Counsel's brief does not go into detail, it appears clear that the government is alleging that before the March 10, 2020 memo, attendants in Judge's job classification did not do floor cleaning - a task assigned to employees classified as "utility attendants" - but that after the memo Judge and other employees in her classification had to do mop floors along with their other assigned tasks.

The General Counsel's argument does not take into account that there are two different types of floor cleaning. The "utility attendants" use machines. Other attendants, such as Judge, use hand mops and perform that work along with other cleaning chores done by hand.

Thus, before Judge testified that she "was surprised" when she read the memo "because we have floor care," she had explained that "[W]e have a floor care person that comes in and they run the machine through the hallways and all that." (Tr. 2820) However, there is no evidence that a supervisor ever told Judge to run one of the floor cleaning machines.

The March 10, 2020 memo, announcing that all floors would be swept and mopped first thing in the morning, had been posted for 3 weeks before Judge read it. If the memo had changed her job duties - for example, if she had been told to start operating a floor cleaning machine - Judge would have known about it long before reading the memo, and the memo would not have surprised her.

Ample evidence establishes that employees in Judge's job classification long had used hand mops. The conditions of employment specified in the 2013-2016 collective-bargaining agreement remained in effect even though that contract had expired because no new agreement had been reached. Section 19.01 of that contract, titled "Mopping of Floors," provided:

> Except for cleaning accidental spillage or breakage, or light mopping in uncarpeted patient rooms, mopping of floors shall be the duty of any Attendant position and no

others.

(General Counsel's Exhibit 4)

This provision applied to Judge, who was classified as an "Attendant II." Section 19.02(a) of the collective-bargaining agreement described the duties of employees in this job classification:

> Except for the specific duties of the Utility Attendant and the Linen Attendant as described below and except for work performed by the Kitchen Porter, all cleaning, terminal cleaning and disinfecting duties and *floor care duties of every kind and nature*, anywhere in the hospital including cath labs and isolation rooms are to be performed by the Attendant II Classification. . .

(General Counsel's Exhibit 4, italics added)

Thus, except for operating the floor cleaning machines, a task assigned to utility attendants, Judge and others in the Attendant II classification performed, among other things, "floor care duties of every kind and nature." As noted above, the record does not establish that management directed Judge to operate a floor cleaning machine.

During cross-examination, the Respondents' counsel sought to establish that Judge had not operated the floor cleaning machines. Judge's answers tended to be nonresponsive and rambling. At one point she testified as follows:

> Q. We can agree a mop is not heavy mechanical equipment, can't we, Ms. Judge?
> A. Where is heavy mopping equipment into play in this? This was -- he was asked to mop floors.
>
> Q. Ms. Judge -- Ms. Judge, just answer my question. We can agree that a mop is not heavy mechanical equipment, can't we?
> A. Yes. It's not. Yes.
>
> Q. All right. And you understood that what you were being asked to do or the dayshift was being asked to do was to use a mop, correct?
> A. Well mopping would consider mop. I would have to go back to that, that bulletin paper. If it stated mopping, then they'd have to use -- we use flat mops and they would have to use a flat mop.
>
> Q. And you always used a flat mop, correct?
> A. Not always. Not always.
>
> Q. Okay. But you -- whatever mop you used, we can all agree that was not heavy mechanical equipment, correct?
> A. Yes.

(Tr. 2903-2904)

Credible evidence does not establish that management told Judge, or anyone else in her Attendant II job classification, to use the floor cleaning equipment which the utility attendants used. The General Counsel also has not proven that, on or after March 10, 2021, the Respondent changed or made more onerous the job duties of Judge or any other bargaining unit employee.

Having concluded that the General Counsel has not proven that any change occurred, it is neither possible nor necessary to consider whether such a change (which did not take place) was material, substantial and significant.

In sum, the General Counsel has not proven the allegations raised in complaint subparagraph 9(e). Therefore, I recommend that the Board dismiss these allegations.

Complaint Subparagraphs 9(f) and 9(g)

Complaint subparagraph 9(f) alleges that about April 26, 2021, Respondent Valley and Respondent UHS implemented a new system for: (1) assigning work duties to employees in the Valley Culinary Unit via iPhone application; (2) assigning work duties outside of the bid-for stations of employees in the Valley Culinary Unit via iPhone application; and (3) tracking employees in the Valley Culinary Unit during work hours via iPhone application. Complaint paragraph 9(l) alleges that this action involved a mandatory subject of collective-bargaining.

Complaint paragraph 9(m) alleges that the Respondents engaged in the alleged conduct without prior notice to Culinary Local 226 and/or without affording Culinary Local 226 an opportunity to bargain about the conduct and/or its effects, and without first bargaining with Culinary Local 226 to an overall good-faith impasse for a successor collective-bargaining agreement.

Complaint paragraph 13 alleges that by this conduct, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive bargaining representative of its employees, and therefore violated Sections 8(a)(1) and 8(a)(5) of the Act.

Complaint subparagraph 9(g) alleges that the conduct described in complaint subparagraph 9(f) resulted in the issuance of disciplinary action to employees in the Valley Culinary Unit, including, but not limited to, the discipline of Respondent Valley and Respondent UHS's employee Leticia Mendoza and the discharge of Respondent Valley and Respondent UHS's employee Kora Williams. Complaint paragraph 9(l) alleges that this action involved a mandatory subject of collective-bargaining. Complaint paragraph 13 alleges that the Respondents thereby violated Sections 8(a)(1) and 8(a)(5) of the Act.

The Respondents deny these allegations.

In assessing the nature and impact of the alleged change, it may be helpful to begin with a general description of housekeeping employees' duties and how they performed them in the past. Those duties obviously include cleaning patients' rooms but it is important to draw a distinction between the type of cleaning performed while a patient still occupied a room from the type of cleaning done after the patient leaves the hospital.

After a patient is discharged from the hospital, the assigned housekeeper gives the room a more thorough cleaning than would have been possible while the patient was still in the hospital bed. The rigorous sanitizing performed after the patient is discharged from the hospital reduces the chance that the next patient will be greeted by unfamiliar germs.

Each housekeeping employee keeps a log showing each room cleaned, when the cleaning began and when it ended. In the past, housekeeper used such logs to document both the cleaning of rooms which a patient still occupied and the cleaning of rooms after the patient had gone home. Each housekeeper would turn her log in to the supervisor and could receive discipline for logkeeping errors and omissions.[93]

When a patient is discharged from the hospital, it is important to clean that room promptly so it will be available, without delay, for the next patient. Therefore, management long has been able to interrupt a housekeeper's planned schedule and dispatch her to the room that needs immediate cleaning. However, how the supervisor communicates these instructions has changed over time. At various times in the past, management has used text messages, telephone calls, and radio.[94]

In April 2021, the hospital adopted a new way to get these messages to housekeepers. When a patient is discharged, a computerized system called CapMan automatically notifies one of the housekeepers that a room has been vacated and needs to be cleaned right away. It sends this notification through an iPhone app, and the hospital furnishes housekeepers Iphones to carry while working.

The CapMan system does more than keeping track of which rooms have been vacated and automatically notifying housekeepers to clean them. Housekeepers also use the app to log the "started/finished" information which previously they wrote by hand.[95]

The complaint alleges that introduction and use of the CapMan system breached the Respondents' duty to bargain in good faith with the Union. To prove a violation of the Act, the General Counsel first must establish that adopting the CapMan system resulted in a material, substantial and significant change in employees' terms and conditions of employment. If the government carries that burden, the General Counsel must then show that the Respondents implemented the change without first giving the Union an opportunity to bargain about the decision and its effects. *Civil Service Employees Association, Inc.*, 311 NLRB 6 (1993).

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93 See, e.g., Respondent's Exhibit 42, a level 3 final warning issued to employee Betty Williams on April 28, 2022. The warning cited several different infractions, including the following: "Failed to enter on your daily log multiple incidents of correct start and end times and correctly identifying where you were cleaning at specific times. Times overlapped and duplicated." See also Williams' testimony concerning this warning. (Tr. 2381-2385)

94 In 2013, employee Betty Williams received a warning for failing to take her radio with her while she worked. See General Counsel's Exhibit 131, Tr. 2360-2361.

95 However, CapMan only provides notifications for cleaning rooms vacated by patients and therefore given priority. Housekeepers still have to fill out paper logs to document other cleaning.

The General Counsel's brief did not specifically discuss whether the adoption of the CapMan system was material, substantial and significant. However, it did include the following description of how that system affected the housekeeping employees' work:

> CapMan, however, would not send employees to their respective stations. Instead, CapMan would send employees all over the hospital to any area to work. CapMan also keeps track of the time employees spend on a room and keeps track of when employees accept or reject a room. TR22:2824-25.

However, the portions of testimony cited in the brief do not always support the statements for which they are cited. For example, after the brief states that CapMan "would not send employees to their respective stations" but instead "would send employees all over the hospital to any area to work," it cites the testimony of Joann Judge, at transcript pages 2824-2825. But this cited testimony makes no reference to employees being sent "all over the hospital."

But there is a more fundamental problem with the General Counsel's argument that the CapMan system resulted in employees being sent "all over the hospital" rather than to their respective stations. The practice of sending the attendants all over the hospital, rather than to their work stations, began before adoption of the CapMan system. That system cannot bear the blame for a practice already in existence when it arrived.

The Respondents' brief points out that the lawfulness of this practice came before the Board in another case well before the hospital began using CapMan. The issue arose in *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, Case 28-CA-234647 et al., a case tried before the Hon. Amita Baman Tracy in March 2021.

Judge Tracy's decision in that case began by noting that a new management team began supervising Valley Hospital's housekeeping, linen and dietary staff in March 2018. That new team's actions, intended to correct perceived deficiencies, resulted in a number of unfair labor practice allegations. The hospital's 2013-2016 collective-bargaining agreement with Culinary Local 226 already had expired but the parties continued a practice of allowing employees to bid on particular job assignments.

Employees were assigned to work at particular stations. When management needed another employee at a particular station, it would post a bid sheet which specified the station and employees could "bid" to be assigned to work there. The employee with the most seniority would get the assignment.

In mid-2018, there was a change. A bid sheet no longer would specify the particular station. Instead, the word "varies" would appear on the sheet, thus allowing management to send the employee to work anywhere in the hospital. Judge Tracy found this change to be unlawful. *Valley Hospital Medical Center, Inc., d/b/a Valley Hospital Medical Center*, JD(SF)-25-21, slip op. at 62-64 (December 22, 2021). The Respondent filed exceptions and the case is now before the Board.

Thus, it would be incorrect to blame the CapMan system, adopted in 2022, for the earlier change in the way management assigns employees to work at particular locations.

The General Counsel's brief also states that CapMan "keeps track of the time employees spend on a room." However, the employees already did that by filling out logs which they turned in to supervisors. If anything, CapMan made it easier for employees to record and report this information.

The General Counsel's brief further states that CapMan "keeps track of when employees accept or reject a room." Even if this is true, no evidence suggests that keeping this information made employees' work more onerous. More generally, credible evidence fails to establish that the CapMan system created a digital panopticon in which employees labored, their every move watched by an unblinking eye.

To the contrary, CapMan merely provided a more efficient way for employees to record and transmit to supervision the information they previously had to write manually on logs. CapMan also created a faster and more efficient way to assign employees to sanitize the rooms vacated by departing patients.

In sum, I conclude that the adoption of the CapMan system did not cause any material, substantial or significant change in employees' terms and conditions of employment. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(f).

Complaint subparagraph 9(g) alleges that the Respondents' implementation of the CapMan system resulted in the issuance of discipline to employees in the culinary employees' bargaining unit, including employees Leticia Mendoza and Kora Williams. Because I have found that the Respondents lawfully implemented this system, I need not determine whether the system resulted in the discipline of any employees. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(g).

Complaint subparagraphs 9(h) and 9(s)

Complaint subparagraph 9(h) alleges that, on a date in or around the end of May 2021, a more precise date being unknown to the General Counsel, Respondent Valley and Respondent UHS implemented a requirement that employees sign for their work keys on a daily basis and return their keys at the end of the day, or face discipline up to, and including, termination. Complaint subparagraph 9(l) alleges that this action involved a mandatory subject of collective-bargaining.

Complaint subparagraph 9(m) alleges that the Respondents engaged in the alleged conduct without prior notice to Culinary Local 226 and/or without affording Culinary Local 226 an opportunity to bargain about the conduct and/or its effects, and without first bargaining with Culinary Local 226 to an overall good-faith impasse for a successor collective-bargaining agreement.

Complaint subparagraph 9(s) alleges that about May 26, 2021, Respondent Valley and Respondent UHS, by McKinnon, at Respondent Valley's facility, bypassed the Union and dealt directly with their employees in the Valley Culinary Unit by requiring employees to sign an acknowledgement of the policy described above in paragraph 9(h).

Complaint paragraph 13 alleges that, by this conduct, the Respondents violated Section 8(a)(1) and Section 8(a)(5) of the Act. The Respondent denies these allegations.

The General Counsel's brief devotes a paragraph to these allegations. The brief states:

> On May 26, 2021, the entire swing shift was called down to the EVS department for a meeting.TR22:2840. McKinnon had every employee line up on the hallway and then place their work keys into a cardboard box. McKinnon warned that if employees took any keys off their key rings that they would be reprimanded. TR22:2841. McKinnon also told employees that it was a new requirement that employees needed to sign for their keys at the beginning of the day and return them at the end. TR22:2841. Whoever did not sign their keys out would be written up. TR22:2841-42. McKinnon then had his lead Marlene Ordoñez distribute acknowledgement forms and then collected them after people signed. TR22:2842-43. Signing out the keys has caused issues for certain materials and supplies. And at times, when supervisors are not available, employees must simply leave their keys in the office. TR22:2845-46.

The relevant facts are undisputed. The hospital keeps cleaning supplies in a locked place and issues keys to employees who will need the supplies in their work.

Before Environmental Services Director McKinnon changed the policy sometime in the spring of 2021, when employees in his department left work at the end of a shift, they would take their keys. And sometimes lose them.

To prevent such losses, McKinnon announced a new policy: Employees must turn in their keys before going home. The keys would be kept in a safe place and available to employees when they returned to work.

Except for the paragraph quoted above, the General Counsel's brief says nothing else about the change in key policy. The brief neither argues that the change was material, substantial and significant nor cites any precedents to support such an argument,

The General Counsel asserts that signing out keys "has caused issues for certain materials and supplies" but does not explain what those issues are or how they affect employees' terms and conditions of employment. Similarly, although the General Counsel claims that when supervisors are not available, employees must simply leave their keys in the office," the brief does not argue that this change has caused any adverse effect on working conditions.

The brief also cites certain portions of the testimony of employee Joann Judge. However, her testimony, part of which is quoted below, does not suggest that the change in key policy has burdened employees or worsened working conditions in any way:

> Q. Now with this new key policy, are you supposed to turn in the keys to anyone in particular?
> A. Yes. We were told it was management, but now we're turning in our keys to the lead person. To this present day, present day, I don't turn my key into anybody. There's nobody. The linen room is open. I leave my keys on the desk with my task sheet and my radio.

Q. When you leave your keys in the linen room, do you notify anyone that you're doing this?

A. Majority of the time when they're not there, I usually call the lead phone and I'll say okay, I'm leaving now. Sometimes they'll say okay, I'm coming right down. Not very often. And most of the time they say okay, leave the keys on the linen table with your phone and your task sheet. And sometimes there's a sign-out sheet and sometimes there's not. So if there's not a sign-out sheet, I don't sign anything.

(Tr. 2845)

Clearly, the change in key policy is not material, substantial or significant. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(h).

With respect to complaint subparagraph 9(s), which alleges that Respondent Valley and Respondent UHS bypassed the Union and dealt directly with employees by making them sign an acknowledgement of the key policy, it is difficult to understand how requiring employees to sign an acknowledgement of a lawful policy could constitute unlawful direct dealing. The prohibition on direct dealing bars an employer from ignoring the employees' union and bargaining directly with employees concerning terms and conditions of employment. Requiring employees to sign an acknowledgement of a policy does not constitute an attempt to negotiate about the matter.

Accordingly, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(s).

Complaint subparagraph 9(i)

Complaint subparagraph 9(i) alleges that on about July 26, 2021, Respondent Desert Springs and Respondent UHS granted a wage increase to their employees in the Desert Technical Unit. Complaint subparagraph 9(n) alleges that this conduct relates to wages, hours and other terms and conditions of employment and that it is a mandatory subject of bargaining.

Complaint subparagraph 9(o) alleges that the Respondents engaged in the alleged conduct without prior notice to SEIU Local 1107 and/or without affording SEIU Local 1107 an opportunity to bargain with respect to the conduct and/or its effects, and without first bargaining with SEIU Local 1107 to an overall good-faith impasse for a successor collective-bargaining agreement.

Complaint paragraph 13 alleges that this conduct violated Sections 8(a)(1) and 8(a)(5) of the Act. The Respondent denies these allegations.

The General Counsel's brief makes no mention of these allegations. It does not refer to or discuss any wage increase in July 2021 and also doesn't mention a decertification election.

Pursuant to a petition filed on May 28, 2021 in Case 28-RD-277972, the Board conducted an election to determine whether employees of Desert Springs Hospital Medical Center, in the technical employees unit then represented by SEIU Local 1107, wished to be represented by that Union. A July 8, 2021 tally of ballots stated that 13 employees voted in favor of representation and 39 voted

against. On July 20, 2021, the Board issued a Certification of Results and the case was closed.[96] Thus, on July 26, 2021 when the Respondents granted the wage increase, the employees receiving the increase were not represented by any union. Only weeks earlier, a majority had rejected representation by SEIU Local 1107.

It is not unlawful for an employer to grant a wage increase to unrepresented employees. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph 9(i).

Complaint subparagraph 9(j)

Complaint subparagraph 9(j) alleges that on about August 20, 2021, Respondent Valley and Respondent UHS ceased granting SEIU Local 1107 access to Respondent Valley's facility. Complaint subparagraph 9(p) alleges that this conduct related to wages, hours and other terms and conditions of employment. Complaint subparagraph 9(q) alleges that the Respondents engaged in this conduct without prior notice to SEIU Local 1107 and/or without affording SEIU Local 1107 an opportunity to bargain with respect to the conduct and/or its effects, and without first bargaining with SEIU Local 1107 to an overall good-faith impasse for a successor collective-bargaining agreement.

Complaint paragraph 13 alleges that the Respondents thereby violated Sections 8(a)(1) and 8(a)(5) of the Act. The Respondents deny these allegations.

Complaint subparagraph 9(j) describes the same conduct - adopting a "no-visitors" policy during a peak in the pandemic - which was discussed above in connection with complaint subparagraph 7(d). The earlier discussion concerned whether the no-visitors policy, which excluded non-employee Union representatives as well as everyone else who didn't work at the hospital, violated Sections 8(a)(1) and 8(a)(3) of the Act. Here, the discussion focuses on whether this policy constituted a unilateral change which violated Section 8(a)(5).

Adopting the policy was indeed a change, and an abrupt one. In late July 2021, a new variant of the COVID-19 virus produced a spike in new cases. In response, on July 29, 2021, Valley Hospital adopted a policy which reduced the number of visitors. When this limitation proved inadequate, the hospital banned all visitors. That policy went into effect on August 20, 2021.

Clearly, the Respondents did not provide the Union with advance notice of the ban. Hospital officials made the decision on August 19, 2021 and the prohibition went into effect the next day.

As a general rule, when a union is the exclusive bargaining representative of a unit of employees, the employer must notify and bargain with the union before making any material, substantial and significant change in terms and conditions of employment. However, the Board recognizes a narrow exception to this principle when economic exigencies compel prompt action. See, e.g., *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enforced 15 F.3d 1087 (9th Cir. 1994).

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[96] It is appropriate to take notice of official documents available to the public on the Board's website and I do so here. See *https://www.nlrb.gov/case/28-RD-277972*.

Whether the July 2021 spike in COVID-19 cases created an *economic* exigency depends on how broadly the word "economic" is defined, but it certainly was an "extraordinary event" and an "unforeseen occurrence" requiring the hospital to take immediate action. The consequences of failing to take such action went well beyond putting the hospital at a competitive disadvantage or the loss of contracts or accounts.[97]

The no-visitors policy reduced the risk that patients would be exposed to the COVID-19 virus and, therefore, the risk that they might contract the potentially-fatal disease. To delay implementation of the policy while the Respondents attempted to reach agreement with the Union would have left the patients at increased risk of exposure, which would been an unconscionable breach of the hospital's duty to its patients. Therefore, I conclude that the need to take action was compelling and that the hospital had little, if any discretion.

Further, I find that the need to adopt the no-visitors policy was caused by external circumstances beyond the hospital's control. Moreover, the need was not reasonably foreseeable. The rise of the COVID-19 delta variant came as unwelcome surprise.

It can hardly be doubted that the spike in COVID-19 cases was extraordinary and created exigencies warranting immediate action. Accordingly, I conclude that the rare circumstances in this case relieved the Respondents of the duty to notify the Union in advance and bargain concerning the decision to institute a no-visitors policy.

The duty to bargain over the effects of this action still existed. *Port Printing AD & Specialties*, 351 NLRB 1269, 1270 (2007). The Union received notice of the no-visitors policy by email on August 19, 2021. (General Counsel's Exhibit 147) However, the General Counsel has not claimed, and the record does not establish, that the Union ever requested to bargain concerning the effects of that decision.

In sum, I conclude that the Respondent did not violate the Act as alleged in complaint subparagraph 9(j). Therefore, I recommend that the Board dismiss these allegations.

Complaint subparagraphs 9(k) and 9(z)

Complaint subparagraph 9(k) alleges that about September 21, 2021, Respondent Valley and Respondent UHS granted a wage increase to their employees in the Valley Hospital RN (registered nurses) unit. Complaint subparagraph 9(p) alleges that this conduct related to wages, hours and other terms and conditions of employment. Complaint subparagraph 9(q) alleges that the Respondents engaged in this conduct without prior notice to SEIU Local 1107 and/or without affording SEIU Local 1107 an opportunity to bargain with respect to the conduct and/or its effects, and without first bargaining with SEIU Local 1107 to an overall good-faith impasse for a successor collective-bargaining agreement.

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[97] The need to avoid being at a competitive disadvantage, or to prevent the loss of contracts or accounts, is insufficient to justify a failure to provide the exclusive bargaining representative with notice of, and the opportunity to bargain about, a contemplated change in terms and conditions of employment. See *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

Complaint subparagraph 9(z) alleges that about September 16, 2021, Respondent Valley and Respondent UHS withdrew their recognition of SEIU Local 1107 as the exclusive collective-bargaining representative of the Valley RN Unit.

Complaint paragraph 13 alleges that the Respondents thereby violated Sections 8(a)(1) and 8(a)(5) of the Act. The Respondents deny these allegations.

The record clearly establishes that on about September 21, 2021, Respondent Valley raised the wages of its registered nurses and did so without first notifying SEIU Local 1107 and giving the Union an opportunity to bargain. So, the lawfulness of that wage increase depends on whether the Union was the nurses' exclusive bargaining representative when the hospital granted the wage increase. If the Union was the exclusive bargaining representative, the hospital violated Section 8(a)(5) of the Act by granting the wage increase unilaterally.

However, the Respondent contends that the Union was not the nurses' exclusive bargaining representative on September 21, 2021 because it had withdrawn recognition from the Union 5 days earlier. The General Counsel alleges that this withdrawal of recognition was unlawful and therefore invalid.

Therefore, the lawfulness of the wage increase depends on the lawfulness of the withdrawal of recognition, an issue raised in complaint subparagraph 9(z). So, to decide whether the wage increase, described in complaint subparagraph 9(k) is lawful, we must first determine whether the withdrawal of recognition, described in complaint subparagraph 9(z), was lawful.

There is no doubt that SEIU Local 1107 was the nurses' exclusive bargaining representative before September 16, 2021. As stated in *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. at 11 (January 30, 2020), the Board certified the Union as the exclusive bargaining representative on July 12, 1999. Its most recent collective-bargaining agreement with Respondent Valley expired on April 30, 2016. Id., slip op. at 1, fn. 3. In early 2017, Respondent Valley withdrew recognition from the Union, which then filed an unfair labor practice charge.

The Board found that the hospital's withdrawal of recognition violated the Act. It also found that Respondent Valley committed a number of other unfair labor practices, including promising bargaining unit employees wage increases if they decertified the Union. The Board's January 30, 2020 decision ordered the hospital to recognize and bargain with the Union. Id.

The Respondent did. Until it didn't. That was on September 16, 2021, when Valley Hospital issued the following memo to all its registered nurses:

VALLEY HOSPITAL WITHDRAWS RECOGNITION
FROM SEIU 1107

> Today, Valley Hospital received objective evidence which clearly and unequivocally indicated that the union has lost the support of the majority of the Register Nurses in the bargaining unit.

Specifically, we have verified that over 50% of the current bargaining unit Rns signed cards indicating they did "not wish to be represented" by the union "for the purpose of collective bargaining with my Employer."

Therefore, the Hospital has withdrawn recognition of SEIU Local 1107 effective immediately. We have notified the union that all future bargaining sessions are cancelled. Also, all union access rights to the Hospital under the expired collective bargaining agreement are terminated.

Congratulations! We are incredibly thrilled and we look forward to working directly and collaboratively with our nurses as we enter a new and exciting era for Valley Hospital! We appreciate your support, and we thank you for your patience, your professionalism, and your dedication to Valley Hospital and to our patients whom you serve so well.

We are in the process of finalizing the details to move all former bargaining unit Valley Hospital Rns to the Valley Health System non-union pay structure. This will entail the implementation of:

- **Merit increases for 2020 and 2021, with applicable retroactive lump sums**
- **Going forward, as with all VHS non-union employees, all former RN bargaining unit employees are eligible for all merit increases and any other applicable market adjustments implemented by VHS.**

We know you may have more questions about the future related to pay, benefits, policies and/or practice. As we work through all of these considerations, please be assured there are many topics about which you will have the opportunity to participate in the decision-making. In the meantime, all current practices and policies remain in place.

Look for more information in the coming days, and please don't hesitate to seek out your Director or anyone in Leadership with any questions or concerns you might have - we want to hear from you!

(General Counsel's Exhibit 78, underlining and boldface type in the original)

Thus, did Respondent Valley boldly go where it had once gone before, unsuccessfully. And it was indeed a bold action. The Board has emphasized that "an employer with objective evidence that the union has lost majority support - for example, a petition signed by a majority of the employees in the bargaining unit - *withdraws recognition at its peril*." *Levitz Furniture Company of the Pacific, Inc.*, 333 NLRB 717, 725 (2001)(italics added).

In *Levitz*, the Board held that "there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees. . ." Id. at 723. The Board thought it "entirely appropriate to place the burden of proof on employers to show actual loss of majority support." Id. at 725.

If the affected union contests a withdrawal of recognition, as it has here, "the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5)." Id.

Typically, an employer seeking to prove that a union has lost majority support will offer into evidence the signatures of a majority of bargaining unit employees on documents stating that they did not want the union to represent them. Usually, the signatures will either be on a petition or on individual cards.

In the present case, Respondent Valley claims that a majority of employees in the registered nurses' bargaining unit signed cards. However, it did not offer the cards into evidence.

Here, failing to show the cards raises the same kind of doubts that it would in poker. The vague testimony of Valley Hospital's human resources director, Dana Thorne, increases those doubts. When counsel for the General Counsel questioned her about the September 16, 2021 memo to employees, quoted above, Thorne answered as follows:

Q. . . .Now, in this particular document, it says one thing, it congratulates the former SEIU employees or bargaining unit members, but it also said they verified that over 50 percent of bargaining unit RNs signed cards. Do you know how that was done?
A. Pardon me?

Q. Do you know how that was done, the verification of 50 percent?
A. Well, I can tell you that I received the cards after it was done.

Q. You received all the cards?
A. Yes.

Q. When did you receive them?
A. I don't recall.

Q. And where are the cards?
A. I'm not sure. I believe they're with our attorney.

Q. Who did you give the cards to?
A. I received the cards from administration and I was directed by an attorney to verify the signatures in the cards.

Q. And you said you received them from administration. Who from administration did you receive them from?
A. I don't know who received them.

Q. No, no. Who did you receive them from administration?
A. I don't recall who gave them to me.

Q. And did you have someone independently verify the 50 percent?
A. Independently verify the signatures, yes.

Q. Who was that?
A. I would have to check my notes. I don't remember.

(Tr. 684-685)

The human resources director thus testified that she did not remember who gave her the cards and also did not remember to whom she had given them. She testified that she "was directed by an attorney to verify the signatures in the cards" but also testified that "I received the cards after it was done."

This testimony is confusing. It makes no sense that she would receive the cards with instructions to verify the signatures after the verification was done. More than that, Thorne's inability to recall names strikes me as dubious.

Past events made it likely that Thorne, the human resources director at Valley Hospital, would pay particular attention to the process of authenticating the cards. When Valley Hospital previously, and unlawfully, withdrew recognition from SEIU Local 1107, it did so based on cards signed by employees and on emails putatively sent by other employees. Thorne had played a role in authenticating the documents.

Thorne had received the signed cards from 2 management officials and the hospital's attorney.[98] Then, she had asked two individuals to verify the signatures. However, in the previous case, the judge determined that 26 of the cards could not be verified with any reasonable degree of certainty. The judge also found inadequate the verification of employees' emails. *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. at 21-22.

In other words, in the prior case the judge, and then the Board, found that the Respondents had not sufficiently verified the documents on which it had relied when it withdrew recognition from the Union. Presumably, both the Board's scrutiny of the verification process and its decision that the process was insufficient would motivate all involved in it to do better in the future.

After this experience in the prior case, Thorne likely would ascribe particular importance to future card verifications and devote careful attention to the process. So her inability to remember many details about that process is somewhat hard to believe.

A little later in Thorne's testimony, counsel for the General Counsel again asked her for the

[98] The individuals who provided the cards and emails to Thorne were Jeanne Schmid, who is vice president of labor relations at UHS of Delaware, Inc., and an admitted agent of Respondent Valley Hospital; the hospital's chief nursing officer, Victoria Barnhouse, and the hospital's attorney, Thomas Keim. *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. at 21.

names of the individuals who actually verified the signatures on the cards. Thorne answered, "As I told you before, I don't recall. I would have to look. I'm sure I have it recorded." (Tr. 687)

Thorne gave that testimony on June 23, 2023, when called as a witness by the General Counsel. On January 23, 2024, the Respondents called Thorne back to the witness stand. During the intervening 7 months, Thorne had ample time to check her records. Additionally, it was in the Respondents' interest to make sure that she was well prepared to testify concerning the cards because the Respondents bore the burden of proving that a majority of bargaining unit employees had rejected representation. Nonetheless, Thorne's testimony remained vague.

Cross-examining Thorne, counsel for the General Counsel again referred to the September 16, 2021 memo to employees quoted above:

> Q. September 16, 2021. And here we have -- the second paragraph says specifically we are verifying that over 50 percent of the current bargaining unit RN signed cards indicating they do not wish to be represented by the union for the purpose of collective bargaining with my employer. Do you know how this verification was done?
> A. Yes. I do.
>
> Q. How was it done?
> A. We were presented - the administrative team was presented with cards and those cards were provided to me to verify the signatures on them in comparing signatures with what's in their HR file. And once we confirmed that -
>
> Q. And where - where are those cards?
> A. I do not know.
>
> (Tr. 5336-5337)

This vague testimony hardly was convincing. More was needed to carry the Respondents' burden of proving that a majority of bargaining unit employees had signed cards disavowing union representation. Then, something strange happened. As the General Counsel started asking for more specific information about the verification process, the Respondent objected:

> Q. Okay. And how long did it take you to verify that it was over 50 percent of the cards?
> A. It took a few -
>
> MR. KEIM: Your Honor, I'm going to object. This is beyond the scope of the Complaint.
>
> (Tr. 5338)

Why would the Respondent want to exclude testimony about the verification process? It would be in the Respondents' interest to show that someone had painstakingly compared each

employee signature on a card with the employee's signature on other documents, such as a job application. After I overruled the objection, counsel for the General Counsel continued:

Q. BY MR. ZARATE-MANCILLA: Okay. So Ms. Thorne, if you can tell us how long did it take you to verify that it was over 50 percent of the cards.
A. It took a few hours.

Q. Okay. About how many nurses are there at Valley Hospital?
A. There's over, right around 600.

Q. And when you verified that it was over 50 percent of the nurses at Valley Hospital, did you keep a tally of the nurses?
A. No.

(Tr. 5339)

Again, the Respondent objected. After I overruled the objection, counsel for the General Counsel continued:

Q. BY MR. ZARATE-MANCILLA: So again Ms. Thorne, did you keep a tally of the names of the nurses that had, that you had seen on the cards or verified?
A. I don't know what you mean by tally, but we kept the cards and counted the cards. Yes.

Q. Did you make a list of the names of the, of the names on the cards?
A. No. We did not.

Q. Did you scratch off on an employee list which employees had signed cards?
A. Not that I recall.

Q. Okay. How did you come to the determination that it was over 50 percent?
A. Because we counted the number of nurses that we had at the time and then we pulled the files to compare the signatures so every file that we pulled was an active employee and active nurse, and then counted the cards.

Q. How many nurses signed?
A. I don't recall.

Q. How many nurses were employed at Valley around that time?
A. I don't recall.

Q. Did you communicate with any of the nurses to verify that it was indeed

their signature?
A. Not that I recall.

(Tr. 5340–5341.)

This vague testimony does not carry Respondent Valley's burden of proof. The most convincing proof, of course, would have been the cards signed by the nurses. Thorne had 7 months to find the cards and bring them to the hearing but did not.

The Respondents most certainly understood the importance of producing the cards. It has expert counsel, who appeared on the Respondents' behalf in the previous case as well as this one. Moreover, in the previous case, the judge herself had examined the signatures on at least 52 of the cards and found that 26 of them could not be sufficiently verified. The cards' significance as proof was obvious.

The Respondent neither produced the cards nor explained why it did not. It did not even offer an implausible reason, such as "the dog ate them." Considering both the failure to produce the cards and the vagueness of Thorne's testimony, the Respondents' claim that it had proof the Union had lost its majority status carries a piscine redolence.

Respondent Valley Hospital acted at its peril when it withdrew recognition from the Union, and it has not provided sufficient evidence to establish that a majority of bargaining unit employees did not wish to be represented by SEIU Local 1107. Concluding that Respondent Valley has failed to carry its burden of proof, I further conclude that the withdrawal of recognition violated Section 8(a)(1) and 8(a)(5) of the Act.

Turning now to the September 21, 2021 wage increase alleged in complaint subparagraph 9(k),[99] that conduct, by definition, relates to wages, hours and other terms and conditions of employment, as alleged in complaint subparagraph 9(p). Moreover, the record establishes that Respondent Valley granted the wage increase without first notifying and bargaining with SEIU Local 1107, as alleged in complaint subparagraph 9(q).

Because SEIU Local 1107 remained the exclusive bargaining representative of those nurses, the Respondent could not lawfully raise their wages without first notifying the Union and bargaining about it, which I find the Respondent did not do. Therefore, I conclude that the Respondent also violated Section 8(a)(1) and 8(a)(5) by granting the September 21, 2021 wage increase unilaterally.

In sum, I conclude that Respondent Valley violated Section 8(a)(1) and (5) of the Act by engaging in the conduct alleged in complaint subparagraphs 9(k) and 9(z).

Complaint subparagraphs 9(t), 9(u) and 9(v)

[99] Complaint subpar. 9(k) actually alleges that the wage increase took place on about September 16, 2021, which was the date on which Respondent Valley withdrew recognition from SEIU Local 1107. The hospital granted the wage increase on September 21, 2021.

Complaint subparagraphs 9(t), 9(u) and 9(v) concern negotiations for an interim wage agreement for employees in the technical unit at Respondent Desert Springs Hospital.

Complaint subparagraph 9(t) alleges that at "various times from about October 2020 through about September 30, 2021, Respondent Desert Springs and SEIU Local 1107 met for the purposes of negotiating an Interim Wage Increase Agreement for the Desert Springs Technical Unit."

Complaint subparagraph 9(u) alleges that, during these negotiations, Respondent Desert Springs and Respondent UHS: (1) insisted upon proposals that were predictably unacceptable to SEIU Local 1107; (2) refused to meet at reasonable times and/or places for bargaining; and (3) denigrated the Union in the eyes of unit employees.

Complaint subparagraph 9(v) alleges that by "its overall conduct, including the conduct described above in paragraph 9(u), Respondent Desert Springs and Respondent UHS have failed and refused to bargain in good faith with SEIU Local 1107 as the exclusive collective-bargaining representative of the Desert Springs Technical and RN Units."[100] The Respondents deny these allegations.

The General Counsel's brief does not address the allegations raised by either complaint subparagraph 9(u)(1) or 9(u)(2) at all. More specifically, although complaint subparagraph 9(u)(1) alleges that the Respondents insisted on predictably unacceptable proposals, the General Counsel's brief does not identify any such proposals.

The record includes a number of proposals exchanged by the parties during bargaining. (See, e.g., General Counsel's Exhibits 105, 106 and 118) However, the General Counsel's brief does not discuss any of them, let alone state why any should be considered "predictably unacceptable." It is far from obvious how any of these proposals differ from the typical proposals found in lawful "hard bargaining."

Although the General Counsel's brief does not address this matter, the Respondents' brief does. It states, in part:

> Counsel asserts that Respondent Desert Springs (or UHS) bargained in bad faith by submitting "predictably unacceptable" proposals. That is not the standard for bad faith, and, even if it were, the accusation is not accurate. The NLRB has clearly stated "the

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100 Complaint subparagraph 9(v) alleges that Respondent Desert Springs and Respondent UHS failed and refused to bargain in good about concerning *both* the unit of technical employees represented by SEIU Local 1107 and the unit of registered nurses, also represented by SEIU Local 1107. However, complaint subparagraphs 9(t) and 9(u) refer only to negotiations concerning the technical employees' unit. Valley Health System negotiated with SEIU Local 1107 concerning a unit staffing incentive plan which would apply to employees represented by the Union at both Valley Hospital and Desert Springs Hospital. See, e.g., GC Exh. 105, which includes Valley Hospital System's December 9, 2020 proposal, the terms of which would apply to employees in the registered nurses' bargaining unit at Valley Hospital and to employees in both the registered nurses' unit and the technical employees' unit at Desert Springs Hospital.

> mere fact that the . . . proposal was unacceptable to the Union does not necessarily make it unlawful. Similarly, the fact that a proposal is 'regressive' does not necessarily establish that it is made in bad faith." *Qual. House of Graphics, Inc.*, 336 NLRB at 515; see also *Mgmt. & Training Corp. & Serv. Emps. Int'l Union Loc. 668*, 366 NLRB No. 134 (2018) (quoting *Genstar Stone Products Co.*, 317 NLRB 1293, 1293 (1995)) ("The fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not 'so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith.'").

Because the General Counsel's brief does not address this matter at all, it is not clear which proposals the government considered "predictably unacceptable." However, the proposal which caused the most controversy at the bargaining table likely was the Respondents' proposal that non-employee Union representatives not have access to the hospital.

One witness, Jamerson Holloway, had been on the Union's executive board at the time of the negotiations and attended some of the bargaining sessions. According to Holloway, Jeanne Schmid, Respondent Desert Springs' agent,, was "dead set against" the Union having physical access to the hospital. Holloway testified that Schmid said there were other ways that the Union could communicate with employees:

> Q. Did Jeanne Schmid provide any other reason for being against in person access to the hospital or the Union?
> A. She made it as if the Union would kind of get in the way of care or try to persuade additional members, additional employees to maybe look at being members of the Union.
>
> Q. In regards to care, do you happen to remember whether Ms. Schmid mentioned anything specific regarding patient care?
> A. No, she didn't mention anything specific, but she said there were strict rules in regards to when Union members could come onto the floor and where they were to be on the floor. And so there would be discussions back and forth related to their understanding that Union members who represented the Union could have access to the floor during certain times while the members were on break. And so, Jeanne was making it as if when the members were on break, they needed their rest to recover. They shouldn't be bothered with Union representatives and whatnot. And the Union's position was that is their break to make the determination on who they wanted to talk to during their break. And if the Union was available during their break, then that is their choice if they wanted to speak to the Union or not. If they did not want to speak to the Union, then they had that choice not to.
>
> (Tr. 3509-3510)

Holloway further testified that there were times that voices got elevated, although not to the point of yelling. (Tr. 3510-3511)

Although Schmid testified, no one asked her why the Respondent sought to deny non-employee Union representatives access to the hospital. However, the presence of Union representatives on an employer's premises is a mandatory subject of bargaining and a hospital environment gives rise to health, safety and privacy issues not present in other workplaces.

Moreover, although the law does not require a party to make a concession during collective bargaining, the Respondents did modify their position on Union access. On June 23, 2021, they tendered a proposal titled "Interim Restricted Access to the Hospital and Patient Care Areas." (General Counsel's Exhibit 123) The introductory paragraph of this proposal refers to the privacy and safety concerns it would address:

> In order to ensure compliance with federal and state protections of patient and family privacy, and to protect patients and their families while at the Hospital, the Hospital maintains strict HIPAA Policies, as well as the Solicitation and Safety & Security clauses of the Employee Handbook which are incorporated herein by reference. . .
>
> (GC Exh. 123)

Because the General Counsel has not identified the proposals the government considers "predictably unacceptable," it is not clear how many proposals supposedly fall into that category or whether the Respondents' Union access proposals, discussed above, are among them. In any event, these proposals address legitimate concerns - compliance with the federal HIPAA regulations and protection of patient safety and privacy - and do not suggest that the Respondents were bargaining in bad faith.

The record does not suggest that any other proposals engendered as much controversy during negotiations. Because the General Counsel has not argued that any particular proposals were "predictably unacceptable," I conclude that the government has not proven the allegations raised in complaint subparagraph 9(u)(1).

Complaint subparagraph 9(u)(2) alleges that the Respondents refused to meet at reasonable times and/or places. However, the General Counsel's brief does not discuss when the parties met, when they requested to meet, or whether the Respondents turned down meeting dates or places proposed by the Union.

From the record, it appears the COVID-19 epidemic affected the scheduling in 2020. Also, that year, the attorney who was the Union's chief negotiator, Nathan Ring, left the law firm which represented the Union. Another lawyer, Paul Cotsonis, assumed the role of the Union's chief negotiator in late November or early December 2020. (Tr. 3202.) It then took time for Cotsonis to become familiar with the status of the negotiations. For example, in a December 8, 2020 email to the Respondents' chief negotiator, Tom Keim, Cotsonis wrote:

> Also Tom, as a follow-up to my voice-mail its my understanding that there is a bonus structure program for extra shifts that has been floating around but that your client has been waiting for a response from us. However, if that is the case, I can't locate it. If that is the case, could you please forward to me.

(General Counsel's Exhibit 101)

Both Cotsonis and Keim are attorneys in private practice. In addition to their own calendars, those of others on the Union and management negotiating committees had to be taken into account in scheduling bargaining sessions. The alleged refusal to meet at reasonable times and places cannot be proven simply by showing the amount of time which elapsed between meetings. Many factors unrelated to an employer's availability on a particular date can cause delays.

The General Counsel must show how an employer's conduct prevented bargaining. For example, if an employer's negotiators said they were unavailable on a great many days and had no reasons, or only a clearly pretextual reason for their unavailability, that conduct would suggest an intent to avoid bargaining.

Depending on the circumstances, willingness to meet only at a location which is distant or otherwise inconvenient can indicate a lack of good faith. However, the General Counsel's brief cites no such instances and, in fact, does not discuss this matter at all.[101]

The General Counsel has not established either that the Respondent turned down proposals to meet at reasonable times and places or that the Respondent insisted upon meeting at unreasonable times and/or places. Therefore, I conclude that the government has not proven the allegations raised in complaint subparagraph 9(u)(2).

Complaint subparagraph 9(u)(3) alleges that the Respondents "denigrated the Union in the eyes of unit employees." However, the General Counsel's brief does not address this allegation at all. It does not identify as "denigrating" any statements made by any of the Respondents' supervisors or agents. Indeed, neither the word "denigrating" nor "denigrate" appears in the General Counsel's brief.[102]

As the Board stated in *Children's Center for Behavioral Development*, 347 NLRB 35 (2006), "an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." However, I do not understand the General Counsel to be alleging

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101 During the examination of Market Director of Human Resources Wayne Cassard, counsel for the General Counsel announced that he would be asking questions pertaining to complaint subpar. 9(t) and 9(u). However, he asked no questions concerning when the negotiators met or about either side's bargaining proposals. Counsel for the General Counsel asked Cassard about the market reports Cassard reviewed and why the hospital's chief executive officer and chief financial officer were not on the bargaining committee. (Tr. 1667–1670.)

102 Complaint subparagraphs 6(j) and 6(p) allege that the Respondents disparaged SEIU Local 1107 by statements in flyers, called "bargaining briefs," which the Respondents distributed to employees. Is complaint subparagraph 9(u)(3)'s allegation of "denigration" based on the statements in these flyers? The answer is unclear because the General Counsel's brief does not discuss or even refer to the "bargaining briefs."

that the supposedly "denigrating" statements, standing alone, violate Section 8(a)(5) of the Act. Rather, I suspect that the General Counsel regards the supposedly "denigrating" statements as manifestations of the Respondents' bad faith in bargaining. However, because the General Counsel has not clarified the government's theory of violation, that is just a tentative assumption. In any event, by failing to identify any alledgely "denigrating" statement, the General Counsel has failed to carry the government's burden of proof.

However, a statement which does not violate Section 8(a)(1) still may shed light on an employer's motivation. But if the government wishes to prove an employer's state of mind as manifested in something the employer said or wrote, the General Counsel must identify that statement and explain what it reveals. The General Counsel has not done so here and has not proven the allegations raised in complaint subparagraph 9(u)(3).

In sum, the General Counsel has not proven that the Respondents dealt with the Union in bad faith. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraphs 9(t), 9(u) and 9(v).

Complaint subparagraph 9(w)

Complaint subparagraph 9(w) alleges that the "serious and substantial unfair labor practice conduct described above in paragraphs 6(j), 6(k), 6(l), 6(p), 6(q), 6(r), 6(v), 6(w), 7(c), 7(k), 9(d), 9(i), 9(n), 9(o), 9(t), 9(u), and 9(v) such that there is only a slight possibility of traditional remedies erasing their effects and conducting a fair election or rerun election. Therefore, on balance, the employees' sentiments regarding representation, having been expressed through authorization cards, would be protected better by issuance of a bargaining order." The first sentence of complaint subparagraph 9(w) lacks a verb, resulting in some uncertainty. However, it is clear that the General Counsel seeks a bargaining order. The Respondent denies this allegation.

For reasons discussed above, I have concluded that the Respondents did not violate the Act by the conduct alleged in the cited complaint subparagraphs. Therefore, I conclude that the General Counsel has not proven the allegations raised in complaint subparagraph 9(w).

Complaint subparagraph 9(x)

Complaint subparagraph 9(x) states that "[t]he allegations described above in paragraph 9(w) requesting the issuance of a bargaining order are supported by, among other things," followed by a list of alleged circumstances which, the General Counsel contends, make a bargaining order warranted. In view of my finding that the General Counsel has proven none of the allegations cited in subparagraph 9(w), it is not necessary to discuss the listed circumstances. These alleged circumstances cannot aggravate the seriousness of unfair labor practices the government failed to prove.

Complaint subparagraph 9(y)

Complaint subparagraph 9(y) alleges that since about July 8, 2021, Respondent has failed and refused to recognize and bargain with SEIU Local 1107 as the exclusive collective-bargaining representative of the Desert Springs Technical Unit. Although this subparagraph does not specifically identify the particular Respondent, from context it is clear that it refers to Respondent Desert Springs.

Complaint paragraph 13 alleges that the Respondent thereby violated Section 8(a))(5) of the Act. The Respondent denies these allegations.

On July 8, 2021, the Board issued a tally of ballots cast in an election conducted by Board personnel. The voters in that election, members of the technical employees' bargaining unit at Desert Springs Hospital, rejected further representation by SEIU Local 1107. The vote was 39 against representation by the Union and 13 in favor. The Board issued a Certification of Results. *Desert Springs Hospital Medical Center*. Case 28–RD–277972.

Based upon the tally of ballots, Respondent Desert Springs withdrew recognition from the Union as the representative of the technical employees bargaining unit.

The bargaining order sought now by the General Counsel would undo the decision of the majority of voters in that election. Moreover, it would do so without allowing current employees to vote. Thus, even if the Respondents had committed the violations alleged by the General Counsel, a bargaining order would be an extraordinary remedy which would deny current employees the right to choose their own bargaining representative or to choose not to be represented by a labor organization.

The employees' right to bargain collectively through representatives of their own choosing, or to refrain from doing so, is a fundamental right central to the Act. See 29 U.S.C. § 157. Although in rare cases the Board may decide that the purposes served by a bargaining order should prevail, the present case certainly is not one of them.

The Respondent did not commit the unfair labor practices alleged by the General Counsel in complaint subparagraph 9(w) and the complaint subparagraphs it cites. Therefore, a bargaining order is unwarranted.

Complaint subparagraph 9(aa)

Complaint subparagraph 9(aa) alleges that, by engaging in the conduct described in paragraphs 6(a) through 6(i), 6(m), 6(n), 6(o), 6(y) through 6(qq), 7(a), 7(b), 7(e) through 7(i), 8, 9(a), 9(b), 9(c), 9(e), 9(f), 9(g), 9(h), 9(l), 9(m), 9(r), and 9(s) of the complaint, Respondent Valley and Respondent UHS undermined Culinary Local 226 as the collective-bargaining representative of the employees in the Valley Culinary unit. The Respondents deny these allegations.

For reasons discussed above, except for allegations raised by complaint subparagraph 6(mm)(2), I have concluded that the General Counsel has not proven any of the allegations in the cited complaint paragraphs. With respect to complaint subparagraph 6(mm)(2), I found that a manager unlawfully interrogated a union supporter.

Considering the totality of circumstances, I conclude that these statements, either single or taken together, would be insufficient to undermine Culinary Local 226's status as exclusive bargaining representative.

Complaint subparagraph 9(bb)

Complaint subparagraph 9(bb) alleges that, by engaging in the conduct described above in

paragraphs 6(j), 6(k), 6(l), 6(s), 6(t), 6(u), 7(d), 7(h), 9(d), 9(j), 9(k), 9(p), 9(w), and 9(z), Respondent Valley and Respondent UHS undermined SEIU Local 1107 as the collective-bargaining representative of the employees in the Valley RN Unit and the Desert Springs Technical unit.

As discussed earlier in this decision, I have concluded that, except for the conduct described in complaint subparagraphs 9(k) and 9(z), the General Counsel has not proven that the Respondents violated the Act by conduct described in any of the cited subparagraphs. However, the General Counsel did prove that the Respondents unlawfully withdrew recognition from SEIU Local 1107 as the exclusive bargaining representative of employees in the registered nurses' bargaining unit at Valley Hospital. as alleged in complaint subparagraph 9(z).

The government also proved that, after it withdrew recognition from the Union, Respondent Valley Hospital granted employees in the bargaining unit a pay increase, as alleged in complaint subparagraph 6(k). These actions certainly undermined SEIU Local 1107 as the exclusive bargaining representative of the registered nurses' unit at Respondent Valley Hospital. However, because Respondent Desert Springs lawfully withdrew recognition from SEIU Local 1107 as the exclusive bargaining representative of employees in the Desert Springs Hospital technical employees unit, and also because that unit is at a separate hospital from the one in which the unfair labor practices occur, I do not conclude that the Respondents' actions undermined SEIU Local 1107 as the exclusive bargaining representative of the technical employees' unit at Desert Springs Hospital.

Complaint subparagraph 9(cc)

Complaint subparagraph 9(cc) alleges that by engaging in the conduct described above in paragraphs 6(j), 6(k), 6(l), 6(p), 6(q), 6(r), 6(v), 6(w), 7(c), 7(k), 9(d), 9(i), 9(n), 9(o), 9(t), 9(u), 9(v), 9(w), 9(x), and 9(y), Respondent Desert Springs and Respondent UHS undermined SEIU Local 1107 as the collective-bargaining representative of the employees in the Desert Springs Technical unit.

However, for reasons discussed above, I have found that the General Counsel has not proven that the Respondents violated the Act by any conduct described in the cited subparagraphs. Therefore, I further conclude that the Respondents did not undermine SEIU Local 1107 by engaging in the alleged conduct.

Summary

The evidence establishes that Respondent Valley Hospital violated Section 8(a)(1) of the Act by the conduct alleged in complaint subparagraph 6(mm)(2).

Respondent Valley Hospital violated Section 8(a)(1) and Section 8(a)(5) of the Act by the conduct alleged in complaint subparagraph 9(k), granting a wage increase to employees in its registered nurses bargaining unit represented by SEIU Local 1107, without first notifying that Union and affording it an opportunity to bargain over the decision to grant the wage increase and the effects of that decision.

Respondent Valley Hospital violated Section 8(a)(1) and Section 8(a)(5) of the Act by the conduct alleged in complaint subparagraph 9(z), withdrawing recognition from SEIU Local 1107, as the exclusive bargaining representative of Respondent Valley Hospital's employees in the registered

nurses bargaining unit.

Respondent Valley Hospital did not otherwise violate the Act. Respondent Desert Springs did not violate the Act.

Ethical Concerns

Section 102.177(a) of the Board's Rules states that any attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts. Section 102.177(e) of the Board's Rules sets forth the procedure to be followed in handling allegations of misconduct.

However, the procedure established in Section 102.177(e) does not apply to allegations of misconduct by Agency personnel. Therefore, I include here my concerns about the General Counsel's conduct, or, more precisely, about actions taken by those exercising authority delegated by the General Counsel.

No one should accuse another of breaking the law unless there is at least some evidence to support such an accusation. This principle of basic fairness becomes particularly important when the accuser is a government official empowered to bring legal proceedings.

However, not just prosecutors but all attorneys have an ethical duty not to make baseless claims. Rule 3.1 of the American Bar Association's Model Rules of Professional Responsibility states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . ."

This basic principle prevents the legal system from becoming a means of harassment or abuse. Unsurprisingly, a version of it appears in codes of professional responsibility promulgated by state supreme courts.

In the present case, there is reason to believe that those acting with the General Counsel's authority included in the complaint allegations which were not supported by any evidence. So far as I could discern, the General Counsel presented no evidence to prove the allegations raised in a number of complaint subparagraphs.[103]

In criminal law, a prosecutor presents evidence to a grand jury, which then determines whether sufficient proof exists to issue an indictment. That safeguard does not exist in these administrative proceedings but the same principle applies. A complaint should not allege that someone violated the Act unless there is some kind of evidence to support such a claim.

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[103] In particular, I am concerned about the allegations set forth in complaint subparagraphs 6(l), (m), 6(w), 6(z) and 9(r), 6(bb), 6(ee)(4), 6(ll) and 7(c). In some other instances, the General Counsel did not describe an allegedly unlawful action or statement sufficiently to ascertain for certain whether any evidence supported the allegation. See, e.g., complaint subparagraphs 6 (c) (2), 6(ee) (1), 6(ee) (6), 6(ee) (7) and 6(gg).

A vast, qualitative chasm separates alleging a violation based on seemingly flimsy evidence and alleging a violation based on no evidence at all. Here, I am concerned that the General Counsel may have done the latter. That concern arises not just from the government's apparent failure to present the needed evidence during the hearing, but also because of another unusual factor.

When the hearing began, counsel for the General Counsel began calling the Respondents' managers and supervisors as witnesses and then requested to examine each pursuant to Rule 611(c) of the Federal Rules of Evidence. This rule allows counsel to use leading questions. When an attorney already knows the facts and wishes to get the witness to admit them, asking leading questions can be an efficient way to obtain those admissions quickly.

Strangely, although counsel for the General Counsel requested and invariably received permission to ask leading questions, he did so infrequently. Rather, the questioning meandered, sometimes with no obvious goal in mind.

The term "fishing expedition" has grown almost meaningless from overuse. However, it would not have surprised me too much if counsel for the General Counsel had showed up for the hearing wearing waders and carrying a pole and worms. It is possible that counsel for the General Counsel might have been conducting the investigation which should have taken place before issuance of the complaint.

For the first 14 days of the hearing, counsel for the General Counsel called only managers and supervisors. On the 15th day, I instructed him that I would permit no further 611(c) examinations until he had finished calling his other witnesses.

At the time, counsel for the General Counsel's manner of proceeding seemed puzzling, indeed inexplicable. In hindsight, the absence of any evidence to prove some of the allegations raises the possibility that the General Counsel had gone into the hearing without any evidence and was trying to find some.

Of course, that should never happen. To allege a violation when there is no evidence of wrongdoing breaches the public's trust.

It should be stressed that I raise these matters tentatively. Perhaps the General Counsel did offer some evidence to prove each allegation and I overlooked it. If so, the General Counsel should be able, in exceptions, to identify that evidence and its location in the record.

However, if the General Counsel's exceptions cannot identify specific testimony or other evidence offered to prove each of the contested complaint allegations, such a failure would, like the death of a canary in a coal mine, indicate the existence of a problem needing prompt attention. The government should not be alleging violations it is unprepared to prove.

It cannot be overstated that making a baseless accusation of wrongdoing in a pleading constitutes professional misconduct. But it should also be stressed that the attorneys who represented the General Counsel at the hearing were not the official who issued the complaint and it would not be fair to criticize them for something beyond their control.

Litigation of baseless allegations imposes a burden on both the Respondents and the taxpayers. To ignore or discount the significance of this problem would be to condone it and encourage its repetition. Ignoring it also would foster an ethical nonchalance totally at odds with the Board's present punctilious culture.

CONCLUSIONS OF LAW

1. At all materials times, Valley Hospital Medical Center, Inc., d/b/a Valley Hospital Medical Center, referred to below as Respondent Valley Hospital, is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center, referred to below as Desert Springs Hospital, is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3; Culinary Workers Union, Local 226, a/w UNITE HERE International Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. Service Employees International Union, Local 1107, is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of Respondent Valley Hospital constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act: All Registered Nurses (RNs) employed by the hospital, but excluding all other employees, guards and supervisors as defined in the Act.

6. At all times since about July 12, 1999, Service Employees International Union, Local 1107, has been and is the exclusive collective-bargaining representative of the employees in the collective-bargaining unit described in paragraph 5, above.

7. Respondent Valley Hospital violated Section 8(a)(1) of the Act by interrogating employees about their union membership, activities and sympathies.

8. Respondent Valley Hospital violated Section 8(a)(1) and Section 8(a)(5) of the Act by the following actions: (1) Withdrawing recognition from Service Employees International Union, Local 1107, as the exclusive bargaining representative of its employees in the bargaining unit described in paragraph 5, above; (2) unilaterally changing the pay of employees in the bargaining unit described in paragraph 5, above, without first notifying Service Employees International Union, Local 1107, and affording the Union an opportunity to bargain concerning the change and its effects.

9. Neither Respondent Valley Hospital nor Respondent Desert Springs Hospital violated the Act in any other manner alleged in the complaint.

REMEDY

Having engaged in unfair labor practices, Respondent Valley Hospital must cease, and take certain actions to remedy the harm caused by its unlawful conduct. Those actions must include the

posting of the Notice to Employees attached to this decision as Appendix.

Respondent Valley Hospital must recognize and bargain with Service Employees International Union, Local 1107, as the exclusive bargaining representative of the employees in the unit of registered nurses described above in paragraph 5 of the conclusions of law.

At the request of that Union, but only at the Union's request, the Respondent must rescind the wage increase which it granted to employees in the bargaining unit of registered nurses in September 2021 without first notifying and bargaining with their exclusive bargaining representative concerning the wage increase and its effects.

The General Counsel has argued that because of the Respondents' history of violating the Act, extraordinary remedial measures are warranted. However, although the General Counsel alleged many unfair labor practices, the government proved few of them.

In a previous case involving these Respondents, *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16 (2020), the Board found that the Respondents herein had committed a substantial number of unfair labor practices, including unlawfully withdrawing recognition from SEIU Local 1107 as the representative of employees in three different bargaining units. One of those was the same unit of registered nurses at Valley Hospital as that described above in paragraph 5 of the conclusions of law.

The judge's recommended remedial order in that prior case included broad language prohibiting the Respondent from violating the Act "in any other manner." However, the Board's Order only prohibited violating the Act in "any like or related manner."

The Board also used "like or related manner" language in its order in *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 372 NLRB No. 33 (2022). Considering the relatively small number of violations found in the present case, I believe that the narrower "like or related manner" language also is appropriate in the present case.

As set forth in the complaint, the General Counsel seeks an order requiring the Respondents to conduct a meeting or meetings "scheduled to ensure the widest possible attendance," at which the hospital's chief executive officer would read, or be present while a Board agent read, the notice to employees. Each employee attending the meeting also would receive a copy of the notice.

In certain unusual circumstances, such an order would have a remedial purpose and effect and therefore be appropriate. For example, an employer's unfair labor practices could make employees so afraid that they could not cast uncoerced votes in a representation election. Ordering a management official to read the notice to employees could neutralize some of the fear. It would have the remedial purposes of assuring a free and uncoerced voted. See, e.g., *McAllister Towing & Transportation Co..*, 341 NLRB 394, 400 (2004).

However, in the present case, employees are not going to be voting in an election. The Union never lost its majority status.

SEIU Local 1107 was the registered nurses' exclusive bargaining representative at the time

Respondent Valley Hospital unlawfully withdrew recognition. Therefore, the appropriate remedy is to order the hospital to recognize and bargain with the Union and to post the notice to employees.

No special remedy is needed to assure an uncoerced election because there is no need for an election. Therefore, requiring a management official to read the notice aloud to employees would serve no remedial purpose beyond that already served by the standard notice posting. *Chinese Daily News*, 346 NLRB 906, 909 (2006),

In the complaint, the General Counsel seeks special remedies for violations which were alleged but not proven. Because the General Counsel did not prove these allegations, it is not necessary to consider whether a special remedy is appropriate. No remedy is appropriate for an alleged violation not proven.

Complaint paragraph 6(dd) alleges that Respondent Valley Hospital "compelled its employees to attend captive-audience meetings in which it addressed the employees about their choice concerning union representation, without providing assurances that attendance was voluntary, that the employees were free to leave at any time, that nonattendance would not result in reprisals, and that attendance would not result in rewards or benefits." At the time the complaint issued, such "captive-audience" speeches were lawful under Board precedent.

Counsel for the General Counsel presumably alleged this then-lawful conduct to be an unfair labor practice in an effort to get the Board to reconsider and overrule its precedents. In another case, the Board did change course, finding a captive-audience speech to be violative. *Amazon.com Services LLC*, above.

However, the Board specifically stated that the change was prospective only. Therefore, I found that the Respondents did not violate the Act by conduct alleged in complaint subparagraph 6(dd).

The complaint seeks a special remedy for the captive-audience speeches. Because this conduct did not violate the Act, no remedy is necessary.

The complaint seeks other extraordinary remedies. Those include an order that "Respondents reimburse the Board, Culinary Local 226, and SEIU Local 1107 for all costs and expenses incurred in the investigation, preparation and conduct of this case before the Board and the courts."

However, the General Counsel has not established that such extraordinary remedies are warranted and I conclude that they are not. The Board's customary remedies are sufficient.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[104]

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[104] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

ORDER

A. The charges against Respondent Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center in Cases 28–CA–278343, 28–CA–278352, 28–CA–281836, 28–CA–283166, 28–CA–284088 and 28–CA–288283 are hereby severed and dismissed.

B. The General Counsel having failed to prove that Universal Health Systems, Inc. is a proper party to this proceeding, that name is hereby stricken from the case caption. The General Counsel's "Erratum" dated May 23, 2023, in effect constituting a motion to amend the complaint to name Universal Health Services, Inc. as a respondent, is denied. The General Counsel's motion to add UHS of Delaware, Inc. (UHSDI) as a respondent is denied.

C. The Respondent, Valley Hospital Medical Center, LLC d/b/a Valley Hospital Medical Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals, including unspecified reprisals, for engaging in union and/or protected, concerted activities;

(b) Interrogating employees concerning the union activities or sympathies of themselves or fellow workers;

(c) Failing and refusing to recognize and bargain collectively and in good faith with Service Employees International Union, Local 1107, as the exclusive bargaining representative of employees in the following appropriate unit:

> All Registered Nurses (RNs) employed by the hospital, but excluding all other employees, guards and supervisors as defined in the Act.

(d) Granting wage increases to employees in the bargaining unit described above in subparagraph (c) without first notifying Service Employees International Union and affording it the opportunity to bargain about that decision and its effects.

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

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

(a) Within 14 days after service by the Region, post the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, 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. In addition to the 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 September 16, 2021.

(b) During this 60-day posting period, the Respondent shall permit a Board agent to enter its facilities at reasonable times and in a manner not to unduly interfere with its operations, for the limited purpose of determining whether it is in compliance with the notice posting, distribution, and mailing requirements.

(c) 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 the Respondent has taken to comply.

(d) Recognize and bargain in good faith with Service Employees International Union, Local 1107, as the exclusive bargaining representative of the employees in the registered nurses' bargaining unit at Respondent Valley Hospital Medical Center.

(e) At the request of Services Employees International Union, Local 1107, but only at the Union's request and with the Union's consent, rescind the wage increase which Respondent gave to employees in the registered nurses' bargaining unit on about September 21, 2022.

Dated Washington, D.C. June 4, 2025

Keltner W. Locke
Administrative Law Judge

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 abide by 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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT threaten employees with reprisals for engaging in union activities or other concerted activities protected by the National Labor Relations Act.

WE WILL NOT interrogate employees about their union sympathies or activities, about other protected activities, or about the union sympathies or protected activities of other employees.

WE WILL NOT fail and refuse to bargain with Service Employees International Union, Local 1107, as the exclusive bargaining representative of our employees in the registered nurses' bargaining unit.

WE WILL NOT make changes in the wages, or other terms and conditions of employment of employees in the registered nurses' bargaining unit without notifying that units exclusive bargaining representative, Service Employees International Union, Local 1107, and affording it the opportunity to bargain concerning the contemplated change and its effects.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of rights guaranteed by the National Labor Relations Act.

WE WILL recognize and bargain in good faith with Service Employees International Union, Local 1107, as the exclusive bargaining representative of the employees in the registered nurses' bargaining unit.

WE WILL, but only if the Union's requests it, return the wage rates of employees in the registered nurses' bargaining unit to the rates in effect before we changed them unilaterally on about September 21, 2021.

Valley Hospital Medical Center, LLC d/b/a
Valley Hospital Medical Center

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099
(602) 640-2178

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-272658 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (602) 416-4755.