

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

FLAGSTAFF MEDICAL CENTER, INC.

and

**Cases 28-CA-21509
28-CA-21637
28-CA-21664**

**COMMUNICATION WORKERS OF AMERICA,
LOCAL UNION 7019, AFL-CIO**

and

Case 28-CA-21548

**NATIONAL NURSES ORGANIZING COMMITTEE/
CALIFORNIA NURSES ASSOCIATION (NNOC/CNA)**

**FLAGSTAFF MEDICAL CENTER, INC. and
SODEXHO, INC., as Joint Employers**

and

Case 28-CA-21704

**COMMUNICATION WORKERS OF AMERICA,
LOCAL UNION 7019, AFL-CIO**

GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS

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GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS

Counsel for the General Counsel (CGC) files the following exceptions to the Decision of Administrative Law Judge Gerald A. Wacknov (ALJ) [JD(SF)–19-09] issued on May 20, 2009, in the above-captioned cases:

Subcontracting Allegations

1. CGC excepts to the ALJ's findings and conclusions that "in February, FMC's executive board made the final decision to contract with Sodexo to perform the patient transport functions with Sodexo employees rather than FMC employees." (ALJD 5; see GC 36, Tr. 107, 1468, 1578, 1799, 1888, 1963-64)
2. CGC excepts to the ALJ's findings and conclusions that "the decision to [subcontract to Sodexo] was made on February 13 at FMC's weekly Senior Management Team meeting." (ALJD 6; see GC 36, Tr. 107, 1468, 1578, 1799, 1888, 1963-64)
3. CGC excepts to the ALJ's findings and conclusions that Doug Umlah was impressed with the patient transport services "operated by Sodexo" at two Phoenix hospitals. (ALJD 6; see Tr. 1839, 1843)
4. CGC excepts to the ALJ's findings and conclusions that "Umlah recommended that FMC contract with Sodexo for similar services." (ALJD 6; see Tr. 107, 1864, 1888, 1963-64)
5. CGC excepts to the ALJ's findings and conclusions that "[i]t was anticipated that transport employees who exclusively performed [patient transport] work would acquire expertise in handling a variety of transport situations that would enhance patient safety." (ALJD 5-6; Tr. 1856-57, 2030)

6. CGC excepts to the ALJ's findings and conclusions that "the FMC employees who performed patient transport work did not lose their jobs, but rather continued to perform patient transport work at the same location for Sodexho rather than FMC." (ALJD 8; see Tr. 294-95, 305, 1470)

7. CGC excepts to the ALJ's findings and conclusions that there is no evidence contrary to the conclusion that "[a]fter exhaustive consideration, [FMC] decided that contracting out the entire operation to Sodexho was in the best legitimate business interest of FMC." (ALJD 9)

8. CGC excepts to the ALJ's findings and conclusions that Respondent's witnesses "are experienced hospital professionals with expertise in hospital administration." (ALJD 9; see Tr. 1808, 2029)

9. CGC excepts to the ALJ's findings and conclusions that "Sodexho's patient transport system is a sophisticated system that had been tried and tested at other hospitals." (ALJD 9; Tr. 1856-57, 2030)

10. CGC excepts to the ALJ's findings and conclusions that "[t]he contention by the General Counsel that FMC had an ulterior, unlawful motive in contracting out the patient transport work and would not have done so in the absence of the Union's organizing drive, is contradicted by persuasive, substantial and uncontroverted record evidence." (ALJD 9; Tr. 1813, 1832-33, 1839, 1843, 1808, 2029, 1839, 1843, 1856-57, 1859-60, 2030, GC 65, 68)

11. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(k) of the Complaint. (ALJD 9)

Section 8(a)(3) Allegations

12. CGC excepts to the ALJ's findings and conclusions that "it is unnecessary to discuss particular matters that were resolved" following the June 29 and July 6 meetings between Schuler, Bradel and dietary department employees. (ALJD 11, n.14)

13. CGC excepts to the ALJ's failure to address the allegations contained within ¶ 6(a) of the Complaint. (See Tr. 75, 135-36, 616-18, 1382, 2096, 2098-99, 2138, GC 5)

14. CGC excepts to the ALJ's findings and conclusions that "FMC presented cogent, persuasive evidence in support of its position that [Lydia] Sandoval's transfer to the later shift was motivated by legitimate business exigencies, rather than in retaliation for being pro-union." (ALJD 27; see Tr. 648-50, 868, 870-72, 876-77, 885, 1062-63, 1183-85, GC 24)

15. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(b) of the Complaint. (ALJD 27)

16. CGC excepts to the ALJ's findings and conclusions that the negative appraisal issued by Drake to Souers in August was warranted as a result of Souers's disregard for well-established and lawful work rules that limited kitchen conversation between on-duty and off-duty kitchen employees to relatively brief exchanges. (ALJD 31)

17. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(m) of the Complaint. (ALJD 31)

18. CGC excepts to the ALJ's findings and conclusions that "in or about August, Gorney and others volunteered to accept additional hours of work." (ALJD 28, n.39)

19. CGC excepts to the ALJ's findings and conclusions that "[t]here is no evidence that Gorney's weekend job duties were more taxing or difficult than her weekday

20. CGC excepts to the ALJ's findings and conclusions that "[i]t appears that Drake has unilaterally changed Gorney's schedule over the years without first consulting Gorney." (ALJD 28)

21. CGC excepts to the ALJ's findings and conclusions that "[t]here is simply no probative evidence showing that the change in Gorney's schedule and/or job duties in June was motivated by unlawful considerations." (ALJD 28; Tr. 1410, 1413-16)

22. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(d) of the Complaint. (ALJD 28)

23. CGC excepts to the ALJ's findings and conclusions that "[i]n [Joe] Brown's view, the scheduling of housekeeping employees seemed more to benefit the requests of the employees rather than the needs of the hospital" and "[h]is end goal was to have people working to benefit the needs of the hospital, rather than vice-versa." (ALJD 34)

24. CGC excepts to the ALJ's findings and conclusions that "Brown was determined . . . to treat all employees similarly, and to apply FMC's personnel policies equally and in accordance with the best interests of the hospital." (ALJD 35; Tr. 449-50, 457-58, 541, 1637; GC 47-50)

25. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(e) of the Complaint. (ALJD 35)

26. CGC excepts to the ALJ's findings and conclusions that "Brown gave cogent, persuasive reasons" for changing Mesa's work schedule. (ALJD 35; Tr. 449-50, 457-58, 541, 1637; GC 47-50)

27. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(f) of the Complaint. (ALJD 34)

28. CGC excepts to the ALJ's findings and conclusions that "the only union activity attributable to Conant is the fact that he wore a union button at work during July, the last month of his employment." (ALJD 35; Tr. 100, 106, 433-37, 471, 525-26, 1315-16, 1322-23, 2252-53; GC 12, 30, 55, 63, R 10)

29. CGC excepts to the ALJ's findings and conclusions that "Brown, from the inception of his tenure with FMC, attempted to enforce FMC's policies with consistence because it was important that all employees be treated equally." (ALJD 35-36; Tr. 100, 106, 433-37, 471, 525-26, 1315-16, 1322-23, 2252-53; GC 12, 30, 55, 63, R 10)

30. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(g) of the Complaint. (ALJD 36)

31. CGC excepts to the ALJ's findings and conclusions that "it is unlikely that FMC would single out [Dale] Mackey as the sole recipient of discriminatory treatment." (ALJD 30; Tr. 655-56, 914-15, 1248-50, 1258-59, 1264, 1266-68, 1270-71, 1307-08, 2113; GC 31, 32)

32. CGC excepts to the ALJ's findings and conclusions that the fact that his revised work schedule has lessened his ability to "socialize" with his friends at work is "simply an incidental consequence." (ALJD 30, n.41; Tr. 1264)

33. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(j) of the Complaint. (ALJD 30)

Independent § 8(a)(1) Allegations

34. CGC excepts to the ALJ's findings and conclusions that Sarah Klein-

35. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 5(a) of the Complaint.

36. CGC excepts to the ALJ's findings and conclusions that FMC was denied the opportunity to present evidence regarding the allegation that Drake forbade employees from engaging in "negative talk" in violation of in violation of § 8(a)(1) of the Act. (ALJD 13, n.18; see GC 20; Tr. 603-05)

37. CGC excepts to the ALJ's refusal to permit CGC's to amend the complaint to allege Drake's ban on "negative talk" an unlawful promulgation of an overly broad rule. (Id.)

38. CGC excepts to the ALJ's failure to address the allegations contained in ¶ 5(b)(2) of the Complaint. (ALJD 14, Tr. 1185-87, 1240)

39. CGC excepts to the ALJ's findings and conclusions that, in March, Supervisor Vivian Kasey did not engage in illegal surveillance of Barbara Mesa in the Hospital cafeteria. (ALJD 31; see Tr. 1607-09, 1134, 1609, 1611-15, 1718)

40. CGC excepts to the ALJ's findings and conclusions that the record evidence fails to indicate whether "Kasey's preoccupation with Mesa" was "union-related" rather than "work-related." (ALJD 32)

41. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 5(c) of the Complaint.

42. CGC excepts to the ALJ's findings and conclusions that Lisa Dominguez did not threaten employees with a loss of scheduling flexibility if the Union came

43. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 5(j) of the Complaint. (ALJD 19 & n.28)

44. CGC excepts to the ALJ's findings and conclusions that FMC's policy regarding photography at the Hospital, as revised on June 6, is not overly broad and does not limit employees' Section 7 rights. (ALJD 20; Tr. 2264, 2284, 2295)

45. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 5(bb) of the Complaint. (ALJD 20)

46. CGC excepts to the ALJ's findings and conclusions that FMC was unaware that Barbara Mesa used her cell phone to take photos in or around the Hospital. (ALJD 20; see Tr. 1672-74)

47. CGC excepts to the ALJ's findings and conclusions that, on June 6, FMC revised its policy regarding photography at the Hospital because of patient privacy concerns. (ALJD 20; Tr. 1672-74, 2279-81, 2285)

48. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 5(cc) of the Complaint.

49. CGC excepts to the ALJ's findings and conclusions that whether, during the June 29 meeting, Bradel referred to a "union organizer" in the cafeteria is "irrelevant." (ALJD at 10)

50. CGC excepts to the ALJ's findings and conclusions that "the format of the June 29 meeting was no different that the format of the numerous meetings with staff, including ancillary services employees, which occurred well prior to the instant union activity." (ALJD 11; Tr. 64-65, 204, 392, 614, 738-39, 1044-45, 1121, 1938-39, 2093)

51. CGC excepts to the ALJ's findings and conclusions that "the follow-up process during the July 6 meeting was similarly consistent with FMC's practice of providing answers and resolutions to employees' concerns that could not be immediately addressed at the June 29 meeting." (ALJD 11; Tr. 64-65, 204, 392, 614, 738-39, 1044-45, 1121, 1938-39, 2093)

52. CGC excepts to the ALJ's findings and conclusions that Janine Drake's absence from the June 29 meeting "seems irrelevant." (ALJD 11; Tr. 204, 392, 1121)

53. CGC excepts to the ALJ's findings and conclusions that "there is no evidence that the Respondent initiated the practice of soliciting and attempting to resolve employee concerns in response to its employees' union activity." (ALJD 11; Tr. 359-60, 741, 1196-97, 1231-32, 1941)

54. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶¶ 5(l)(1), (3) and 5(n) of the Complaint.

55. CGC excepts to the ALJ's findings and conclusions that Supervisor Frances Otero testified that she "observed" Souers talking to several different employees "for a very extensive amount of time." (ALJD 21; Tr. 699, 714)

56. CGC excepts to the ALJ's findings and conclusions that Souers was "disrupting the work of the kitchen employees for an extended period of time and that Otero admonished her for doing so." (ALJD 22; Tr. 699, 714)

57. CGC excepts to the ALJ's findings and conclusions that Drake did not promulgate an overly broad and discriminatory rule against solicitation in Souers' August performance evaluation. (ALJD 31; GC 18 at § VI), Tr. 402-03, 597, 757, 832-33, 837, 2061)

58. CGC excepts to the ALJ's findings and conclusions dismissing the

59. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 5(p) of the Complaint. (ALJD 30)

60. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 6(c) of the Complaint. (ALJD 30)

61. CGC excepts to the ALJ's findings and conclusions that employee Shawn White "admitted that non-kitchen employees or employees who have no business in the kitchen are not allowed in the main kitchen area." (ALJD 22; Tr. 362-65, 385-88)

62. CGC excepts to the ALJ's findings and conclusions that "it is clear that non-kitchen employees are not permitted in the kitchen area for any reason" and that "[e]mployees are aware of this rule." (ALJD 22; Tr. 402-03, 597, 757, 832-33, 837, 2044, 2061, 2066)

63. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶ 5(q) of the Complaint. (ALJD 21-22)

64. CGC excepts to the ALJ's findings and conclusions that Otero did not disparage union supporters by stating that "every time I come around the corner you scatter like cockroaches." (ALJD 23; Tr. 687-88, 759-61, 1665, 1720-21)

65. CGC excepts to the ALJ's findings and conclusions that Otero did not give employees the impression of surveillance by informing them stating she could identify them by their body language. (ALJD 23; Tr. 687-88, 759-61, 1665, 1720-21)

66. CGC excepts to the ALJ's findings and conclusions dismissing the allegations contained within ¶¶ 5(r)(2) and (3) of the Complaint. (ALJD 23)

67. CGC excepts to the ALJ's findings and conclusions that "the complaint

Joint-Employer Allegations

68. CGC excepts to the ALJ’s findings and conclusions that the “leased managers and supervisors for the EVS department . . . play no role in formulating policy as it relates to hiring criteria, terms and conditions of employment, rates of pay, performance appraisal criteria and raises, and discharge and disciplinary criteria. All these matters are dictated to Sodexho’s managers and supervisors through FMC’s policy manual which Sodexho has no input in formulating.” (ALJD 4; Tr. 51-55, 62, 77-78, 80, 207-08, 433, 1131-32, 1452, 2034; GC 56)

69. CGC excepts to the ALJ’s findings and conclusions that FMC and Sodexho are not joint employers as alleged. (ALJD 5)

70. CGC excepts to the ALJ’s findings and conclusions dismissing the allegations contained within ¶¶ 2(j), (k) and (l) of the Complaint. (ALJD 4-5)

Dated at Phoenix, Arizona this 1st day of July 2009.

Respectfully submitted,

/s/Mara-Louise Anzalone
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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS in FLAGSTAFF MEDICAL CENTER, INC., Cases 28-CA-21509 et al., was served by E-Gov, E-Filing and by E-mail, on this 1st day of July 2009, on the following:

Via E-Gov, E-Filing on the following:

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