UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

VERITAS HEALTH SERVICES, INC. d/b/a CHINO VALLEY MEDICAL CENTER, Respondent, and UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO, Charging Party.	Case Nos. 31-CA-29713, *et. al.*

CHARGING PARTY UNION'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION AND ORDER

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I. INTRODUCTION AND STATEMENT OF THE CASE

Charging party United Nurses Associations of California/Union of Health Care Professionals ("UNAC" or "Union") filed 14 unfair labor practice charges against respondent Veritas Health Services d/b/a Chino Valley Medical Center ("Respondent," "CVMC," or "Hospital") for engaging in egregious and widespread violations of the National Labor Relations Act ("NLRA") shortly after the Union soundly won the April 2010 election conducted by the National Labor Relations Board ("NLRB"). Counsel for the Acting General Counsel proved the allegations of its consolidated complaint as amended ("Complaint") at the six-day hearing, which occurred before Administrative Law Judge ("ALJ") William G. Kocol.

The Union believes the Board should largely affirm the ALJ's decision except as to four points concerning remediation of Respondent's violations. To best effectuate the NLRA's purposes, the remedial order should include: (1) rescission of Respondent's unlawful policy that prohibits employees from speaking to the media; (2) production of all information requested by the Union for bargaining that Respondent heretofore has refused to produce; (3) a requirement that Respondent mail the Notice from this matter to all persons employed by Respondent from the time that the unfair labor practices were committed to the present; and (4) an award of attorneys' fees to the Union for the time it spent opposing Respondent's Motion to Reopen the Record, which the ALJ described as "utterly without merit" (ALJ Decision at 30).

II. FACTUAL BACKGROUND

A. Even Though Respondent's CEO Unlawfully Warned Nurses Not To Speak To The Media On Behalf Of Employees—In Accordance With Respondent's Written Policy—The ALJ Did Not Order Rescission Of The Unlawful Written Policy.

During the first week in May 2010, Chief Executive Officer Lex Reddy of Prime Healthcare Services, the Hospital's owner, came to the Hospital to meet with groups of nurses

(Tr. 79-81, 246-47, 1011). The nurses understood CEO Reddy's position at the top of the company (Tr. 69 (Reddy is "the boss to me"); Tr. 246 (CEO or CFO)). Tyrone Clavano, RN, testified that in front of 40-50 RNs, CEO Reddy stated the RNs "need to go through channels rather than go speak to the media" (Tr 79-81). Ronald Magsino, RN, testified that at another meeting later that day in the presence of 10-20 RNs, CEO Reddy said that if employees have issues with management that they should talk to management directly and not go directly to the newspaper or media (Tr. 246-47). Yesenia DeSantiago, RN, testified that at a meeting later that week in front of approximately 30 staff RNs, Reddy "mentioned that if we had any problems with our managers that we should go directly to them, or to Administration, and not to the media. He said that he didn't want his name in the papers. He said he didn't want Chino Valley's name in the papers" (Tr. 400-401, 406).

Chief Nursing Officer Linda Ruggio ("CNO Ruggio") admitted that in early May 2010, CEO Reddy told RNs not to have "discussions of hospital matters with the media" (Tr. 900-901) after mentioning the recent union vote that had occurred (Tr. 902, 904). Specifically, Reddy stated that he "would appreciate the general staff not to discuss hospital matters with the media because we do have policies in relation to discussing hospital matters with the media and there are only certain people within the facility or within the corporation who really have authorization to give information or speak with the media" (Tr. 903).

Respondent's Employee Handbook has contained the following policy since January 2010: "Only the designated spokespersons may make statements **to the members of the media on behalf of** the Facility, its patients, or **its employees**. If you are approached by members of the media, refer them to Administration for assistance" (RX 88, p.7 (emphasis added); Tr. 1009).

Respondent's HR Director Arti Dhupher testified that she attended "quite a few" meetings where Reddy met with RNs in May 2010 (Tr. 958, 991-93). When asked by Respondent's Counsel if Reddy told employees "you are not to go to the media or outside parties with respect to any issues you might have," Director Dhupher did not deny the statement (Tr. 994-95). Instead, she said that she could not recall those statements, but she was sure that Reddy said "if there was (sic) concerns, they need to go to administration." (Tr. 995). CEO Reddy did not hold any other mandatory meetings with ER staff nurses (Tr. 753-54).

The ALJ declined to find Respondent's written confidentiality policy unlawful because the "rule is not alleged to be unlawful in the complaint and the General Counsel did not challenge the policy either at the hearing or in his brief," explaining the "bare minimum of due process requires that a respondent know ahead of time what it must defend against" (ALJ Decision at 9).

B. Respondent Refused To Provide UNAC With *Any* Information, But The ALJ's Order Left Out Almost All Of The Requested Information That Is Necessary For The Union To Be Able To Bargain A First Contract.

Former UNAC President Kathy Sackman testified that she sent Respondent a request for information in preparation for bargaining (Tr. 224-25; GC 27). The request sought information necessary for bargaining that was not enumerated in the General Counsel's complaint—the General Counsel used "*inter alia*" rather than list all the items requested in the Union's nine-page letter (*compare* GC 1 (ww), p. 4 (Complaint) *with* GC 27 (Union's Information Request)). Respondent—in writing—stated that it would not provide any information until it received a valid certification (Tr. 228; GC 28), and has not provided any information to the Union in response to the Union's information request (Tr. 230).

Respondent—in its Answer to the Complaint—admitted to the allegations on "April 9, 2010, the Union, by letter, has requested that Respondent furnish the Union with, inter alia, the following information" (*see* GC 1 (ww), p. 4 at ¶9(a) (Complaint allegation)) and since "April 14, 2010, Respondent, has failed to furnish the Union with the information requested by it as described in Paragraph 9(a)" (*see id*. at ¶9(c)). (*See* GC 1(yy), p. 1 (Respondent's Answer)).

At the hearing, when the Union's Information Request letter, marked as GC 27, was being moved into evidence, Respondent—for the first time—raised the supposed ambiguity in the previously admitted Paragraph 9(a) of the Complaint as follows:

> MS. SILVERMAN: Your Honor, I move that General Counsel 27 be received into evidence.
>
> JUDGE KOCOL: Any objection?
>
> MR. SCOTT: Just a clarification -- the Complaint alleges a failure to provide information with respect to a particular item within the letter and it's my understanding from the allegations of the Complaint that that is the information request that is at issue rather than the other information request within the letter. And I'm just asking -- so if it's just coming in with respect to show that a request for information was made with respect to the items set forth in the Complaint, I have no objection. If it's coming in for additional purposes, then I would object on the basis of relevance as well as due process.
>
> MS. SILVERMAN: Your Honor, it's coming in in support of Paragraph 9(a) of the Complaint where we allege that the Union requested that Respondent furnish it with interalia and then we list out some of the information -- so I would

not limit the information request allegation to just that information listed in the Complaint.

JUDGE KOCOL: No, no, no, wait a minute now. Are you saying that the -- something else in GC 27 may be the basis for an unfair labor practice finding other than what's listed in Paragraph 9(a)?

MS. SILVERMAN: Yes, Your Honor.

JUDGE KOCOL: Well then the objection is sustained. You have to give the Respondent notice as to what they need to defend against. So what -- I mean -- this is a --

MS. SILVERMAN: I mean -- our understanding --

JUDGE KOCOL: -- this is a nine page document -- how's Respondent supposed to know what to defend here -- other than list of employees, etc. -- that's alleged in the Complaint.

MS. SILVERMAN: Well, the letter -- most of the letter is requesting information and Respondent -- I don't think there is a dispute -- Respondent did not provide -- doesn't believe it has a duty to provide information -- did not provide information responsive and --

JUDGE KOCOL: But address the due process contention --

MS. SILVERMAN: Well, Respondent was --

JUDGE KOCOL: -- how are they supposed to defend if they don't have notice -- that's basic due process?

MS. SILVERMAN: Well, Respondent had notice of the -- of this information request in its entirety --

JUDGE KOCOL: No, no, but the Complaint -- frames the allegations in the Complaint.

MS. SILVERMAN: I guess we had viewed that allegation as not having -- identifying the -- some of the information requested in the Complaint, but not limiting the Complaint allegation to just those categories.

JUDGE KOCOL: Well, you haven't satisfied your due process requirements. You have to put any Respondent on notice as to what they are up against and you haven't done so other than what's listed in 9(a), so I'm just going to receive Exhibit 27 for the purposes of showing that on April 9th the Union requested the information listed in 9(a). So for that limited purpose, GC 27 is received.

(Tr. 225-27). The ALJ's ruling at the hearing did not consider that Respondent had admitted to the allegations in Paragraph 9(a) with the "inter alia" reference. The ALJ, in the written decision, reaffirmed the earlier ruling, explaining: "[T]he additional information was not specifically alleged in the complaint and I reaffirm my conclusion that sufficient due process has not been provided to Chino Valley to allow it to mount a defense to the Union's claim" (ALJ Decision at 29).

C. Many Of The Nurses Affected By Respondent's NLRA Violations Work Sporadically Or No Longer Work At CVMC, And The ALJ's Decision Is Silent As To How The Violations Will Be Communicated To Them.

Remedying the violations from Spring 2010 will be difficult to communicate because bargaining-unit per diem nurses, such as Rosalyn Roncesvalles, RN, are not regularly at the Hospital. Roncesvalles testified that she works at CVMC once a week (Tr. 122), and has a full time job elsewhere similar to many other per diem RNs (Tr. 159). Remediation is further

complicated by the fact that nurses affected by Respondent's violations no longer work at CVMC. Vincent Hilvano, RN, was a subject of a NLRA violation (ALJ Decision at 23-25 (GC 15 (tardiness warning))), but has not worked at CVMC since July 2010 (Tr. 211). Similarly, Yesenia DeSantiago, RN, was a subject of a NLRB violation (ALJ Decision at 23-25 (GC 17 (tardiness warning))), but has not worked at CVMC since May 2011 (Tr. 398).

The ALJ's Decision did not address how the remedial order is sufficient to effectuate the purposes of the NLRA when it will not be communicated to individuals who were the subject of Respondent's NLRA violations, such as Hilvano, DeSantiago, and Roncesvalles (*see* ALJ Decision at 33 ("In its brief the Union seeks a requirement that Respondent mail the Notice from this matter to all persons employed by Respondent from the time that the unfair labor practices were committed to the present. But I will issues a broad cease and desist order, require Respondent to post, email, and read the Notice to employees.")).

D. A Month After The Hearing Ended, UNAC Had To Expend Resources To Oppose Respondent's Motion To Reopen The Record, Which The ALJ Later Found To Be "Utterly Without Merit."

On July 18, 2011, Respondent filed a Motion to Reopen the Record, seeking the extraordinary step of reopening the record closed the previous month without proving either that the evidence was previously unavailable to it, or even that it would be able to introduce it if the hearing were reopened. In the ALJ's decision, the motion was denied as follows:

> On July 18, over a month after the trial had closed, Chino Valley filed a motion to reopen the record. The motion again concerns GC Ex. 84 that I had received into evidence on June 8, 2011; the hearing did not close until June 15. The General Counsel and the Union filed oppositions to the motion to reopen. In the motion Chino Valley seeks to reopen the record to present testimony and evidence from the supervisor of the [California Department of Public Health]'s employee who prepared the document to show that the "investigator incorrectly stated in those notes that no breach had occurred with respect to the actions reported to her by Respondent, and that the reported actions of Ronald Magsino constituted an intentional breach of HIPAA." In support of the motion Chino

> Valley filed an affidavit from Ruggio containing email exchanges between her and Lena Resurreccion of the Department that culminate in a telephone conversation as follows:
>
> > Ms. Resurreccion called me and we discussed Mr. Magsino's conduct in greater detail. During this phone call Ms. Resurreccion stated that Mr. Magsino's conduct was indeed a breach of HIPAA because the breach was intentional even if it was not malicious. Ms. Resurreccion also stated that she could not comment on what Ms. Robin Burton may have been thinking when she wrote the comment on her worksheet stating "no breach actually occurred" because there definitely was a breach by Mr. Magsino.
>
> I first note that this exchange confirms my ruling that Resurreccion had nothing to contribute concerning GC Ex. 84; rather she could only provide testimony concerning other situations presented to her by Chino Valley; the fact pattern that Ruggio apparently presented Resurreccion omitted critical facts such as Magsino use of the information for internal grievance matters and the permission granted to him by Gilliatt. Chino Valley has not shown the "extraordinary circumstances" as required under Section 102.65(e)(1) of the Board's Rules and Regulations. I therefore deny the motion to reopen the record.

ALJ Decision at 30.

The Union, in its opposition to the motion, requested that Respondent be ordered to pay its litigation expenses, including attorney fees, incurred in opposing Respondent's Motion to Reopen. The ALJ denied the Union's request, stating:

> Chino Valley's motion was indeed **utterly without merit**. Although the issue is a close one, I cannot say that Chino Valley's motion was so frivolous so as to warrant the extraordinary sanction of attorney's fees. I deny the Union's request.

Id. at 30 (emphasis supplied).

III. ARGUMENT

To best effectuate the NLRA's purpose, the NLRB should make four minor changes to the remedial order in this matter. All of the changes were raised below, but the ALJ erroneously declined to include the four requests in the order. The first change is that Respondent should be ordered to rescind its unlawful policy that prohibits employees from speaking to the media. The

second change is that Respondent should be ordered to produce *all* information requested by the Union for bargaining that Respondent heretofore has refused to produce. The third change is that Respondent should be ordered to mail the Notice from this matter to all persons employed by Respondent from the time that the unfair labor practices were committed to the present as several victims of Respondent's violations are no longer employees or work sporadically. The fourth change is that Respondent should be ordered to pay UNAC's litigation expenses incurred when opposing Respondent's Motion to Reopen the Record, which the ALJ described as "utterly without merit." These four minor amendments to the remedial order will allow for adequate remedy of "Respondent's egregious widespread misconduct" (*see* ALJ Decision at 32).

A. The ALJ Erred By Not Requiring Respondent To Rescind Its Policy That Unlawfully Prohibits Employees From Speaking To The Media About Working Conditions.

The ALJ erred by failing to order CVMC to rescind its unlawful confidentiality policy. Respondent has unlawfully interfered with CVMC RNs' Section 7 rights by maintaining a broad written policy—further enunciated by Prime's top management personally to Chino RNs shortly after the election—prohibiting employees from speaking to third parties and the media on behalf of other employees. Section 7 protection covers employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employment relationship. *See Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications with the public—including newspaper reporters and other media—concerning an ongoing labor dispute. *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995); *Roure Bertrand Dupont*, 271 NLRB 443, n.1 (1984); *Auto. Club of Mich. v. N.L.R.B.*, 610 F.2d 438 (6th Cir. 1979); *Cmty. Hosp. of Roanoke Valley v. N.L.R.B.*, 538 F.2d 607, 610 (4th Cir. 1976).

"In the health care field, patient welfare and working conditions are often inextricably intertwined." *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1252 (2007). Employees' public "statements regarding patient care and/or staffing levels have been found protected where it was clear from the context of the statements that they related to a labor dispute and/or employees' terms and conditions of employment." *Id*. (citing *Brockton Hosp.*, 333 NLRB 1367, 1374–75 (2001) *enf'd in relevant part* 294 F.3d 100 (D.C. Cir. 2002) (finding as protected distribution to other nurses of articles addressing the adverse effect on patients of downsizing nursing staff)).

The NLRB has recognized that nurses' communications with the media about working conditions, patient welfare, or an ongoing labor dispute are protected. *Valley Hosp., Inc.*, 351 NLRB at 1252. During the May 2010 meetings with nurses, CEO Reddy unlawfully instructed employees not to speak to third parties and the media about anything, and such a broad instruction encompasses their protected concerted activities or other terms and conditions of employment (*see*, *supra*, pp. 1-3). CEO Reddy's unlawful instruction had already been memorialized in Respondent's handbook confidentiality policy, which prohibits employees from speaking to the media on behalf of other employees, regardless of the subject (RX 88, p.7; Tr. 1009). Respondent did not instruct employees on this broad gag policy until shortly after the Union election victory.

That Respondent has not enforced its confidentiality rule is of no consequence because the mere presence of overly broad rules reasonably tends to discourage employees from engaging in protected activity that they could reasonably believe to be encompassed by the rule. *Guardsmark v. N.L.R.B.*, 475 F.3d 369, 374 (D.C. Cir. 2007) (explaining "mere maintenance of a rule likely to chill section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice even absent evidence of enforcement" (internal quotations

omitted)); *N.L.R.B. v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968) (enforcing "the Board's broader order prohibiting the company from maintaining its rule since the mere existence of a broad no-solicitation rule may chill the exercise of the employees' § 7 rights").

Because Respondent's written confidentiality policy and similar oral instruction by CEO Reddy clearly interfere with CVMC RNs' Section 7 rights, proper and just relief requires rescission of the policy, even though said relief was not enumerated in the Acting General Counsel's Complaint. In *Long Drug Stores California*, 347 NLRB 500 (2006), the Board found that "the Respondent must rescind the general [confidentiality] provisions and the particular provision [prohibiting discussion about wages]," even though "the latter was not attacked as independently unlawful" because "we believe that a complete remedy for the violations found should include the rescission of the provision which supports finding the general provisions unlawful." *Id*. at 501. After providing the above authority in its post-hearing brief to the ALJ, the Union requested that the ALJ's order include rescission of the part of the Respondent's handbook confidentiality policy that restricts speaking on behalf of employees to the media (*see* UNAC's Post-Hearing Brief to ALJ ("UNAC's ALJ Br") at 31-32).

The ALJ—without distinguishing *Long Drug Stores California*—incorrectly declined to rescind the unlawful policy based on an overbroad notion of due process. Accordingly, UNAC respectfully submits that the Board should amend the remedial order to include rescission of Respondent's policy that restricts employees from speaking on behalf of employees to the media.

B. The ALJ Properly Found That Respondent Unlawfully Refused To Provide Necessary Bargaining Information To The Union, But Improperly Limited The Remedial Order To The Sampling Enumerated On The Complaint When The Respondent Knew Of All Items Requested And Gave A Blanket Refusal.

The ALJ erred by drastically limiting the information that Respondent must produce to UNAC when Respondent indisputably refused to provide UNAC **all** requested information.

After admitting in its Answer to the Complaint allegations that the Union requested information in an April 9 letter and that Respondent refused to provide any information requested on April 14 (GC 1 (yy), p.1), Respondent disingenuously claimed for the first time at the hearing that it would be a due process violation to admit the Union's entire letter, but rather it should be received only as to the sampling of items listed in the Complaint (Tr. 225-26). The Complaint, however, precedes the listed items with "*inter alia*" (GC 1 (ww), p. 4). It is undisputed that Respondent received the letter and refused to provide any of the information. Respondent knew exactly what the letter requested, and there is no dispute that it is refusing to provide any information as it continues to refuse to bargain. *See Chino Valley Med. Ctr.*, 356 NLRB No. 137 (2011). The true due process violation would instead be to allow Respondent to effectively amend its Answer at the hearing. Counsel for the Acting General Counsel cogently explained at the hearing—without rebuttal by Respondent's counsel—"I don't think there is a dispute [that] Respondent doesn't believe it has a duty to provide information" (Tr. 227).

In its post-hearing brief to the ALJ, the Union respectfully requested the Board to amend the remedial order to cover the entire refusal to provide information as the purposes of the Act would not be satisfied by limiting the order to the sampling of information identified in the Complaint with a preceding "*inter alia*" (UNAC's ALJ Br at 32-33). The ALJ erred by denying UNAC's request. UNAC respectfully submits that the NLRB should amend the remedial order to cover all information requested on April 9, 2010.

C. The NLRB Should Amend The Remedial Order To Require Respondent To Mail The Notice To The Homes Of All Nurses Employed By Respondent Since The April 2010 Election.

To best effectuate the NLRA's purposes, the remedial order should have included requiring Respondent, at its own expense, to mail the Notice to all persons employed by

Respondent since the Union election, when Respondent began committing its unfair labor practices (ALJ Decision at 33). Such mailing is important where employees affected by Respondent's unfair labor practices no longer work for Respondent, such as Yesenia DeSantiago and Vincent Hilvano, and where affected employees often miss mandatory meetings because they work only one day per week for Respondent due to full time jobs elsewhere, such as Rosalyn Roncesvalles.

In *Eastern Maine Medical Center*, 253 NLRB 224, 228 (1980), the Board adopted the ALJ's "recommendation that the notices to employees required by that Order be mailed to the homes of all present employees and all those employed by Respondent since March 1, 1977, whether in the bargaining unit or not." The Board found "this requirement appropriate in view of Respondent's extensive violations, the evidence that its unlawful conduct was motivated in part by a desire to squelch any unionization in order to deter further organizational efforts with respect to other hospital employees, and because of the passage of time since commencement of Respondent's unfair labor practices due to the protracted nature of these proceedings." *Id*. The purpose of the "mailing of notices is that all employees potentially affected by Respondent's actions be apprised of the unlawful nature of these acts and assured that they will not be repeated." *Id*.; *accord, e.g., Haddon House Food Products, Inc*., 242 NLRB 1057, 1058 (1979) (ordering "in addition to posting copies of the attached notice marked "Appendix" at its Medford, New Jersey, facility, . . . mail it to each individual employee at his or her home address, including but not limited to all employees on the payroll at the time the unfair labor practices were committed; all such notices, both mailed and posted, to be signed personally by Respondent's owner and manager, Harold Anderson, who shall also read the notice to current employees assembled for that purpose"). Although UNAC provided this precedent in its post-

hearing brief, the ALJ did not discuss this precedent when it declined to order Respondent to mail the Notice (*Compare* UNAC's ALJ Brief at 33-34 *with* ALJ Decision at 33).

The ALJ erred by declining—without sufficient explanation—to include a mailing requirement in the remedial order. Accordingly, the NLRB should amend the remedial order to require Respondent to send the Notice, at Respondent's own expense, to the homes of all persons employed by Respondent including but not limited to employees since the April 2010 election when Respondent began committing unfair labor practices.

D. The ALJ Improperly Denied The Union Litigation Expenses Incurred To Oppose For CVMC's "Utterly Without Merit" Motion To Reopen.

1. Respondent Waived The Argument Underlying Its Motion To Reopen.

Respondent strenuously objected to the admission of GC 84 at the hearing (Transcript "Tr." at 462-470), raising four specific objections: (1) relevance (Tr. 463); (2) hearsay (Tr. 463-64); (3) due process because Respondent did not receive GC 84 pursuant to its subpoena served on California Department of Public Health ("CDPH") for San Bernardino County (Tr. 464); and (4) due process because it unsuccessfully subpoenaed the CDPH employee Robin Burton, who prepared GC 84, to testify (Tr. 464). For the first time in its Motion to Reopen, Respondent raised a fifth objection by claiming that it must be permitted to call the head of CDPH Lena Resurreccion to testify about GC 84 (Resp's Motion at 1-3). Because Respondent failed to raise what is, in essence, the above fourth objection but with respect to Lena Resurreccion (instead of Robin Burton), Respondent waived the objection. Waived objections cannot be considered by an ALJ, the Board, or a Court of Appeals. *See N.L.R.B. v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1343 (5th Cir. 1993) (Employer waived its evidentiary objection by failing to raise the objection during the hearing.).

2. Respondent Did Not Put Forth Any Qualifying Newly-Discovered Evidence To Justify The Extraordinary Step Of Reopening The Evidentiary Record Long After It Was Closed.

The parties agreed that the Board's legal standard for evaluating Respondent's Motion to Reopen was NLRB Rules and Regulations §102.65(e)'s standard that only "extraordinary circumstances," such as the discovery of new evidence, warrant reopening a record. *See Atl. Veal & Lamb, Inc.*, 355 NLRB No. 38, n.1 (2010). Newly discovered evidence, as defined in NLRB Rules and Regulations § 102.48(d)(1), is "evidence which has become available only since the close of the hearing." Respondent did not come close to meeting its burden of showing that the evidence supporting its Motion to Reopen was not available during the hearing simply by claiming that it was not allowed to subpoena Resurreccion during the hearing (*see* Resp's Motion at 3).

Respondent failed to show that the evidence submitted with its Motion to Reopen, namely the facts contained in CNO Ruggio's declaration attached to the Motion, was unavailable before the close of the hearing. CNO Ruggio's first step taken to obtain the facts cited in her declaration occurred on June 29—two weeks **after** the record was closed on June 15 (Ruggio Decl. ¶2). Respondent has not shown that it exercised due diligence, for example, CNO Ruggio should have emailed Resurreccion on June 8, the date when GC 84 was introduced at the hearing (Tr. 462), or anytime soon thereafter but before the hearing concluded a week later.

According to Respondent's Motion to Reopen, Resurreccion's alleged statements appear to have been made freely—the email exchange and telephone conversations were not conducted pursuant to a subpoena, thereby undermining Respondent's claim that the information was unavailable during the hearing because CDPH's petition to revoke Respondent's subpoena directed to Resurreccion was granted. Moreover, Counsel for the Acting General Counsel aptly

noted the limited value of Respondent's "new evidence" in that even by CNO Ruggio's own account of the information she provided to Resurreccion, she omitted critical record evidence when discussing Ronald Magsino's conduct with Resurreccion (GC's Opposition to Respondent's Motion to Reopen, p.3 (noting the omission of the facts that Magsino redacted the patient's name and used the information pursuant to the Hospital's internal grievance procedure)).

Respondent filed a Motion to Reopen only—not a Motion for Reconsideration of CDPH's Petition to Revoke the subpoena Respondent served on Resurreccion. Thus, even if Respondent's Motion to Reopen had been based on evidence that qualified as newly discovered, Respondent has not shown that it would be able to introduce the evidence because of the earlier ruling revoking the subpoena served on Resurreccion. Nowhere in CNO Ruggio's declaration does it state that Resurreccion would now be willing to appear voluntarily if a seventh hearing day were scheduled as her organization had already successfully petitioned to revoke the subpoena served on her.

Respondent's Motion to Reopen merely sought to further delay resolution of the unfair labor practice charges against Respondent as is evidenced by the 12-day delay between the occurrence of the conversation between CNO Ruggio and Resurreccion and Respondent's filing of the four-page Motion to Reopen. Our justice system would come to a grinding halt if evidentiary records could be reopened based on untimely and flimsy statements made in a party's declaration. *See, e.g.*, CHARLES DICKENS, BLEAK HOUSE (1853). Because Respondent has not met its burden of demonstrating that extraordinary circumstances exist to reopen the record, Respondent's Motion to Reopen was properly denied.

3. The ALJ Should Have Ordered Respondent To Pay UNAC For Its Litigation Expenses Incurred When Opposing Respondent's Meritless Motion To Reopen.

In its opposition motion, UNAC requested that Respondent be ordered to pay its litigation expenses, including attorney fees, incurred in opposing Respondent's Motion to Reopen as it was a frivolous motion (UNAC's Opposition Brief to Respondent's Motion, pp.5-6). "[T]he Board will order reimbursement of a charging party's litigation expenses only where the defenses raised by the respondent are 'frivolous.'" *See Unbelievable, Inc.*, 318 NLRB 857, 860 (1995). The Board has "emphasized the importance of discouraging frivolous litigation, and declared that the policies of the Act 'can only be effectuated when speedy access to uncrowded Board and court dockets is available.'" *Id*. (quoting *Tiidee Prods, Inc.*, 194 NLRB 1234, 1236 (1972)).

Substantial evidence supports the ALJ's finding that Respondent's Motion to Reopen was "utterly without merit" given: (1) the ALJ's previous ruling on the irrelevance of Ms. Resurreccion's testimony on GC 84 as she did not participate in the preparation of it (Tr. 1068-1069), as noted in the General Counsel's Opposition (*id*. at 2); (2) Respondent's failure to object to the admission of GC 84 on the basis that it could not subpoena Ms. Resurreccion to testify, as it had similarly objected regarding Ms. Burton; and (3) Respondent's failure to show it exercised due diligence in seeking the evidence that appears to have been previously available if Ms. Ruggio had simply sent the June 29 email during the remainder of the hearing after GC 84 was introduced—June 8 to June 15. Reopening the record to allow additional testimony already deemed irrelevant (and unavailable to Respondent) would have only further delayed remediation of the unfair labor practices that found by the ALJ to violate the NLRA.

The ALJ, however, erred by finding Respondent's "utterly without merit" Motion to Reopen was not "so frivolous as to warrant the extraordinary sanction of attorney's fees" (ALJ

Decision at 30). The ALJ implicitly found that Respondent's Motion to Reopen was frivolous (although apparently only to an unspecified degree) and explicitly found it to be meritless, thereby warranting an award of UNAC's litigation expenses incurred by opposing the motion. UNAC respectfully requests that the Board correct the ALJ's error and discourage frivolous motions by amending the remedial order to include an award of the litigation expenses it incurred opposing Respondent's meritless motion.

IV. CONCLUSION

For the foregoing reasons, UNAC respectfully requests that the Board affirm the ALJ's decision except that the remedial order—in accordance with proper and just relief sought in the Complaint—should include: (1) partial rescission of Respondent's confidentiality policy; (2) production of all information requested by the Union by letter dated April 9, 2010; (3) a requirement that Respondent mail the Notice to the homes of all Respondent's employees since the first unfair labor practice was committed; and (4) award of attorneys' fees to the Union for the time it spent defending against Respondent's meritless motion to reopen the record.

Dated: December 23, 2011

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NUHHCE, AFSCME, AFL-CIO

Re: Veritas Health Services, Inc. d/b/a Chino Valley Medical Center-and-United Nurses Associations of California/Union of Health Care Professionals; Case No. 31-CA-29713, et. al.

DECLARATION OF SERVICE

I hereby certify that I served the attached copy of the **CHARGING PARTY UNION'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION AND ORDER** on the parties listed below on December 23, 2011.

VIA E-FILE

National Labor Relations Board
Washington, D.C.
www.nlrb.gov

VIA E-MAIL

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct and was executed by me on December 23, 2011, in the State of California, County of Los Angeles.

LISA C. DEMIDOVICH