



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

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<b>In the Matter of</b>	)	
	)	
<b>1621 ROUTE 22 WEST OPERATING COMPANY, LLC D/B/A SOMERSET VALLEY REHABILITATION AND NURSING CENTER</b>	)	
	)	
<b>Respondent</b>	)	<b>Case No.    22-CA-29599</b>
	)	<b>22-CA-29628</b>
	)	<b>22-CA-29868</b>
<b>and</b>	)	
	)	
<b>1199 SEIU UNITED HEALTHCARE WORKERS EAST, NEW JERSEY REGION</b>	)	
	)	
<b>Charging Party</b>	)	

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**RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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The Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center ("Respondent"), by and through its undersigned attorneys, and pursuant to Section 102.46 of the Board's Rules and Regulations, hereby files its exceptions to the Decision and Order issued by Administrative Law Judge Steven Davis ("ALJ") on November 21, 2011. In accordance with Section 102.46(c), the analysis, rationale, and legal precedent supporting these exceptions is fully set forth in the accompanying brief.

## **I. Exceptions to the ALJ's Findings of Fact**

The Respondent excepts to the following specific factual findings and conclusions on the ground that they are not supported by the weight of the evidence in the record:

- 1) The Respondent excepts to the ALJ's finding that Elizabeth Heedles ("Heedles") was the Respondent's director of nursing and that Jason Hutchens ("Hutchens") removed Heedles from that position. (ALJD 7:44-45; Tr. 1421, 1455)<sup>1</sup>.
- 2) The Respondent excepts to the ALJ's findings of fact to the extent that he did not acknowledge that Jacquie Southgate ("Southgate") was not continuously employed in a supervisory position from August 2008, through August 2010. (ALJD 8:1-2; Tr. 900, 1077).
- 3) The Respondent excepts to the ALJ's finding that Avian Jarbo ("Jarbo") is male. (ALJD 10:18-24 and 40:17-21; Tr. 688-695).
- 4) The Respondent excepts to the ALJ's finding that Jarbo testified credibly. (ALJD 10:18-24 and 40:17-21; Tr. 688-695).
- 5) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to address Doreen Illis' ("Illis") un rebutted testimony that it was her regular practice to have people leave her prior facility after they resigned rather than work during their notice period, not only at Somerset Valley, but also at her prior facility. (ALJD 12:47-13:1; Tr. 2828-29).
- 6) The Respondent excepts to the ALJ's finding that prior to the election, employees who were late "were told to get to work as soon as possible, and they were not generally disciplined for lateness or absenteeism." (ALJD 13:13-15; Tr. 520).
- 7) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that Inez Konjoh ("Konjoh") was a new Director of Nursing with new expectations of employees, in finding that she decided to issue discipline for excessive absenteeism and tardiness despite having been told that it was previously common practice for employees to arrive late. (ALJD 13:37-39; Tr. 2742-43).

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<sup>1</sup> Throughout this document, the ALJ's decision will be cited as "(ALJD \_\_\_)"; the transcript of the proceedings before the ALJ will be cited as "(Tr. \_\_\_)"; and references to the Employer's exhibits at the proceedings before the ALJ will be cited as "(R-1, R-2, etc.)," references to the Acting General Counsel's exhibits will be cited as "(GC-1, GC-2, etc.)," and references to the Charging Party's exhibits will be cited as "(CP-1, CP-2, etc.)."

- 8) The Respondent excepts to the ALJ's finding that "prior to the election, the nurses simply called in that they would be late," but following the election Konjoh told Southgate that "she should no longer accept calls from late employees, and that she should direct them to Konjoh" inasmuch as he failed to acknowledge that Konjoh was a new manager with new expectations. (ALJD 13:37-39; Tr. 952-954, 2032-2036).
- 9) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge Jillian Jacques' ("Jacques") admission that Illis praised her and wrote her a thank you card when her attendance improved. (ALJD 14:40-15:17; Tr. 603-05).
- 10) The Respondent excepts to the ALJ's finding that "the evidence does not support the reasons for the increased scrutiny of the employees' performance of the tightening of procedures which had been lax before the election," but instead "supports a finding that the Employer took the major steps that it did in response to the Union's winning the election on September 2." (ALJD 16:21-24; Tr. 1996, 1998-99, 2013, 2026, 2032, 2544, 2687-89; R-15).
- 11) The Respondent excepts to the ALJ's finding that "the Respondent took no affirmative steps relating to changes in its administration or increased oversight of the employees' performance immediately following the results of the survey in December 2009." (ALJD 16:26-28; Tr. 1436, 1446-49).
- 12) The Respondent excepts to the ALJ's finding that "although there may have been heightened reviews of the MAR and TAR records from August 2010, even greater scrutiny was made following the September 2 election," and that prior to the election, reviews of such records "were not as rigorous." (ALJD 16:32-35; Tr. 913).
- 13) The Respondent excepts to the ALJ's finding that "even if there were reviews before the election, it was only after the election that discipline began to be regularly and consistently issued for mistakes found on those records." (ALJD 16:35-37; Tr. 2031-2032).
- 14) The Respondent excepts to the ALJ's finding that "it is inconceivable, given the strict oversight of the facility by CareOne, the frequent visits by Hutchens and other specialists in the areas the Respondent cites as being critically deficient, that Hutchens' attention would have been brought to bear on the allegedly worsening situation for the first time in the Spring of 2010." (ALJD 16:49-52; Tr. 1436).

- 15) The Respondent excepts to the ALJ's finding that "it is clear that no definitive, consistent disciplinary actions were taken in the period prior to the September 2, 2010 election." (ALJD 17:2-4; Tr. 1446-49).
- 16) The Respondent excepts to the ALJ's finding that "the timing of such employee monitoring and disciplinary measures coincided with the Union's election victory." (ALJD 17:2-4; Tr. 1446-49).
- 17) The Respondent excepts to the ALJ's finding that "Konjoh stated that she reviewed the MAR and TAR records at the time the patient is [sic] admitted, adding that other than at that time, she did not review those records unless she received a complaint from a patient, or there was an issue that required her to review those documents" as he failed to acknowledge that Konjoh also testified that she reviewed such records in preparation for state certification surveys. (ALJD 17:44-47; Tr. 1954, 2029-31).
- 18) The Respondent excepts to the ALJ's finding that "prior to the election, [the MAR and TAR] records were not scrutinized as carefully as they were after the election, and that any errors in those records were not the subject of discipline." (ALJD 17:44-47; Tr. 2031-2032, 2035, 2085, 2741).
- 19) The Respondent excepts to the ALJ's finding that "Jacques testified that reviews of past MAR records did not occur 'too often'" and that "such a practice was not routine, but that it would take place only if an incident occurred where the date and nature of a particular treatment had to be determined." (ALJD 18:19-22; Tr. 2031-2032, 2035, 2085, 2741).
- 20) The Respondent excepts to the ALJ's finding that "before the election, the Respondent's supervisor did not 'really' review [Claudio's] administration of medications as set forth on the MAR or the TAR books," "supervisors checked the MAR only once or twice per month," "there was no set schedule for reviews of MAR records, and "such reviews were done periodically as needed." (ALJD 18:26-30; Tr. 2031-2032, 2035, 2085, 2741).
- 21) The Respondent excepts to the ALJ's finding that Southgate testified credibly. (ALJD 19:2-3; Tr. 419-435, 2151).
- 22) The Respondent excepts to the ALJ's finding that Konjoh said that "they would be obviously looking at the people who they believed to be union organizers . . . actively involved in trying to get a union in . . . closely and if they were given a reason to write them up they would write them up." (ALJD 19:4-6; Tr. 1118).

- 23) The Respondent excepts to the ALJ's finding that Konjoh implied that she was "looking for something to write Jacques up for" by "using words 'to the effect that if she was given an excuse to discipline her she would do so.'" (ALJD 19:9-11; Tr. 1118).
- 24) The Respondent excepts to the ALJ's finding that Mohamed Bockarie ("Bockarie") testified credibly. (ALJD 19:21; Tr. 3202-06, 3279-82).
- 25) The Respondent excepts to the ALJ's finding that Illis asked Bockarie to "look for errors committed by employees who were involved in the Union's successful campaign." (ALJD 19:25-26; Tr. 3273).
- 26) The Respondent excepts to the ALJ's finding that Konjoh told the patient that "the next time she was given the pill she should not ingest it, but rather should hold it and show it to Konjoh. (ALJD 19:39; Tr. 2147).
- 27) The Respondent excepts to the ALJ's finding that Shannon Napolitano ("Napolitano") "waited until [the patient] swallowed all the medication she gave her." (ALJD 19:39-40; Tr. 2148, 2151-52, 2168; R-82).
- 28) The Respondent excepts to the ALJ's finding that Napolitano administered a discontinued zinc pill only "on August 25 and 30." (ALJD 19:51-20:1; Tr. 2375).
- 29) The Respondent excepts to the ALJ's finding that "other nurses also improperly gave the patient the zinc pill after it was discontinued." (ALJD 20:1-2; Tr. 2154, 2158, 2162, 2181-82, 2369-70, 2381-82, 2433-35; R-82; GC-106).
- 30) The Respondent excepts to the ALJ's finding that "if medication is supposed to be given on only a certain day, the nurse writing the order in the MAR is responsible to 'box out' or 'box off' the date by drawing a box or line around the date to highlight it." (ALJD 20:4-6; Tr. 2157-58, 2189).
- 31) The Respondent excepts to the ALJ's finding that "after Konjoh became aware that Napolitano was administering medication improperly she took no steps to remove the medication from the cart or advise Napolitano of that fact." (ALJD 20:23-25; Tr. 2167, 2390-91, 2394, 2563-64).
- 32) The Respondent excepts to the ALJ's finding that "inasmuch as Napolitano was not supposed to have given the discontinued medication to the patient, it seems that Konjoh was overreaching in disciplining her for failing to ensure that the patient swallowed the unprescribed medication." (ALJD 21:24-26; Tr.1858-62, 1865, 2150-52; R-59).

- 33) The Respondent excepts to the ALJ's finding that "Napolitano had been 'set up.'" (ALJD 21:29; Tr. 2167, 2173, 2390-91, 2394, 2563-64. 2566).
- 34) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that Sheena Claudio ("Claudio") admitted to committing all but one of the errors for which she was written up. (ALJD 22:8-14; Tr. 150-52, 2195-96; R-86).
- 35) The Respondent excepts to the ALJ's finding that "Claudio's termination letter did not state that she was being terminated for failing to perform the treatments," but instead mentioned "only that she failed to properly initial the TAR." (ALJD 23:7-9; N/A; R-125).
- 36) The Respondent excepts to the ALJ's finding that "prior to the election, it was 'not uncommon' for nurses to complete their TAR entries the day after the treatments had been administered," and that Southgate "did so without being disciplined." (ALJD 23:32-34; Tr. 2014-15, 2218, 2220, 2292; R-125).
- 37) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that Doreen Dande ("Dande") was disciplined for charting that she gave vitamin B to a patient when she had not and was therefore treated the same as Claudio. (ALJD 24:8-10; Tr. 2175-76, 2477-78, 2610-11; R-83, R-85).
- 38) The Respondent excepts to the ALJ's findings of fact to the extent that he accepted as true Southgate's testimony that "Jacques was disciplined, and [Patricia] Beck received discipline in late October, 2010, but she [Southgate] did not believe that Bockarie was disciplined for his mistake." (ALJD 24:49-52; Tr. 2453, 2956; GC-110, GC-131).
- 39) The Respondent excepts to the ALJ's finding that "other nurses received less discipline for committing similar errors," his failure to acknowledge Jacques' disciplinary history, and his failure to acknowledge the Respondent's adherence to a progressive discipline policy. (ALJD 26:18-27:2; Tr. 1893, 2220-21, 2231-33; R-66, R-87, R-88; GC-43, GC-46).
- 40) The Respondent excepts to the ALJ's finding that Dande administered regular aspirin for two days when enteric coated aspirin should have been given every other day and that she was disciplined for having done so. (ALJD 26:19-22; Tr. 2175, 2259, 2957-58; R-83, R-93, R-133).
- 41) The Respondent excepts to the ALJ's finding that Jacques administered regular aspirin for two days when enteric coated aspirin should have been given every other day and that she was disciplined for having done so.

(ALJD 26:20-22; Tr. 1885, 1961, 1969-71, 221, 2231-33, 2951-52; R-87, R-88; GC-43, GC-46).

- 42) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that Dande resigned in lieu of termination. (ALJD 26:30; Tr. 2957-58).
- 43) The Respondent excepts to the ALJ's finding that Bockarie began work on "October 25." (ALJD 27:27; Tr. 2976-78).
- 44) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that Illis texted with Bockarie because he was difficult to understand verbally. (ALJD 27:39-40; Tr. 3275-76).
- 45) The Respondent excepts to the ALJ's finding that prior to the election, Valerie Wells ("Wells") "received no discipline for her work performance as staff coordinator" inasmuch as he failed to acknowledge that Wells was verbally counseled with regard to the staffing and scheduling issues in August 2010. (ALJD 29:33-34; Tr. 2099-2101).
- 46) The Respondent excepts to the ALJ's finding that while Wells was under the supervision of Illis and Konjoh prior to the election, "neither [Illis nor Konjoh] referred to any problems with her performance as a staff coordinator." (ALJD 29:35-36; Tr. 2108-09, 2744-46, 2809-11).
- 47) The Respondent excepts to the ALJ's finding that Illis' meeting with Valerie Wells "on September 7 took place at a time when Wells should have been permitted to input those reconciliations, but instead, she was being disciplined at that premature meeting for not yet doing so." (ALJD 30:35-37; Tr. 2101-04, 2751-55, 2758-66; GC-70).
- 48) The Respondent excepts to the ALJ's finding that the issue of whether Wells would have been terminated based on after-acquired evidence "was not fully litigated." (ALJD 32:10-15 and 50-51; Tr. 1319, 1778-79, 2862-71, R-30, R-55, R-56, R-114).
- 49) The Respondent excepts to the ALJ's finding that "prior to the election, per diem employees were scheduled to work a regular shift, on weekends, having specific days and hours of work being scheduled by staff coordinator Wells." (ALJD 32:19-20; Tr. 2005-06).
- 50) The Respondent excepts to the ALJ's finding that "no correction was made to this long-standing practice [of scheduling per diem employees for a regular shift] until after the election." (ALJD 32:38; Tr. 831, 2005-06, 2008, 2305-06, 2500, 2885, 2887-93, 2910; R-27).

- 51) The Respondent excepts to the ALJ's finding that Gertrudis Rodriguez-Arias ("Rodriguez-Arias") "signed a card for the Union solicited by Napolitano in a patient's room." (ALJD 34:19-20; Tr. 823, 837).
- 52) The Respondent excepts to the ALJ's finding that the conflict between Rodriguez-Arias' pre-trial affidavit and testimony at hearing did not fatally harm her credibility. (ALJD 34:19-20, 34:50-51; Tr. 823, 837).
- 53) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that Dominique Joseph ("Joseph") never called Konjoh after Konjoh told her, with regard to being scheduled as a per diem employee, that she "should call when her car was fixed." (ALJD 35:18; Tr. 777-78, 804-05).
- 54) The Respondent excepts to the ALJ's finding that Rita Onyeike ("Onyeike") had an exchange with Inez Konjoh on September 12, 2010, in which Konjoh purportedly attempted to force Onyeike to leave the Center without punching out. (ALJD 35:50-36:11; Tr. 2419, 2897-98; R-97).
- 55) The Respondent excepts to the ALJ's finding that Onyeike testified credibly. (ALJD 35:50-36:11; Tr. 2419, 2897-98; R-97).
- 56) The Respondent excepts to the ALJ's finding that "the Respondent replaced the five per diem employees above [Daysi Aguilar ("Aguilar"), Rodriguez-Arias, Joseph, Onyeike, and Annie Stubbs ("Stubbs")] with other per diem workers who it transferred from CareOne's Holmdel facility." (ALJD 38:29-31; Tr. 2999).
- 57) The Respondent excepts to the ALJ's findings of fact to the extent that he universally credited the testimony of all of the Acting General Counsel's witnesses (including Claudio, Napolitano, Jacques, Jarbo, Onyeike, Joseph, Rodriguez-Arias, Stubbs, Southgate, Lynette Tyler ("Tyler"), Aguilar, Wells, and Bockarie) to the extent their testimony conflicted with the testimony of the Respondent's witnesses. (ALJD 39:1-2; Tr. 352, 419-435, 472-74, 476, 630, 649-52, 688-695, 773-74823, 837, 891-93, 2151, 2279-83, 2419, 2898-99, 3202-06, 3279-82; R-97).
- 58) The Respondent excepts to the ALJ's finding that "as a group, the employees testified in a straightforward, confident, consistent manner with respect to conversations and events which must have made an indelible mark on their memories." (ALJD 39:2-4; Tr. 352, 419-435, 472-74, 476, 630, 649-52, 688-695, 773-74823, 837, 891-93, 2151, 2279-83, 2419, 2898-99, 3202-06, 3279-82; R-97).
- 59) The Respondent excepts to the ALJ's finding that Southgate "was a person in whom the Respondent's officials, including Illis and Konjoh

confided” and was therefore credible. (ALJD 39:10-12; Tr. 900, 951, 1077, 1524, 2002, 2271-73, 2683-84, 3100).

- 60) The Respondent excepts to the ALJ’s finding that Inez Konjoh exaggerated the reasons for Claudio’s termination at the hearing, and therefore was not credible, on the basis that “Claudio had not performed certain of the treatments listed in the TAR sheet, but no mention of such serious misconduct was made in her termination letter.” (ALJD 39:31-34; R-6, R-86, R-125).
- 61) The Respondent excepts to the ALJ’s finding that the Respondent “reasonably tended to coerce employees in the exercise of their Section 7 rights.” (ALJD 40:51-52; Tr. 105, 343, 515, 1021, 1460, 1463-64, 1471-75, 2647-48, ).
- 62) The Respondent excepts to the ALJ’s finding that “the Respondent disciplined and discharged employees for errors because of the Union being selected as the employees’ representative in the September 2 election” and that “immediately thereafter, the Respondent began disciplining and discharging employees for errors that would not have merited such treatment prior to the election.” (ALJD 43:32-36; Tr. 1898-99, 2175-83, 2240-41, 2244, 2257-63, 2287-90, 2459-63, 2955-56).
- 63) The Respondent excepts to the ALJ’s finding that “Claudio and Jacques appeared in the Union’s YouTube video which was seen by Hutchens before the election” to the extent that he failed to acknowledge that Hutchens was not a decisionmaker with regard to Claudio and Jacques and it was undisputed that Hutchens did not tell Illis about the YouTube video. (ALJD 43:48-49; Tr. 1885, 1961, 1969-71, 2940-43, 2951; R-66, R-125).
- 64) The Respondent excepts to the ALJ’s finding that “Claudio, Jacques and Napolitano engaged in activities in support of the Union and that their union activities were well known to the Respondent.” (ALJD 44:3-4; Tr. 2220, 2943).
- 65) The Respondent excepts to the ALJ’s reliance upon the fact that although Illis became aware of excessive absenteeism among employees when she began on August 3, “no action was taken against anyone for six weeks, not until shortly after the election” to conclude that “the Respondent sought to retaliate against employees for the Union’s election victory.” (ALJD 44:26-28; Tr. 2034, 2036, 2713).
- 66) The Respondent excepts to the ALJ’s finding that Illis’ disappointment and feelings of betrayal as a result of losing the election “manifested itself in her post-election examination of the lateness records and decision to

issue discipline to the 'worst offenders'" for attendance issues. (ALJD 44:31-34; Tr. 2034-73, 2676, 2713, 2742-43).

- 67) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that Konjoh was a new manager with new expectations in finding that Claudio, Napolitano, and Jacques were disciplined for attendance issues "inconsistently" and "without regard to the past practice of the facility." (ALJD 44:43-45:11; Tr. 2034-2073, 2676, 2713, 2742-43; R-71, R-77, R-103, R-104, R-105, R-106, R-134).
- 68) The Respondent excepts to the ALJ's finding that "the General Counsel has made a prima facie showing that the Respondent's issuance of discipline to Claudio, Jacques and Napolitano by more strictly enforcing its attendance policies was motivated by their union activities, and that the Respondent has not proven that it would have issued discipline to the three workers in the absence of their union activities" on the ground that it is against the weight of the record evidence. (ALJD 45:21-25; Tr. Tr. 1885, 1961, 1969-71, 2218, 2220-2, 2292, 2940; R-66, R-87, R-88; GC-43, GC-46).
- 69) The Respondent excepts to the ALJ's finding that "even assuming that the Respondent would have issued discipline to the three union leaders [Claudio, Napolitano, and Jacques], it would not have discharged them in the absence of their union activities." (ALJD 46:4-5; Tr. 1885, 1961, 1969-71, 2218, 2220-2, 2292, 2940; R-66, R-87, R-88; GC-43, GC-46).
- 70) The Respondent excepts to the ALJ's finding that while Dande was disciplined for committing the same error as Claudio, the Respondent did not discipline a night shift nurse for failing to conduct a 24-hour check of proper medication administration, and Claudio's discipline was therefore motivated by discriminatory or retaliatory animus. (ALJD 46:40-45; Tr. 2218, 2220, 2292, 2940).
- 71) The Respondent excepts to the ALJ's finding that Claudio and Sandy Mootosamy ("Mootosamy") were similarly situated. (ALJD 46:51- 47:4; Tr. 2257-59, R-6, R-86, R-92, R-125).
- 72) The Respondent excepts to the ALJ's finding that it was not uncommon for Southgate to complete TAR entries the day after treatments had been administered, and Claudio's discipline was therefore motivated by discriminatory or retaliatory animus. (ALJD 47:15-18; Tr. 2218, 2220, 2292, 2940).
- 73) The Respondent excepts to the ALJ's finding that Konjoh attempted to embellish the reasons for Claudio's termination, and that Konjoh therefore

undermined the Respondent's legitimate, non-discriminatory reason for terminating Claudio. (ALJD 47:20-23; R-125).

- 74) The Respondent excepts to the ALJ's finding that "the Respondent has not proven that it would have disciplined and discharged Claudio in the absence of her Union activities." (ALJD 47:33-34; Tr. 137-39, 149-50, 2187-89, 2192-93, 2606, 2610; R-6, R-86, R-125; GC-19).
- 75) The Respondent excepts to the ALJ's finding that prior to the election, Jacques' errors of not fully completing incident reports and failing to transcribe a medication order accurately would have been remedied with in-service training. (ALJD 47:43; Tr. 2240-41, 2260-61, 2280-81; R-89, R-84, R-94).
- 76) The Respondent excepts to the ALJ's finding that even after the election, other nurses received less discipline for committing similar errors inasmuch as he failed to consider that the comparators had different disciplinary histories and the Respondent adhered to a progressive discipline policy. (ALJD 47:44-45; Tr. 2240-41, 2260-61, 2280-81; R-89, R-84, R-94).
- 77) The Respondent excepts to the ALJ's finding that "the Respondent has not proven that it would have disciplined and discharged Jacques in the absence of her union activities." (ALJD 48:2-3; Tr. 1885, 1961, 1969-71, 221, 2231-33, 2951-52; R-87, R-88; GC-43, GC-46).
- 78) The Respondent excepts to the ALJ's finding that Napolitano would not have been disciplined or terminated for improperly administering medication absent her union activities based, in part, on his conclusion that Konjoh should have confronted Napolitano earlier and/or removed the medication from the medication cart. (ALJD 48:12-17 and 48:31-32; Tr. 2167, 2390-91, 2394, 2563-64, 2566).
- 79) The Respondent excepts to the ALJ's finding that three other nurses also administered the same discontinued medication as Napolitano and were not disciplined. (ALJD 48:19-20; Tr. 2154, 2158, 2162, 2381-82; R-82).
- 80) The Respondent excepts to the ALJ's finding that nurses falsified the MAR with regard to the medication Napolitano improperly administered. (ALJD 48:23-24; Tr. 2158, 2162, 2381-82).
- 81) The Respondent excepts to the ALJ's finding that Konjoh's discipline of Napolitano for documenting an incorrect pulse oxygen level differed from the treatment a nurse would have received prior to the election. (ALJD 48:27-29; Tr. 2240, 2257-58, 2260; R-89, R-91, R-94).

- 82) The Respondent excepts to the ALJ's finding that "the Respondent has not proven that it would have disciplined and discharged Napolitano in the absence of her union activities." (ALJD 48:31-32; Tr. 2152-53, 2167-68, 2173-74, 2947-48).
- 83) The Respondent excepts to the ALJ's finding that Illis did not speak to Wells numerous times in August about her performance notwithstanding that that fact was undisputed at trial. (ALJD 49:3-5; Tr. 2092, 2099-2100).
- 84) The Respondent excepts to the ALJ's finding the Respondent's use of a progressive discipline policy under which Wells was verbally counseled before any discipline was issued to her was evidence that Wells was treated inconsistently based on her support for the Union. (ALJD 49:7-9; Tr. 2092, 2099-2100, 2140-41, 2848-49).
- 85) The Respondent excepts to the ALJ's finding that Hutchens did not inquire into any problems with Wells' performance prior to the election notwithstanding that there was no evidence that Hutchens was aware of any such problem. (ALJD 49:15-16; Tr. N/A).
- 86) The Respondent excepts to the ALJ's finding that Hutchens had knowledge of Wells' performance problems merely by virtue of his ability to access the Respondent's scheduling software. (ALJD 49:15-16; Tr. N/A).
- 87) The Respondent excepts to the ALJ's finding that "it was only after the election that Illis brought Wells' errors to her attention." (ALJD 49:16-17; Tr. 2092, 2099-2100).
- 88) The Respondent excepts to the ALJ's finding that "the Respondent would not have disciplined and discharged Wells in the absence of her union activities." (ALJD 49:17-19; Tr. 2008-09, 2093, 2101, 2106-07, 2112-13, 2117, 2137-38, 2765, 2824, 2848-49; R-111; GC-74, GC-75, GC-81).
- 89) The Respondent excepts to the ALJ's finding that the Respondent knew Tyler supported the Union. (ALJD 49:31-38; Tr. 2091-92, 2346, 2933-34).
- 90) The Respondent excepts to the ALJ's findings to the extent that he failed to acknowledge that neither Tyler nor the Union were adversely affected by the acceleration of Tyler's resignation. (ALJD 49:21-50:6; Tr. 2928, 2930-31, 3317).
- 91) The Respondent excepts to the ALJ's finding that "the Respondent's accelerated resignation of Tyler was undertaken to remove her from the Respondent's premises because of her Union activities." (ALJD 49:51-50:1; Tr. 2091-92, 2346, 2933-34).

- 92) The Respondent excepts to the ALJ's findings to the extent that he failed to acknowledge the evidence in the record that Illis accelerated the resignations of other employees at her prior facility. (ALJD 50:4-6; Tr. 2929).
- 93) The Respondent excepts to the ALJ's finding that the Respondent's "marked difference in attitude toward the per diem employees must have been because they voted in the election which was won by the Union." (ALJD 50:24-25; Tr. 2311, 2899, 2911-16).
- 94) The Respondent excepts to the ALJ's finding that Hutchens knew per diem employees were working pursuant to a regular schedule prior to the election. (ALJD 50:36-40; Tr. N/A).
- 95) The Respondent excepts to the ALJ's finding that "the hours of per diem employees would not have been reduced in the absence of their Union activities." (ALJD 50:51-52; Tr. 2311, 2899, 2911-16).
- 96) The Respondent excepts to the ALJ's findings of fact to the extent that he failed to acknowledge that there was no evidence that per diem employees Aguilar, Rodriguez-Arias, Joseph, and Stubbs supported the Union. (ALJD 50:51-52; Tr. N/A).

## **II. Exceptions to the ALJ's Conclusions of Law**

The Respondent excepts to the following specific conclusions of law on the ground that they are not supported by the weight of the record evidence and are contrary to established Board policy and law:

- 97) The Respondent excepts to the ALJ's conclusion that Respondent's exercise of its legal right to oppose the Union constitutes evidence of anti-Union animus sufficient to sustain a violation of 8(a)(3) of the National Labor Relations Act (the "Act"). (ALJD 44:6-9; Tr. N/A).
- 98) The Respondent excepts to the ALJ's conclusion that the Respondent violated Section 8(a)(1) of the Act "by interrogating its employees about their union membership, sympathies and/or activities." (ALJD 51:4-5; Tr. N/A).
- 99) The Respondent excepts to the ALJ's conclusion that the Respondent violated Section 8(a)(1) of the Act "by soliciting employee complaints and grievances" and "promising employees increased benefits and improved

terms and conditions of employment if they refrained from union organizational activities.” (ALJD 51:7-9; Tr. N/A).

- 100) The Respondent excepts to the ALJ’s conclusion that the Respondent violated Section 8(a)(1) and 8(a)(3) “by issuing a written warning to employee Shannon Napolitano on about September 13, 2010, and by terminating Napolitano on September 17, 2010.” (ALJD 51:11-13; Tr. N/A).
- 101) The Respondent excepts to the ALJ’s conclusion that the Respondent violated Section 8(a)(1) and 8(a)(3) “by issuing two written warnings to employee Jillian Jacques on about September 13, 2010, and by issuing a written warning to Jacques on about November 5, 2010, and by suspending Jacques on about February 9, 2011, and by discharging Jacques on about February 10, 2011.” (ALJD 51:15-18; Tr. N/A).
- 102) The Respondent excepts to the ALJ’s conclusion that the Respondent violated Section 8(a)(1) and 8(a)(3) “by issuing two written warnings to employee Sheena Claudio on about September 20, 2010, and by issuing a written warning to Claudio on about September 27, 2010, and by terminating Claudio on about October 21, 2010.” (ALJD 51:20-23; Tr. N/A).
- 103) The Respondent excepts to the ALJ’s conclusion that the Respondent violated Section 8(a)(1) and 8(a)(3) “by issuing a written warning to employee Valerie [sic] Wells on about September 16, 2010, and by issuing a written warning to Wells on about September 20, 2010, and by terminating Wells on about September 9, 2010.” (ALJD 51:25-28; Tr. N/A).
- 104) The Respondent excepts to the ALJ’s conclusion that the Respondent violated Section 8(a)(1) and 8(a)(3) “by accelerating the resignation date of its employee Lynette Tyler on about September 9, 2010.” (ALJD 51:30-31; Tr. N/A).
- 105) The Respondent excepts to the ALJ’s conclusion that the Respondent violated Section 8(a)(1) and 8(a)(3) “by reducing the hours of per diem employees, including Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs.” (ALJD 51:30-31; Tr. N/A).
- 106) The Respondent excepts to the ALJ’s conclusion that reinstatement is an appropriate remedy for employees who admittedly have committed serious patient care errors. (ALJD 51:43-44 and 49-50; Tr. N/A).

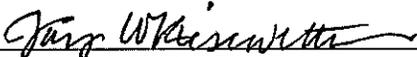
**III. Exceptions to the ALJ's Remedy and Order**

In light of all of the foregoing specific exceptions to the ALJ's decision, the Respondent excepts as follows to the ALJ's Remedy and Order on the ground that they are not supported by the weight of the record evidence and are contrary to established Board policy and law:

- 107) The Respondent excepts to the ALJ's Remedy in its entirety. (ALJD 51:37-52:8; Tr. N/A).
- 108) The Respondent excepts to the ALJ's Order in its entirety. (ALJD 52:11-53:38; Tr. N/A).

Respectfully submitted,

KIESEWETTER WISE KAPLAN PRATHER, PLC

  
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**CERTIFICATE OF SERVICE**

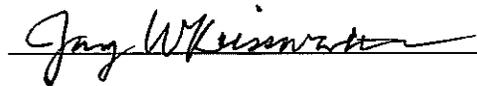
The undersigned certifies that on the 18<sup>th</sup> day of January, 2012, the foregoing pleading was filed via electronic filing with:

Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street N.W.  
Washington, DC 20570

and served via e-mail upon:

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A handwritten signature in black ink, appearing to read "Jang W. Kwon", written over a horizontal line.