

**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,

v.

UNITED NURSES ASSOCIATIONS OF  
CALIFORNIA/UNION OF  
HEALTHCARE PROFESSIONALS,  
NUHHCE, AFSCME, AFL-CIO,

Charging Party.

Case Nos. 31-CA-29713, 31-CA-29714,  
31-CA-29715; 31-CA-29716,  
31-CA-29717, 31-CA-29738,  
31-CA-29745, 31-CA-29749,  
31-CA-29768, 31-CA-29769,  
31-CA-29786, 31-CA-29936,  
31-CA-29965, 31-CA-29966

**RESPONDENT CHINO VALLEY MEDICAL CENTER'S ANSWERING BRIEF TO  
CHARGING PARTY UNION'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S  
DECISION**

THEODORE R. SCOTT  
LITTLER MENDELSON  
A Professional Corporation  
501 W. Broadway, Suite 900  
San Diego, CA 92101.3577  
Telephone: 619.515-1837 [Direct]  
Facsimile: 619.615.2261 [Direct]  
Telephone: 619.232.0441 [Main]  
Facsimile: 619.232.4302 [Main]

Attorneys for Respondent  
VERITAS HEALTH SERVICES, INC. d/b/a  
CHINO VALLEY MEDICAL CENTER

## TABLE OF CONTENTS

|   | PAGE |
|---|------|
| I. INTRODUCTION .....   | 1    |
| II. STATEMENT OF THE CASE.....  | 2    |
| A. The Union’s Exceptions Relating To Respondent’s Employee Handbook<br>(Exception Nos. 1-3).....   | 2    |
| B. The Union’s Exception Relating To The Union’s Request For Information<br>(Exception No. 4).....  | 2    |
| C. The Union’s Exception Relating To Its Request For A Mailing Remedy<br>(Exception No. 6).....   | 3    |
| D. The Union’s Exception Relating To Litigation Expenses (Exception No. 5).....   | 4    |
| III. ARGUMENT.....  | 5    |
| A. The General Counsel, And Only The General Counsel, May Determine<br>What Unfair Labor Practices To Prosecute .....   | 5    |
| B. The Union’s Exception Relating To Its Information Request Ignores The<br>Plain Language Of The Complaint .....   | 8    |
| C. A Mailing Remedy Is Unwarranted.....   | 9    |
| D. The Union’s Request For Litigation Expenses Was Properly Denied By<br>The ALJ .....  | 11   |
| 1. Respondent’s Motion To Reopen The Record Was Not Frivolous .....   | 11   |
| 2. Board Law Does Not Permit The Imposition Of Litigation<br>Sanctions On A Piecemeal Basis Based On One Particular Motion<br>Made In Support Of A Good Faith Defense To The Allegations Of<br>A Complaint..... | 14   |
| IV. CONCLUSION.....   | 16   |

## TABLE OF AUTHORITIES

|  | PAGE       |
|--|------------|
| <b>CASES</b>   |            |
| <i>Adam Wholesalers, Inc.</i> ,<br>322 NLRB 313 (1996) .....                       | 11         |
| <i>Camay Drilling Co.</i> ,<br>254 NLRB 239 (1981) .....                           | 6          |
| <i>Eastern Maine Medical Center</i> ,<br>253 NLRB 224 (1980) .....                 | 10         |
| <i>Farrens Tree Surgeons, Inc.</i> ,<br>264 NLRB 668 (1992) .....                  | 11         |
| <i>Frontier Hotel &amp; Casino</i> ,<br>318 NLRB 857 (1995) .....                  | 11, 15, 16 |
| <i>Haddon House Food Products Inc.</i> ,<br>242 NLRB 1057 (1979) .....             | 10         |
| <i>Heck's Inc.</i> ,<br>215 NLRB 765 (1974) .....                                  | 11, 14     |
| <i>Houston County Electric Cooperative</i> ,<br>285 NLRB 1213 (1987) .....         | 11, 14, 15 |
| <i>Longs Drug Stores California</i> ,<br>347 NLRB 500 (2006) .....                 | 7          |
| <i>McKenzie Engineering Co.</i> ,<br>326 NLRB 473 (1998) .....                     | 6          |
| <i>NLRB v. Mackay Radio &amp; Telegraph Co.</i> ,<br>304 U.S. 333 (1938) .....     | 7          |
| <i>Pergament United Sales, Inc. v. NLRB</i> ,<br>920 F.2d 130 (2d Cir. 1990) ..... | 7          |
| <i>Polymark Corp.</i> ,<br>329 NLRB 9 (1999) .....                                 | 6          |
| <i>Tiidee Products</i> ,<br>194 NLRB 1234 (1972) .....                             | 16         |

**TABLE OF AUTHORITIES**  
**(CONTINUED)**

|   | <b>PAGE</b> |
|---|-------------|
| <i>Williams v. NLRB</i> ,<br>105 F.3d 787 (2d Cir. 1996)..... | 6           |
| <i>Workroom for Designers</i> ,<br>274 NLRB 840 (1985) .....  | 11          |
| <b>STATUTES</b>   |             |
| HIPAA .....   | 5, 13       |

**I.**  
**INTRODUCTION**

Charging Party UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTHCARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO (“Union”) excepts to those portions of the Administrative Law Judge’s Decision (1) denying the Union’s request that Respondent be ordered to rescind a portion of its employee handbook addressing confidentiality; (2) denying the Union’s request that Respondent be ordered to produce certain information to the Union; (3) denying the Union’s request that the Notice to Employees be mailed to the homes of present and former employees of Respondent; and (4) denying the Union’s request for litigation expenses incurred in responding to Respondent’s motion to reopen the record.

As will be explained in greater detail in Part III below, the Union’s exceptions are without merit. First, the General Counsel’s complaint did not allege that Respondent violated the Act by any of the language contained in its employee handbook, Respondent did not therefore present evidence relating to its handbook during the hearing, and the ALJ’s refusal to consider whether any language in the handbook violated Section 8(a)(1) was correct as a matter of law. Similarly, the General Counsel’s complaint did not allege that Respondent violated the Act by not providing the information that is the subject of the Union’s exceptions, Respondent did not therefore present evidence relating to such information during the hearing, and the ALJ therefore correctly refused to allow the Union to amend the General Counsel’s complaint to add additional allegations relating to such information or to order Respondent to provide the Union with that information. The ALJ also correctly determined that the extraordinary mailing remedy requested by the Union was not appropriate. Finally, the Union’s request for litigation costs was properly denied because Respondent’s motion to reopen the record was not “frivolous” and because Board law does not authorize litigation expenses to be assessed in the piecemeal fashion requested by the Union.

**II.**  
**STATEMENT OF THE CASE**

**A. The Union's Exceptions Relating To Respondent's Employee Handbook (Exception Nos. 1-3)**

General Counsel's complaint does not include an allegation that Respondent maintained an overbroad confidentiality policy in violation of Section 8(a)(1), nor does it allege that any provisions of Respondent's employee handbook are unlawful. See GCX 1(ww). During the hearing Respondent offered into evidence portions of its employee handbook (RX 88) to demonstrate that its written policies relating to attendance, tardiness, patient privacy, employee conduct, employment classifications, scheduling and certifications, all of which were placed at issue by the allegations of the complaint (see GCX 1(ww), ¶¶ 10-16), had not changed since the April 1, 2010 representation election. T 997-1000.

In its post-hearing brief to the ALJ, the Union contended that the ALJ should find that the confidentiality provision in the handbook violates Section 8(a)(1). The ALJ refused to do so because General Counsel never alleged in his complaint that maintenance of the provision was an unfair labor practice. ALJD 9:6-10.

**B. The Union's Exception Relating To The Union's Request For Information (Exception No. 4)**

Paragraph 9 of General Counsel's complaint provides as follows:

9. (a) Since on or about April 9, 2010, the Union, by letter, has requested that Respondent furnish the Union with, *inter alia*, ***the following information***:

lists of employees including details as to full or part-time status, hourly wage rates, wage increases, fringe benefits, classifications, shifts, addresses and phone numbers; employee handbooks; company policies and procedures; job descriptions; benefit plans; costs of benefits; and disciplinary notices.

(b) The information requested by the Union, as described above in Paragraph 9(a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since on or about April 14, 2010, Respondent, has failed and refused to furnish the Union with information requested by it as described in Paragraph 9(a).

GCX 1(ww), ¶ 9 (emphasis added).

During the hearing General Counsel argued, in effect, that Respondent's failure to provide information that was not identified in the complaint but that was included in the Union's April 9 letter referenced in the complaint could be the basis for an unfair labor practice finding. The ALJ rejected General Counsel's contention. T 225-227. At no time did General Counsel make a motion to amend its complaint to include a refusal to provide information allegation relating to any requests other than those specifically identified in the complaint ("lists of employees including details as to full or part-time status, hourly wage rates, wage increases, fringe benefits, classifications, shifts, addresses and phone numbers; employee handbooks; company policies and procedures; job descriptions; benefit plans; costs of benefits; and disciplinary notices").

The Union resurrected in its post-hearing brief General Counsel's argument denied by the ALJ at the hearing. The Union's argument was rejected by the ALJ on the same basis that the ALJ had rejected the argument when raised by General Counsel during the hearing. ALJD 29:19-23 ("the 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").

**C. The Union's Exception Relating To Its Request For A Mailing Remedy (Exception No. 6)**

In the complaint General Counsel requested the extraordinary remedy of a reading of the Notice, but did not request additional extraordinary remedies. GCX 1(ww), p. 10. The ALJ's recommended order includes a reading requirement as well as a broad cease and desist order, in addition to requiring Respondent to post the Notice and email the Notice to current employees. ALJD 32:24-41, 35:16-24. The ALJ rejected the Union's request that the Notice also be mailed to former and current employees, finding that the remedies set forth in his Decision would adequately remedy the unfair labor practices found in the Decision. ALJD 32:41-45.

**D. The Union's Exception Relating To Litigation Expenses (Exception No. 5)**

During the hearing General Counsel produced and offered into evidence as General Counsel exhibit 84 a series of documents, hereinafter called "GCX 84." The first document included in GCX 84 is titled "Declaration of Custodian of Record," was signed by James Johnson, and states that "the accompanying business records are true copies of records maintained by CDPH as described in the U.S. National Labor Relations Board Subpoena Duces Tecum issued on June 6, 2011" and that "these records were prepared by CDPH—L&C personnel in the ordinary course of business at or near the time of the act, condition, or event." GCX 84, pp. 1-2. The second document included in GCX 84 is what appears to be a formal reporting form referencing what appears to be a case number ("CA00229601"), identifies "Chino Valley Medical Center" in the "Name of Provider or Supplier" box on the form, and includes a number of entries in the "Summary Statement of Deficiencies" column, including one stating, in part, "no deficiency issued." *Id.*, p. 3. The third document included in GCX 84 is titled "Summary Report" and includes a number of hand-written notations, including dates that appear to be inconsistent. *Id.*, p. 4. The fourth is titled "Surveyor Notes Worksheet" and appears to be a "living" document containing handwritten notes made during an unspecified period of time by CDPH personnel. Among the handwritten notations is one stating "no breach actually occurred;" the final handwritten entry on the Worksheet states "It was for personal use in defending themselves (Internal P&P breach)." *Id.*, p. 5. The ALJ admitted GCX 84 into evidence over Respondent's objections. T 462-470. Respondent subsequently attempted to obtain both the "U.S. National Labor Relations Board Subpoena Duces Tecum" referenced in the Declaration of Custodian of Records, as well as testimony from CDPH representatives Johnson and Lena Resurreccion, the supervisor of the office that prepared the documents included in GCX 84, which presumably would have resulted in evidence explaining the context, sources, intent and notations included within GCX 84, but its efforts to do so were unsuccessful. See, i.e., RX 107-110, 112-116; T 1063-1071.

On July 5, 2011 Respondent obtained information from Resurreccion advising that the conduct of alleged discriminate Magsino referenced in the Surveyor Notes Worksheet included in GCX 84 constituted a breach of HIPAA and that the notation that “no breach actually occurred” in the Worksheet was erroneous. Respondent thereafter filed a motion to reopen the record to allow it to call Resurreccion to testify. General Counsel and the Union filed oppositions and the motion was referred to the ALJ. In his decision the ALJ denied the motion, making numerous self-serving statements further demonstrating his bias against Respondent, as discussed more fully in Respondent’s exceptions and supporting brief.<sup>1</sup> ALJD 29:40-30:29. The ALJ also denied the Union’s request for attorney’s fees incurred in responding to the motion as follows:

In its opposition to the motion to reopen, the Union asks that I award attorneys fees to it for having to defend against the motion to reopen. 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.

ALJD 30:31-35.

### **III.** **ARGUMENT**

#### **A. The General Counsel, And Only The General Counsel, May Determine What Unfair Labor Practices To Prosecute**

The Union excepts to the ALJ’s refusal to consider whether the confidentiality provisions of Respondent’s handbook are unlawful because General Counsel did not allege a violation based on that provision in his complaint. However, the ALJ’s refusal to do so is fully supported by the text of the Act, the Board’s regulations and U.S. Supreme Court and Board law.

---

<sup>1</sup> In order to avoid undue repetition, Respondent will not in this answering brief repeat the contentions previously made with respect to the ALJ’s bias and his reliance on GCX 84 in finding that Respondent unlawfully terminated Magsino. However, Respondent’s efforts to simplify the Board’s review of the parties’ exceptions in this regard is not intended to be, and should not be interpreted as, a waiver of any of Respondent’s exceptions or arguments previously made in this case.

Section 3(d) of the Act vests the General Counsel with the sole power to determine the unfair labor practices to be placed at issue by a complaint, and the decision not to issue a complaint on a particular allegation is final and unreviewable. See *Williams v. NLRB*, 105 F.3d 787, 790-01 n.3 (2d Cir. 1996) (citations omitted). Section 3(d) does not permit a charging party to issue an unfair labor practice complaint, and Respondent is not aware of any Board or court cases permitting a charging party to usurp the authority of General Counsel by independently amending a complaint itself. For this reason alone the Union's exception must be denied.

Similarly, Section 102.15 of the Board's Rules and Regulations provides that a complaint "**shall contain ... a clear and concise description of the acts which are claimed to constitute unfair labor practices**, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed" (emphasis added). In accordance with these principals, Section 10264.2 of the NLRB's Casehandling Manual provides that "[t]he allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met." The Board has therefore long recognized that the requirement that a complaint contain sufficient detail includes a requirement that the complaint specify: (1) the nature of the violations alleged; (2) the dates on which the alleged violations occurred; (3) the names of the agents of the respondent who allegedly violated the Act; and (4) the location at which the alleged violations occurred. When these standards are not met, the Board will find that a respondent has been denied due process. See, i.e., *Polymark Corp.*, 329 NLRB 9, 10 (1999); *McKenzie Engineering Co.*, 326 NLRB 473, 473 (1998); *Camay Drilling Co.*, 254 NLRB 239, 240 n.9 (1981) [to determine a new issue "when it is raised for the first time as a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense"].

Longstanding United States Supreme Court precedent likewise dictates that an unfair labor practice complaint must adequately put the charged party on notice of the violations it allegedly committed: "[T]he respondent [is] entitled to know the basis of the complaint

against it, and to explain its conduct, in an effort to meet the complaint[.]” *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938). As stated by the Second Circuit in *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130 (2d Cir. 1990), when discussing due process limitations relating to a complaint issued by General Counsel:

It is a basic tenet of Anglo-American law that one accused of a wrong has the right to be notified of the specific charges raised against him and an opportunity to defend himself against them; the tenet is capsulized in the Fifth Amendment: ‘No person shall . . . be deprived of life, liberty, or property, without due process of law.’ U.S. Const. Amend V. Due process requires the Board to afford an alleged violator notice and an opportunity for a hearing on a charge under the Act[.]

Id. at 134. The court further explained: “The primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior.” Id. at 135.

In this matter, General Counsel was provided with the employer’s handbook during the unfair labor practice hearing, and presumably received it, or could have subpoenaed it, during his investigation of the Union’s charges. See, i.e., RX 88, 101. If General Counsel believed that any of the provisions in Respondent’s handbook violated Section 8(a)(1), General Counsel could have included a specific allegation in his complaint alleging such violation, or made a motion to amend his complaint at the hearing to do so. Because General Counsel did not do so, Respondent had no reason to present evidence or argument rebutting any such allegation, and did not do so. Given these circumstances and the law cited above, the ALJ correctly denied the Union’s request to find a violation based on Respondent’s handbook, or order that any provisions therein be rescinded.

Moreover, the Union’s reliance on *Longs Drug Stores California*, 347 NLRB 500 (2006), is misplaced. The Union claims that *Longs* establishes a rule allowing the Board to order rescission of a handbook provision not specifically alleged as an unfair labor practice in order to effectuate a “complete remedy”. Union Brief, p. 16. However, *Longs* establishes no such rule and is easily distinguished from the facts of this case. In *Longs*, the complaint specifically

included an allegation that the respondent's handbook provisions relating to confidentiality were unlawful. In the present case, General Counsel's complaint did not place any portions of the handbook at issue, much less the confidentiality provisions thereof. To now allow a remedy to be ordered based on an unfair labor practice that was never alleged would violate Respondent's right to due process. For this additional reason the Union's exception is without merit.

**B. The Union's Exception Relating To Its Information Request Ignores The Plain Language Of The Complaint**

The Union argues that by inclusion of the term "*inter alia*" in Paragraph 9(a), the complaint incorporates all of the requests set forth in the Union's April 9, 2010 letter notwithstanding what the Union describes as the "sampling of items" listed in the complaint. Union Brief, pp. 11-12. The Union's argument is wholly without merit.

First, the Union conveniently ignores that the very language of the complaint makes clear that Respondent was charged only with a failure to provide the Union with the specific information described in Paragraph 9(a) of the complaint ("lists of employees including details as to full or part-time status, hourly wage rates, wage increases, fringe benefits, classifications, shifts, addresses and phone numbers; employee handbooks; company policies and procedures; job descriptions; benefit plans; costs of benefits; and disciplinary notices"), hereinafter called "Requested Information, which was set forth in Item 1 of the Union's April 9 information requests (GCX 27, p. 2). The complaint did not include any reference to the other 46 enumerated items (not including subparts) requesting additional information (*id.*, pp. 2-8), many of which are not presumptively relevant and/or which do not exist. As noted, Paragraph 9(a) specifically alleges that the Union had requested "the following information" and then specifically describes the Requested Information as such "following information." Paragraph 9(b) then alleges that the "information requested by the Union, as described above in Paragraph 9(a)" is relevant, and Paragraph 9(c) alleges that Respondent has refused to furnish the Union with "information requested by it as described in Paragraph 9(a)." As shown, the "information requested by the Union as described in Paragraph 9(a)" is the Requested Information as detailed

therein, not the entirety of the information requested in the Union's April 9 letter. Accordingly, when Respondent admitted the allegations of Paragraphs 9(a) and 9(c), it was only admitting that the Requested Information was requested and had not been provided; Respondent was not admitting to anything not specifically set forth in the complaint itself.

Nor is the Union's argument supported by the appearance of the term "*inter alia*" in Paragraph 9(a). First, and as discussed immediately above, the clear and unambiguous language of the complaint itself, and particularly its description of the Requested Information as the information requests at issue, makes clear that Respondent was only charged with committing an unfair labor practice by refusing to provide the Requested Information. Moreover, the Union apparently is interpreting "*inter alia*" to mean "everything that is requested in the April 9 letter." However, this interpretation is inconsistent with the language of the complaint immediately following the "*inter alia*" reference specifically describing the Requested Information as the information that had been requested. It is also inconsistent with the common usage of the term "*inter alia*," which is used to indicate that the specific language/words that are set forth are those that are relevant but have been taken from a more complete document.

Finally, the Union's argument is inconsistent with the law discussed in Section A above. First, General Counsel could have made a motion to amend his complaint to allege that Respondent violated the Act by failing to provide all of the information requested by the Union's April 9 letter, but did not do so. The Union is not permitted to usurp the General Counsel's authority by urging an unfair labor practice not alleged by General Counsel. Moreover, if the Union's exception is granted Respondent will have been denied due process by not having the allegations urged by the Union clearly set out in the complaint; because those allegations are not in the complaint, Respondent had no reason to present a defense to them at the hearing. Union Exception 4 must be denied.

**C. A Mailing Remedy Is Unwarranted**

The Union contends that because two of its supporters (DeSantiago and Hilvano) are no longer employed by Respondent and another Union supporter (Roncesvalles) works only

one day per week, the ALJ should have ordered Respondent to mail a copy of the Notice to all of its current and former employees. Union Brief, pp. 13-14. However, the Union has cited no cases where the Board has ordered the mailing of a Notice to both former and current employees based on such limited turnover (two employees out of a workforce of several hundred) or the facts established by the record in this case.

For example, in *Eastern Maine Medical Center*, 253 NLRB 224 (1980), relied on by the Union, the initial unfair labor practice charge was filed in March 1977 but the Board's order did not issue until November 1980, more than three years later. Moreover, the employer's bad faith bargaining actually began in mid-1975, if not before, and continued through at least March 1978. *Id.* at 244, 248. Here, the unfair labor practices found by the ALJ (and disputed in Respondent's exceptions) occurred during a two-month period in March-May 2010. Moreover, the unfair labor practices in *Eastern Maine* involved protracted bad faith surface bargaining and the unlawful withholding of wage increases given to the employer's unrepresented workforce, none of which are alleged here.

Similarly, in *Haddon House Food Products Inc.*, 242 NLRB 1057 (1979), also relied on by the Union, the unfair labor practices involved the wholesale termination of a significant percentage of the employer's workforce immediately after they had signed union authorization cards, and the termination of even more employees who engaged in a strike in support of their unlawfully terminated colleagues, unfair labor practices that were so egregious that the Board imposed a *Gissel* bargaining order as a remedy to the employer's unfair labor practices. Additionally, the unfair labor practices began in November 1975 but the Board's decision was not issued until June 1979. As such, both *Eastern Maine* and *Haddon House*, the only two cases cited by the Union in support of this exception, are clearly inapposite. Union exception number 6 should be denied, as the Union has not provided a sufficient basis to impose even more drastic of a remedy than has already been recommended by the ALJ.<sup>2</sup>

---

<sup>2</sup> As set forth more fully in its exceptions and supporting brief, Respondent contends that the ALJ's recommended remedy, and in particular the imposition of a reading order, is not warranted

**D. The Union's Request For Litigation Expenses Was Properly Denied By The ALJ**

**1. Respondent's Motion To Reopen The Record Was Not Frivolous**

The Board's rule is that litigation expenses are potentially available if the respondent's defenses presented in opposition to an unfair labor practice complaint are "frivolous." However, if the defenses presented by the respondent are "debatable," litigation expenses will not be imposed, even if the unfair labor practices found are "clearly aggravated," "pervasive," or involve "flagrant repetition of conduct previously found unlawful." *Heck's Inc.*, 215 NLRB 765, 767-768 (1974). The Board has not drawn a bright line in determining whether a respondent's defenses are "frivolous" to the extent necessary to allow for an award of litigation expenses, recognizing that the determination of whether the defenses are "frivolous" or "debatable" must be made on a case-by-case basis taking all factors into consideration. *Id.* at 768. In this regard, it appears that the Board will impose an order requiring the payment of litigation costs only if it is clearly demonstrated that the respondent's defenses are undeniably "frivolous" and have been asserted in bad faith. See, i.e., *Frontier Hotel & Casino*, 318 NLRB 857, 860-861 (1995) [noting that "consistent with the intent expressed in *Heck's*, the Board has found that most cases do not meet the restrictive standard prescribed there" and citing examples where no litigation expenses were ordered despite findings of flagrant violations]; see also *Adam Wholesalers, Inc.*, 322 NLRB 313 (1996); *Workroom for Designers*, 274 NLRB 840, 842 (1985); *Farrens Tree Surgeons, Inc.*, 264 NLRB 668 (1992). The Board has also refused to impose litigation costs when it determines that some defenses presented by the respondent were "frivolous" but others were not. *Houston County Electric Cooperative*, 285 NLRB 1213 (1987).

In this matter, the ALJ determined that Respondent's motion was not "so frivolous so as to warrant the extraordinary sanction of attorney's fees." ALJD 30:33-34. Ignoring this finding, the Union argues that the ALJ's determination that the motion was "utterly without merit" (ALJD 30:32-31) warrants the imposition of an order of litigation expenses.

---

in this case. Respondent does not waive its contentions in this regard by the arguments presented in this answering brief to the Union's exceptions.

Union Brief, pp. 17-18. However, “utterly without merit” is not the equivalent of “frivolous.” Accordingly, the ALJ properly determined that litigation expenses could not be assessed against Respondent for filing its motion.

Moreover, Respondent’s motion was neither “frivolous” nor “utterly without merit.” As discussed in Part II(D) above and Respondent’s prior filings in this matter, the ALJ admitted GCX 84 without any evidence concerning the context or entries made in the various documents therein, then foreclosed Respondent from obtaining evidence that would have provided an explanation of the various portions of the exhibit. While the ALJ in his decision faults Respondent for not providing a more detailed “offer of proof” concerning Resurreccion’s potential testimony (ALJD 29:50-30:2), Respondent of course was not in a position to make such an offer because it was denied the opportunity to question Resurreccion by the ALJ’s ruling. While Respondent’s counsel could have speculated on the specifics of what Resurreccion might have testified to, counsel understandably, and appropriately, did not do so. Moreover, Respondent’s explanation of the purpose of the subpoena, and the ALJ’s response, illustrates both the appropriateness of the subpoena and the ALJ’s refusal to let competent evidence keep him from making the determinations on the merits of the Magsino termination that he so clearly wished to make:

JUDGE KOCOL: What purpose did you subpoena Ms. Resurreccion for?

MR. SCOTT: In order to provide testimony and to explain what is in evidence as General Counsel Exhibit 84.

JUDGE KOCOL: Did Ms. Resurreccion participate in that?

MR. SCOTT: No.

JUDGE KOCOL: Alright, I don’t see the relevance then. The petition to revoke is granted.

T 1068-1069.

The ALJ also states in support of his determinations on Respondent’s motion that “the fact pattern that Ruggio apparently presented Resurreccion omitted critical facts such as

Magsino [sic] use of the information for internal grievance matters and the permission granted to him by Gilliat.” ALJD 30:25-27. However, and is more fully developed in Respondent’s exceptions brief, the ALJ’s “internal grievance” reference illustrates a failure to appreciate the relevant requirements of HIPAA and the “permission granted by Gilliat” involves an issue of credibility. Moreover, and more importantly, the ALJ’s reference to what was “apparently” presented to Resurreccion illustrates that the ALJ was making an assumption (which of course supported the results he wished to reach) regarding the entirety of the discussion that took place between Ruggio and Resurreccion. Had the ALJ granted the motion, then all the parties would have had the opportunity to examine Resurreccion on exactly what the basis was for her statements to Ruggio that Magsino’s conduct violated HIPAA and that there was definitely a breach by Magsino notwithstanding the note in GCX 84 stating otherwise.

Given these circumstances, the ALJ’s finding that Resurreccion “had nothing to contribute concerning GC Ex. 84” is clear error. These circumstances also show why Respondent’s motion should have been granted. At the very least, and as most relevant to the Union’s exception, these circumstances establish that Respondent’s motion was most certainly “debatable,” and even more certainly was not “frivolous.”<sup>3</sup>

---

<sup>3</sup> The Union’s brief also contends that “[t]he parties agreed that the Board’s legal standard for evaluating Respondent’s Motion to Reopen was NLRB Rule and Regulations §102.65(e)’s standard.” Union Brief, p. 15. The Union is incorrect. Respondent’s motion expressly states Respondent’s position that Section 102.65 does not apply to unfair labor practice proceedings. Motion, p. 3 [“Respondent contends that the Board’s statements in *Epic Security* relating to Section 102.65(e) cannot properly be applied to set the standards for a motion to reopen the record in an unfair labor practice proceeding inasmuch as the structure and content of the Board’s Rules make clear that there is a fundamental difference between unfair labor practice case proceedings and representation case proceedings, and there is no equivalent provision in Section 102.9 et seq. of the Board’s Rules governing unfair labor practice proceedings”]. In any event, Respondent’s motion explains that its motion nevertheless met the *Epic Security* standards. *Id.*, pp. 3-4.

2. **Board Law Does Not Permit The Imposition Of Litigation Sanctions On A Piecemeal Basis Based On One Particular Motion Made In Support Of A Good Faith Defense To The Allegations Of A Complaint**

As discussed in the cases cited in subsection 1 above, the Board examines the totality of the respondent's defenses to the allegations of the complaint when determining whether its defenses are "frivolous" or "debatable." If any of the unfair labor practices alleged in the complaint are dismissed, the Board will refuse to impose litigation costs, even if defenses raised in response to other allegations might be properly deemed to be "frivolous." This principle is illustrated by the Board's decision in *Houston County Electrical Cooperative*, 285 NLRB 1213. In that case the ALJ found that the respondent had engaged in unlawful surface bargaining and had also committed a number of independent violations of Section 8(a)(5) by certain tactics employed during the course of the bargaining, and included in his recommended order a requirement that the respondent reimburse the union and General Counsel for litigation expenses incurred in the proceeding. The Board affirmed the ALJ's surface bargaining finding, but dismissed some of the independent 8(a)(5) violations found by the ALJ. Applying the principles articulated in *Heck's Inc.* and similar cases, the Board then refused to order the payment of litigation expenses:

In paragraph 2(c) of his recommended Order, the judge, in lieu of ordering the Respondent to revoke the 22 December 1980 wage increase, required the Respondent to reimburse the Union for its bargaining expenses incurred between 6 November 1979 and 22 January 1981, and for its litigation expenses incurred in this proceeding. The judge also included, on a conditional basis, an order that the Respondent reimburse the General Counsel for her litigation expenses. We have found such extraordinary remedies appropriate in rare cases in which a respondent has raised patently frivolous defenses to a refusal-to-bargain charge (*Tiidee Products*, 194 NLRB 1234 (1972)), and where a respondent has set out on a particularly egregious course of conduct aimed at undermining the union and frustrating bargaining. *Harowe Servo Controls*, 250 NLRB 958, 964-965 (1980). We do not believe that the Respondent's conduct in this case, although unlawful, rises to the level of the misconduct found in *Harowe Servo Controls*, nor do we find the Respondent's defenses in the present proceeding patently frivolous. Indeed, as our reversals of some of the judge's findings indicate, we have found some of the Respondent's defenses not only nonfrivolous but meritorious. This case is closer to *M. A. Harrison Mfg. Co.*, 253 NLRB 675 (1980), in which we declined to award collective-bargaining' expenses to a charging

party union as a remedy for the respondent employer's surface bargaining, unilateral changes, and direct dealing. See also *Heck's Inc.*, 215 NLRB 765 (1974). Accordingly, we shall modify the recommended Order by deleting the provisions requiring reimbursement of bargaining and litigation expenses.

Id. at 1217.

In *Frontier Hotel & Casino*, 318 NLRB 857, the Board found the imposition of litigation sanctions appropriate even though it dismissed some of the allegations of the complaint. However, in that case the Board found that the respondent's defenses to specific and significant allegations in the complaint, and particularly its defenses to the surface bargaining allegation of the complaint which "significantly overshadows the other allegations and dominated the litigation of the complaint," were frivolous; the Board did not parse the analysis into an evaluation of each and every litigation tactic engaged in by the respondent, then impose a litigation sanction only with respect to that particular tactic. Id. at 860-862. Moreover, the Board cited with approval its decision in *Houston County Electric Corporation*, described by the *Frontier Hotel* Board as a case where the Board "has denied reimbursement of litigation costs where some complaint allegations have been dismissed." Id. at 860

Here Respondent's motion was only one piece of Respondent's defenses to the allegation that Respondent unlawfully terminated Magsino. For the reasons more fully discussed in Respondent's exceptions brief, those defenses were established by the record and should have resulted in the dismissal of the Magsino allegation of the complaint. Respondent's defenses to those allegations were most certainly not "frivolous" within the contemplation of the Board's cases involving the imposition of litigation costs inasmuch as the defenses were based, in part, on witness credibility. Accordingly, even if it is determined that Respondent's motion was "frivolous," the Union's request for litigation costs cannot be permitted to stand. Otherwise parties before the Board will routinely request litigation costs whenever a particular motion, or even a line of questioning of a witness, is deemed "frivolous." Indeed, to the extent Respondent's motion could be considered to be "frivolous" and supporting an award of litigation costs, so to could at least some of the Union's exceptions discussed in this answering brief.

To allow the parsing of the components of litigation in the manner suggested by the Union will lead to the very clogging of the Board's docket underlying its willingness to impose an award of litigation costs in those limited cases where such an award is warranted. See, i.e., *Frontier Hotel & Casino*, 318 NLRB at 861; *Tiidee Products, Inc.*, 194 NLRB 1234, 1236 (1972). Awarding litigation costs with respect to motions or other discreet portions of a party's litigation of the allegations against it, without requiring that the entirety of the party's defenses to an important allegation contained in a complaint be deemed frivolous, also will chill advocacy before this Board, and therefore result in a denial of due process of law.

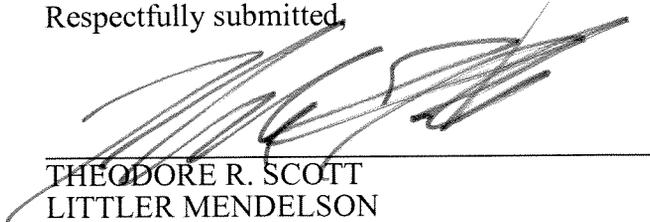
For all of the foregoing reasons the Board should refuse the Union's invitation to award it litigation costs incurred in responding to Respondent's motion.

**IV.**  
**CONCLUSION**

WHEREFORE, the Union's exceptions should be denied in their entirety.

Dated: January 25, 2012

Respectfully submitted,



---

THEODORE R. SCOTT  
LITTLER MENDELSON  
A Professional Corporation  
501 W. Broadway, Suite 900  
San Diego, CA 92101.3577  
Telephone: 619.515-1837 [Direct]  
Facsimile: 619.615.2261 [Direct]  
Telephone: 619.232.0441 [Main]  
Facsimile: 619.232.4302 [Main]  
Attorneys for Respondent  
VERITAS HEALTH SERVICES, INC. d/b/a  
CHINO VALLEY MEDICAL CENTER

**PROOF OF SERVICE BY E-MAIL**

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On January 25, 2012, I served a true and correct copy of:

RESPONDENT CHINO VALLEY MEDICAL CENTER'S  
ANSWERING BRIEF TO CHARGING PARTY UNION'S  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S  
DECISION

by e-mailing the document to the following persons at the e-mail addresses listed below:

Lisa Demidovich, Esq.  
United Nurses Associations of California/  
Union of Health Care Professionals  
955 Overland Court, Suite 150  
San Dimas, CA 91773-1718

E-Mail Address  
lisa@unac-ca.org

Joanna Silverman, Esq.  
National Labor Relations Board, Region 31  
11150 W. Olympic Boulevard, Suite 700  
Los Angeles, CA 90064-1824

E-Mail Address  
joanna.silverman@nlrb.gov

Executed on January 25, 2012, at San Diego, California.



---

ROSA DYER