

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

1621 ROUTE 22 WEST OPERATING COMPANY, LLC  
d/b/a SOMERSET VALLEY REHABILITATION AND  
NURSING CENTER

and

Cases 22-CA-29599  
22-CA-29626  
22-CA-29868

1199 SEIU UNITED HEALTHCARE WORKERS EAST,  
NEW JERSEY REGION

**ANSWERING BRIEF ON BEHALF OF THE ACTING GENERAL COUNSEL IN  
RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF  
ADMINISTRATIVE LAW JUDGE STEVEN DAVIS**

Saulo Santiago  
Michael Silverstein  
Counsel for Acting General Counsel  
National Labor Relations Board  
Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102  
(973) 645-3319  
(973) 645-3077

## TABLE OF CONTENTS

I.	SUMMARY OF THE ARGUMENT .....	1
II.	FACTS.....	2
	<b>A. The Somerset Valley Facility .....</b>	<b>2</b>
	<b>B. Somerset’s Nursing Department Operation .....</b>	<b>3</b>
	<b>C. Nursing Employees Complaint In Response to Schedule Changes .....</b>	<b>5</b>
	<b>D. Employees Turn to the Union .....</b>	<b>6</b>
	<b>E. Somerset/Care One’s Response to the Union Petition .....</b>	<b>7</b>
	<b>F. Somerset Remedies Significant Employee Concerns Post-Petition .....</b>	<b>9</b>
	<b>G. Management Meetings Throughout the Campaign .....</b>	<b>11</b>
	<b>H. Coercive Interrogation of Somerset Employees .....</b>	<b>13</b>
	<b>I. Continued Open Union Activity Throughout the August Campaign .....</b>	<b>14</b>
	<b>J. The Election and Its Aftermath .....</b>	<b>15</b>
	1. Acceleration of Lynette Tyler’s Resignation .....	15
	2. September 13 and 14 attendance and tardiness disciplines issued to Napolitano, Claudio and Jacques .....	17
	3. Discharge of Shannon Napolitano .....	20
	a. Somerset’s Charting Record Procedure Change.....	20
	b. Resident Reports Medication Error to Konjoh .....	21
	c. Napolitano’s September 17 Incident and Discharge.....	22
	d. Events after Napolitano’s September 17 Discharge .....	26
	4. Discharge of Sheena Claudio .....	26
	a. Claudio’s September 17 Discipline .....	26
	b. Claudio’s September 27 Discipline .....	28
	c. Claudio’s October 7 Incident and Discharge .....	29
	d. Events After the October 7 Incident .....	30
	5. Mohammed Bockarie and Somerset’s Push to Monitor Union Supporters.....	32
	6. Discharge of Jillian Jacques .....	33
	a. Jacques’ September 28 Discipline .....	34
	b. Jacques’ November 1 Discipline .....	34
	c. Jacques’ February 7 Incident and Discharge .....	35

7.	State Survey.....	37
	a. State Survey and Complaints 2008-2010 Overview.....	38
8.	Documentary Evidence of Disparate Treatment .....	39
9.	Valarie Wells .....	43
	a. Wells’ Spotless Staffing Coordinator Discipline Record Until September 2010 .....	43
	b. Staffing Coordinator Responsibilities.....	43
	c. The Heedles Schedule.....	45
	d. Wells’ Union Activities .....	46
	e. September 7-September 21: From Zero Disciplines to Discharge .....	46
	f. Somerset Abandons “Reconciliation” Upon Wells’ Discharge.....	50
10.	Per Diem Aides at Somerset.....	52
	a. Annie Stubbs.....	53
	b. Dominique Joseph.....	54
	c. Gertrudis Rodriguez.....	56
	d. Rita Onyeike .....	58
	e. Daysi Aguilar .....	60
	f. LPNs Performing Aide Work in October and November 2010.....	61
	g. As Somerset Eliminated Union-Supporting and Election-Eligible Per Diem Aides, It Hired and Transferred In New Per Diem Aides .....	63
<b>III.</b>	<b>ARGUMENT.....</b>	<b>64</b>
<b>A.</b>	<b>The substantial record evidence supports the ALJ’s conclusion that Respondent violated Section 8(a)(1) of the Act by soliciting, promising benefits and remedying employee grievances following the July 22 filing of the Union representation petition. ....</b>	<b>64</b>
	1. Solicitation of Employee Grievances and Promised and Granted Benefits Legal Standard.....	65
	2. Respondent Promised and Granted Benefits to Dissuade Employees’ Union Support .....	66
	a. Substantial record evidence supports the ALJ’s finding that Respondent violated Section 8(a)(1) by rescinding its proposed schedule change. ....	66
	b. Hutchens told employees that he was there to fix things and to give him a chance to remedy problems.....	66

- c. Substantial record evidence supports the ALJ’s finding that Respondent promised and granted reduced work tasks to Lynette Tyler in violation of Section 8(a)(1) of the Act..... 67
    - d. Substantial record evidence supports the ALJ’s finding that Respondent violated the Act by curing a department-wide grievance regarding the availability of trash bags..... 68
  - B. The substantial record evidence supports the ALJ’s conclusion that Respondent violated Section 8(a)(1) of the Act by interrogating employees following the filing of the July 22 representation petition. .... 69**
    - 1. Interrogation Legal Standard..... 69
      - a. The clear record evidence supports the ALJ’s crediting Avian Jarbo’s testimony and the ALJ’s finding that Arroyo interrogated Avian Jarbo about how she was going to vote in the upcoming election. .... 70
      - b. The ALJ correctly concluded that Konjoh interrogated Claudio about how she felt employees were going to vote. .... 70
      - c. The record evidence supports the ALJ’s conclusion that Illis unlawfully interrogated Tyler regarding hers and other employees’ Section 7 activities..... 71
      - d. The ALJ correctly found that Konjoh unlawfully interrogated Stubbs about her Union sympathies..... 72
  - C. The Substantial Record Evidence Supports the ALJ’s Conclusion that Respondent Warned, Unlawfully Discharged And Eliminated Employees’ Hours In Retaliation for their Support of the Union ..... 73**
    - 1. Legal Standard..... 73
    - 2. The ALJ correctly found that Respondent violated Section 8(a)(3) of the Act by issuing Napolitano, Claudio and Jacques Attendance and Lateness Disciplines in retaliation for their Union sympathies..... 75
      - a. The record clearly supports the ALJ crediting Southgate’s testimony and finding that anti-Union animus was the motivating factor in Respondent’s crusade to enforce its time and attendance policy..... 75
      - b. The ALJ properly concluded that Respondent’s proffered reason for stricter enforcement of time and attendance policy is pretextual. .... 76
      - c. Respondent’s Departure From its Time and Attendance Policy Is Strong Evidence of Animus..... 77
      - d. Respondent Treated Napolitano, Claudio and Jacques Differently than Other Employees ..... 78
    - 3. The overwhelming record evidence supports the ALJ’s finding that Respondent violated Section 8(a)(3) of the Act by accelerating Lynette Tyler’s resignation date in retaliation for her Union sympathies. .... 79

a.	Tyler engaged in union activities prior to the September 2 election.....	79
b.	The substantial evidence shows that Respondent’s managers had knowledge of Tyler’s Union activities.....	80
c.	Respondent’s anti-union animus was the motivating factor in Illis’ decision to accelerate Tyler’s resignation.....	80
4.	The overwhelming record evidence supports the ALJ’s finding that Respondent violated Section 8(a)(3) of the Act by discharging Shannon Napolitano in retaliation for her Union sympathies. ....	83
a.	Napolitano engaged in union activity and Respondent’s managers had knowledge of her activity. ....	83
b.	Respondent’s animus is direct evidence of unlawful motivation in discharging Napolitano.....	84
c.	The ALJ properly found that Respondent set up Napolitano to justify her discharge.....	85
d.	Timing and Abruptness of Napolitano’s discharge is evidence of animus.....	87
e.	Respondent treated Napolitano more harshly than other nurses.....	87
5.	The substantial record evidence supports the ALJ’s finding that Respondent violated Section 8(a)(3) of the Act by discharging Sheena Claudio in retaliation for her Union sympathies. ....	89
a.	The ALJ properly found that Respondent had knowledge of Claudio’s union activity.....	89
b.	Direct evidence of Respondent’s unlawful motivation.....	90
c.	Timing is circumstantial evidence of Respondent’s unlawful motivation.....	90
d.	The ALJ properly concluded that Respondent’s anti-Union animus was a motivating factor in the issuance of Claudio’s disciplines and discharge. ....	91
(i)	Respondent’s September 17 warning shows Konjoh’s deviation from Somerset policies to justify issuing discipline.....	91
(ii)	Respondent’s September 27 warning illustrates Konjoh’s unwillingness to give Claudio the benefit of the doubt in order to issue discipline. ....	92
(iii)	The ALJ correctly found that the October 21 discipline and discharge of Claudio illustrates Respondent’s exaggeration of the misconduct to justify discharge.....	94

e.	Respondent treated Claudio disparately compared to other employees .....	95
6.	The substantial record evidence supports the ALJ’s conclusion that Respondent violated Section 8(a)(3) of the Act by discharging Jillian Jacques in retaliation for her Union sympathies.....	96
a.	Jacques’ engaged in union activity and Respondent had knowledge of this activity .....	96
b.	Direct evidence of Respondent’s unlawful motivation.....	97
c.	The substantial record evidence supports the ALJ’s finding that Respondent’s anti-Union animus was a motivating factor in the issuance of Jacques’ disciplines and discharge.....	98
(i)	Respondent’s September 28 warning illustrates Konjoh’s rush to issue discipline without a full investigation and attempt to disguise her discriminatory motive. ....	98
(ii)	Respondent’s November 1 warning shows Konjoh’s willingness to deviate from Somerset policies to justify Jacques’ discipline.....	99
(iii)	The ALJ properly found that Respondent’s February 12 discipline and discharge of Jacques demonstrates Respondent’s retaliation against the remaining leading Union supporter. ....	100
d.	Respondent treated Jacques disparately compared to other employees .....	101
e.	Timing of Jacques’ discharge illustrates animus .....	102
7.	The clear record evidence supports the ALJ’s conclusion that Respondent discharged Valarie Wells in retaliation for her Union activities. ....	103
a.	Wells was fully engaged in Union activities and the ALJ correctly found that Respondent knew of her Union support. ....	103
b.	The substantial record evidence supports the ALJ’s conclusion that Respondent would not have disciplined and discharged Wells in the absence of her union activities.....	105
c.	Respondent’s September 20 warning further illustrates Respondent’s zeal to issue disciplines without fully investigating them first, and an unwillingness to reconsider these disciplines in light of credible evidence validating the discipline recipient’s conduct.....	108
d.	Respondent cannot carry its <i>Wright Line</i> defense burden because it failed to discipline Konjoh for scheduling errors similar to those Wells committed. ....	109

8.	The substantial record evidence supports the ALJ’s finding that Respondent violated Section 8(a)(3) of the Act by reducing per diem employee hours to prevent them from voting in a possible re-run election and in retaliation for their Union sympathies.....	110
a.	Respondent’s multiple proffered justifications for reducing per diem hours stand as shifting defenses, all of which are pretextual. ....	111
b.	Respondent’s cost considerations defense fails based on its use of LPNs to cover aide shifts. ....	112
c.	Respondent’s consistency and continuity of care defense fails because it replaced many long-tenured per diem aides with less qualified, less experienced per diem aides. ....	113
d.	Respondent’s “flexibility” defense is a pretext and shifting defense, further evidence of unlawful motivation. ....	116
(i)	Respondent knew of Annie Stubbs’ union support and violated Section 8(a)(3) of the Act by reducing her hours .....	117
(ii)	Dominique Joseph communicated her union support to Respondent and her hours were subsequently reduced in violation of Section 8(a)(3) of the Act. ....	118
(iii)	Respondent knew of Gertrudis Rodriguez’s union activities and violated Section 8(a)(3) of the Act by reducing her hours. ....	119
(iv)	Respondent violated Section 8(a)(3) of the Act by reducing Rita Onyeike’s hours.....	120
(v)	Respondent knew of Daysi Aguilar’s union support and violated Section 8(a)(3) by reducing her hours.....	121
9.	The ALJ properly credited Acting General Counsel’s witnesses.....	121
10.	Respondent’s affirmative defense is pretextual and fails to rebut Acting General Counsel’s prima facie case .....	122
<b>IV.</b>	<b>CONCLUSION</b> .....	<b>124</b>

**TABLE OF AUTHORITIES**

**Federal Cases**

*10 Ellicott Square Corp.*,  
320 NLRB 762, 774-75 (1996), enfd. 104 F.3d 354 (2<sup>nd</sup> Cir. 1996)..... 87

*Allegheny Ludlum Corp.*,  
320 NLRB 484, 505 (1995)..... 101

*Amptech, Inc.*,  
342 NLRB 1131, 1137 (2004)..... 65

*Atlantic Limousine, Inc.*,  
316 NLRB 822 (1995)..... 74

*Bethlehem Temple Learning Center*,  
330 NLRB 1177 (2000)..... 74, 87

*Cook Family Foods, LTD.*,  
311 NLRB 1299, 1319 (1993)..... 82

*Covanta Bristol, Inc.*,  
356 NLRB No. 46 at pg. 8 (2010)..... 70

*Dynabil Industries*,  
330 NLRB 360 (1999)..... 74

*Embassy Vacation Resorts*,  
340 NLRB 846, 848-9 (2003)..... 86

*Evergreen America Corp.*,  
348 NLRB 178, 215-217 (2006)..... 66

*Family Nursing Home & Rehabilitation Center, Inc.*,  
295 NLRB 923, 923 (1989)..... 124

*Fluor Daniel, Inc.*,  
311 NLRB 498 (1993)..... 74

*Fluor Daniel, Inc.*,  
304 NLRB 970 (1991)..... 83

*Gelita USA, Inc.*,  
352 NLRB 406, 415 (2008)..... 82

*Greyston Bakery, Inc.*,  
327 NLRB 433, 443 (1990)..... 90, 97

*Guardian Automotive Trim, Inc.*,  
340 NLRB 475 fn 1 (2003)..... 101, 102

<i>Hays Corp.</i> , 333 NLRB 1250 (2001).....	74
<i>Hoffman Plastics v. NLRB</i> 535 U.S. 137, 143-44 (2002).....	124
<i>Hospital Cristo Redentor, Inc.</i> , 347 NLRB 722, 741 (2006).....	94
<i>Joseph Chevrolet, Inc.</i> , 343 NLRB 7, 8 (2004).....	78, 98
<i>KOFY TV-20</i> , 332 NLRB 771 (2000).....	74
<i>Laboratory Corp. of America Holdings</i> , 333 NLRB 284 (2001).....	65
<i>La Gloria Oil &amp; Gas Co.</i> , 337 NLRB 1120, 1124 (2002).....	86
<i>Manno Electric</i> , 321 NLRB 278, 283 fn. 12 (1996).....	74
<i>Manorcare Health Services- Easton</i> , 356 NLRB No. 39 at p. 19 (2010).....	65
<i>Masland Industries</i> , 311 NLRB 184, 187 (1993).....	90
<i>McBurney Corp.</i> , 351 NLRB 799, 800-801 (2007).....	77, 91, 100
<i>Mercedes Benz of Orland Park</i> , 333 NLRB 1017 (2001).....	74
<i>Meritor Automotive, Inc.</i> , 328 NLRB 813 (1999).....	74
<i>Metro Networks, Inc.</i> , 336 NLRB 63, 65 (2001).....	74
<i>Midnight Rose Hotel &amp; Casino</i> , 343 NLRB 1003, 1004 (2004).....	98
<i>Multi-Ad Services, Inc.</i> , 331 NLRB 1226, 1228 (2000).....	69
<i>NACCO Materials Handling Group</i> , 331 NLRB 1245 (2000).....	74
<i>NLRB v. Big Tree Industrial Gas &amp; Equipment Co.</i> , 405 F.2d 1140, 1142-43 (5 <sup>th</sup> Cir. 1969).....	124

<i>NLRB v. Exchange Parts Co.</i> , 375 U.S. 405 (1964) .....	65
<i>NLRB v. Henry Colder Co.</i> , 907 F.2d 765, 769 (7 <sup>th</sup> Cir. 1990) .....	95
<i>NLRB v. Rain-Ware, Inc.</i> , 732 F.2d 1349, 1354 (7 <sup>th</sup> Cir. 1984) .....	90
<i>NLRB v. Western Clinical Laboratory</i> , 571 F.2d 457, 461 (9 <sup>th</sup> Cir. 1978) .....	124
<i>Noah's New York Bagels</i> , 324 NLRB 266, 267, 271 (1997).....	65, 66
<i>Perdue Farms, Inc.</i> , 144 F.3d 830, 835 (D.C. Cir. 1998).....	69
<i>Pinkerton's Inc.</i> , 295 NLRB 538 (1989).....	84
<i>Pope Concrete Products</i> , 305 NLRB 989, 990 (1991).....	87
<i>Pro-Spec Painting, Inc.</i> , 339 NLRB 946, 950-51 (2003).....	100
<i>Ready Mixed Concrete Co. v. NLRB</i> , 81 F.3d 1546, 1552 (10 <sup>th</sup> Cir. 1996) affg. 317 NLRB 1140, 1143-44 (1995) .....	83, 84
<i>Regal Health and Rehab Center, Inc.</i> , 354 NLRB No. 71 (2009).....	117
<i>Reliance Electric Co.</i> , 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6 <sup>th</sup> Cir. 1972).....	65
<i>Rossmore House</i> , 269 NLRB 1176 (1984).....	69, 71, 90
<i>Sawyer of Napa, Inc.</i> , 300 NLRB 131, 150 (1990).....	87
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1951), enfd 188 F.2d 362 (3 <sup>rd</sup> Cir. 1951).....	122
<i>Sears, Roebuck &amp; Co.</i> , 337 NLRB 443 (2002).....	74, 87, 90, 102
<i>Sunbelt Enterprises</i> , 285 NLRB 1153 (1987).....	74
<i>Syracuse Scenery &amp; Stage Lighting Co., Inc.</i> , 342 NLRB 672, 679 (2004).....	101

<i>Tim Foley Plumbing Service,</i> 337 NLRB 328, 329 (2001).....	90, 97
<i>Timsco, Inc. v. NLRB,</i> 819 F.2d 1173, 1178 (D.C. Cir. 1987).....	69
<i>Thomas Cartage, Inc.,</i> 186 NLRB 157 (1970).....	111
<i>Toll Mfg. Co.,</i> 341 NLRB 832, 833 (2004).....	77
<i>Treanor Moving &amp; Storage Co.,</i> 311 NLRB 371, 375 (1993).....	74, 88
<i>Tubular Corp. of America,</i> 337 NLRB 99 (2001).....	74
<i>Westwood Healthcare Center,,</i> 330 NLRB 935 (2000).....	69
<i>Wright Line,</i> 251 NLRB 1083 (1980).....	passim
<i>Wyman-Gordon Co. v. NLRB,</i> 654 F.2d 134, 141 (1 <sup>st</sup> Cir. 1981) .....	99

## TABLE OF NAMES AND TITLES

### CARE ONE/SOMERSET VALLEY REHABILITATION AND NURSING CENTER

Jessica Arroyo, Care One Clinical Services Consultant

Oswaldo Carpio, Somerset Valley Business Office Manager

Jackie Engram, Care One Vice President of Clinical Services and/or Somerset Valley Acting Director of Nursing (i.e. January 2011 to May 2011)

Elizabeth Heedles, Somerset Valley Administrator (i.e. January 2009 to July 28, 2010)

Jason Hutchens, Care One Regional Director of Operations

Doreen Illis, Somerset Valley Administrator (i.e. August 3, 2010 to July 2011)

Inez Konjoh, Somerset Valley Director of Nursing (i.e. August 16, 2010 to January 2011)

Andrea Lee, Care One Vice President of Human Resources

Janet Matthias, Somerset Valley 11-7 Shift Nursing Supervisor

Eileen Meyers, Somerset Valley Director of Nursing (i.e. January 2010 to March/April 2010)

Jacquie Southgate, Somerset Valley Unit Manager (i.e. August 2010 to November 19, 2010)

Janice Vyzas, Somerset Valley Director of Social Work

Michael Yannota, Somerset Valley Unit Manager (i.e. November 2010 to present)

### DISCRIMINATEES, 1199 SEIU REPRESENTATIVE AND SOMERSET VALLEY LPN/AIDES

Daysi Aguilar, Somerset Valley Per Diem Aide and Discriminatee

Mohammed Bockarie, Somerset Valley LPN (i.e. transferred from Care One Holmdel to Somerset Valley in or about October 25, 2010)

Sheena Claudio, Somerset Valley LPN and Discriminatee

Jillian Jacques, Somerset Valley LPN and Discriminatee

Avian Jarbo, Somerset Valley Aide

Dominique Joseph, Somerset Valley Per Diem Aide and Discriminatee

Maharanie “Shanny” Mangal, Somerset Valley LPN

Shannon Napolitano, Somerset Valley LPN and Discriminatee

Rita Onyeike, Somerset Valley Per Diem Aide and Discriminatee

Gertrudis Rodriguez, Somerset Valley Per Diem Aide and Discriminatee

Annie Stubbs, Somerset Valley Per Diem Aide and Discriminatee

Lynette Tyler, Somerset Valley Unit Secretary and Discriminatee

Brian Walsh, 1199 SEIU Organizer

Valarie Wells, Somerset Valley Staffing Coordinator and Discriminatee

## I. SUMMARY OF THE ARGUMENT

The record evidence adduced at the hearing clearly supports the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) of the Act by disciplining and discharging Shannon Napolitano, Sheena Claudio, Jillian Jacques, Valarie Wells and Lynette Tyler and by reducing the hours of per diem certified nurses aides, including Annie Stubbs, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez and Daysi Aguilar because of their Union support and violated Section 8(a)(1) of the Act by soliciting employees' grievances and complaints, promising employees increased benefits and improved terms and conditions of employment to vote against the Union, and by interrogating Lynette Tyler, Avian Jarbo, Annie Stubbs and Sheena Claudio about their union support.

Napolitano, Claudio, Wells, Jacques and Tyler were discharged shortly after 1199 SEIU United Healthcare Workers East, New Jersey Region (herein "the Union") won a hotly contested election, in which Respondent waged an aggressive anti-Union campaign. During the August 2010<sup>1</sup> campaign, Respondent held mandatory meetings to convince employees that a union was unnecessary, solicited employees' grievances, told employees that only Respondent could fix what was causing the facility's problems, and interrogated employees about their union sympathies. Shortly after the election, Respondent began disciplining visible Union supporters and demonstrated disdain for the employees' exercise of their Section 7 rights by discharging Napolitano, Claudio and, later, Jacques for allegedly poor work performance and patient care errors. Respondent's discipline and discharge of Napolitano, Claudio, Jacques, and Wells, and acceleration of Tyler's resignation date deviated from Respondent's policies, practices and its treatment

---

<sup>1</sup> All dates will refer to 2010 unless otherwise indicated.

of other employees. Respondent also eliminated the hours of per diem employees to prevent them from voting in a re-run election.

ALJ Steven Davis (the ALJ) correctly concluded that the Acting General Counsel presented credible, forthright witnesses. Respondent's witnesses offered manufactured testimony in support of its shifting legal defenses. The overwhelming evidence supports the ALJ's finding that Respondent would not have disciplined or discharged the discriminatees nor reduced the hours of certain per diem employees but for the union organizing campaign and the employees' activities therein.

## **II. FACTS**

### **A. The Somerset Valley Facility**

Care One, a health care corporation that either owns or operates more than 20 nursing homes in New Jersey, acquired Somerset in the fall of 2006. Somerset is part of the Care One/Healthbridge facility portfolio. [R-40, Tr. 1410-19].<sup>2</sup> It provides short-term rehabilitation and skilled nursing care to residents at its Bound Brook, New Jersey facility. It has a capacity of 64 patients, with 32 double-occupancy resident rooms. [Tr. 912, 1404]. Somerset receives reimbursements for resident treatment and care through the federal Medicare program, and is subject to regulation by the New Jersey Department of Senior Services and federal Centers for Medicare and Medicaid Services. [Tr. 1847-48]. MDS Coordinator Mary Apgar, a 2(11) supervisor, is the facility's liaison for Medicare reimbursement. [GC-1(x) ¶6, Tr. 1412-13].

Jason Hutchens has served as Care One's Regional Director of Operations since September 2008. In this capacity, Hutchens has oversight over Somerset and Somerset's

---

<sup>2</sup> In this Answering Brief, references to the official transcript will be designated as "Tr" followed by the page number. References to the Acting General Counsel, Respondent and Union exhibits will be referred to as "GC," "R," and "CP" respectively, followed by the exhibit number.

administrator reports to him. Hutchens selects the administrator for Somerset and administrators must receive approval from Hutchens before hiring a DON. [Tr. 1403, 1618-9]. In his oversight role, Hutchens can access Somerset's work schedules at any time from anywhere through Care One's Smartlinx scheduling application, and he also receives daily census reports from Somerset personnel. [Tr. 1479, 1504]. Until late 2010, Hutchens reported to Richard Speas, Senior Vice-President of New Jersey operations. [Tr. 1495]. Throughout 2009 and 2010, Andrea Lee served as Care One's Vice-President of Human Resources. [Tr. 1511, 1610-11].

Under Hutchens' watch, Carolyn Allen served as Somerset's administrator until about early 2009. Elizabeth Heedles then replaced her as administrator. In the fall of 2008, Rebecca McCarthy served as Somerset's DON. McCarthy was promoted in early 2009 and Christiana Enworum replaced her. Enworum served as Somerset DON for four months until Eileen Meyer assumed the Somerset DON position in the spring of 2009. [Tr. 1420-22]. Meyer departed Somerset in about March or April 2010 and was replaced by Kamala Kovacs. [Tr. 1420-22, 1450].

**B. Somerset's Nursing Department Operations**

Somerset has a small physical footprint with the nurses' station serving as the hub of activity for nursing and clinical personnel. The unit manager, charge nurse, night/evening supervisor, and unit secretary all work at the nurses' station desk.<sup>3</sup> In close proximity to the nurses' station are the administrator's office, the DON's office, supply

---

<sup>3</sup> A charge nurse is in charge of completing patient admissions paperwork, transcribing physician's orders and handling related functions at the nurse's station. Konjoh and Illis contend that charge nurses are vital and critical to Somerset's operation and only experienced and dependable nurses are selected to fill in as charge nurse. Konjoh testified that LPNs Sharon Smith and Jillian Jacques alternated charge nurse duties starting in November 2010. [Tr. 2001-02]. Napolitano performed charge nurse duties two/three times in her 1 ½ years at Somerset. [Tr. 390].

rooms, social worker's office, and resident dining room. Resident rooms are located in two separate corridors diagonal to the nurses' station. [GC-2, Tr. 1084-85].

Somerset's nursing department consists of floor nurses- either licensed practical nurses (LPNs) or registered nurses (RNs) - and certified nurses' aides (aides).<sup>4</sup> Floor nurses dispense medications, give treatments, and assess and monitor the condition of Somerset's residents. Aides assist residents with daily life functions such as grooming, eating, bathing, and toileting. Floor nurses report to the unit manager or shift supervisor, who in turn report to the Assistant Director of Nursing (ADON) or DON. Aides take their instructions from floor/charge nurses or the shift supervisor.

Nursing work is spread across three shifts: the day shift (7:00 a.m. to 3:00 p.m.); evening shift (3:00 to 11:00 p.m.); and night shift (11:00 p.m. to 7:00 a.m.). Depending upon the resident census, about 3 floor nurses and between 4-6 aides work the day and evening shifts. Fewer nurses and aides work the night shift. Nurses and aides receive their assignments from the daily assignment sheet. This sheet tells the nurses which rooms they will cover on the shift and identifies for the aides the rooms to which they are assigned, and any special tasks they are to perform during their shift. Somerset's staffing coordinator generates the daily assignment sheets and places them at the nurses' station prior to the start of a shift. [See generally GC-65, 134, Tr. 1205, 1213-14].

Nursing department employees can have four separate statuses: full-time, part-time with benefits, part-time without benefits, and per diem. Full-time employees are scheduled for 40 hours per week. Part-time employees with benefits are scheduled to work 24 hours per week, plus some holidays and weekends. This threshold 24

---

<sup>4</sup> LPNs who perform aide work for an entire shift are still paid their hourly LPN rate, which is significantly higher than the aide wage rate [Tr. 2642].

hours/week figure is calculated based on an average over the course of a calendar quarter. [Tr. 1406, 1602]. Benefits like vacation and sick time are calculated based on hours worked. [Tr. 2814]. Part-time employees without benefits do not have to commit to a certain number of hours. There is no pay difference between the two part-time classifications. [Tr. 1602-3]. Per diem employees are called into work and/or put on a schedule as needed. Per diems earn about \$2/hour more than part-time employees, but are not eligible to receive benefits. All employees receive shift premiums for performing work at night and on the weekends. [R-32, Tr. 1407].

**C. Nursing Employees Complaint In Response to Schedule Changes**

In the spring of 2010, Heedles called employees into one-on-one meetings to inform them that their hours would be cut, shifts and status changed, or wages reduced. Heedles announced that her changes would take effect on August 1. [Tr. 41, 50].

Employees immediately shared their mutual concerns over the new schedules and the brusque manner in which Heedles delivered this news. [Tr. 34-5, 41, 43, 283, 285, 290-91]. Initially, employees addressed their concerns to corporate human resources and Care One's employee hotline.<sup>5</sup> Jillian Jacques, an eleven year mainstay on the evening shift, spoke with Andrea Lee in May 2010, who told Jacques that she knew that changes were being made, but she had no idea about the breadth of Heedles' changes. Lee promised to look into the matter. [Tr. 44-7, 294, 299, 448-49, 488-89, 928-29].

In about June 2010, Lee appeared unannounced at Somerset and held meetings with nursing employees on all shifts. At these meetings, Lee said that she was not going to take notes to share with Heedles - she just wanted to know what was going on. Lee feigned ignorance regarding the extent of the schedule changes, but at the evening shift

---

<sup>5</sup> This number was posted in the facility and appeared on employee paychecks. [R-19, Tr. 299].

meeting, Jacques reminded her that she had previously told her what was happening, she promised to look into the matter, but never did. [Tr. 47-50, 491-3].

To the employees, Lee's visit had no impact in addressing their concerns. Heedles issued a 30-day written notice of the pending schedule changes and on July 16, instructed staffing coordinator Valarie Wells to post her (Heedles) new master schedule in the employee breakroom. Wells did as told. [Tr. 41, 50, 1222-24, R-30].

**D. Employees Turn to the Union**

After no response from Lee, Sheena Claudio, an LPN on the day shift since January 2010, contacted Brian Walsh from the Union. Claudio and Shannon Napolitano, an LPN on the day shift since March 2009, when she transferred from another Care One facility where she worked for three years, met with Walsh about the end of June 2010. [Tr. 50-3]. At their first meeting, Claudio and Napolitano presented Walsh with a petition containing signatures of employees who wished to be represented by the Union. Napolitano, Claudio, and Jacques had distributed this petition. [Tr. 53-4]. About June 2010, Jacques joined Napolitano and Claudio in meetings with Walsh. They discussed these meetings with 2(11) supervisors Oswaldo Carpio (business office manager), Jacquie Southgate, (unit manager) and Apgar. [Tr. 55-6, 305-6].

Throughout July 2010, the frequency of Union meetings increased as well as the number of employees attending these meetings. Jacques, Claudio, and Napolitano distributed authorization cards<sup>6</sup> at the nurses' station, in the break room and throughout the facility. [Tr. 74, 77, 79, 316-7, 501]. Napolitano shared her progress with Southgate on almost a daily basis, and Napolitano and Claudio spoke regularly to Wells and Apgar about their organizing efforts. [Tr. 75-6, 311-13, 936]. Jacques hosted two Union

---

<sup>6</sup> Unit secretary Lynette Tyler also distributed four authorization cards. [Tr. 1009].

meetings at her home in July, shortly before the Union filed a representation petition on July 22. [GC-6, Tr. 331, 498, 511].

**E. Somerset/Care One's Response to the Union Petition**

Care One responded swiftly to the filing of the petition. Its coordinated response involved four separate elements: 1) Somerset regime change; 2) efforts to mollify employees and address individual grievances; 3) an aggressive anti-union "education" campaign; and 4) closed door manager meetings to identify voter intentions.

Hutchens testified that Somerset/Care One received a copy of the Union's petition sometime between July 22 and July 27. [Tr. 1459]. On July 28, Heedles posted a memo to employees in the facility noting that the filing of the petition was "disappointing" and it would be a "mistake" to bring a union into Somerset. [GC-9].

Three days later, Care One transferred Heedles and replaced her with Doreen Illis. Hutchens testified that Heedles was overwhelmed by the job, she hadn't grown enough to lead Somerset, and his concern stemmed from a poor state survey<sup>7</sup>. [Tr. 1423, 1454-55]. The poor state survey occurred in December 2009 but Care One didn't transfer Heedles until nine months later, in early August 2010. [R-33, Tr. 1455]. Although Heedles was assertedly struggling to lead a 64-bed facility, Care One transferred Heedles to Holmdel, a facility offering similar skilled nursing and rehabilitation services but with approximately twice as many beds. [Tr. 1455, 2664].

Illis was a veteran of a failed Union organizing campaign at Holmdel. [Tr. 1021]. Hutchens testified that he places administrators in the centers that he manages, but that he

---

<sup>7</sup> The New Jersey Department of Health conducts an annual survey of all nursing homes and assisted living facilities to ensure compliance with state and federal regulations. [Tr. 1423].

didn't know Illis, couldn't recall interviewing her for the Somerset position, and that Speas recommended Illis for the job. [Tr. 1632, 1639].

Illis testified that she first learned of the organizing campaign at Somerset when she started working there on August 3. [Tr. 2673]. Illis, however, is included in a July 28 e-mail between Andrea Lee, Jason Hutchens, Rick Speas, Maureen Montegari (Care One HR), and other Care One attorneys and managers. The subject matter of this assertedly privileged e-mail is "legal advice and analysis re: receipt of NLRB petition for Election and further proceedings." [GC-141]. Illis then reluctantly admitted that she knew about the organizing drive prior to August 3. [Tr. 3071-72].

In July 2009, the Union filed a representation petition seeking to represent a similarly-structured bargaining unit at Care One's East Brunswick facility. [GC-81]. Hutchens also has oversight over East Brunswick. He acknowledged hearing about disgruntled East Brunswick employees signing authorization cards in anticipation of filing a representation petition. As at Somerset, East Brunswick's administrator was hastily replaced in response to organizing efforts. [Tr. 1496, 1526-29].

Hutchens also terminated DON Kamala Kovacs shortly after learning of the Union petition at Somerset. On August 16, Inez Konjoh became the new DON at Somerset. Konjoh had never been a DON before - she was a Unit Manager and ADON at East Brunswick - making her a veteran of the Union's failed 2009 organizing campaign. [Tr. 1456-57, 1529, 1919, 1993]. She was transferred from Somerset five months after she started there for substandard performance and since then has held two lower level positions at other Care One facilities - neither job being a DON. [Tr. 1956-60].

**F. Somerset Remedies Significant Employee Concerns Post-Petition**

Following the sudden reassignment of Heedles, Somerset took action to remedy significant employee concerns. [Tr. 337-8]. Respondent did not implement the August 1 schedule changes and Illis instructed Wells to replace the posted Heedles schedule with the original nursing department master schedule. [Tr. 1222, 1225-26]. Additionally, Somerset heeded the demands of its nursing employees who had begged the Employer to retain Jacquie Southgate.<sup>8</sup> In about the first or second week of August, Illis promoted Southgate from floor nurse to unit manager. [Tr. 1094-95].

Through individual and small group conversations, Somerset and Care One officials learned of individual employee concerns and immediately set out to remedy them. The first week Illis started at Somerset she met with unit secretary Lynette Tyler. Tyler explained that several aspects of her job made work “overwhelming.” Tyler specified that several months earlier, the dietary manager instructed her to take patients’ weights and ensure the accuracy of these readings. While this was traditionally a task performed by aides, by August 2010, Tyler performed this task on a daily basis. Per Illis’ request, Tyler wrote down all of her job responsibilities and Illis said she would see what changes she could make. In this same conversation, Illis asked Tyler why Somerset employees wanted a union. Tyler had not referenced the Union prior to Illis raising the subject. Tyler said in response “Why not?” Illis said that she didn’t think the Union was needed, the facility from where she came didn’t have a union, and she didn’t think the union would work for Somerset employees. A week later, Tyler learned that she no longer had to take patients’ weights. [Tr. 1008, 1016-19, 1054].

---

<sup>8</sup> Southgate had previously tendered her resignation in July 2010. [Tr. 1095-96].

Annie Stubbs, a per diem aide who worked the day shift every other weekend and occasionally during the week, directed complaints to Hutchens at one of the mandatory meetings that Lee, Hutchens, and Illis conducted throughout the August campaign period. In response to Hutchens' inquiry as to why employees wanted the Union, Stubbs told Hutchens about a continuing grievance aides had regarding access to plastic bags used to dispose of dirty linens. The Employer had placed these bags in a locked office, which sometimes remained locked over an hour into the start of the day shift. The day after this meeting, Illis brought bags to the aides. [Tr. 861, 865, 876-77, 886-88]. Hutchens confirms Stubbs' complaint about the trash bags. [Tr. 342, 1472].

Additionally, Tyler and Napolitano testified about one of the August meetings conducted by Hutchens in Somerset's conference room. [Tr. 342-43, 1012-15]. This meeting began by Hutchens stating that he was very disappointed that the employees petitioned for a union. [Tr. 1013]. He said he was not aware that there was so much chaos in the building because the employees seemed happy, the beds were filled, numbers were up, and it seemed like one of the better run buildings. Hutchens said that he was there now and he would do whatever he could to remedy the problems. [Tr. 1013].

Throughout the campaign period, Respondent held daily mandatory meetings to play videos and make presentations besmirching the Union. [Tr. 768-69, 1010, 2659-60]. Further evidence of Somerset's anti-union animus is reflected in its notices posted at the facility during the campaign.<sup>9</sup> [GC-41, 42]. In memorandum Illis sent to her staff during the campaign, she noted that "...many of you already have expressed your opposition to this Union...and your support is appreciated...After all, the decision that some of our

---

<sup>9</sup> These posters state that the Union was only there to get a piece of employees' paychecks, would control employees' lives, and could put employees on trial for violating its rules.

team members will make on September 2, 2010 could affect the future of *everyone* who works at Somerset Valley Nursing & Rehabilitation Center...” [CP-6]. Illis also wrote that “...by respecting each other and supporting one another, I believe that we can pull together to overcome any issue that threatens our team or could interfere with the quality of care we want to provide our residents...I am committed to helping this team overcome its issues and want to be part of this Center’s future, but only if the voters in our election give us the opportunity to work together without a union.” [GC-12]. Illis used more blunt language in pre-election meetings, telling employees that it would be like a “slap in the face” if employees voted in the Union. [Tr. 516].

**G. Management Meetings Throughout the Campaign**

Southgate’s testimony offered unvarnished, objective insights into Somerset’s behind-the-scenes machinations during the Union campaign. Several times a week, Illis or Pat Fleming, a non-attorney consultant from Kiesewetter Wise, the law firm representing Respondent in the instant matter, conducted meetings with management staff usually in Illis’ office. Attendees included Southgate, Illis, Hutchens, Konjoh, Apgar, and Carpio. Either Fleming or Illis would lead a discussion in which they went through each name on the *Excelsior* list and classified employees as either yes votes, no votes, or not sure votes. [Tr. 942-46, 949-950, 1517].<sup>10</sup>

Southgate testified that Fleming identified Napolitano as a union organizer and said that it would make no sense trying to convince her to vote no because she was an obvious yes vote. Fleming said that he believed that Claudio was very pro-Union and that Jacques would vote in favor of the Union. Regarding Tyler, Konjoh said that it

---

<sup>10</sup> During the August campaign, Fleming was at Somerset on average 4 days a week. [Tr. 1654]. Although Fleming is still listed on Kiesewetter’s letterhead, and no representation was made by Respondent as to his unavailability, Fleming did not testify to rebut Southgate’s allegations.

seemed like she was going back and forth and that she would talk to Tyler about her vote.<sup>11</sup> Regarding Stubbs, Fleming noted that she worked for a union facility at her full-time job. [Tr. 947-950].

Southgate testified that there was discussion at these meetings about two Union-generated items. The first item was a Union flyer mailed out shortly before the election to all employees on the *Excelsior* list. [Tr. 1362-63]. The flyer clearly states on the cover, in both English and Spanish, "At Somerset We're Voting Yes for 1199SEIU!" Numerous employees are pictured on the cover, including Napolitano, Claudio, Jacques, and Wells. Additional pages of the flyer contain names, pictures, and testimonials from employees as to why they are voting in favor of the Union. Pictured on the same page as the statement "We're Voting Yes for 1199SEIU" are Napolitano, Jacques, Tyler, and Stubbs. Wells and Claudio's pictures and testimonials appear on another page titled "Our Opportunity to Vote Yes is Here." [GC-10].

Hutchens acknowledged seeing this flyer in the second or third week of August and immediately showing it to Illis. [Tr. 1520-22]. This testimony corroborates Southgate's account of a management meeting led by Illis in which she said that there was a flyer circulated by the Union that had pictures of employees on it. [Tr. 951-52].

The second Union-generated item discussed at management meetings in August was a YouTube video available on the Internet. [Tr. 950-51]. Union representative Brian Walsh testified that in August 2010, the video was uploaded to YouTube, where anybody with Internet access could view it, and the Union also mailed CD versions of the video to

---

<sup>11</sup> During the August campaign, Konjoh admitted that she spoke to Tyler approximately 10 times per day. [Tr. 2346]. Although Konjoh denied that she spoke to Tyler about the Union, the sheer number of discussions raises doubt that the subject of the Union never came up between Tyler and Konjoh, especially when these discussions took place in the campaign period.

all Somerset employees on the *Excelsior List*. The YouTube video contains a series of testimonials from Somerset employees explaining why they are voting for the Union. Claudio is the first employee testimonial featured; Jacques, Wells, and Tyler also speak out in favor of the Union in the video. [GC-11, Tr. 1361-62].

Hutchens acknowledged seeing the YouTube video on the Internet sometime prior to the election, telling Illis about the YouTube video immediately after he viewed it, and getting the impression that Illis already knew about the video when he told her about it. [Tr. 1522-24, 1658-59]. Southgate confirms that at an August 2010 manager meeting, Illis said that there was a YouTube video with various Somerset employees talking about why they wanted a union. [Tr. 950-51].

Southgate testified that Fleming instructed managers that if employees were discussing the union during the course of a shift, they should listen to the conversation and report back the contents of the conversation to him. [Tr. 1083]. Managers were assigned different employees to speak to about their union sympathies. [Tr. 946].

#### **H. Coercive Interrogation of Somerset Employees**

Avian Jarbo, an aide on the evening shift, testified that about a week before the election, she was walking towards the facility's supply room to retrieve patient supplies. Jessica Arroyo, Care One Clinical Services Consultant, walked into the supply room and asked Jarbo if she was going to get a no vote out of her. Jarbo replied that she wasn't sure if she was going to vote. Arroyo opined that she had to come in to vote or else it would be an automatic yes vote for the Union. Arroyo only had one innocuous conversation with Jarbo prior to the supply room interrogation and never spoke to her again after it. [Tr. 688-695]. Tellingly, Arroyo did not testify at the hearing.

Claudio also testified that in August 2010, she was in the supply room alone when Konjoh approached her and said that she had been talking to all of the employees about the Union and the upcoming election. Konjoh pointedly asked Claudio how she felt people were going to vote. Claudio said she didn't know. Konjoh responded by asking Claudio to give her a chance and to vote no. [Tr. 108-110].

Lynette Tyler also testified about conversations initiated by Illis during the August campaign. Less than a week after Tyler attended a mandatory meeting held by Illis and Hutchens, Illis approached her in the hallway near the DON's office. Illis asked Tyler what she thought about the mandatory meetings and proceeded to ask Tyler if she was going to vote for the Union or not. Tyler told Illis that she was unsure. Illis told Tyler that employees did not need a union, and inquired if she knew how the rest of her co-workers were voting. Tyler told her no. Illis asked if Tyler could convince her co-workers to vote no and find out who was going to vote yes or no. [Tr. 1022-24].

**I. Continued Open Union Activity Throughout the August Campaign**

In addition to the YouTube video and the Union flyer,<sup>12</sup> which identify Union supporters and their reasons for voting yes in the election, one other open union activity occurred in August 2010. For one day, Union supporters wore a sticker at work to demonstrate their support for the Union. The sticker read "Respect" with "Nursing Home Workers Uniting for Quality Care and Quality Jobs 1199SEIU" in a smaller font below. [GC-8]. On the day shift, Napolitano and Claudio wore the stickers on the outside of their nursing scrub tops. Claudio testified that supervisors Apgar and Southgate saw her wearing the sticker. Napolitano wore her sticker throughout her double shift and

---

<sup>12</sup> Respondent filed post-election objections, two of which specifically referenced the YouTube video and Union flyer. These objections were filed on September 9. [GC-5].

estimated that 25-30 employees in total wore the sticker that day. Jacques wore two stickers that day and testified that director of social work, Janice Vyzas, approached her and asked her what the sticker said. [Tr. 85-6, 319-321, 506, 615-16].

**J. The Election and Its Aftermath**

On September 2, 2010, employees voted 38-28 in favor of the Union. [GC-3]. After the Union's victory, Somerset unleashed a furious assault against Union supporters to oust them from the facility and prevent a similar result should a re-run election be ordered. This retaliation involved disparately targeting Union supporters for discipline and discharge, more closely monitoring Union adherents, importing company-friendly employees from other Care One facilities, and enforcing previously ignored rules.

**1. Acceleration of Lynette Tyler's Resignation**

Tyler worked as the facility's unit secretary. She assisted nursing staff with admissions and discharge paperwork, and prepared residents for appointments outside the facility. [Tr. 1007]. She provided a testimonial for the YouTube video and for the Union flyer disseminated shortly before the election. [GC-10, 11, Tr. 1030].

Both before and after the election, Tyler had expressed to Illis and Konjoh her desire to return to school.<sup>13</sup> Illis and Konjoh told her that they wanted her to stay. [Tr. 1026, 1028, 1051]. On September 8, Konjoh and Tyler spoke again about her future plans and Konjoh tried to talk Tyler out of resigning.<sup>14</sup> [Tr. 1051].

---

<sup>13</sup> Tyler told them that she had a disabled son at home and work demands were interfering with her overwhelming responsibilities at home. [Tr. 1016, 1030].

<sup>14</sup> In this conversation, Tyler told Konjoh that the work environment was starting to get hostile. [Tr. 1034].

The next day, Tyler handed Illis her resignation letter. In this letter, Tyler gave the two weeks notice required by Respondent's handbook.<sup>15</sup> A few minutes after handing Illis her two-week notice, Illis called Tyler into her office. Illis told Tyler that she did not have to stay until the date on her letter and Tyler asked for clarification. Tyler then asked whether Illis was asking her to leave the premises and Illis said yes.<sup>16</sup> [Tr. 1039-1040].

This terse exchange illustrates the change in Illis' demeanor after the September 2 election. According to Tyler, before the election, Illis had a sunny, warm disposition in her dealings with employees, and Tyler specifically. After the Union victory, Tyler observed that Illis spoke to her in a cold, harsh tone, even neglecting to acknowledge Tyler's morning greeting. [Tr. 1030-33].

In addition to requesting Tyler leave the premises on September 9, Illis disparaged Tyler on the personnel action form dated the same day. Illis wrote "not eligible for rehire - resigned with bad attitude towards company..." [GC-60]. In her trial testimony, Illis described Tyler as a mediocre employee, yet in her declaration given as part of the 10(j) proceeding, Illis made no adverse comment about Tyler's performance and confirmed that she and Konjoh attempted to dissuade Tyler from resigning. [Tr. 3015, 3018-19].

Respondent cites two episodes in which Illis told supervisors that she was accepting their resignations immediately as evidence of a pattern reflecting the way that she treated voluntarily resignations. The two episodes cited, from January and April

---

<sup>15</sup> Page 39 of the handbook, under the resignation section, states "...The Center requests all hourly employees submit, in writing, to their Center Administrator/Supervisor, notice of voluntary termination two (2) weeks in advance of their last working day..." [GC-16, 58, Tr. 1038].

<sup>16</sup> Somerset initially only paid Tyler part of the money owed her. Seven months after Illis removed Tyler from the facility, and shortly before the unfair labor practice hearing began, Tyler received the balance of the money owed her assertedly due to Respondent's policy to pay out two weeks salary. [GC-59, Tr. 1040-41].

2011, both post-date the instant charge being filed, and in one case, post-dates the consolidated complaint issued regarding Tyler's termination. [R-123, 124].

2. September 13 and 14 attendance and tardiness disciplines issued to Napolitano, Claudio and Jacques

On September 13, a few days after Respondent filed objections to the results of the election, Konjoh issued Napolitano a written warning for excessive absenteeism.<sup>17</sup> [Tr. 352-55, GC-31]. Napolitano insisted to Konjoh that everyone at Somerset was aware that she had received permission from supervisors to arrive late because she lived an hour away from the facility. [Tr. 347-54]. She had never previously received discipline for tardiness.<sup>18</sup> [Tr. 347-51]. Southgate corroborates Napolitano's testimony that employees frequently called into the facility to inform supervisors, including herself, that they were going to be late, and that no disciplinary actions were taken against them. [Tr. 952-54].

On September 16, Konjoh issued Claudio a warning because she had called out the day before her scheduled day off. [Tr. 120-21]. In response, Claudio said she did not know she could not call out before a scheduled day off. Konjoh responded, "It's in the employee handbook." [Tr. 122]. Claudio repeated she did not know of such a policy. Konjoh said, "Well, it's in there. The rules are the rules." Claudio remarked that she would look in the employee handbook because the policy did not make sense. Claudio asked how come no one said anything to her, referring to the warning's citation of a

---

<sup>17</sup> In addressing permission for late arrivals to work, the Employee Handbook in subsection Attendance notes on page 27 that employees "...are expected to work your full scheduled work day unless otherwise agreed upon in advance between you and your Supervisors. If you anticipate a need for time off, you should advise your Supervisor as soon as possible." [GC-16, 85].

<sup>18</sup> Napolitano testified that she always signed her disciplinary warnings because she did not know she could choose not to sign them. She further testified that Konjoh did not explain that she could write her response to the warning in the employee comment section. [Tr. 381].

previous violation of this policy.<sup>19</sup> [Tr. 2058, GC-14]. Konjoh then presented Claudio with a second warning for lateness. Claudio said, “So one warning, two warnings and three warnings I’m out...I have to think of that because of what happened with the election.” [Tr. 123]. Claudio disagreed with the warnings, contending in response to the second warning that she called her supervisors ahead of time when she was going to be late. [Tr. 124, GC-15].

Later that day, Konjoh handed Jacques two warnings dated September 13: one for having been late 119 times since January 1 and 11 times within the prior 30 days and another for calling out 3 times within the last 60 days. Jacques informed Illis and Konjoh that she had received permission from the previous DON to come in later than her scheduled time because of her mother’s health condition. [Tr. 534, R-9]. Illis admits that Jacques discussed her late arrival arrangement at this meeting.

Jacques further testified that in her eleven years at Somerset, she was not aware of any policy forbidding employees from calling out 3 times within 60 days. [Tr. 536-537]. Konjoh told her that she could not call out before or after a day off and that her call outs demonstrated a pattern. Jacques denied this accusation, mentioning that she was sick on the days in question and felt that this discipline was unfair. [Tr. 537, GC-40].

Although Konjoh testified that a spike in lateness and absences during the Labor Day weekend caused her to approach Illis about this perceived problem, Respondent’s position statement makes no reference to this supposed spike in lateness or absences. [Tr. 2034-35, R-117]. Instead, Illis testified that she audited employees’ attendance records at

---

<sup>19</sup> The Employee Handbook has no policy regarding employees calling out before a scheduled day off. [GC-16]. Respondent only offered an attendance policy relating to call outs before a scheduled day off that is part of a manager’s manual provided to only managers and supervisors and is not part of the Employee Handbook. [Tr. 2059-61, R-78].

Konjoh's request, focused her attention on the "worst offenders", and provided the audits to Konjoh for her to issue discipline at her discretion. [Tr. 2713-15]. Neither Konjoh nor Illis explained why they waited until September 13 – a week after the Labor Day weekend – to issue these disciplinary warnings.

Konjoh and Illis further testified that the issuance of the tardiness and absenteeism disciplinary warnings were meant as a wake up call to employees and not as a punitive measure. [Tr. 2036]. But rather than counsel employees that they would strictly enforce an attendance policy, they issued disciplines.

Konjoh admitted that even though supervisors told her it was a common practice for employees to call into the facility to inform them of their late arrivals, she did not investigate whether employees were disciplined in the past for lateness nor did she consult with supervisors regarding the disciplinary procedure used at the facility. [Tr. 2359-61]. Southgate verified that neither Illis nor Konjoh met with her to discuss the disciplinary warnings. [Tr. 954-55]. Rather, Southgate testified that shortly after the Union election, Konjoh suddenly changed the call-out procedure. [Tr. 953]. Konjoh instructed her to forward all employee calls to her. [Tr. 953, 2274-75]. Southgate recalled a conversation where Konjoh said there was a union meeting that day and that if Jacques called in that day, Konjoh wanted to take that call. [Tr. 952-54].

At the hearing, Respondent produced lateness and attendance warnings assertedly issued to May Novelette, Dominique Joseph, Amaka Gladys Agu, Guillaume Soldedad, Patsy Benimadho, Cesu Lusette, Beatrice Beauvoir and Jennifer McAuley on September 13 and September 14. The Employee Warning Records issued to Novelette, Joseph, Soldedad and Lusette were unsigned by both the supervisor and employee. [Tr. 2044-54,

R-72-77, 103-105]. Konjoh testified that Employee Warning Records are normally signed by the supervisor, who issues the discipline and the employee, who receive the discipline. [Tr. 2048]. All of the disciplines post-dated the September 2 election.

Respondent also produced a “Punch Detail Report” for Amaka Gladys Agu, which states, “You were late 34 out of 37 shifts. Why?” [GC-133]. The Punch Detail Report makes no reference to discipline and no discipline was offered into evidence, despite Agu having a worse attendance record than Napolitano, Claudio or Jacques.

In response to her written warnings, McAuley alluded to the fact that she felt like “her head was on the chopping blocks.” Although McAuley did not specifically reference the Union, Illis testified that she addressed the statement with McAuley because Illis believed it was inappropriate and she was bothered by the implication that the written warning had a causal connection with the Union campaign. [Tr. 2720-21].

### 3. Discharge of Shannon Napolitano

As noted above, Napolitano worked at Somerset for 1 ½ years as an LPN on the day shift and at another Care One facility for 3 years previous to that. She was a leading Union supporter: distributing and collecting authorization cards; appearing on Union literature and the YouTube video; attending Union meetings; and serving as the Union’s observer at the election. Respondent admits knowledge of Napolitano’s union activity.

#### a. Somerset’s Charting Record Procedure Change

Immediately after the Union election, Respondent began to more closely monitor the work of several union supporters, including Napolitano. Southgate testified that, due to the results of the election, Konjoh made it clear that Respondent would be looking for any reason to discipline Union supporters. [Tr. 955]. Southgate admits that prior to the

election Respondent rarely conducted audits of medical administration records (“MARS”)<sup>20</sup> or treatment administration records (“TARS”). [Tr. 912-14].

b. Resident Reports Medication Error to Konjoh

About September 16, Konjoh was made aware of a patient’s complaint regarding being given a pink capsule. [Tr. 2145-47]. Konjoh immediately pulled the resident’s MARS to investigate what medications she was receiving. When the resident indicated that Napolitano had given her the “pink capsule,” Konjoh did not contact Napolitano to ask her what, if any, pink capsule she had given to the resident. Konjoh also did not check the medication cart to try to identify the pink capsule. Nor did Konjoh meet with Napolitano the next morning to ask questions about what medication Napolitano had given the resident. [Tr. 2165-67, 2563-68]. Engram testified that, in her professional opinion in this type of investigation, she would routinely review MARS and check the medication cart to identify the medication. [Tr. 1942-44].

Konjoh admits that after her review of the MARS revealed no medication matching the description of the pink capsule,<sup>21</sup> she returned to the resident’s room and gave the resident specific instructions not to take the medication if the nurse gave it to her again and to promptly report the incident to her.<sup>22</sup> [Tr. 2147]. According to Southgate,

---

<sup>20</sup> MARS identify patient medications and track when the medications are given, by date, time and administering nurse. MARS records are created when the patient is admitted to the facility by transcribing information from a physician’s order sheet (“POS”) onto the MARS. MARS records are maintained on medication carts parked at the nurses’ station. There are three medication carts used at the facility. Medications are divided by boxes with the patient’s names. Medications for approximately five patients are maintained in each drawer of the cart. [Tr. 2536]. When a nurse dispenses medication, he/she is responsible for initialing the MARS in a box under the appropriate time and date that the patient was given his/her medication. On the day shift, patient medications are dispensed from approximately 8-9 a.m. and from approximately Noon-1p.m. Nurses are assigned approximately 15 to 22 patients per shift depending on the daily census. [Tr. 2537].

<sup>21</sup> She testified that the pill could have been more potent than zinc. [Tr. 2569].

<sup>22</sup> Konjoh’s attempt to distinguish between “holding the medication” and “not taking the medication” is puzzling, confusing and disingenuous given that the patient subsequently did not take the zinc pill as requested by Konjoh to do. [Tr. 2391-93].

that same day Konjoh told her that a resident had informed her that Napolitano had been giving her zinc, which had been discontinued. Konjoh told Southgate that she had instructed the resident to hold the medication and report to her if Napolitano gave it to her again. [Tr. 963-64].

Southgate concluded that Konjoh had set up Napolitano to justify her termination. [Tr. 963-64]. Southgate came to that conclusion because Konjoh, having specific information that the zinc was discontinued, had a medical duty to remove the zinc from the medication cart and intentionally failed to do so. [Tr. 964-65]. Engram agreed that a DON has a professional obligation to remove the discontinued medication from the medication cart if she knew about it. [Tr. 1942-44].

c. Napolitano's September 17 Incident and Discharge

Napolitano reported to work on Friday, September 17. That morning, Napolitano went to speak to staffing coordinator Valarie Wells regarding her double shift. [Tr. 356]. Irene D'Vidio was in the office as well. Wells informed Napolitano that her double shift was canceled.<sup>23</sup> D'Vidio added that she should start looking to transfer somewhere closer to her home because things were going to get worse. [Tr. 356]. Napolitano asked D'Vidio what she meant. D'Vidio responded that she was not allowed to say. [Tr. 357].

Later that morning, Napolitano ran into Southgate at the nurses' station. Southgate looked troubled and Napolitano asked her if something was wrong. Southgate said that there was stuff going on in the building that was making her sick. Napolitano asked her what it was but Southgate said that she was not allowed to say. [Tr. 355-56].

---

<sup>23</sup> Napolitano worked double shifts on Monday and Friday and every other weekend. [Tr. 285].

Sometime during the morning med pass, Southgate asked Napolitano for her MARS telling her that Konjoh wanted to review her medication orders.<sup>24</sup> [Tr. 358]. Konjoh asked Southgate to photocopy the MARS for Konjoh's records. Napolitano felt like Southgate's request was peculiar because she had never before asked to review her MARS. [Tr. 358]. Southgate returned the MARS to Napolitano shortly afterwards.

Napolitano continued with her med pass and entered Room 15. Napolitano gave resident 15W her medication while recreation aide Patsy Benimadho was also in the resident's room. Napolitano testified that resident 15W had a peculiar way of taking her medication; the resident would pour all of her medication in her hands and then ingest them together. Napolitano observed resident 15W take her medication and in fact, waited 5 minutes to confirm that she had taken all of her medication. [Tr. 360-61].

Within minutes of exiting resident 15W's room, Benimadho approached Napolitano to tell her that resident 15W contacted Konjoh to speak to her. Napolitano observed Konjoh go in to see resident 15W and then come out of the resident's room. Konjoh approached Napolitano at her medication cart holding a pink capsule in her hand and said that the resident was not supposed to get this medication. [Tr. 359-60].

At approximately noon, Konjoh called Napolitano into a meeting with Illis. Konjoh explained to Napolitano that she had given a resident a zinc oxide pill that the resident was not supposed to receive because it had been discontinued. [Tr. 362]. Konjoh explained that the resident had approached her earlier and told her that Napolitano was the only nurse giving her the pink pill. [Tr. 363]. Konjoh showed Napolitano the MARS

---

<sup>24</sup> Napolitano testified that Southgate requested the MARS around 9 a.m. or 10 a.m. [Tr. 359].

for August 2010 where the medication was discontinued with a line through August 24 and her initials signed afterwards.<sup>25</sup>

A review of the August 2010 MARS shows that two other nurses, Carol Chambers and Henrietta Lezuaba initialed as having given resident 15W zinc after the discontinuation date. Chambers and Lezuaba initialed the MARS on August 27 and August 28 respectively. [GC-100-103, 106]. Konjoh admits that Chambers and Lezuaba were not disciplined.<sup>26</sup> [Tr. 2377-80].

Konjoh also told Napolitano that she had documented a zero oxygen saturation level for a different resident.<sup>27</sup> Napolitano told Konjoh that her practice was to review her TARS at the end of the shift and she would have picked up the mistake and corrected it. [Tr. 369]. Konjoh admits that the oxygen saturation reading was obviously an error. [Tr. 2570]. Napolitano also testified that she carried a sheet of paper which she used to write down residents' vitals and treatments and that she used this sheet to review her

---

<sup>25</sup> Napolitano testified that the zinc oxide pill did not appear on the MARS in September. [Tr. 368].

<sup>26</sup> Konjoh offered testimony that was blatantly spun to fit Respondent's shifting defenses. Konjoh's testimony was detailed in direct examination, but was vague, evasive and combative in cross examination when she was asked about Union meetings with employees; management meetings where Pat Fleming discussed the Union organizing drive; and disparate treatment of employees. Seeking to establish that Napolitano was the only nurse who gave a resident medication after it was discontinued, Konjoh testified that Napolitano's initials were the only initials, except for Claudio's scratched out initials, that appeared after the medication had been discontinued on 8/24. [Tr. 2158-63, 2165]. Konjoh's testimony changed when attendance records showed that the initials on 8/27 and 8/28 could not have been Napolitano because she did not work on either day. At that point, Konjoh miraculously recalled having conversations with the two nurses, LPNs Chambers and Lezuaba pertaining to the discontinued medication and their blanket denial that they had given the medication. Konjoh's testimony that she did not believe their stories, but she lacked sufficient proof to discipline them is mystifying especially when she did not offer Claudio the same benefit of the doubt regarding the nurses' admission note. [Tr. 2376-82].

If Konjoh's version was not fictional enough she then indicates that a diagonal line stretching from August 24 to August 31 was drawn in to cross out Chambers' and Lezuaba's names. [GC-106]. Konjoh could neither identify who drew the line nor when the line was made. [Tr. 2434-35]. Konjoh modified her testimony for the third time to emphasize that she believed Chambers' and Lezuaba's story because the patient had remarked that Napolitano was the only nurse that gave her the pink capsule. [Tr. 2377-80]. That Konjoh shifted her story to fit the information demonstrates that she was more interested in hiding the truth than the integrity of these proceedings.

<sup>27</sup> The oxygen saturation level is recorded on TARS. TARS is the record for treatments provided to patients, such as blood pressure readings, pain assessment, wound treatments, ointments, and creams. TARS are maintained in separate binders at the nurses' station.

records. According to Napolitano, the majority of LPNs use a separate sheet of paper to keep track of resident treatments.<sup>28</sup> Konjoh did not address the fact that Napolitano would have corrected her mistake in her review of the records. [Tr. 369]. Unlike Konjoh, Engram asserts that nurses routinely review their records at the end of the shift and if errors are discovered nurses can correct them without facing discipline. [Tr. 1982-83]. Napolitano testified that prior to State surveys unit managers, DON Eileen Meyer, and Care One Clinical Consultant Jessica Arroyo each told nursing staff to review their MARS and TARS at the end of their shifts to make sure there were no mistakes. [Tr. 370-73]. Southgate corroborated Napolitano's testimony. [Tr. 967].

Konjoh finally told Napolitano that she had documented a resident's pain assessment at the beginning of the shift rather than at the end of the shift. Napolitano told Konjoh that the year before, the State surveyor notified Somerset nursing staff that pain assessment should be documented at the beginning of the shift. [Tr. 378]. Konjoh left the meeting and returned with LPNs Michelle Moore, Sheena Claudio and Shanny Mangal.<sup>29</sup> Konjoh asked them for their understanding as to when pain assessment should be done. [Tr. 378]. Claudio and Mangal indicated that Napolitano's method for assessing pain was correct. [Tr. 131-32, 1169-71, 1178]. Konjoh confirms that these employees stated that Napolitano's pain assessment practice was correct. [Tr. 2171-73].

Konjoh and Illis asked Napolitano to write an individual statement, but they failed to explain what she should address in the statement. Napolitano wrote out a statement addressing solely the pain assessment portion of the supposed investigation. [GC-33]. Konjoh and Illis later presented Napolitano with a document that itemized the violations,

---

<sup>28</sup> Claudio corroborated Napolitano's testimony regarding this practice. [Tr. 163-68, 214].

<sup>29</sup> Respondent stipulated that Shanny Mangal's proper name is Maharanie Mangal.

including leaving medication at the patient's bedside and not witnessing the patient take the medication, and asked her to sign it.<sup>30</sup> [GC-34, R-82]. Napolitano signed the sheet of paper because she believed she had to sign all of her warnings. [Tr. 381]. At that point, Konjoh and Illis handed Napolitano her termination letter. [GC-35].

d. Events after Napolitano's September 17 Discharge

In the afternoon on September 17, Konjoh told Southgate that Napolitano had been terminated. Konjoh explained to Southgate how she had told resident 15W to hold the medication and that led her to discipline Napolitano for committing a medication error. Southgate did not react to what Konjoh told her, but instead kept quiet. [Tr. 966].

4. Discharge of Sheena Claudio

Sheena Claudio began working at Somerset in January 2010. Claudio was an active Union supporter who appeared on Union literature, provided a testimonial on the YouTube video, and played a prominent role in the organizing drive: distributing authorization cards, attending Union meetings, and wearing Union stickers. Prior to the September 2 election, Claudio had never been disciplined for any patient care issue, nor had she been counseled for any work performance deficiency.

a. Claudio's September 17 Discipline

On September 17, Konjoh issued Claudio a written discipline for giving a resident baby aspirin on two consecutive days when the order required the medication to be given every other day. [Tr. 139, GC-17]. Konjoh told Claudio that another nurse, Doreen

---

<sup>30</sup> Jacques testified that sometime in July 2010, after the petition was filed, she mistakenly left medication at a patient's bedside. According to Jacques, the mistake was discovered by a corporate official visiting Somerset Valley and was brought to DON Kamala Kovacs' attention. Jacques did not receive a warning for her medication error. [Tr. 479-82]. Rather, Respondent responded by holding an in-service on "Medication Administration and Documentation" on July 28, 2010. The July 28 in-service emphasized making sure that residents swallow their meds before nurses leave the room. [R-1].

Dande, had committed the same error.<sup>31</sup> [Tr. 139]. Claudio testified that the person who wrote the order should have blocked off every other day on the MARS which would indicate that the medication should not be given on those days. [Tr. 139-41]. Konjoh admits that Claudio raised this argument when she issued her the discipline. [Tr. 2188].

Claudio questioned Konjoh as to why nobody fixed the order on 9/7, but instead waited until she committed the same error. Claudio insisted that the error should have been picked up on the 24 hour chart check<sup>32</sup> and corrected by the 11 p.m. to 7 a.m. nurse.<sup>33</sup> [Tr. 142]. Nurses' meeting agendas for October and November 2010 note that chart checks on 11-7 are "a must." [CP-5, R-15, Tr. 996, 1976-77].

Although Konjoh testified that she reviewed new admissions within 24-48 hours, she could not recall why it took her more than 96 hours to review this particular new admission. Konjoh admits that had she reviewed the new admission within her usual timeframe she would have discovered that only Dande, who made the initial med pass, had committed the error. [Tr. 2487-90]. There is no evidence that Konjoh disciplined the 11-7 shift nurses for their failure to identify the error during the 24 hour chart check.

---

<sup>31</sup> The MARS indicates that Claudio and Dande each gave the resident Aspirin 81 mg or "baby aspirin" on consecutive days. [Tr. 2189-90, GC-18]. Dande's initials appear on GC-18 on 9/6 and 9/7 as "DD." [Tr. 139]. Dande received a written final warning on 9/17. [Tr. 2190, R-85].

<sup>32</sup> The 24 hour chart check is a review conducted by the night shift staff to verify that orders on MARS and TARS on new admissions match what are on the physician's orders. [Tr. 1975-78, 1987, 2544-52, CP-1]

<sup>33</sup> By Initial Notice dated March 29, 2010, the State of New Jersey Department of Health and Senior Services notified Heedles that the facility was found to be deficient in several categories in a complaint investigation. [GC-88]. The investigation revealed that Somerset failed to consistently document on TARS in violation of F-Tag 514. F-Tag 514 is a clinical records error listed on PP-855 of the Federal Regulations Guide. [R-57]. In order to remedy the deficiencies, Somerset submitted a Plan of Correction addressing what measures the facility would put into place to ensure that the deficient practice would not recur; how the facility would monitor its corrective actions; and the timeframe when the corrective actions would be implemented. [CP-1]. In this connection, Somerset's Plan of Correction indicated that the 11-7 shift would check for completion of MARS/TARS on a daily basis. [CP-1]. Thus, Somerset is required by its Plan of Correction to maintain the 24 hour chart check to prevent recurrences of deficient MARS/TARS.

b. Claudio's September 27 Discipline

About September 27, Konjoh issued Claudio a written warning for documentation errors on three separate patients. [Tr. 149, GC-19, R-86]. During the discussion, Konjoh asked Claudio how many days she was supposed to chart a post-status fall and a new patient admission. Claudio told Konjoh that every shift had to chart a post-status fall for three consecutive days and for five consecutive days for a new patient admission. [R-64] Konjoh asked if Claudio had done a nurse's admission note for a patient along with the admission package. Claudio answered that she had completed the nurse's admission note. Konjoh mentioned that she had the admission package, but the only thing that was missing was the admission note. [Tr. 150-52]. Konjoh admits that Claudio insisted that she had done the note, but she that she could not find the note. [Tr. 2195]. Konjoh further admits that the nurses' admission notes are at times written on the back side of the Daily Skilled Nurses Notes; however, she did not recall if she looked for Claudio's missing admission note there. [Tr. 2205-06, 2211-12, 2559-60].

Konjoh then told Claudio that she had charted on a patient for 1 out of 3 days for a post-status fall and that the 11-7 shift did not chart at all.<sup>34</sup> Claudio admitted that she did not chart for 2 days post-status fall, but insisted that she should not be the only nurse disciplined and that the 11-7 shift nurses should also be disciplined for the incident. [Tr. 152]. Claudio's written statement addressed the nurses' note and fall incident. [GC-19].

Claudio did not recall a second page to the September 27 discipline. [Tr. 153]. Neither did Claudio recall Konjoh discussing with her anything regarding a skin tear with

---

<sup>34</sup> A review of the Daily Skilled Nurses Notes attached to R-86 confirms Claudio's testimony that the night (N) and day (D) shifts did not chart on the patient post-status fall for 9/20 and 9/22 and did not chart on the patient post-admission on 9/22 and 9/26. [Tr. 2207-09].

another patient.<sup>35</sup> [Tr. 154]. Claudio testified that she responded to all of the allegations raised by Konjoh at the September 27 disciplinary meeting. [Tr. 155]. Claudio was suspended for two days. [GC-19, R-86]. Respondent offered no evidence that it disciplined the 11-7 shift staff for similar conduct.

c. Claudio's October 7 Incident and Discharge

On October 7, Claudio worked her regular 7-3 shift at Somerset and worked her per diem job that evening. After leaving for her per diem job, Claudio recalled that she had forgotten to initial her TARS. [Tr. 167]. Claudio had completed the treatments - she listed them on her personal sheet where she wrote down patient's treatments and vitals - but inadvertently failed to initial the TARS before she left Somerset. [Tr. 168].

Claudio returned to Somerset after 11 p.m. Claudio rang the door bell at the front door and 11-7 shift supervisor Janet Matthias opened the door. Matthias asked Claudio what she was doing back at the facility and Claudio told her that she had forgotten something. [Tr. 169]. Claudio walked to the nurses' station.

Within a few minutes, Matthias approached Claudio, who was reviewing her TARS. Matthias asked her what she was doing. [Tr. 169]. Claudio told her that she had forgotten to sign the treatment book. Matthias said, "Okay" and returned to the front desk. [Tr. 169-70]. Illis testified that after Matthias returned to the front desk she asked Matthias why Claudio had returned to the building and insisted that they walk to the nurses' station to investigate. [Tr. 2937-38].

---

<sup>35</sup> Konjoh testified that she disciplined Claudio for not obtaining a physician's order after Claudio treated a resident for a skin tear. [Tr. 2200-01]. A review of the documentation reveals that the resident was treated for a scratch to the right elbow. [R-86]. Although the documentation clearly states that the alleged skin tear was actually a minor scratch, Konjoh insisted that nurses had to get a physician's order even for scratches. [Tr. 2201-02]. That nurses would call physicians to obtain orders prior to treatment for such a minor issue makes little sense given the nature of the injury.

When Illis and Matthias reached the nurses' station Claudio and Jacques were talking. [Tr. 2938]. Illis asked Claudio what she was doing. Claudio told her that she had done her treatments, but she had forgotten to initial that she did them. [Tr. 169-70]. Illis warned Claudio that she could not initial her TARS because it would be considered forgery. [Tr. 169-70]. Illis admitted that she used the word forgery. [Tr. 2938]. Claudio questioned, "How is it forgery if I did them and just forgot to sign?" Illis responded that she was not on the clock, could not sign them and was putting her license at risk. [Tr. 169-70]. Illis then ordered Matthias to seize the TARS, and Claudio handed them to her.

Illis asked Claudio to leave the facility. Claudio left the facility without signing the treatment book. [Tr. 170]. Claudio indicated that before the election, she had occasionally signed TARS the day following treatments without any incident. [Tr. 170-71]. She further testified that she saw blanks in TARS on the 11-7 shift and the next day she would see the blanks filled in. [Tr. 171]. Numerous witnesses testified that Somerset has had a recurring issue with blanks in MARS and TARS, but those issues were resolved through in-services rather than discipline. [Tr. 916-17, 968-69, CP-1, 2, 5, R-15].

d. Events After the October 7 Incident

Mangal's assignment on October 8 was to train LPN Sally Conteh, who was in her orientation period. Mangal testified that Conteh notified her that Dande had failed to sign for treatments on October 7. [Tr. 1172]. Conteh on her own made Dande aware of these errors. [Tr. 1172-73]. Mangal overheard the entire conversation and observed Dande initial the TARS at the nurses' station. [Tr. 1173-76]. This is further evidence that missed entries are customarily made on a subsequent date.

That same day, Konjoh called Claudio to schedule a meeting to discuss what happened on October 7. [Tr. 172]. About a week later, Claudio met with Konjoh. Claudio explained that she had completed her treatments, but had inadvertently forgotten to initial the TARS. Claudio told Konjoh that she returned to initial the TARS because Somerset had fired other employees for patient care issues and she did not want Somerset to think that she did not do the treatments. [Tr. 172]. Konjoh asked Claudio to write her statement and said that she would conduct an investigation. Claudio asked what there was to investigate given that she had simply forgotten to initial her treatment book. [Tr. 173]. Claudio gave a written statement about the October 7 incident. [GC-26].

Typically nurses verify that they provided treatments by signing and dating the bandage or gauze applied to cover the treatment wound. Claudio testified that Somerset could easily verify that she had completed her treatments since she signed and dated them. [Tr. 170, 253-54]. Engram agreed that the general practice for a nurse who has done her treatments but forgotten to initial the TARS is to allow the nurse to place a circle on the blank and initial the nurses' note without being disciplined.<sup>36</sup> [Tr. 1949-50, R-64]. Southgate also testified that nurses could initial TARS on the next day.<sup>37</sup> [Tr. 1109-10]. In contrast, Konjoh testified that she would only allow a nurse to sign off on treatments on the same shift without facing discipline.<sup>38</sup> [Tr. 2014, 2219-20]. Her

---

<sup>36</sup> In Section 19.2 of Somerset's Medical Record: Charting and Documentation policy, it states "draw a single line through the error, write the correction above the error, and initial and date the change." In Section 19.3, the policy reads: "do not leave blank lines. Draw a single line through a blank line." [R-64].

<sup>37</sup> Mangal testified that a nurse who forgot to sign her TARS could receive permission from a supervisor to initial her TARS after the fact without facing disciplinary action. [Tr. 1181-82].

<sup>38</sup> Numerous witnesses – both nurses and supervisors – acknowledged that nurses regularly charted in TARS at the end of the shift. Given that there are two medication passes, in addition to patient treatments, it is unlikely that nurses would be able to chart for all 15-22 patients immediately after providing the treatments. Thus, Konjoh's testimony in this regard is untrustworthy and must be discredited.

testimony is in direct contradiction to Somerset's Medical Record: Charting and Documentation policy 19.2. [R-64].

Konjoh asserts that her investigation into the October 7 incident found no evidence that Claudio had actually done the treatments in question. [Tr. 2218-19, 2557-59]. Respondent offered no evidence to support Konjoh's contention. Konjoh's testimony is contrary to the reasons cited in Respondent's October 21 termination letter. [GC-25]. Respondent's October 21 termination letter does not charge Claudio with failure to perform patient treatments. Instead, the letter addresses only Claudio's failure to complete clinical documentation.<sup>39</sup> Claudio received the October 21 termination letter shortly after Respondent's termination decision.

5. Mohammed Bockarie and Somerset's Push to Monitor Union Supporters

As part of Somerset's post-election push to weed out Union supporters, Illis maneuvered for Mohamed Bockarie to transfer from Holmdel to Somerset. Bockarie started working as an aide at Holmdel in 2009. In July 2010, Bockarie became an LPN. [Tr. 3160-62].

Illis initiated contact with Bockarie after the election. She told him that the Union won the first election, Somerset was petitioning for another election, and she was recruiting employees to come over to Somerset to support the company (and vote against the Union). Illis asked him who from Holmdel he believed would be interested in transferring. In short order, Bockarie (in late October, less than two weeks after he applied), Abdulai Monsaray, Irene Donker, and Elzira Vital transferred to Somerset. Illis offered Bockarie his preference of shift and requested that he serve as her eyes and ears

---

<sup>39</sup> It is undisputed that Claudio returned to Somerset to complete her clinical documentation and Illis prevented her from doing so.

in the building to monitor Union activity. Additionally, Illis requested that Bockarie keep his eyes peeled for errors committed by Union advocates, specifically Jacques. Illis asked him to review nurses' notes, charts, MARS, and TARS with the hope that he would uncover said errors and report them to her. [Tr. 3161-71].

Starting with his late October transfer to Somerset, Bockarie frequently met with Illis alone in her office. During these conversations, Illis referenced her desire to remove Jacques and other Union sympathizers, like Southgate, and even stated that improving patient care would take time, but she needed to get over the Union issue first. [Tr. 3170-73]. Their in-person machinations, however, are trumped by the sheer volume of text messages sent between the two from mid-October 2010 (including approximately 23 text exchanges prior to his transfer date) until early January 2011. As an example, Illis and Bockarie exchanged 14 text messages on November 3, 2010. [GC-138, Tr. 3171]. Finally, Bockarie asserts that in about January 2011, Illis asked him to go to a Union meeting at a nearby hotel to monitor who was in attendance and to report back his findings. Illis offered him paid time off to attend this meeting. [Tr. 3176-77].

#### 6. Discharge of Jillian Jacques

Jillian Jacques worked for Somerset for eleven years as a licensed practical nurse. She was a highly valued employee and regularly performed charge nurse functions. Jacques had a relatively clean disciplinary record before the Union election.

Jacques was one of the leading Union supporters and was open in her support of the Union. At the election, she served as a "roving" Union observer and also appeared on Union literature and gave a testimonial on the YouTube video.

a. Jacques' September 28 Discipline

About September 28, 2010, Konjoh gave Jacques a written warning allegedly for failing to chart a post-admission and a post-fall on patients on September 24 and 25. [GC-43]. Jacques informed Konjoh that she had not worked on September 25, but Konjoh refused to rescind that portion of the warning. [Tr. 554-55]. Respondent's work schedules confirm that Jacques did not work on September 25. [GC-43, 44].<sup>40</sup>

b. Jacques' November 1 Discipline

On November 5, Southgate handed Jacques a written warning for failing to properly fill out an incident report. [Tr. 567]. Jacques asked Southgate if she knew why she was being disciplined. Southgate said that Konjoh had instructed her to write her up for the incident report. [Tr. 568]. Jacques told Southgate that she had called Konjoh, left a message explaining that she was unable to complete the incident report because the aide had left, she was aware of her charting responsibilities, and would obtain the aide's statement the following day.<sup>41</sup> [Tr. 568-69]. Jacques responded to the 11/1 discipline. [GC-46]

---

<sup>40</sup> With regard to Jacques' 9/28 discipline, Konjoh's testimony is contradicted by Respondent's position statement. Konjoh testified that she had crossed out a portion of Jacques' 9/28 discipline. [Tr. 2222-25, 2254-55]. However, Respondent's position statement, dated March 30, 2011, attached Jacques' 9/28 disciplinary action with no portion of Jacques' discipline crossed out and made no reference to that portion of Jacques' discipline being crossed out. [Tr. 2498-2500, GC-116].

Another employee, Patty Beck, had actually failed to document the 9/25 post-status fall. Konjoh initially testified that Beck had been subsequently disciplined for the 9/25 documentation error attributed to Jacques as proof that she had crossed out the discipline on Jacques' 9/28 discipline. [Tr. 2229, 2242, 2255-56]. Yet Konjoh interrupted her testimony to admit that the discipline issued to Beck on 9/28 was not the same, but was actually for another documentation error she had committed on the same date. [Tr. 2257-60]. Konjoh admitted that Beck should have been disciplined for the documentation error cited on Jacques' 9/25 warning. Konjoh argued she had intended to discipline Beck, but forgot to do it. [Tr. 2257-61].

<sup>41</sup> The incident report consists of the Incident/Accident Report, Nurses' statement, Aide statement and Supervisor's statement. [Tr. 569-70]. Jacques followed Somerset's Accidents/Incidents policy (Section 4.5), which requires nurses to make the Administrator or DON aware of any incidents occurring in the facility so they can review and sign all completed reports. A nurse has 24 hours to submit a completed accident/incident report and investigation forms to the Administrator and DON. [R-62]. Jacques' testimony demonstrates that she knew her responsibilities and intended to complete the incident reports within 24 hours of the incidents.

Konjoh admits that Southgate made her aware of Jacques' claims. [Tr. 2233-35]. Although Konjoh acknowledges receiving a voicemail from Jacques explaining why she failed to complete one report, Konjoh asserts that Jacques failed to address errors on two other reports. [Tr. 2234-35, R-88]. This contention is in stark contrast to Jacques' response to the 11/1 discipline citing all three incidents. Konjoh's acknowledgement that Jacques must have completed the incident reports because she signed off on them further evinces that her story is contrived. [Tr. 2232, R-88]. Southgate testified that the discipline was not deserved and that Konjoh was being too rigid. [Tr. 986, 1136].

c. Jacques' February 7 Incident and Discharge

About three weeks before Jacques' termination, the Hearing Officer issued her Report on Objections in Case 22-RC-13139 overruling all of Respondent's objections to the election conducted, including an objection in which Konjoh accused Jacques of telling voters to vote yes for the Union while serving as an observer. [GC-49].

On February 7, 2011, Jacques served as the 3-11 charge nurse. That particular day was extremely hectic with five new admissions, patient issues, family member questions, as well as the facility's fax machines not working. [Tr. 574-77]. Jacques told unit manager Mike Yannota that the fax machines were not working, but Yannota did nothing to fix the problem. [Tr. 578].

Either on February 8 or February 9, 2011, Mangal asserts that Yannota asked to review the MARS for a patient who had been admitted the night before. About ten minutes later, Yannota told Mangal that Jacques had forgotten to put a medication on the MARS. Mangal says she told Yannota that she could provide the patient with the proper

medication, but Yannota insisted that he would first contact the physician to verify that the patient was still on the medication. [Tr. 1174].

On February 9, 2011, Acting DON Engram met with Jacques and asked her if she worked as the charge nurse on February 7. Engram told her that she transcribed the wrong medication from the POS and failed to transcribe the same medication onto the MARS. [Tr. 579]. Engram sent Jacques home while the facility investigated the incident. Jacques asked why the error was not picked up by the 24 hour chart check and Engram acknowledged that the 24 hour chart check missed the error. [Tr. 575-76]. That evening, Jacques received a message from Illis asking her to return to the facility the next day.

On February 10, 2011, Illis informed Jacques that she had improperly transcribed enteric coated aspirin. Jacques asserts that she told Illis and Engram that no nurse in such a chaotic situation could do the five admissions like she did. [Tr. 576]. Jacques again asked why the 24 hour chart check did not pick up the transcription error and Engram again admitted that the 24 hour chart check missed the error. [Tr. 1892, 1975-76].

Engram also told Jacques that she had failed to chart on a patient post-status fall on the second day, which Jacques admitted. [Tr. 576]. Even though Konjoh, Illis and Engram testified that they conducted audits on MARS and TARS only if it was a new admission, or if there was a specific complaint, Engram admits that the post-status fall incident occurred the week prior to the transcription error. [Tr. 1965-68]. Engram did not testify to a specific patient complaint that warranted the investigation. Jacques disputed Respondent's version of facts in the discipline. [GC-48]. Engram discharged Jacques for patient care issues.

After her termination, while talking to LPN Sharon Smith regarding her discharge, Smith admitted to Jacques that she had committed a similar transcription error the week before and she was told by Engram to simply correct the error. [Tr. 583].

7. State Survey

All nursing homes and rehabilitation centers that participate in Medicare and Medicaid must meet Federal regulation requirements. [Tr. 1846-47]. State surveys are performed on average every 12 months. [CP-3]. Nursing homes are not informed when surveys will be conducted, but the facilities can predict when a survey is likely to occur and begin preparing for the survey by holding in-services to spotlight deficiencies which the State surveyors look for, conduct medication pass training and review medical records, including MARS and TARS for accuracy. [Tr. 1849-50].

When a nursing home fails to meet federal requirements it is cited for a deficiency. [Tr. 1850-1853]. The federal regulations have 190 possible deficiencies that fall into 16 different categories. [R-57, CP-3]. Surveyors determine the scope and severity of the deficiencies based on a matrix outlined below. [CP-3].

	Scope of the Deficiency			
	Isolated	Pattern	Widespread	
Severity of the Deficiency	Immediate jeopardy to resident health or safety	J	K	L
	Actual harm that is not immediate jeopardy	G	H	I
	No actual harm with a potential for more than minimal harm, but not immediate jeopardy	D	E	F
	No actual harm with potential for minimal harm	A	B	C

Substandard quality of care exists when a facility has one or more deficiencies at the more serious scope and severity levels within certain categories. The scope and

severity levels of substandard quality of care are shown in the shaded area in the matrix as gleaned from CP-3, page 3 above (letters “F,” “H,” “I,” “J,” “K” and “L”).

Surveyors also investigate complaints. Complaints may be by nursing home residents, family members, or facility employees. [Tr. 1849-50]. The State must review all allegations and depending on the outcome of the review, the State may conduct a standard or abbreviated standard survey to investigate the allegation. A substantiated allegation results in a citation for a deficiency. [CP-3, pg. 2].

In 2007, 92.2% of nursing homes in New Jersey received deficiencies. The average number of deficiencies per nursing home surveyed in New Jersey was 4.3 deficiencies. [CP-3]. At the hearing, Hutchens confirmed that the State average for deficiencies per home in New Jersey in 2011 was 6 deficiencies. [Tr. 1679].

a. State Survey and Complaints 2008-2010 Overview

The 2008 State Survey was conducted on December 22, 2008. At that time, Carolyn Allen was Somerset’s Administrator. The State cited the facility for 4 deficiencies. Twelve months later, the State visited Somerset for the 2009 survey. [R-33]. As noted above, Elizabeth Heedles was Somerset’s Administrator. In this survey, the facility was cited for 6 deficiencies. The most serious deficiencies were two G-tags that constituted “isolated actual harm that is not immediate jeopardy.” The G-tag deficiencies related to the facility’s lack of a comprehensive care plan and pain management assessment for a single resident. A severity level of “G” does not constitute a substandard quality of care as shown in the deficiency matrix above.

The State required the submission of a corrective plan and the State’s revisit found that the deficiencies cited on the 2009 survey had been corrected. [R-35]. Although the State’s letter contains a recommendation that the facility be fined for non-

compliance, Respondent did not offer any evidence that the facility paid the fine. Hutchens would have had to approve payment of such a fine and could not recall that the facility had paid a fine. [Tr. 1631-32].

Although Hutchens argues that he was concerned by the 2009 State survey, he did nothing to address the supposed quality of care issues for 9 months. The breadth of complaint allegations in March 2010 required the State to conduct a standard survey. This led to Somerset having to submit another plan of correction to address deficiencies found by the State. [CP-1, GC-88]. By letter dated April 29, 2010, the State accepted the facility's plan of correction. [GC-87]. Despite the facility's citation for deficiencies in the State survey and complaint investigation, Respondent did not make changes to the Administrator or DON until right after the Union petitioned to represent Somerset's employees.

Even though Hutchens posited that the 2009 State survey prompted him to clean house (switching administrators and director of nursing) and prioritize clinical improvements, the 2010 State survey belies his contention. In the 2010 state survey, the facility was cited for 25 Federal and State deficiencies and many of the deficiencies were categorized as substandard quality care. [R-37, 38]. Deficiencies rose by over 400% in less than a year. The figure is four times the State deficiency average. Hutchens admits that the 2010 State survey was not good and resulted in Somerset Valley's star ratings being lowered to the bottom of nursing homes in Somerset County.<sup>42</sup> [Tr. 1680].

#### 8. Documentary Evidence of Disparate Treatment

Respondent's claim that it administered discipline in a fair, non-discriminatory manner is not supported by the record. The record demonstrates that Respondent's

---

<sup>42</sup> Illis also admitted that the 2010 State survey was not favorable. [Tr. 2675, 3112].

disciplinary practices when it came to Union supporters or individuals that it reasonably believed supported the Union was defined by haste and decisive discipline. Yet when discipline was issued to non-Union supporters or individuals that were not viewed as leading Union adherents, Respondent's disciplinary practice was defined by inconsistency and restraint. The following table summarizes this point:

<b>Name</b>	<b>Dates</b>	<b>Warning Type</b>	<b>Description</b>	<b>Exh. #</b>
<b>Mohamed Bockarie</b>	12/1/10	Verbal	Incorrect Pain Assessment	GC-110
	1/28/11	Verbal	Failure to Sign MARS	R-132
	4/5/11	Verbal	Lateness	Same
	4/22/11	Unknown	Documentation Error	Same
	4/23/11	Unknown	Documentation Error	Same
	4/29/11	Unknown	Failure to Order Meds	Same
	5/13/11	Unknown	Failed to write admission note	Same
	5/18/11	Suspension		Same
	5/24/11	Termination		Same
<b>Doreen Dande*</b>	9/17/10	Written Final	Medication Error	R-85
	11/8/10	Written	No Incident Report	R-93
	11/23/10	Written	Patient Care	R-98
	11/26/10	Written	Medication Error/Falsified Rrd.	R-83
	2/9/11	Unknown	Documentation Error	R-133
	2/12/11	Resignation	TARS not complete	Same
<b>Michelle Moore*</b>	3/4/10	Verbal	Documentation Error	GC-118
	6/3/10	Written	Leaving Medication Bedside	GC-119
	12/23/10	Written	Transcription Error not on POS but on MARS/Discharge Order	R-84
	2/9/11	Written	Trtmnts not done/Falsified Rrd.	R-68
<b>Patty Beck</b>	9/10/10	Written	Medication Error/Falsified Rrd.	R-94
	9/28/10	Verbal	Admission/Incident Report	R-90
	10/21/10	Verbal	Incomplete Incident Report	GC-114
	2/15/11	Written Final	Trtmnt Not Done/Falsified Rrd.	R-69
<b>Jeremias Santos</b>	3/16/10	Verbal	Delay in Medication Order	GC-112
	11/29/10	Verbal	Administered Meds w/o Order	GC-111
	11/29/10	Verbal	Failed to complete Admission Assessment	R-91
<b>Maharanie Mangal</b>	12/6/10	Written	Leaving Medication Bedside	R-24
	12/22/10	Written	Incorrect Med Pass (State Survey)	R-25
<b>Alice Bisong</b>	10/25/10	Verbal	Incident Report Incomplete	GC-115
<b>Paulino Sagrario</b>	9/6/10	Written	Patient Care	R-98
<b>Adeline Destin</b>	12/28/10	Written	Patient Care	R-98

<b>Cheryl Dacres</b>	11/29/10 12/17/10	1 <sup>st</sup> Written 2Day Suspension	Patient Status Chg. Not Follow Neglected to Report Abuse (State Survey)	R-98 R-98
<b>Avian Jarbo</b>	12/27/10	Verbal	Dress Code	R-120
<b>Nicole Ibe</b>	1/29/11	Written	Incident Report Post-Fall Incomplete; No neuro check	R-67
<b>Beatrice Beauvoir*</b>	2/3/10	Verbal	Patient Care (Wrong Weight)	GC-113
<b>Miguel Roche*</b>	8/27/10	1 <sup>st</sup> Written	Inaccurate Stmt./Falsified Rrd.	R-95
<b>Sally Conteh</b>	11/29/10  1/10/11	Verbal  Termination	Did Not Transcribe Order on MARS or POS (Retrained) Pain Assessment Incorrect/ Missed IV/Asked Another Nurse to Write Stmt./Daily Skilled Nurses' Notes Incomplete	R-89  R-131

The asterisks next to the name of certain employees denote that the employees testified for Respondent at the Objections hearing. [GC-49]. The table demonstrates that these individuals were treated leniently and Respondent ignored progressive discipline. For example, Dande was issued four consecutive written warnings for similar errors that Napolitano, Claudio, and Jacques allegedly committed, yet she was not terminated. By Konjoh's own account, Dande also falsified MARS records representing that she had given a resident his/her medication when in fact she had not. [R-83, Tr. 2477-83]. Konjoh did not issue Dande discipline for this infraction.

Respondent also disciplined known Union supporters more harshly than other employees. Thus, for example, Patty Beck and Alice Bisong (verbal warnings) were obviously treated differently than Jacques (2<sup>nd</sup> written warning) despite each failing to properly complete incident reports. Sally Conteh and Michelle Moore received only verbal warnings for failing to transcribe an order onto MARS and POS yet Respondent terminated Jacques for the same infraction. Remarkably, employees who falsified medical records were issued only written warnings (e.g. Beck and Dande). [R-83, 94].

Numerous witnesses testified that Respondent failed to issue discipline to individuals perceived to be supportive of Respondent. For example, Jacques testified that in two separate incidents in December 2010, Dande and Bockarie failed to give residents their Coumadin medication.<sup>43</sup> Jacques specifically reported Bockarie on the 24 hour report because the resident's physician was extremely upset over the matter. The next day, Jacques approached Konjoh to inquire about Bockarie's Coumadin error, but Konjoh said the matter was already taken care of. [Tr. 471-76]. Bockarie confirms Jacques' account. He acknowledges failing to give the required medication, admits that the PT/INR was not done, and that Konjoh and ADON Francia Dominique were standing at the nurses' station with him when Jacques accused him of this serious infraction.<sup>44</sup> [Tr. 3177-78].

Southgate also testified that she received complaints from residents about Dande and Bockarie's failure to administer medication, and received incomplete admissions paperwork from them. Neither Dande nor Bockarie was disciplined for these incidents. [Tr. 970-71, 982-83]. In this connection, Southgate described how she prepared to discipline Dande for an incomplete incident report yet Konjoh thwarted her from issuing discipline.<sup>45</sup> [Tr. 986-97]. Respondent did not refute Southgate's account.

Southgate testified that she frequently noticed blanks in her review of MARS and TARS yet did not issue discipline.<sup>46</sup> [Tr. 968-69]. This persistent problem is clear from a review of MARS and TARS introduced at the hearing. [GC-18, 106, R-131-133]

---

<sup>43</sup> Coumadin is a blood thinner that can cause significant harm if not properly dispensed.

<sup>44</sup> Bockarie had no reason to fabricate this testimony admitting to his serious medication error.

<sup>45</sup> The persistent problems with proper documentation in regards to the 24 hours reports, new admissions documentation and accident/incident reports were repeatedly a subject of in-service trainings at Somerset. [CP-4, R-127].

<sup>46</sup> Southgate's testimony is bolstered by Respondent's monthly nurses' meetings that repeatedly mentioned "blanks on MARS and TARS no excuse." [CP-2, R-70, 15, CP-5].

9. Valarie Wells

Valarie Wells served as Somerset's staffing coordinator for about seven years. She started working at the facility as an aide in 1995. She worked in this capacity for about ten years, slowly migrating some of her work responsibilities into the staffing job. She performed aide and staffing work simultaneously for a period of years until in January 2010, Wells' staffing duties became her full-time job. Even as a full-time staffing coordinator, Wells occasionally filled in as an aide on an as needed basis. [Tr. 1185-88, 1190-91, 1194]. Her regular work hours were Monday-Friday, from about 6:30 a.m. to 3:00 p.m. [Tr. 1206, 1208].

a. Wells' Spotless Staffing Coordinator Discipline Record Until September 2010

As staffing coordinator, Wells reported to either the DON or the Administrator. Prior to the September 2 election, Wells had never received a discipline in her capacity as staffing coordinator. This spotless record covered the tenures of Carolyn Allen, Elizabeth Heedles, Doreen Illis, Rebecca McCarthy, Christiana Enworum, Eileen Meyer, Kamala Kovacs, and Inez Konjoh. Before the election, neither Illis nor Konjoh spoke to Wells about any problems they had with her job performance. In fact, in August 2010, Illis told her to continue doing what she was doing. [Tr. 1233-38]. Although Illis asserts that she did speak to Wells about her performance pre-election, no written evidence was proffered. [Tr. 2744-45]. Wells denied these conversations occurred. [Tr. 1237].

b. Staffing Coordinator Responsibilities

The staffing coordinator at Somerset generates the daily and monthly nursing department schedules. [Tr. 1198, Tr. 1204]. The daily staffing numbers and needs vary

in concert with fluctuations in the resident census. [Tr. 1299-1300]. Wells also ensures that replacements are found to cover shifts when employees call off or are on vacation.

Wells generated monthly nursing schedules and usually tried to have them posted by the middle of the month. [Tr. 1198-1200]. The new schedules, posted by Wells in the employee break room, would cover a four week period. [GC-64, R-108]. Although Wells, and Care One facilities, used a scheduling application called Smartlinx<sup>47</sup> to generate forms, monitor and track attendance, schedules, and payroll, Wells generated the monthly nursing master schedule from her desktop Microsoft Excel spreadsheet. [Tr. 1202-03, 1222]. She did so because quite simply nobody had ever told her otherwise.

Wells generated daily assignment sheets for all three facility shifts. She transposed the monthly schedules onto the daily schedules taking into account vacation requests, call offs, staffing needs, etc.<sup>48</sup> These daily assignment sheets listed which nurses were assigned to which rooms and which aides were assigned to specific posts or special assignments required of them during the shift. [GC-65, Tr. 1204-05].

To locate a replacement aide on a shift, Wells would inquire with present staff or use her aide phone log to seek volunteers to cover the shift. When using this phone list, Wells would try to use per diems or part-time employees because that is what former DON Rebecca McCarthy instructed her to do. [Tr. 1208, 1210-11]. Former DON Eileen Meyer created a “cheat sheet” for Wells to use, which tracked the daily holes in the schedule and her attempts to track down a replacement. When Wells left for the day, she

---

<sup>47</sup> Other Somerset employees with access to Smartlinx included the payroll/benefits coordinator, DON, and administrator. [Tr. 1203]. Hutchens could also access this data in real time.

<sup>48</sup> Wells testified that she used a staffing grid generated by the Employer which dictated how many nurses and aides to use on a given shift based on a given census figure. Wells further testified that Illis instructed her not to use this grid religiously while making schedules in August 2010. On September 7, Illis directed Wells to resume using the grid full-time. [Tr. 1299-1301].

attached the cheat sheet to the assignment sheets and gave them to the nursing supervisor on duty. This way the nursing supervisor would know who had already been contacted regarding filling the schedule vacancy. The daily assignment sheets would remain at the nurses' station for each shift. The next day, Wells would collect them, put them in a binder, and monitor any changes from the previous shifts that might need to be documented in Smartlinx. [Tr. 1212-14].

Wells was also charged with sending a census report to Care One designees. Wells' component of the report listed the facility census and a breakdown of staff classifications for each shift. Wells submitted weekend census reports on Friday, with the understanding that census numbers could change over the course of a day or two (depending on the number of admissions, discharges, etc.). This report was generated out of Smartlinx. [GC-66, Tr. 1217, 1219, 1221, 1357].

c. The Heedles Schedule

In about June 2010, Heedles announced significant changes to employees' hours, days and shifts worked, and job status. Heedles told employees that the changes would take effect on August 1. Heedles created this new schedule on her desktop, e-mailed it to Wells on July 16, and requested that Wells post it in the breakroom. Wells did so. Unbeknownst to Wells at the time, Heedles also manually changed employees' schedules in Smartlinx. Later on Wells could tell that Heedles made these changes because Smartlinx identifies the system user who makes schedule modifications. Wells recognized Heedles' user ID as the one attached to the systemic changes.<sup>49</sup> Heedles'

---

<sup>49</sup> On April 8, 2011, Counsel for the Acting General Counsel issued a Subpœna *duces tecum*, which in paragraph 11 specifically requested "For the period June 1, 2010 to August 9, 2010, all documents that reflect or concern additions and/or deletions made on the SMTLX system by Elizabeth Heedles." No

sudden transfer in the wake of the petition being filed, along with Illis' instruction to Wells in August to take down the posted Heedles schedule and return to the prior schedule, created chaos. [Tr. 1222-26].

d. Wells' Union Activities

Because Wells believed her part-time aide duties enabled her to vote in the Union election, she approached the organizing campaign with alacrity. She signed an authorization card, attended Union meetings, appeared in the Union's flyer and in the YouTube video. Her appearance on the flyer and YouTube video confirmed Somerset's knowledge of her Union sympathies. [GC-10, 11, Tr. 1194-96].

Wells appeared to vote on September 2. She was on vacation beginning September 1 and so she arrived at Somerset on September 2 with the sole purpose of voting. Her name did not appear on the *Excelsior* list but she was permitted to cast a ballot under Board agent challenge. Konjoh acknowledged seeing Wells come in to vote on September 2. [GC-4, Tr. 1195-96, 2140-41].

e. September 7-September 21: From Zero Disciplines to Discharge

In her seven preceding years as Somerset staffing coordinator, Wells had received zero disciplines. Immediately after the Union election victory, Wells received four disciplines in two weeks and was discharged.

Wells was on vacation from September 1 through September 6. On the morning of September 7, Illis met with Wells and Konjoh. Illis gave Wells a document entitled "Summary of discussion with Valarie and Inez." Illis pointed out several discrepancies between the manually typed schedule and what had been entered into Smartlinx for the

---

documents were produced. Respondent's counsel represented that such information was no longer accessible via Smartlinx. [Tr. 787-792].

previous day's shifts. Wells responded by noting that Heedles had entered her proposed schedule changes in Smartlinx, accounting for much of the confusion regarding employees not being scheduled to work or being scheduled to work but not having their punches register. Wells and Illis discussed a timeframe for updating employees' schedules in Smartlinx and Wells said that she hoped to be able to input all of that information by the end of her shift on Friday. [GC-70, Tr. 1238-1253].

Wells also said, regarding item #1 on the summary sheet, that she did not know how to input a truncated schedule into Smartlinx. Illis indicated that she would show her how to do so and a few days later Illis trained Wells on how to perform this task. [GC-70, 72, Tr. 1246-48, 1261-62].

As part of Wells' plan of correction, she was directed to stop using her "cheat sheet" and to use a Smartlinx-generated daily attendance sheet instead. She was also asked to give an extra copy of this document to Konjoh each day. Illis also asked Wells to stop using her Excel-based spreadsheet to generate the nursing master schedule and instead generate it through Smartlinx. Wells agreed to comply. [GC-70, Tr. 1253].

Although Konjoh and Illis assert that this was not a disciplinary meeting, subsequent disciplines that Wells received referred to this 9/7 meeting as either a verbal warning or a written warning. [GC-73, GC-75, Tr. 2101, 2752].

Illis selected a series of discrepancies from September 6 (the last day of Wells' vacation) to use in the disciplinary meeting with Wells on September 7. This meeting took place in the morning on the 7<sup>th</sup>, shortly after morning clinical and managerial meetings. The timing is suspect because the staffing coordinator has until 10:00-10:30 a.m. the next morning to reconcile any scheduling discrepancies from the day before. [Tr.

1239, 3031]. Given that Wells was on vacation for a week, this meeting occurred in the morning, and the summary of discussion was presented to Wells at the beginning of the meeting, it does not appear that Illis and Konjoh afforded Wells any opportunity to rectify the cited scheduling discrepancies within the permitted window.

On September 15, Illis issued Wells a written warning for two “inaccuracies” regarding the schedules of Yendy Dautruche and Shanny Mangal. [GC-73]. Dautruche is an aide who had taken a short vacation. Dautruche’s scheduled date of return was in Smartlinx, but Wells mistakenly omitted her from the daily assignment sheet because she thought that Dautrauche was still on vacation that Sunday (September 13). On the 14<sup>th</sup>, Dautrauche talked to Wells about the scheduling mistake. Wells apologized to Dautrauche and joked that once she got her angel wings and halo there would be no more mistakes. Illis, however, was lurking behind Dautruche during this conversation. Illis then told Wells to lose the attitude. Wells told Illis that she didn’t have an attitude - just that she felt like she is being picked on for little things that weren’t a problem in the past and are a direct result of the Union campaign and victory. [Tr. 1267-68].

Mangal submitted her paperwork requesting a day off after Wells had left for the weekend. Such requests were placed in a box outside Wells’ office. Wells testified that customarily when requests were submitted after she left for the day, she retrieved the request her next work day and inputted the request in Smartlinx. In this case, Illis pounced on the discrepancy before Wells was afforded an opportunity to change Mangal’s status in Smartlinx. Wells received a first written warning. Wells further testified that the copy of the discipline she was shown did not contain Illis’ handwritten comments next to her response. [GC-73, Tr. 1263-64, 1269-70]. Illis’ comments, which

she acknowledged were not shown to Wells [Tr. 2843-44], painting Wells as “lazy” and intentionally failing to perform this job task, demonstrate a level of pettiness and vindictiveness in light of Wells’ union activities.

The next day, September 16, Konjoh issued Wells a second written warning for failing to give her a copy of the daily attendance form. Wells admitted that she forgot to do this, but affirmed that she placed the document at the nurses’ station, where she usually posted such forms along with the daily attendance sheets. [GC-74, Tr. 1273-75].

On September 20, Konjoh issued Wells a final warning for failing to properly reconcile several employees’ shifts between Smartlinx and the written schedules. [GC-75]. Regarding the last item on the discipline attachment, “Saturday schedule given to Inez reflected Guerline on 3-11, but Val put one on unit stating 7-3,” Wells protested. Wells told Konjoh that she always scheduled Guerline for 3-11 and Konjoh replied that she was in Smartlinx for 7-3 and she had a problem punching in. Certain she was right, Wells retreated to her office, logged on to Smartlinx and found Guerline’s “audit trail of changes.” This screen indicated that “dtrain,” Illis’ Smartlinx user ID, changed Guerline’s schedule to 7-3, and that Wells (user ID wval) had originally scheduled Guerline for the correct 3-11 shift. Wells showed Konjoh this screen on the computer and Konjoh said that she would talk to Illis about it. Nothing was done to rescind this portion of the discipline. [GC-75, 77, R-81, Tr. 1276-83].

Another problem Wells had with the discipline lay in the bulleted item “Friday 11-7 Greg was cancelled and should have been left on.” Konjoh told Wells that Greg had come in for a meeting that Friday and indicated that he wasn’t staying because Wells had told him that he was cancelled. Wells told Konjoh that she doesn’t cancel anybody two

shifts in advance, but there was a note left for the evening supervisor to cancel Greg if he wasn't needed. Wells never spoke with Greg directly. Wells explained that she attached her note to the evening shift's daily assignment sheet, and it would have been the evening supervisor's responsibility to call Greg with any status change. Konjoh failed to investigate the matter further. [GC-75, R-81, Tr. 1285-88].

Finally, Wells protested to Konjoh that "Saturday 7-3 Noel noted on handwritten schedule but not in Schedule Optimizer" was also problematic. Noel refers to LPN Noel Wisner, a new hire at the time. Wells explained that she believed that he had not yet been entered into Smartlinx and that is why he only appeared on the handwritten sheet. It is undisputed that Somerset's payroll benefits coordinator (Sheena Orzoco), and not the staffing coordinator, is responsible for entering new hire information into Smartlinx. [Tr. 2650]. Wells explained to Konjoh that she could not make any entries in Smartlinx for him until he was loaded into the system. This argument is reflected in the statement of protest Wells supplied Konjoh relating to this discipline. [GC-75, 76, R-81, Tr. 1284-85].

The next day, September 21, Konjoh and Illis notified Wells that she was fired. Wells was given a termination notice, but none of the explanatory documents underlying the latest allegation of substandard performance. [GC-78]. Wells says that Konjoh reiterated that she was failing to reconcile Smartlinx schedules with the written assignment sheets and had placed one extra nurse in the daily census report sent to Care One corporate. [Tr. 1289-1293].

f. Somerset Abandons "Reconciliation" Upon Wells' Discharge

Illis testified that the nursing department schedule is distorted or inaccurate if it is not reconciled. [Tr. 3031]. Yet Illis' zeal for reconciliation, and scheduling matters in

general, quickly dissipated following Wells' removal. Konjoh assumed the staffing coordinator mantle upon Wells' dismissal. Illis testified that she tried to assist Konjoh when she could and Konjoh testified that she knew how to reconcile schedules in Smartlinx, but admitted that she didn't do any reconciling of the time and attendance records when she did the scheduling. [Tr. 2142-43, 2606, 2852].

Southgate testified that Konjoh's performance as staffing coordinator was "very erratic." Southgate didn't know who was working and what shift they were working. Southgate contrasts this with Wells' tenure, when Southgate had sufficient staff for each shift. During Konjoh's run as staffing coordinator, there were frequent holes in staffing. As an example of the chaos, Southgate cited a time when it was almost 3:00 p.m., she told Konjoh that there wasn't enough staff, but Konjoh still hadn't notified her who was working the evening shift. [Tr. 980-82].

Southgate's observations about Konjoh's performance as a staffing coordinator are borne out in the following table. These items reflect reconciliation failures in the months of October and November 2010. These are performance errors for which Somerset swiftly punished Wells, yet no punishment was meted out when Konjoh committed similar errors. Said analysis is gleaned from GC Exhibits 120 and 121:

Date	Shift	Reconciliation Errors	GC120 Bates #	GC121 Bates #
10/14	11-7	Add Maria/Kerline, Subtract Mariatu	1673	4074
10/15	3-11	Add Carol, Subtract Alice	1675	4075
10/15	11-7	Add Sharon/Greg, Subtract Doreen	1676	4075
11/1	7-3	Add Mohammed and May	1728	4092
11/6	3-11	Add Doreen	1749	4097
11/7	7-3	Add Victor and Elfise	1752	4098
11/9	7-3	Add Michele, Subtract Bessie	1761	4100

Additionally, the following reflect reconciliation failures in December 2010 after Charlotte D'Antignac replaced DON Konjoh as full-time staffing coordinator. Although reconciliation errors persisted, as shown below, Respondent meted out no discipline against D'Antignac. This analysis is gleaned from GC Exhibit 134:

Date	Shift	Reconciliation Errors	GC 134 Bates #
12/9	3-11	Dande not on Assignment Sheet, but on SMTLX	4213 / 4139
12/15	7-3	Aminta on Assignment Sheet, but not on SMTLX	4235 / 4145
12/20	7-3	Bessie left 12:20 p.m./SMTLX says 6:45-3:15 p.m.	4255 / 4150

10. Per Diem Aides at Somerset

Before the September 2010 election at Somerset, many per diem aides worked a regular schedule in addition to being available at certain other times when the facility needed them. This arrangement had been in place for many years. Hutchens had real-time access to the Somerset nursing department schedules in Smartlinx, but there is no record evidence of him raising the issue of regularly scheduled per diem aides with Somerset administrators, DONs, or the staffing coordinator prior to the Union's election victory. Nor did any of the four permanent DONs (McCarthy, Enworum, Meyer, Kovacs) raise this issue with Wells, either in her performance appraisals or in any written or verbal communications. Although Respondent entered a bevy of post-election September 2010 e-mails between Illis, Konjoh, and Wells into the record, no August 2010 e-mails touching on any subject between these individuals were offered into the record.

Less than a week after the election, Konjoh told Southgate that she could not use any per diem nursing employees without first clearing it with her. A few weeks later, Konjoh explained why. Konjoh told Southgate that Somerset was contesting the election results and if another election was ordered, per diem employees<sup>167</sup> needed to have worked a

minimum number of hours to be eligible to vote. That was why Southgate could no longer call per diems into work. [Tr. 957-59].

The primary casualties of Somerset's per diem purge were those aides who either expressly supported the Union or Respondent had reason to believe supported the Union.

a. Annie Stubbs

Stubbs started working at Somerset in about May 2009. She worked as a per diem aide every other weekend on the day shift, and as needed during the week.<sup>50</sup> Stubbs' full-time job is as an aide at a Union-represented facility. [GC-128, Tr. 861-62].

Stubbs aired a collective grievance that the day shift aides shared regarding the accessibility of linen bags at a mandatory meeting led by Hutchens. After one of these mandatory meetings in Somerset's conference room, Konjoh approached Stubbs in the hallway and asked her what she thought about the Union. Stubbs replied that she didn't know. Konjoh declared that she knew that Stubbs had a union at her other job, but Somerset didn't want a union. Stubbs remained silent and walked away. [Tr. 865-67].

Stubbs' union sympathies are also unmistakably identified on the Union flyer disseminated shortly before the election. Stubbs' name and picture appear on the page which says "We're Voting Yes for 1199SEIU!" and her testimonial reads "My life will improve with the union because we'll get more respect." [GC-10, Tr. 863].

Stubbs voted in the September 2 election, worked the weekend of September 4 and her next scheduled weekend of September 18. The following Monday, Wells called Stubbs at home to inquire about her availability on the night shift. Stubbs told Wells she

---

<sup>50</sup> When she worked during the week, Stubbs could only work the day shift from 6:45 a.m. to 2:00 p.m. Stubbs left an hour early to enable her to get to her full-time job on time. [Tr. 861-62].

would let her know, but when Stubbs called back, Stubbs was transferred to Konjoh's line, where she left a message stating her availability to work nights. [Tr. 869-872].

Konjoh first called her back four nights later. Konjoh left a message for Stubbs asking if she could work the upcoming weekend. Stubbs called back less than ten minutes later, but Konjoh said that somebody had already claimed the available shift. Stubbs reminded Konjoh of her exchange with Wells and said that depending on the night, she was available to work the night shift. Stubbs then inquired as to whether she was on the schedule for her regular weekend the following week. Konjoh told Stubbs that she was not on the schedule and she would call Stubbs when she needed her. The following Friday, Stubbs called Konjoh to confirm that she was not on the schedule for the next day. Konjoh never called her back. Stubbs' co-worker confirmed for her that she wasn't on the posted schedule. Neither Konjoh nor any other Somerset representative ever called Stubbs back to ask her to work. Stubbs has not worked at Somerset since September 2010. [Tr. 873-75].

b. Dominique Joseph

Dominique Joseph started working for Somerset as a per diem aide in about 2007. During her tenure at Somerset, she worked every other weekend from 4:00-11:15 p.m. Joseph's Somerset shift began at 4:00 p.m. because her shift at her full-time job ended at 3:00 p.m. Like Stubbs, Joseph worked full-time at another facility whose employees are represented by the Union. [Tr. 761-63].

In August 2010, Joseph unknowingly shared her admiration for the Union with Andrea Lee at one of Respondent's mandatory union meetings. Joseph had not met Lee before and prior to the start of the meeting, she spoke with Lee about the benefits of the

Union. Joseph specifically told Lee that it would be a good thing to bring in the Union to Somerset. Lee simply listened to Joseph's statements. A few minutes later Lee began the meeting by introducing herself, playing a DVD about union dues, and stating that the Union was going to take a lot of money out of employees' paychecks. [Tr. 767-69].

Later in August, Joseph attended another mandatory meeting led by Illis and Hutchens. At this meeting, Illis said that the Union did not support Somerset employees and was not going to represent them. Hutchens also spoke about the Union taking a lot of money in dues out of employees' paychecks. In response, Joseph stated that she only worked 13 hours every 2 weeks and so she didn't make enough money for the Union to take a lot of it. Hutchens did not respond to this comment. [Tr. 769-772].

After this meeting, when only Hutchens and three employees remained in the conference room, Hutchens asked Joseph if she was going to vote in the election. Joseph said she really didn't know. The other remaining employees said that they wanted to vote in the election, but Hutchens told them that they hadn't worked enough hours to be eligible to vote. [Tr. 773-74].

Joseph voted in the election and her next scheduled shift was the weekend of September 11. She called Konjoh on Friday the 10<sup>th</sup> to tell her that her car had broken down and that she needed to be taken off of the weekend schedule (due to lack of transportation). Joseph called Somerset on Saturday morning to ensure that she had been taken off the weekend schedule. [Tr. 774-75].

Two weeks later, Joseph arrived for her regular shift but was unable to punch in. She went to speak with the supervisor and to fill out a missed punch form to allow her hours to be recorded. While doing this, Joseph looked at the daily assignment sheet and

noticed that she was not assigned to any post. Joseph spoke to Illis, who told her she was not scheduled to work that day and she should not come into work the next day.<sup>51</sup> Illis directed Joseph to call Konjoh the following week. [Tr. 775-77].

Joseph called and left a message for Konjoh on Wednesday of the following week. In her message, Joseph identified herself, inquired whether she was on the schedule for her regular weekend, and asked Konjoh to return her call. Konjoh never called Joseph back. Joseph left similar messages for Konjoh on Thursday and Friday. Nobody from Somerset ever called Joseph back and she has not been scheduled to work since the weekend of September 11. [Tr. 778-780]. Illis terminated Joseph on January 22, 2011 due to not having active hours and indicated that Joseph was not eligible for rehire. [GC-125].

c. Gertrudis Rodriguez

Gertrudis Rodriguez started working as an aide at Somerset in May 2007. From May 2007 through November 2009, Rodriguez enjoyed part-time status working day and afternoon shifts. In December 2009, Rodriguez switched to per diem status.<sup>52</sup> In per diem status, Rodriguez worked every Monday, and every other weekend, on the day shift. [Tr. 818-821].

During the organizing campaign, Rodriguez signed an authorization card. Rodriguez's name, picture, and testimonial appear on the Union flyer distributed in August 2010. She appears under the heading of "Vamos a Votar si por 11999SEIU!" the

---

<sup>51</sup> Joseph said that only once in her two/three years at Somerset did she arrive on her regularly scheduled weekend and was told that she could not work. This was due to a low resident census. [Tr. 777-78].

<sup>52</sup> Rodriguez switched to per diem status because her son from Costa Rica came to live with her. Her son suffers from Down's syndrome, which forced her to give up her afternoon shift availability. [Tr. 819]. Rodriguez testified that everyone at Somerset knew about her son's condition and the limitations on her flexibility his care required. [Tr. 831, 846].

Spanish translation of “We’re Voting Yes for 1199SEIU” and her Spanish language testimonial which roughly translates to her wanting the Union for a better medical plan, to stop unjust treatment at work, and to respect employees’ rights. [GC-10, 55, Tr. 821-27]. Rodriguez also supplied a testimonial in the Union’s YouTube video. [GC-11].

Rodriguez voted in the September 2 election. She worked on Monday, September 13 and was originally scheduled to work that upcoming weekend. On Saturday, September 18, Rodriguez arrived at Somerset and attempted to punch in. The time clock did not allow her punch to register and Rodriguez sought the assistance of the supervisor. The supervisor told her that she was not on the schedule and that she would call Inez. After speaking with Inez, the supervisor told Rodriguez that she was not on the schedule and she should go home. She was not on the schedule for Sunday, September 19 or Monday, September 20, her usual work days. [Tr. 828-830].

About two weeks later, Rodriguez called Konjoh and asked her if she needed her to work. Konjoh said that she needed her but she didn’t have a steady schedule so she (Konjoh) would just call her whenever she was needed. Rodriguez explained that she had worked at Somerset for 3 ½ years and had always been on the schedule. Konjoh offered her a different schedule, but Rodriguez told her she could not do those shifts because of her son. Konjoh indicated that she would call her whenever she needed her and Rodriguez specified that she was only available for the day shift. Konjoh offered Rodriguez a different shift knowing that she could not work it. After this conversation with Konjoh, Rodriguez only received one call to work from Somerset- for an afternoon or evening shift which she could not work due to her son’s condition. [Tr. 830-33].

Rodriguez last worked for Somerset in September 2010. Illis terminated Rodriguez on January 22, 2011, the same day as Joseph, due to not having active hours and indicated that Rodriguez was not eligible for rehire. [GC-123].

d. Rita Onyeike

Rita Onyeike started working at Somerset in July 2010 as a part-time aide on Saturday and Sunday night shifts, plus occasional evening shifts. Her full-time job is at a Union-represented facility. [Tr. 697-99].

Onyeike voted in the September 2 election. On the day of the election, she received a purple scrub top and a purple wristband with the Union's name emblazoned on them. Onyeike wore the wristband when she went in to vote and throughout her double shift two days later. [GC-28, 50, Tr. 703, 705-06].

Unbeknownst to Onyeike, the following week, Illis started reviewing her employment status and recommended switching Onyeike to per diem status. [Tr. 749].

Onyeike worked the night shift on September 12, wearing both her Union wristband and the purple Union scrub top during the entire shift. At the end of her shift on September 13, as she was about to punch out, Konjoh confronted Onyeike. Konjoh asked her to leave the facility and threatened to call the police. Onyeike asked what she did and attempted to punch out. Konjoh initially prevented her from punching out, but later relented, telling her she should only come back when she called her and if she came back, not to come back with that (Union) scrub.<sup>53</sup> [GC-52, Tr. 708-711].

On about September 15, Onyeike received via regular mail a letter dated September 13 signed by Illis, Konjoh, and Wells. The letter indicated that they had

---

<sup>53</sup> This same day, September 13, Konjoh issued Onyeike a verbal written warning for wearing the Union scrub top (referred to as purple t-shirt in the warning). Konjoh testified that although she signed the warning, she never actually presented it to Onyeike. [GC-54, Tr. 713, 2418].

reviewed her schedule and that she had not worked enough shifts to satisfy her part-time benefits eligible status, and that effective immediately, she would be changed to per diem status. Konjoh admitted that Illis authored the letter. [GC-53, Tr. 711, 2421].

The letter's assertion that Onyeike had only worked four shifts to date was clearly erroneous. Onyeike worked on 7/28 (orientation), 7/31 (orientation), 8/1 (orientation), 8/7 (11-7), 8/8 (11-7), 8/28 (11-7), 9/4 (3-11 and 11-7), 9/11 (11-7), and 9/12 (11-7). [GC-107]. Konjoh further acknowledged that there was no discussion with Onyeike about offering her part-time without benefits status instead of converting her directly to per diem status, which Konjoh admits she could have been offered. [Tr. 2421-22].

Upon receiving this letter, Onyeike called Somerset and spoke to Illis. Illis acknowledged writing the letter and Onyeike asked if this had anything to do with the confrontation between her and Konjoh. Illis said that you should have known that if you were wearing an 1199 scrub we would look at you as part of the Union. Onyeike asked if this was why Konjoh asked her to leave the facility and Illis said yes. [Tr. 712-15].

After the Union scrub incident, Onyeike never worked again at Somerset. The following Saturday she received a call shortly before her scheduled shift. The evening supervisor indicated that Inez wanted to tell her she should not come in due to a low census. Onyeike received the same message on September 19, 25 and 26, and thereafter. Although the census may have been low on the weekend of the 19<sup>th</sup>, it is clear that by early October, the census had rebounded considerably (Saturday, October 2 census- 59/Saturday, October 9 census- 56) [GC-95, 98, Tr. 716-722].

Onyeike next contacted Somerset in January 2011 to inquire about work. She spoke with the new staffing coordinator Charlotte about being placed on the schedule.

Charlotte said that she needed help that night and would call her back. Nobody from Somerset called Onyeike back that day or any day since. [Tr. 722-23].

Onyeike last worked for Somerset in September 2010. Illis terminated Onyeike on January 22, 2011, the same day as Joseph and Rodriguez, due to not having active hours and indicated that Onyeike was not eligible for rehire. [GC-123].

e. Daysi Aguilar

Daysi Aguilar started working as an aide at Somerset in the fall of 2005. She worked the evening shift every other weekend until September 2009 when DON Rebecca McCarthy approved her request to work from 3-8 p.m. on Sundays. [Tr. 1142-43].

Aguilar signed a Union authorization card on August 1, and voted in the election on September 2. Prior to going in to vote, she spotted Jacques and went over to greet/hug Jacques but Jacques motioned her away. Konjoh observed this exchange from about 30 feet away. Aguilar then continued to the polling area to vote. [GC-61, Tr. 1144-1151].

Aguilar worked her regular shift on September 11. The following Monday, Konjoh called her and asked her position. Aguilar told her that she was a per diem aide who worked every other weekend on the evening shift. Konjoh told her that per diem didn't mean working every other weekend, it meant working one weekend per month. Aguilar told Konjoh she would give her availability as soon as possible. The next day, Aguilar hand-delivered a note to Somerset's receptionist, with the instruction to give it to Konjoh. The note, dated 9/14/10 and signed by Aguilar, indicates that "I will be able to work Saturday Sept 25, 3-11 and Sunday Sept 26, 7-3 or Saturday Oct 9, 3-11 and Sunday Oct 10, 7-3." Konjoh never called Aguilar regarding her note, even though she acknowledged receiving it. [GC-62, Tr. 1153-55, 2310].

On September 20, Wells sent Konjoh an e-mail indicating that she was leaving a copy of the next day's schedule with Illis prior to leaving for the day. There apparently had been a call out on the day shift for the 21<sup>st</sup> and Wells contacted Aguilar to fill in. Eight minutes after Wells sent Konjoh this e-mail, Konjoh replied by saying that "...I don't want to use Daisy." There is no other Daysi or Daisy that works at Somerset in the nursing department. [GC-108, Tr. 2446].

Aguilar next spoke with Konjoh on September 24, asking her if she would need her the next day (per her letter). Konjoh told her that she wasn't needed and that if she (Konjoh) needed her (Aguilar), she would call her. [Tr. 1155-56].

Aguilar dropped another note off for Konjoh indicating that she was available to work on October 9 and 10. Aguilar left three messages for Konjoh before Konjoh called her back. Aguilar asked Konjoh if she needed her to work on October 9 and Konjoh said no. Konjoh said that she would call her if she needed her. Neither Konjoh nor anybody else from Somerset has called Aguilar to work at the facility since then. [Tr. 1156-57].

Aguilar last worked for Somerset in September 2010. Illis terminated Aguilar on January 22, 2011, the same day as the other per diems, due to not having active hours and indicated that Aguilar was not eligible for rehire. [GC-126].

f. LPNs Performing Aide Work in October and November 2010

One of the explanations Respondent supplied for the severe reduction in the use of per diems at Somerset was the extra cost involved in employing these aides. [Tr. 1398]. Hutchens testified that per diem aides earn \$2/hour more than part-time aides-what he termed a "premium rate." [Tr. 1407-08]. Yet when both Konjoh and Charlotte

D'Antignac<sup>54</sup> performed the role of staffing coordinator in October and November 2010, the use of LPNs to perform aide work flourished, primarily on weekend shifts formerly worked by the above-mentioned aides.

The following table summarizes this point as culled from GC Ex 120:

Date	Day of Week	Shift	LPN	Aide Shift	Bates #
10/9/10	Saturday	Day	Shanny M.	Stubbs/Rodriguez	1655
10/9/10	Saturday	Evening	Shanny	Aguilar <sup>55</sup> /Joseph	1656
10/10/10	Sunday	Evening	Shanny	Joseph	1658
10/22/10	Friday	Day	Shanny	Stubbs	1695
10/23/10	Saturday	Day	Shanny	Stubbs/Rodriguez	1698
11/1/10	Monday	Day	Shanny	Stubbs/Rodriguez	1728
11/6/10	Saturday	Day	Shanny	Stubbs/Rodriguez	1748
11/6/10	Saturday	Day	Mohammed	Same	1748
11/6/10	Saturday	Evening	Mohammed	Aguilar/Joseph	1749
11/7/10	Sunday	Day	Shanny	Stubbs/Rodriguez	1752
11/7/10	Sunday	Evening	Shanny	Aguilar/Joseph	1756
11/14/10	Sunday	Day	Shanny	Stubbs/Rodriguez	1788
11/21/10	Sunday	Day	Michele M.	Same	1805
11/21/10	Sunday	Day	Mohammed	Same	1805
11/21/10	Sunday	Day	Doreen D.	Same	1805

None of the four aides noted in the "Aide Shift" column was called to work any of these shifts and all were available to work.

By using LPNs in an aide capacity, Somerset not only paid the LPNs their regular wage rate, a figure significantly higher than the hourly per diem aide rate, but the facility also incurred higher benefit costs. Earned vacation and sick time are calculated based on hours worked, and Somerset matches employees' 401(k) contributions up to 3% based on the number of hours worked, meaning that the more shifts LPNs picked up, the greater the likelihood that the employees would reach this 3% ceiling. [GC-16, page 31-32, Tr. 2814]. Of course, per diem aides received no benefits. [R-32].

<sup>54</sup> Illis testified that D'Antignac took over as Somerset staffing coordinator in November 2010. [Tr. 2853].

<sup>55</sup> Aguilar's note to Konjoh said she was available to work from 3-11 on Saturday, October 9. [GC-62].

g. As Somerset Eliminated Union-Supporting and Election-Eligible Per Diem Aides, It Hired and Transferred In New Per Diem Aides

Another explanation posited by Respondent as to why per diem aides had their hours reduced was “consistency” and “continuity” of care. [Tr. 1486, 2007]. Yet at the same time that Somerset was removing per diem aides who had worked the same shifts for several years, and who provided a great consistency of care, it was replacing them with new hire per diems and per diems who transferred from Care One’s Holmdel facility. Not only were these less experienced aides, but they were still per diems, not the part-time and full-time aides who were supposed to assume the lion’s share of the “as needed” shifts. [Tr. 1486]. These new hires and transfers included Gerarda Jean, Edeisha Jarrett, Aminata Conteh, and Abdulai Mansaray.

Somerset hired Jean as a per diem aide on August 24. [GC-92]. Somerset hired Jarrett as a per diem aide on September 24, paying her a higher hourly rate than Illis offered Onyeike in her September 13 letter, with slotted hours on the evening and night shifts. [GC-53, 93, 94]. Aminata Conteh’s orientation as a per diem aide began on October 12, over a month after the Union election. [GC-96]. And most curious of all, Mansaray was hired as a per diem aide at Holmdel on August 13, yet was allowed to transfer to Somerset, effective November 14. Hutchens had testified that transfer approvals take into consideration the employee’s past work history and Illis testified that transfers usually take between a month or two to effectuate [Tr. 1496, 2976, GC-91].

The following table summarizes the hours and shifts that new hires Jean, Jarrett, and Conteh, along with transfer Mansaray worked at Somerset in October and November 2010, shortly after the Union-supporting aides were dispatched:

3 1 1

Date	Day	Shift	New Aide	Aide Shift	GC Ex/Bates #
10/2	Sat	Day	Jarrett	Stubbs/Rodriguez	95
10/2	Sat	Evening	Jarrett	Joseph/Aguilar	95
10/3	Sun	Evening	Jarrett	Same	95
10/9	Sat	Evening	Jean	Same <sup>56</sup>	98/1656
10/10	Sun	Evening	Jean	Same	98/1658
10/12	Tues	Evening	Conteh	Orientation	96/1666
10/16	Sat	Evening	Conteh	Orientation	96/1678
10/17	Sun	Evening	Conteh	Orientation	96/1681
10/19	Tues	Evening	Conteh		96/1687
10/23	Sat	Evening	Jean	Joseph/Aguilar	98/1699
10/24	Sun	Evening	Jean	Joseph/Aguilar	98/1703
10/26	Tues	Evening	Conteh <sup>57</sup>		96/1690
10/30	Sat	Evening	Conteh	Joseph/Aguilar	96/1723
10/31	Sun	Evening	Conteh	Joseph/Aguilar	96/1726
11/6	Sat	Evening	Jean	Joseph/Aguilar	98/1749
11/7	Sun	Evening	Jean	Same	98/1754
11/13	Sat	Evening	Conteh	Same	96/1777
11/14	Sun	Evening	Conteh	Same	96/1783
11/20	Sat	Day	Mansaray	Stubbs/Rodriguez	97/1800
11/20	Sat	Evening	Mansaray	Joseph/Aguilar	97/1802
11/20	Sat	Evening	Jean	Same	Same
11/21	Sun	Day	Mansaray	Stubbs/Rodriguez	97/1805
11/21	Sun	Evening	Mansaray	Joseph/Aguilar	97/1806
11/25	Thurs	Evening	Mansaray		97/1820
11/27	Sat	Day	Mansaray	Stubbs/Rodriguez	96/1827
11/27	Sat	Evening	Mansaray	Joseph/Aguilar	96/1827
11/27	Sat	Evening	Conteh	Same	96/1825
11/28	Sun	Day	Mansaray	Stubbs/Rodriguez	96/1828
11/28	Sun	Day	Conteh	Same	96/1828
11/28	Sun	Evening	Mansaray	Joseph/Aguilar	96/1831
11/28	Sun	Evening	Conteh	Same	96/1831

## V. ARGUMENT

Exceptions # 3, 4, 61, 98, 99

- A. The substantial record evidence supports the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by soliciting, promising benefits and remedying employee grievances following the July 22 filing of the representation petition.

Somerset responded to the Union's representation petition by addressing employee complaints it had ignored all year. Prior to the filing of this petition, Somerset

<sup>56</sup> Aguilar's note to Konjoh said she was available to work from 3-11 on Saturday, October 9. [GC-62].

<sup>57</sup> Conteh worked a different post than the previous Tuesday, October 19.

employees met with Andrea Lee in the spring of 2010 to express their displeasure with proposed cuts to nursing department wages, hours, and changes to scheduled shifts and job status. Lee did nothing to address these complaints. Employees received notices that these changes would take effect on August 1, and employees pivoted towards the Union.

1. Solicitation of Employee Grievances and Promises and Grant of Benefits Legal Standard

Section 8(a)(1) prohibits the solicitation of employee grievances in a manner which interferes with the exercise of Section 7 rights. While the solicitation of grievances is not unlawful by itself, it “raises an inference that the employer is promising to remedy” them. *Manorcare Health Services- Easton*, 356 NLRB No. 39 at p. 19 (2010), quoting *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004). Absent a previous practice of doing so, the solicitation of grievances during an organizational campaign accompanied by an express or implied promise to remedy such grievances violates the Act. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001). There is a compelling inference that an employer “implicitly promising to correct those inequities that he discovers as a result of inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.” *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6<sup>th</sup> Cir. 1972). The inquiry must be whether the express or implied promise of benefits, whether specified or not, was given for the purpose of influencing the employees’ vote in the election and was of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Vague exhortations by the Employer for the employees to “give us a second chance” are within the limits of permissible campaign propaganda. *Noah’s New York Bagels*, 324 NLRB 266, 267 (1997). However, when such statements are made in the

context of unprecedented meetings soliciting grievances, and address the specific problems employees have previously raised, they are unlawful. *Evergreen America Corp.*, 348 NLRB 178, 215-217 (2006); *Noah's New York Bagels*, 324 NLRB at 271.

2. Respondent Promised and Granted Benefits to Dissuade Employees' Union Support

- a. Substantial record evidence supports the ALJ's finding that Respondent violated Section 8(a)(1) by rescinding its proposed schedule changes.

Within days of the representation petition filing, Respondent canceled implementation of the August 1 changes. Soon thereafter, Illis instructed Wells to remove Heedles' posted schedule and to return to the old department schedule. Nursing department employees had complained vociferously not only about Heedles' schedule changes, but also about the lack of consideration and concern for how her schedule changes would impact their lives. [Tr. 337]. Given the timing of this action, it is clear that this change was made solely to pacify employees and influence their votes. Based on the above, the substantial record evidence supports the ALJ's finding that Respondent's actions constitute an unlawful adjustment of grievances in violation of Section 8(a)(1).

- b. Hutchens told employees that he was there to fix things and to give him a chance to remedy problems.

Having already cured one significant grievance, Respondent set about holding mandatory meetings, coupled with one-on-one conversations to identify and fix other employee concerns in anticipation of the September 2 election. Tyler and Claudio offered strikingly similar accounts of an August 2010 mandatory meeting conducted by Hutchens. At this meeting, Hutchens apologized and stated that he was not aware that there was so much chaos in the building, or that employees were so unhappy. [Tr. 104-5, 1013-14]. According to Claudio and Tyler's properly credited testimony, Hutchens said

that he just wanted the employees to give Respondent a chance to fix it and that he was there now and he would do whatever he could to remedy the problems. [Tr. 105, 1013].

In this case, Hutchens' comments about wanting a chance to fix things or to remedy problems cannot be viewed in isolation. His comments were made immediately after Respondent strategically withheld implementation of Heedles' draconian schedule changes. Moreover, Hutchens and other Somerset officials continued to solicit and adjust grievances, as well as interrogate employees throughout the organizing campaign.<sup>58</sup> These factors, coupled with the unprecedented number of mandatory meetings addressing employee concerns while deriding the Union, support the ALJ's conclusion that Hutchens' comments (wanting a chance to fix things or remedy problems) exceeded permissible limits of campaign propaganda and constituted unlawful 8(a)(1) statements.

- c. Substantial record evidence supports the ALJ's finding that Respondent promised and granted reduced work tasks to Lynette Tyler in violation of Section 8(a)(1) of the Act.

The ALJ rightly credited Southgate's testimony that management had identified Tyler as an employee who seemed to be wavering regarding her vote. Within a few weeks of the filing of the petition, Respondent, via Doreen Illis, unlawfully solicited and remedied Lynette Tyler's grievance regarding her job responsibilities. In August, Illis sought out Tyler to discuss her responsibilities as unit secretary. The ALJ properly credited Tyler's testimony that Tyler told Illis that several aspects of her job, including responsibility for daily weighing of patients, made work "overwhelming." Illis asked Tyler to write down all of her job responsibilities and told her she would see what kind of

---

<sup>58</sup> Hutchens testified that Respondent conducted about 7 meetings per day to reach all of the facility's eligible voters. [Tr. 1460].

changes she could adjust. About a week later, Tyler was informed that she no longer had to take patients' weights.

The ALJ correctly concluded that this solicitation, promise and subsequent remedying of one of Tyler's chief complaints, violated Section 8(a)(1). Respondent swooped in, solicited feedback regarding her working conditions, and promptly adjusted one of Tyler's primary concerns. Respondent's sole motivation for adjusting Tyler's work duties was its belief that such an act could sway Tyler's vote. Therefore, the ALJ was correct in finding that Respondent's actions violated Section 8(a)(1) of the Act.<sup>59</sup>

- d. Substantial record evidence supports the ALJ's finding that Respondent violated the Act by curing a department-wide grievance regarding the availability of trash bags.

Respondent held almost daily mandatory meetings with its employees during the August organizing campaign. At some of these meetings, employees just watched DVDs or presentations smearing the Union. Hutchens testified that the purpose of these meetings was for him to apologize for issues he had missed, like staffing and scheduling problems. [Tr. 1469]. Although Hutchens testified that he told employees that Somerset couldn't rectify employee complaints under the "current situation," his actions belie his words by allowing employees to air their grievances. [Tr. 1474]. At one of these meetings, per diem aide Annie Stubbs complained that day shift aides had no access to trash bags at the beginning of their shifts because these bags were kept in a locked office. Stubbs noted that these complaints had been raised before, but nothing had been done. The next day, bags were made available and were no longer kept under lock and key.

---

<sup>59</sup> Respondent's argument that Illis' actions were de minimis ignores the overwhelming record evidence of 8(a)(1) and (3) violations in August and September 2010. More importantly, the 8(a)(1) solicitation and interrogation of Tyler predate the unlawful acceleration of her resignation by only a matter of weeks.

The ALJ correctly found that Stubbs' testimony on these subjects was lacking hyperbole and plainly credible. This was a forum to air grievances and she mentioned specific problems on the job. The ALJ also properly discredited Hutchens' testimony that Respondent could not make promises or remedy problems during the campaign because his denials were contradicted by Respondent's swift resolution of unaddressed complaints. Again, Respondent's sole motivation for taking action here was to try to sway voters with the September 2 election approaching. In this respect, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act.<sup>60</sup>

**B. The substantial record evidence supports the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by interrogating employees following the filing of the July 22 representation petition.**

**1. Interrogation Legal Standard**

In determining whether the questioning of an employee constitutes an unlawful interrogation, the Board considers the background, nature of the information sought, identity of the questioner, place and method of the interrogation, and truthfulness of the reply. *Rossmore House*, 269 NLRB 1176 (1984). The Board's task is to determine whether "under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Perdue Farms, Inc.*, 144 F.3d 830, 835 (D.C. Cir. 1998); *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987); *Westwood Health Care Center*, 330 NLRB 935 (2000). This is not a subjective test having to do with whether the employee in question was actually intimidated. *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1228 (2000).

---

<sup>60</sup> It is immaterial whether Stubbs or Hutchens first raised the linen bag issue at the meeting. What is most important is that the issue was raised in a forum in which employees were airing their grievances and Respondent's agents promptly remedied this previously ignored grievance.

- a. The clear record evidence supports the ALJ's crediting of Avian Jarbo's testimony and the ALJ's finding that Arroyo interrogated Avian Jarbo about how she was going to vote in the election.

Jessica Arroyo coercively interrogated Avian Jarbo<sup>61</sup> by asking her whether she was going to get a no vote out of her. This interrogation took place in Somerset's supply room approximately one week before the election. Arroyo followed Jarbo into the supply room and nobody else was present during this conversation. Jarbo did not know how to respond and told Arroyo that she wasn't sure she was going to vote. Arroyo then told Jarbo that a failure to vote would count as an automatic vote for the Union. Arroyo never spoke with Jarbo again, and had only spoken with her once before this supply room conversation- when Arroyo asked her to cover a shift earlier in August 2010.<sup>62</sup>

As a current employee, Jarbo's testimony is considered particularly reliable in that it is potentially adverse to her own pecuniary interests. *Covanta Bristol, Inc.*, 356 NLRB No. 46 at pg. 8 (2010). Arroyo did not testify, Jarbo's testimony stands un rebutted, and based on the clear, concise testimony offered by Jarbo, the ALJ properly credited her. Arroyo's conduct clearly interfered with, and reasonably tended to coerce Jarbo's Section 7 rights and the ALJ correctly found that said conduct constitutes an unlawful interrogation in violation of Section 8(a)(1).

- b. The ALJ correctly concluded that Konjoh unlawfully interrogated Claudio about how she felt employees were going to vote.

In the latter half of August 2010, Konjoh pulled Claudio into the supply room for a private conversation. The sole subject Konjoh raised was the election and Konjoh

---

<sup>61</sup> Counsel for the Acting General Counsel agrees that Avian Jarbo is a female. This appears to be nothing more than a typographical error in the ALJ's decision which has no impact on the ALJ's credibility assessment or his finding of an 8(a)(1) interrogation violation.

<sup>62</sup> The ALJ correctly found that Arroyo worked at Somerset everyday during the August campaign. [Tr. 1914].

probed Claudio about how she felt employees were going to vote. Claudio said that she didn't know and Konjoh responded by asking her to vote no.

The ALJ correctly found that the *Rossmore House* factors militate in favor of an 8(a)(1) violation. Konjoh had just started working at Somerset and so there was no history of a professional or collegial personal relationship between her and Claudio. As the DON, Konjoh was the second highest ranking official at Somerset and the highest ranking member of the clinical nursing staff. No assurances about reprisals were given to Claudio and Konjoh's inquiry touched at the heart of Section 7 rights - Claudio and her colleagues' union support. Claudio's response evinced a lack of comfort with the questions and the situation in general. Viewing the totality of the circumstances in an objective manner, the record evidence supports the ALJ's finding that Konjoh's coercive actions here clearly constitute a violation of Section 8(a)(1).<sup>63</sup>

- c. The record evidence supports the ALJ's conclusion that Illis unlawfully interrogated Tyler regarding her and other employees' Section 7 activities.

The ALJ properly credited Tyler's detailed, candid testimony that in August 2010, Illis stopped Tyler in the hallway near the DON's office and asked what she thought of the mandatory meetings. Illis then asked Tyler whether she was going to vote for the Union or not. Tyler said that she was unsure. Illis reminded Tyler that employees did not need the Union and next asked if Tyler knew how the rest of her co-workers were voting. Tyler told her no. Illis then asked her if she could convince her co-workers to vote no and to find out who was going to vote yes or no.

---

<sup>63</sup> Konjoh's blanket denial regarding her alleged unlawful conduct was properly discredited. Her lack of candor, penchant for stubbornly refusing to admit the obvious, and selective memory are addressed in more detail *infra*. Claudio, on the other hand, testified with poise, candor, and precise recall, and the ALJ correctly credited her testimony over Konjoh's blanket denial.

The ALJ correctly found that Illis' words, and the context in which they were used, suggest an element of coercion and interference in violation of Section 8(a)(1). Illis was the highest ranking Somerset official. She had already solicited and remedied a grievance of Tyler's earlier in the August campaign. Illis' insistence that employees did not need a Union was consistent with Respondent's discourse throughout the August campaign. Additionally, Tyler's non-committal responses to Illis' inquiries reflect a lack of comfort with the nature of the questions and the manner in which Illis initiated and conducted this conversation. Tyler is rarely mistaken for being shy, yet her unwillingness to directly admit her Union support speaks to her surprise at the direct probing and her general unease with the entire line of questioning. Based on the totality of the circumstances, the substantial record evidence supports the ALJ's finding that by asking Tyler about her own vote and that of co-workers, and if she could influence their votes, Illis engaged in an unlawful interrogation in violation of Section 8(a)(1) of the Act.

d. The ALJ correctly found that Konjoh unlawfully interrogated Stubbs about her Union sympathies.

The ALJ correctly credited Stubbs' testimony that she aired both personal and collective grievances at an August 2010 mandatory meeting conducted by Hutchens. Stubbs testified that she attended several subsequent mandatory meetings and that after one of those meetings, Konjoh approached her in the hallway. The ALJ also correctly credited Stubbs' testimony that Konjoh asked her what she thought about the Union and Stubbs said that she didn't know. Konjoh told Stubbs that she knew she had a union at her other job, but Somerset didn't want a union.<sup>64</sup> Stubbs stayed silent and walked away.

---

<sup>64</sup> Stubbs' testimony that Konjoh told her she knew she was represented by the Union at her other job is consistent with Southgate's testimony regarding management meetings. Southgate testified that at these meetings, Stubbs' name was referenced as someone who worked for a facility represented by the Union.

Konjoh's inquiry to Stubbs about her Union sympathies was clearly coercive. Konjoh did not raise this subject in the course of a more extended conversation - she sought out Stubbs and the Union was the only subject raised during this discussion. Again, Konjoh and Stubbs had no pre-existing personal or professional relationship because Konjoh started working at Somerset on August 16. Holding the title of DON made Konjoh the highest ranking nursing supervisor in the facility. And finally, Stubbs' denial and silence in response to Konjoh's pointed questioning reflect discomfort and concern about the nature of the questioning, yet Konjoh offered no assurances against reprisals. Therefore, the record evidence clearly supports the ALJ's conclusion that Konjoh unlawfully interrogated Stubbs regarding her Union sympathies.<sup>65</sup>

C. **The Substantial Record Evidence Supports the ALJ's Conclusion that Respondent Warned, Unlawfully Discharged And Eliminated Employees' Hours In Retaliation for their Support of the Union.**

1. **Legal Standard**

Under the applicable framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the General Counsel must first establish a *prima facie* showing that Respondent disciplined, terminated and reduced its employees' hours because of their Union support and/or activity. A *prima facie* case may be established by satisfying the following elements: (1) the employees engaged in protected union activity; (2) Somerset knew about this activity; (3) Somerset took an adverse employment action against the employees; and (4) there was a

---

This corroborative aspect of her testimony, coupled with Stubbs' candor and forthrightness on the witness stand, led the ALJ to correctly credit her testimony over Konjoh's manufactured direct testimony and evasive cross-examination testimony.

<sup>65</sup> Respondent's contention that the 8(a)(1) violations here are *de minimis* is laughable. The numerous 8(a)(1) violations found by the ALJ all occurred during the August campaign, which immediately preceded Respondent's 8(a)(3) onslaught. Said onslaught commenced because a majority of Somerset's employees had the temerity to vote in favor of unionization.

motivational nexus between the employees' protected activity and the adverse employment action. See *Hays Corp.*, 333 NLRB 1250 (2001).

The Board may infer discriminatory motivation from direct or circumstantial evidence and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99 (2001); *Metro Networks, Inc.*, 336 NLRB 63, 65 (2001). It is also appropriate to consider relevant evidence beyond the charged conduct. *Meritor Automotive, Inc.*, 328 NLRB 813 (1999). Evidence of discriminatory motivation may include: (1) expressed hostility toward the protected activity, *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001); (2) timing, *Sears, Roebuck & Co.*, 337 NLRB 443 (2002); *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000); (3) abruptness of the adverse action, *Dynabil Industries*, 330 NLRB 360 (1999), (4) departures from policy or practice, *Sunbelt Enterprises*, 285 NLRB 1153 (1987), (5) stricter enforcement of a policy, *Treanor Moving & Storage Co.*, 311 NLRB 371, 375 (1993), (6) inconsistent explanations for the action in question, *Atlantic Limousine, Inc.*, 316 NLRB 822 (1995); (7) disparate treatment, *NACCO Materials Handling Group*, 331 NLRB 1245 (2000); and (8) nonsensical and pretextual reasons, *KOFY TV-20*, 332 NLRB 771 (2000); *Fluor Daniel*, 311 NLRB 498 (1993).

Once the General Counsel establishes a prima facie case, the burden of persuasion shifts to the Respondent to establish as an affirmative defense that it would have taken the same action regardless of any discriminatory motive. *Wright Line*, 251 NLRB 1083 (1980); *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996).

2. The ALJ correctly found that Respondent violated Section 8(a)(3) of the Act by issuing Napolitano, Claudio and Jacques attendance and lateness disciplines in retaliation for their Union sympathies.

**Exceptions # 6-10 and 65-68**

- a. The record clearly supports the ALJ's crediting of Southgate's testimony<sup>66</sup> and finding that anti-Union animus was the motivating factor in Respondent's crusade to enforce its time and attendance policy.

The ALJ correctly credited Southgate's testimony that sometime after the September 2 election, Konjoh told her that she planned to issue disciplinary warnings to Union adherents if they gave her an excuse to discipline them. Konjoh then suddenly changed the call-out procedure and instructed Southgate to forward all employee calls to her. Konjoh specifically noted that she knew that the Union was conducting meetings and if Jacques called, the call should immediately be forwarded to her.<sup>67</sup>

The timing of the call-out procedure change falls immediately after the Union's victory. This is no coincidence, however, as the stricter enforcement of Respondent's time and attendance policy was designed to retaliate against Union supporters in violation of Section 8(a)(3). Respondent's argument in Exceptions 7 and 8 that Konjoh ordered employees' calls to be forwarded to her for greater consistency and more accountability, unmistakably side steps Southgate's credited testimony, which contradicts this assertion. In fact, when Konjoh arrived at Somerset on August 16, she made no immediate effort to rein in the supposed out of control employee attendance patterns. The ALJ correctly

---

<sup>66</sup> Contrary to Respondent's assertion in Exception 2, Southgate credibly testified that she served as a supervisor between August 2008 and August 2010, including stints as the Unit Manager with the exception of a couple of weeks when she worked as a floor nurse. Even still, Southgate testified that she frequently filled in as a supervisor during these periods. [Tr. 899-903, 1077-79]. Thus, Respondent's exception raises a minor discrepancy that does not impact the ALJ's decision.

<sup>67</sup> Respondent's assertion that employees were disciplined for lateness prior to the election is disingenuous. Southgate's credited testimony clearly demonstrates that employees were allowed to come in late with supervisory permission in accordance with Respondent's attendance policy. Respondent's contention is further undermined as it proffered no evidence of attendance or lateness disciplines prior to the election.

discredited Konjoh's testimony that she became fully aware of the gravity of the time and attendance problem after the Labor Day weekend. Instead, the ALJ properly concluded that Konjoh's motivation for the call-out procedure change was to exact vengeance on Union supporters.

- b. The ALJ properly concluded that Respondent's proffered reason for stricter enforcement of time and attendance policy is pretextual.

Although Konjoh testified that a spike in lateness and absences during the Labor Day weekend caused her to approach Illis about an attendance problem, Respondent made no mention of this concern in its November 18, 2010 position statement. Instead, Illis said that Konjoh asked her to conduct an audit of employees' attendance records in early September 2010, she focused her attention on the worst offenders, and provided the audits to Konjoh for her to issue discipline at her discretion. Although Illis used the label worst offender, she offered no explanation as to how she determined who fell into that category. Nor did she offer any specifics about the nature of her audit review.

That Illis was aware of attendance problems prior to Labor Day is inconsistent with Konjoh's testimony – that she was unaware of the problem until after Labor Day weekend. Although Illis, an experienced Administrator from Care One at Holmdel, identified time and attendance problems prior to the Union election, she did not take any action until after the election. The ALJ properly discredited Illis and Konjoh's testimony regarding the time and attendance problem and instead relied on Illis' statements that she was disappointed with employees for favoring the Union, felt betrayed and identified Jacques, Napolitano and Claudio as being the "worst offenders."

- c. Respondent's departure from its time and attendance policy is strong evidence of animus.

Respondent's stricter enforcement of time and attendance is inconsistent with Respondent's policies and practices. Supervisors informed Konjoh that it was a common practice for employees to call into the facility to inform them of their late arrivals. The ALJ rightly credited Southgate's testimony that she often took calls for late arrivals from employees like Napolitano and Claudio, and simply told them to get to the facility quickly. The ALJ also credited Southgate's testimony that she did not discipline employees for late arrivals. Numerous employee witnesses corroborated Southgate's testimony and verified that they had never received discipline for lateness or absenteeism.

Konjoh's decision to issue tardiness and absenteeism warnings stands in stark contrast to Respondent's time and attendance policy. Respondent's Employee Handbook directs employees who are absent or late to call their supervisor as soon as possible and states "You are expected to work your full scheduled work day unless otherwise agreed upon in advance between you and your supervisor." The ALJ properly credited Napolitano and Jacques' testimony that they had received permission, either tacitly or explicitly, to arrive late for work. Napolitano stated that she was permitted to arrive late because of her long commute. Jacques, on the other hand, received permission because of her mother's health condition. Southgate confirmed that she was aware of Napolitano, Claudio and Jacques' late arrivals because she routinely took their calls and gave them permission to arrive late without discipline. The ALJ correctly found that Konjoh's sudden deviation from Somerset's policy timed to coincide with employee union activity is strong evidence of Konjoh's discriminatory motivation. See *McBurney Corp.*, 351 NLRB 799, 800-801 (2007); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004).

Konjoh admits that she did not do any investigation into whether employees had been disciplined for lateness or absenteeism before she issued these disciplines, nor did she consult with supervisors regarding the disciplines. Southgate verifies that neither Illis nor Konjoh met with her to discuss the disciplinary warnings. The ALJ properly concluded that Konjoh's unilateral disciplinary actions strongly evidenced discriminatory motive. *Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004).

d. Respondent treated Napolitano, Claudio and Jacques differently than other employees.

Respondent's treatment of Napolitano, Claudio, and Jacques stands in stark contrast to the treatment of other employees who had attendance issues. At the hearing, Respondent produced lateness and attendance warnings assertedly issued to eight employees - May Novelette, Dominique Joseph, Amaka Gladys Agu, Guillaume Soledad, Patsy Benimadho, Cesu Lusette, Beatrice Beauvoir and Jennifer McAuley- to support its contention that it disciplined employees in a non-discriminatory manner. Yet the disciplinary warnings issued to Novelette, Joseph, Soledad and Lusette were unsigned. Konjoh testified that warnings are normally signed by the supervisor who issues the discipline and the employee who receives the discipline. In this instance, Konjoh could not explain why the warnings were unsigned by both the supervisor and employee and did not recall which supervisors issued the disciplines. Nonetheless, it is undisputed that they were all issued after the September 2 election. Thus, the ALJ properly found that Respondent's failure to issue attendance-related disciplines prior to the election is evidence that Respondent would not have issued these disciplines but for union activity.

The record evidence reveals Respondent's generously tolerant treatment of Amaka Gladys Agu. Respondent produced a "Punch Detail Report" for Gladys Agu that

states “You were late 34 out of 37 shifts. Why?” Yet the Punch Detail Report makes no reference to discipline and no discipline was offered into evidence. Comparing Respondent’s treatment of Gladys Agu to Napolitano, Claudio or Jacques leads to one conclusion - that union activity is responsible for the differing treatment.

Illis’ testimony regarding McCauley’s discipline further sheds light on Respondent’s true motivation. In response to her written warning, McCauley wrote that she felt like “her head was on the chopping block.” Although McCauley did not specifically reference the Union, Illis testified that she addressed the statement with McCauley because she believed it was inappropriate and she was bothered by the implication that the written warning had a causal connection with the Union campaign. Illis’ reaction to McCauley’s statement flies in the face of Respondent’s contention that this was not discriminatorily motivated.

Thus, in light of evidence that Respondent deviated from its policies and practices and offered pretextual reasons for issuing these time and attendance disciplines, the ALJ rightly concluded that Respondent’s attendance disciplines are discriminatorily motivated and in violation of Section 8(a)(3) of the Act.

3. The overwhelming record evidence supports the ALJ’s finding that Respondent violated Section 8(a)(3) of the Act by accelerating Lynette Tyler’s resignation date in retaliation for her Union sympathies.

**Exception #5, 89, 90, 91, 92, 104**

- a. Tyler engaged in union activities prior to the September 2 election.

Tyler’s testimonials explaining why she favored the Union appeared in both the Union flyer and the YouTube video. Tyler’s picture and testimonial appear on the flyer under the heading “We’re Voting Yes for 1199SEIU.” Furthermore, Tyler is the first

testimonial in Part II of the YouTube video as viewed on the Internet.<sup>68</sup> Tyler states in the video that employees need the Union to cure understaffing and burdensome job responsibilities. These sentiments echo her complaints to Hutchens and Illis at mandatory meetings, and in one-on-one conversations, early in the August campaign.

b. The substantial evidence shows that Respondent's managers had knowledge of Tyler's union activities.

Respondent's contention that it was unaware of Tyler's Union support is belied by the substantial record evidence. Tyler's testimonial in the Union flyer demonstrates her unambiguous support for the Union. Hutchens testified that he saw the flyer at Somerset sometime before the election and he then immediately showed it to Illis. His admission that he viewed the YouTube video, in which Tyler is prominently featured, erases any possible doubt that Respondent knew of Tyler's Union activities. Konjoh's denial that she knew of Tyler's Union support [Tr. 2091], despite her presence at management meetings in which these two critical pieces of evidence were discussed, casts further doubt on the veracity of her testimony. Illis' blanket denial regarding knowledge of Tyler's union activity [Tr. 2933] is similarly unpersuasive given her admission that she saw and read the Union flyer prior to the election. Therefore, the ALJ correctly found that Respondent was aware of Tyler's union activities.

c. Respondent's anti-union animus was the motivating factor in Illis' decision to accelerate Tyler's resignation.

Respondent's persistent anti-union animus is demonstrated in the 8(a)(1) violations outlined above. Respondent specifically targeted Tyler when Illis responded to Tyler's complaint by reducing her workload and when she questioned Tyler about her union sympathies and those of other employees.

---

<sup>68</sup> That is the manner in which Hutchens testified he viewed the video.

The Union's victory on September 2 and Tyler's two-week notice submitted on September 9 only stoked Illis' simmering anti-Union animus. This is reflected in Illis' acceleration of Tyler's resignation date and her comments on Tyler's personnel action form. Illis' motivation is clear- to rid the facility of Union adherents. Contrary to Respondent's contention, the Union was adversely impacted by Illis' unlawful actions in that one unit employee was prematurely removed from the facility, sending a signal to other employees that open Union support would not be tolerated. Tyler herself was adversely impacted by Respondent's actions in that she was not paid the balance of moneys owed her for the two week period until seven months later.

Tyler followed Respondent's handbook protocol and gave Somerset two weeks notice of her pending departure. Her letter unmistakably indicates that her last day of work would be September 22.<sup>69</sup> But a few minutes after receiving Tyler's resignation letter, Illis told her to leave the premises.

Respondent asserts that the ALJ erred by not crediting Illis' testimony that her standard practice at Holmdel and Somerset was to accept resignations, not require employees to work through their notice period, yet pay them for the full period. Respondent's position is unsupported by the record and must be rejected. Other than Illis' self-serving testimony that this was her practice, Illis provided no names, dates, or documentary evidence demonstrating that this was her past practice at Holmdel.<sup>70</sup> Instead, Respondent simply offered two examples which post-date the unfair labor practice charge filed in protest of Respondent's conduct (one of the examples cited even

---

<sup>69</sup> Illis' testimony [Tr. 2931] that Tyler never requested to work during the two-week notice period defies logic considering Tyler's letter explicitly indicated that she would work through September 22 and she questioned Illis whether she was being asked to leave the facility.

<sup>70</sup> This record is bereft of documentary evidence corroborating Illis' contention despite the fact she sat in on all of Tyler's May 3 hearing testimony and did not testify herself on this subject until June 21.

post-dates the issuance of the complaint in the instant matter), and relate to two supervisors, not bargaining unit personnel.

What Illis wrote on Tyler's personnel action form bolsters the argument that animus guided Illis' acceleration of Tyler's resignation date. See *Cook Family Foods, LTD.*, 311 NLRB 1299, 1319 (1993) (use of the terms "bad attitude" and "be careful of the company you keep" by a high ranking company official during a discharge interview implicate the employee's union activities as a motivating factor in the discharge and tend to undermine otherwise lawful reasons for discharge). The same day that Illis removed Tyler from the premises, Illis wrote "not eligible for rehire- resigned with bad attitude towards company" on an internal personnel action form. This "bad attitude" comment stands in stark contrast to Konjoh and Illis' repeated attempts to persuade Tyler not to resign. Konjoh even pitched the idea of staying to Tyler the night before she resigned. And Konjoh testified that Tyler never exhibited a bad attitude to her. [Tr. 2348].

Further undermining Respondent's indefensible position was Illis' less than forthright testimony about Tyler's job performance. On direct examination, Illis labeled Tyler a mediocre or marginal performer. Yet when confronted on cross-examination with the declaration she gave as part of the 10(j) proceedings, Illis acknowledged that her declaration made no reference to Tyler as either a marginal or mediocre performer nor did it say she possessed a bad attitude. Instead, Illis' declaration simply confirmed that she and Konjoh had repeatedly attempted to dissuade Tyler from resigning.

Based on the above, the record evidence clearly supports the ALJ's conclusion that Respondent violated Section 8(a)(3) by accelerating Tyler's resignation date and effectively discharging her on September 9, 2010. See *Gelita USA, Inc.*, 352 NLRB 406,

415 (2008) (The ALJ and Board found an 8(a)(3) violation when the Employer pushed up a laboratory technician's resignation date after the Employer's unlawful interrogation revealed her pro-union inclinations, and the Employer's explanation was pretextual because it was unable to establish a past practice of accelerating resigning employees' proposed departure dates)<sup>71</sup>; See also *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) (Where an employer's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation).

4. The overwhelming record evidence supports the ALJ's finding that Respondent violated Section 8(a)(3) of the Act by discharging Shannon Napolitano in retaliation for her Union sympathies.

**Exceptions # 26-29, 31-33, 69, 76, 80-82, 97 and 100**

- a. Napolitano engaged in union activity and Respondent's managers had knowledge of her activity.

Napolitano was one of the leading Union adherents on the day shift and served as the Union's observer at the election. She also distributed authorization cards, talked to employees and supervisors regarding the need for a Union at Somerset, appeared in a Union flyer and the YouTube video mailed to employees right before the election.<sup>72</sup>

Napolitano testified that in August 2010 she wore a Union sticker at work and that Apgar and Southgate saw her wearing the sticker. It is therefore appropriate to impute knowledge of Napolitano's union activity to Somerset based on Apgar and Southgate having seen her wearing the Union sticker. *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d

---

<sup>71</sup> Respondent's contention that *Gelita* is inapposite to this case is misplaced. As in *Gelita*, Tyler was the subject of unlawful interrogation shortly before Respondent accelerated her resignation date. Additionally, the *Wright Line* analysis applicable in *Gelita* is also applicable here, namely that Respondent's asserted defenses are pretextual and unsupported by the record evidence.

<sup>72</sup> Hutchens testified that he had received a copy of the Union flyer from a Somerset manager and also viewed the YouTube video at the behest of a manager before the Union election. Southgate testified that Illis brought up the Union flyer and YouTube video for discussion at management meetings (where the Union organizing drive was discussed). [Tr. 950-52].

1546, 1552 (10<sup>th</sup> Cir. 1996) affg. 317 NLRB 1140, 1143-44 (1995); *Pinkerton's Inc.*, 295 NLRB 538 (1989). Also, the ALJ properly credited Southgate's testimony that Fleming identified Napolitano as a Union adherent at management meetings.

b. Respondent's animus is direct evidence of unlawful motivation in discharging Napolitano.

Two weeks after the September 2 election, Somerset issued Napolitano a disciplinary warning for alleged patient care issues and discharged her. Thus, the first three elements of the prima facie case – protected activity, knowledge and adverse action – are established by clear evidence that Somerset was thoroughly acquainted with Napolitano's union activities. As demonstrated below, the record also contains overwhelming evidence that Somerset was motivated to discharge Napolitano because of her support for the union.

As the ALJ rightly concluded, Somerset conducted an aggressive anti-Union campaign. It solicited employees' complaints and directly remedied significant employee concerns in an effort to persuade employees to reject the Union. Somerset distributed flyers and held daily mandatory meetings to cast the Union in a negative light. Illis' statements during mandatory meetings that she would consider a vote for the Union "a slap in the face" and her sudden change in attitude – from a sunny, warm disposition to a cold, harsh one – after the election demonstrates general anti-Union animus.

It is noteworthy that Napolitano was singled out as a leading union adherent. The ALJ properly credited Southgate's testimony that Somerset put into motion a plan to more closely monitor leading Union supporters and issue them discipline until ultimately discharging them. That Somerset began issuing disciplines with greater frequency

immediately after the election further confirms this strategy and demonstrates that the reasons for discharging Napolitano were transparently discriminatory.

- c. The ALJ properly found that Respondent set up Napolitano to justify her discharge.

Shortly after the Union won the election, Napolitano was abruptly discharged for patient care errors, an action inconsistent with Respondent's policies, practices and treatment of other nurses. Konjoh claims that on September 16, a patient told her that Napolitano was giving her a pink capsule and she immediately conducted an investigation.<sup>73</sup> Although Konjoh denied knowing the pink capsule was zinc, her actions contradict her testimony. The ALJ correctly found that Konjoh did not contact Napolitano to ask her what, if any, pink capsule she had given the resident, nor did she check the medication cart to try to identify the pink capsule. Although Engram stated that in her professional opinion it would be routine to both review MARS and check the medication cart to identify the medication, Konjoh did not follow investigatory best practices. Rather than preventing the error, Konjoh instructed the resident not to take the pink pill if the nurse gave it to her again and to promptly report the incident to her.

Southgate's credited testimony sheds light on Konjoh's true motive. Konjoh revealed to Southgate that the resident had informed her that Napolitano had been giving her zinc, which had been discontinued. Konjoh told Southgate that she instructed the resident to hold the medication and report it to her if Napolitano gave it to her again. Southgate rightly concluded, and the ALJ as well, that Konjoh had set up Napolitano to

---

<sup>73</sup> In cross-examination, Konjoh admitted that Napolitano's initials only appeared on two days, August 25 and 30, rather than the four days which she cited in R-82. [Tr. 2373-75, 2428-33]. In apparent recognition of the weakness of its case, Respondent now argues that Napolitano acknowledged giving the pill four times. Respondent proffered no evidence that Napolitano was shown the MAR to positively identify her initials, nor presented evidence that she gave the pill on the other days in question. Thus, Respondent's exception is a blatant attempt to create an exception where there is none.

justify her termination. Konjoh had a duty to remove the zinc from the medication cart and intentionally failed to do so in an effort to entrap Napolitano.

Moreover, Konjoh disciplining Napolitano for her failure to wait for the patient to take all of her medication is nonsensical. The ALJ correctly concluded that Konjoh disciplined Napolitano for not witnessing the patient take the zinc – the very medication she was not supposed to give the patient. Respondent’s discipline demonstrates that it was attempting to establish a paper trail to disguise its true reason for termination.

Further, Respondent asserts that Napolitano charted an incorrect oxygen saturation level, which also merited discipline. The ALJ properly credited Napolitano’s testimony that she would have caught the mistake at the end of her shift in her regular review of the treatment records. Yet Konjoh rejected Napolitano’s explanation despite her acknowledgement that the error was clearly a mistake, nurses routinely review their records at the end of the shift, and if errors are discovered nurses can correct them without facing discipline. Napolitano’s conduct would have been easy to correct, but Somerset did not give her a chance. Rather, Somerset’s actions from the start of the day on September 17 – from canceling her double shift to Konjoh’s insistence that Napolitano failed to follow proper pain management procedures – demonstrates that the investigation was a charade to disguise its unlawful motive.<sup>74</sup>

A review of Somerset-produced disciplinary actions shows that LPNs Moore and Mangal also left medicine by residents’ bedsides, but such actions did not result in their terminations like Napolitano. Additionally, as discussed in detail *infra*, Dande and Bockarie committed more serious medication errors yet were not terminated. Thus, the

---

<sup>74</sup> The failure to offer an employee an opportunity to explain the circumstances for which he/she is being disciplined or discharge supports a finding of pretext. *Embassy Vacation Resorts*, 340 NLRB 846, 848-9 (2003); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002).

ALJ properly concluded that Somerset has offered no credible evidence that it would have taken the same action in discharging Napolitano *but for* her Union support. Napolitano's medication error and incorrect oxygen saturation documentation did not raise significant concerns. The real concern was Napolitano's pro-Union sympathies on the heels of the Union's election victory.

d. Timing and abruptness of Napolitano's discharge is evidence of animus.

Napolitano was abruptly discharged shortly after the Union election. The timing here is strong evidence of an unlawful motive for her discharge. *Sears, Roebuck & Co.*, 337 NLRB 443 (2002); *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000). Indeed, timing alone may be sufficient to establish that antiunion animus was a motivating factor. *Sawyer of Napa, Inc.*, 300 NLRB 131, 150 (1990).

e. Respondent treated Napolitano more harshly than other nurses.

Somerset's disparate treatment of Napolitano stands in stark contrast to the treatment of other nurses who committed medication and patient care errors. As the ALJ rightly found, the evidence demonstrates that Respondent treated other employees who engaged in similar or worse conduct than Napolitano in a much more lenient manner. Such conduct substantially detracts from Somerset's attempt to meet its *Wright Line* burden. *10 Ellicott Square Corp.*, 320 NLRB 762, 774-75 (1996), *enfd.* 104 F.3d 354 (2<sup>nd</sup> Cir. 1996); *Pope Concrete Products*, 305 NLRB 989, 990 (1991).

Respondent was especially tolerant of LPNs Doreen Dande and Mohammed Bockarie. On September 17, the same day of Napolitano's discharge, Dande received a final written warning for a similar infraction. Notwithstanding this alleged final warning,

Dande received four additional disciplinary warnings until she finally resigned on February 12, 2011.

Bockarie received a verbal warning for pain assessment on December 12, 2010. Somerset's issuance of a verbal warning for improper pain assessment, the same issue that led to deficiencies in the 2009 State Survey, demonstrates lenient treatment. Bockarie also received two verbal warnings for charting and attendance violations, and four more warnings for patient care errors before his suspension on May 18, 2011.

Comparing Dande and Bockarie's disciplinary records to Napolitano, who was discharged after a single warning, reveals blatant disparate treatment. Somerset gives no legitimate reason for its tolerance of Dande and Bockarie's more serious and prolonged misconduct before taking actions to discharge them. The only logical conclusion is Napolitano's union activities were responsible for Somerset's differing treatment.<sup>75</sup>

Moreover, the evidence demonstrates that Somerset more strictly enforced its policies against Union supporters. Southgate testified that Konjoh said she would discipline Union adherents if they gave her an excuse and she observed Konjoh more closely reviewing Napolitano's records. That Konjoh was reviewing Napolitano's records more closely confirms what she had told Southgate she would do. Thus, the stricter enforcement of a policy in retaliation for employees' support for a union is patently unlawful. *Treanor Moving & Storage Co.*, 311 NLRB 371, 375 (1993).

Finally, Somerset treated certain employees differently by intentionally refusing to discipline them despite committing similar medication errors as Napolitano. Southgate testified that she had received complaints regarding Dande and Bockarie committing

---

<sup>75</sup> Contrary to Respondent's assertion in Exception 22, the ALJ referenced Southgate's testimony as to what Konjoh stated she would do to union adherents, not Konjoh's testimony. This is Respondent's attempt to drum up an exception without any substantive basis for it.

medication errors yet they did not receive discipline. Jacques testified that in two separate incidents in December 2010, Dande and Bockarie failed to give residents their Coumadin medication. Jacques specifically recalls reporting the Bockarie incident on the 24 hour report and Konjoh told her the next day that she had taken care of the matter. Bockarie confirms Jacques' account that he committed a medication error and observed Jacques report it to Konjoh, but he never received discipline. Thus, Somerset's failure to discipline employees for similar infractions is evidence of disparate treatment.

5. The substantial record evidence supports the ALJ's finding that Respondent violated Section 8(a)(3) of the Act by discharging Sheena Claudio in retaliation for her Union sympathies.

**Exceptions # 34-37, 40-42, 69-74, 97, 102**

- a. The ALJ found that Respondent had knowledge of Claudio's union activity.

The unrebutted evidence demonstrates that Claudio was a leading Union adherent. She distributed authorizations cards, appeared in the Union flyer and as the first testimonial in the Union's YouTube video. Hutchens testified that he saw the Union flyer and YouTube video prior to the election. Southgate testified that the flyer and YouTube video were discussed in management meetings before the September 2 election.

Claudio also wore a Union sticker on her uniform at work that unambiguously demonstrated her Union support and that was seen by supervisors Apgar and Southgate. The ALJ also properly credited Southgate's testimony that Fleming identified Claudio as a Union supporter at the August 2010 management meetings. Thus, the evidence overwhelmingly demonstrates that Claudio engaged in protected activity and Respondent knew about Claudio's support for the union.

Thereafter, Somerset issued Claudio two written warnings for alleged patient care infractions on September 17 and September 29 (two day suspension), and terminated her on October 21 (due to an alleged incident on October 7).

b. Direct evidence of Respondent's unlawful motivation.

Somerset's anti-union animus toward Claudio is evidenced first by Respondent's overall anti-Union animus, as shown by its numerous unfair labor practices. *Greyston Bakery, Inc.*, 327 NLRB 433 (1990) (Section 8(a)(1) violations are evidence of animus regarding discharge of union supporters). More specifically, the ALJ correctly found that Konjoh unlawfully interrogated Claudio regarding how she felt employees were going to vote in the election. *Rossmore House*, 269 NLRB 1176 (1984).

As noted above, and found by the ALJ, Somerset's animus is further evinced by its anti-Union campaign. *Tim Foley Plumbing Service*, 337 NLRB 328, 329 (2001) ("The Board has held that an employer's anti-Union comments, while themselves lawful, may nevertheless be considered as background evidence of animus toward employees' union activities.").

c. Timing is circumstantial evidence of Respondent's unlawful motivation.

Claudio received no disciplinary warnings in the nine months prior to the September 2 election. Yet Claudio received two written warnings (including a 2 day suspension) and was discharged within a month of the Union election. Timing is evidence of such probative worth that, even standing alone, it may demonstrate antiunion animus as motivation for an employer's actions. *Sears, Roebuck & Co.*, 337 NLRB 443, citing *Masland Industries*, 311 NLRB 184, 187 (1993) and *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7<sup>th</sup> Cir. 1984).

More compelling is the fact that Claudio's disciplinary problems began after the Union election and her disciplinary problems culminated during the same period she was identified as a strong union adherent.

- d. The ALJ properly concluded that Respondent's anti-Union animus was a motivating factor in Claudio's disciplines and discharge.
  - (i) Respondent's September 17 warning shows Konjoh's deviation from Somerset policies to justify issuing discipline.<sup>76</sup>

About September 17, Konjoh issued Claudio discipline for giving a patient medication on two consecutive days when the order required medication to be administered every other day.<sup>77</sup> Respondent argues that there was no policy of boxing out MARS, yet the ALJ credited Claudio's testimony that MARS should have been "boxed out" and that the medication error should have been caught during the night shift's 24 hour chart check, which was required pursuant to the March 2010 plan of correction submitted to the State to verify that physician's orders matched the admissions paperwork. Respondent did not discipline other responsible parties and instead placed the entire blame on Claudio for the error. That Konjoh did not enforce the plan of correction, thus jeopardizing Somerset's compliance with the State, evinces that her conduct was retaliatory. See *McBurney Corp.*, 351 NLRB at 800-801.

---

<sup>76</sup> In Exceptions 40 and 41, Respondent's assertions simply boil down to minor discrepancies when the ALJ mistakenly identifies the pill as "enteric-coated" and identifies Jacques rather than Claudio as having dispensed the medication on consecutive days. In both instances, it appears that the ALJ made inadvertent mistakes given that earlier and later in the decision he correctly identifies Claudio as the nurse involved in the baby aspirin incident. Respondent raises discrepancies which do not impact on the ALJ's credibility resolutions or his finding of a Section 8(a)(3) violation.

<sup>77</sup> In Exception 17, Respondent argues that the ALJ failed to acknowledge that Konjoh testified she reviewed MARS/TARS in preparation for state certification survey. However, in cross-examination Konjoh admitted that, as the ALJ found, she only reviewed records on new admissions or if there was a specific complaint. [Tr. 2370, 2386-87]. That Konjoh was reviewing for the state survey during this period is unlikely given that the last state survey took place in December 2009 and surveys normally occur every 12 months.

Moreover, Somerset's suspension of Claudio for failure to sign her TARS is inconsistent with its own charting and documentation policy. Konjoh's assertion that she would not allow a nurse to sign off on treatments on the same shift without facing discipline is in direct conflict with Somerset's Medical Record: Charting and Documentation policy permitting such changes. The policy requires that the nurse "draw a single line through the error, write the correction above the error, and initial and date the change." Engram agreed that the general practice for a nurse, who has done his/her treatments but had forgotten to initial them, is to allow the nurse to place a circle on the blank and initial on the nurses' note without facing discipline.

- (ii). Respondent's September 27 warning illustrates Konjoh's unwillingness to give Claudio the benefit of the doubt in order to issue discipline.

Ten days after her first warning, Konjoh issued Claudio a 2 day suspension contending that Claudio failed to document a post-status fall,<sup>78</sup> failed to include a nurse's note in a new patient admission, and improperly treated a skin tear. While there was no dispute about the patient fall, Konjoh's handling of the two remaining complaints reveals a pattern of deliberate myopia and entrapment with regard to errors of union adherents.

Konjoh admitted that the evening shift nurses did not chart the post-fall patient at all and that nobody was disciplined from this shift for the same infraction Claudio committed. Konjoh also admitted that she had not checked the back of the package where a nurse's note is sometimes written and refused to give Claudio the benefit of the

---

<sup>78</sup> Respondent assertion in Exception 71 that the ALJ erred when he found that Claudio and Sandy Mootosammy were similarly situated is a misinterpretation of the ALJD. The ALJ correctly pointed out that Mootosammy received a first written warning for similar conduct as Claudio; however, despite Claudio's prior warning, in terms of progressive discipline her two day suspension far exceeded the discipline issued to Mootosammy. It is clear that the ALJ simply used Mootosammy's discipline to buttress his finding that Respondent's issuance of two day suspension to Claudio, rather than following progressive discipline, was an obvious deviation.

doubt that she had done the nurse's note even though she had received an otherwise complete admission package.

Konjoh's refusal to give Claudio the benefit of the doubt also was inconsistent with her dealings with other employees. Regarding the zinc pill incident, LPNs Chambers and Lezuaba's initials appeared on the MARS as having given the medication after it was discontinued, yet they denied that they had given the patient the zinc pill. Although Konjoh concedes that she did not believe Chambers and Lezuaba, she did not issue them discipline. Konjoh's differing treatment of Claudio versus Chambers and Lezuaba strongly indicates that union activity was the motivating factor.

Respondent's surreptitious insertion of a third accusation further suggests a discriminatory motive. Although Claudio did not recall a second page to the September 27 discipline, Somerset insists that she was disciplined for treating a patient for a skin tear without first obtaining a physician's order for the treatment. In cross-examination, Respondent's counsel suggested that the second page may have actually been written on the back of the disciplinary form. Even if the alleged incident had been written on the back of the disciplinary form, Konjoh's failure to make Claudio aware of it is an indictment of Konjoh's disparate treatment of Union supporters.

In addition, Konjoh's exaggeration of Claudio's alleged misconduct is further evidence of anti-Union animus. The evidence is clear that Claudio treated the patient for a minor scratch to the right elbow. Nevertheless, Konjoh issued her a warning for not obtaining a physician's order after the fact and repeatedly referred to the scratch as a skin tear. There is certainly no evidence that nurses have to obtain physician's orders for minor scratches. The notion that nurses would have to contact physicians for an order

every time a patient had a scratch seems contrived given the nature of the injury. The intentional distortion and exaggeration of this allegation strongly suggests an underlying animus against Claudio. See *Hospital Cristo Redentor, Inc.*, 347 NLRB 722, 741 (2006).

- (iii) The ALJ correctly found that the October 21 discipline and discharge of Claudio illustrates Respondent's exaggeration of the misconduct to justify discharge.

Somerset claims that Claudio was terminated because she returned to the facility after her shift had ended on October 7 to initial her TARS. It is undisputed that Illis warned her that she could not initial her TARS because it would be considered forgery, she ordered the night shift supervisor Janet Matthias to seize the TARS records, and had Claudio escorted out of the facility. Somerset offered no evidence showing that any other nurse was discharged for a similar infraction.

Contrary to Somerset's contention, there is ample evidence in the record that prior to the election, employees signed TARS the day after without facing discipline. Numerous employee witnesses and Southgate testified that Somerset had a recurring problem with blanks in MARS and TARS, but that these issues were resolved through in-services rather than discipline.<sup>79</sup> Moreover, Mangal testified that she observed Dande initial the TARS records the day after Claudio's indefinite suspension on October 7.

Illis' refusal to allow Claudio to initial her TARS records is contrary to Somerset's Medical Record: Charting and Documentation policy that requires that the nurse "draw a single line through the error, write the correction above the error, and initial and date the change." Yet Somerset discharged Claudio for failure to complete required clinical documentation which Illis herself prevented Claudio from completing.

---

<sup>79</sup> Exception 72 is a clear misinterpretation of the ALJD. The ALJ credited Southgate's testimony that nurses, not herself, completed TARS the next day without discipline. Thus, Respondent's exception is meritless.

More troubling is Somerset's shifting reasons for Claudio's discharge. At the hearing, Konjoh asserted that, despite Claudio's representation that she had given the treatments, she found no evidence that Claudio had actually done the treatments in question. Somerset offered no evidence to support Konjoh's contention. This testimony is contrary to the reasons set forth in Somerset's October 21 termination letter which only cited Claudio's failure to complete required clinical documentation. The ALJ rightly found that Konjoh's attempt to expand Claudio's alleged misconduct during her testimony indicates a shifting reason from which discriminatory motive may be inferred. *NLRB v. Henry Colder Co.*, 907 F.2d 765, 769 (7<sup>th</sup> Cir. 1990).

- e. Respondent treated Claudio disparately compared to other employees.

The record evidence reflects that Claudio was treated differently from other similarly situated nurses in significant ways. As noted above, Somerset tolerated the serious and prolonged misconduct of Dande and Bockarie, but afforded Claudio no such leniency. Against the backdrop of Somerset's anti-Union hostility, the difference in Somerset's treatment of Claudio, Dande and Bockarie for offenses of a similar nature is convincing indicia that Respondent's defense is pretextual.

The record evidence also demonstrates that missing initials on the MARS and TARS records was a persistent problem at Somerset. The ALJ properly credited Southgate's testimony that she frequently noticed blanks in her review of MARS and TARS, asked nurses about the blanks, yet no discipline was issued. The ALJ also credited Napolitano's testimony that DON Eileen Meyer and Care One Clinical Consultant Jessica Arroyo each told nursing staff to review their MARS and TARS and fill them in if blanks appeared. Both Southgate and Napolitano's testimony is bolstered

by Somerset's monthly nurses' meeting agendas that repeatedly mentioned "blanks on MARS and TARS no excuse." Moreover, a naked eye review of the MARS and TARS offered into evidence provide further proof that blanks on MARS and TARS records were frequent. Even though blanks on MARS and TARS were problematic, Somerset offered little by way of discipline to employees other than Claudio. Respondent's suggestion in Exception 37 that Dande's discipline for falsifying her MARS is similar to Claudio's discipline, is unpersuasive. To that point, Konjoh acknowledged that Dande admitted to falsifying medical records (not giving medication but signing the MARS as if she did), but did not discipline her for this infraction. In contrast, Claudio testified that she did her treatments and there was no evidence proffered by Respondent that she did not do them. Thus, Respondent's claim is inapposite. Yet it serves to highlight the disparate treatment of Claudio that is inimical to Respondent's *Wright Line* burden.

6. The substantial record evidence supports the ALJ's conclusion that Respondent violated Section 8(a)(3) of the Act by discharging Jillian Jacques in retaliation for her Union sympathies.

Exceptions # 38, 39, 43, 44, 62, 63, 69, 75-77, 97, 101

- a. Jacques engaged in Union activity and Respondent had knowledge of this activity.

Jacques was the leading Union organizer on the evening shift, distributed authorization cards, and held two Union meetings at her home. She also appeared in the Union flyer and the Union's YouTube video providing a testimonial in favor of unionization at Somerset.<sup>80</sup> Jacques further served as the Union's "roving" observer at the election. Although Somerset denied knowledge of Jacques' union activity at the

---

<sup>80</sup> As noted above, and contrary to Respondent's Exception 63, Hutchens knew of the existence of the Union flyer and the YouTube video prior to the election and testified that he told Illis about the existence of both. Both the Union flyer and YouTube video also were the subject of two post-election objections.

hearing, Respondent now concedes in its Brief in Support of Exceptions that it knew about Jacques' leadership role in the union organizing drive.

Jacques also wore two Union stickers on her uniform on Sticker Day, supervisor Janice Vyvas approached Jacques that day, and asked her what the sticker said. The ALJ properly credited Southgate's testimony that Jacques was identified as a Union supporter at management meetings. Also, Jacques spoke about her support for the Union with Konjoh, where in response to Konjoh's statement that she prayed the Union did not come into the building Jacques told Konjoh "Well I hope your prayers are not answered." [Tr. 2344, Tr. 2541]. Although Konjoh denies that Jacques' statement conveyed a message of support for the Union, her claim is unpersuasive.

b. Direct evidence of Respondent's unlawful motivation.

Somerset's anti-Union animus at this time is well-documented. Such evidence includes Somerset's solicitation of employees' complaints and grievances, interrogations, and its aggressive anti-Union campaign. *Tim Foley Plumbing Service*, 337 NLRB at 329; *Greyston Bakery, Inc.*, 327 NLRB at 443.

Bockarie's testimony confirms Somerset's unlawful targeting of Jacques as a Union supporter.<sup>81</sup> That Somerset put in motion a strategic plan to rid itself of Union adherents, like Jacques, through closer monitoring of Union adherents' activities and stricter enforcement of policies is patently discriminatory.

---

<sup>81</sup> Respondent's assertions in Exceptions 25 and 44 that Illis did not ask Bockarie to look for and report medication errors flies in the face of Bockarie's properly credited testimony and documentary evidence produced at the hearing in the form of text message audits. [Tr. 3161-64, 3166-73, GC-138]. The ALJ rightly credited Bockarie over Illis' self-serving testimony regarding the nature and reasons for the overwhelming number of text messages between the two, which began prior to Bockarie's arrival at Somerset.

- c. The substantial record evidence supports the ALJ's finding that Respondent's anti-Union animus was a motivating factor in the issuance of Jacques' disciplines and discharge.
  - (i) Respondent's September 28 warning illustrates Konjoh's rush to issue discipline without a full investigation and attempt to disguise her discriminatory motive.

Jacques was issued two written warnings before her discharge. About September 28, 2010, Jacques was issued a written warning allegedly for failing to chart the status of a post-admission patient and a post-fall patient on both September 24 and September 25. Jacques informed Konjoh that she believed she had not worked on September 25, then later reviewed her work schedule and confirmed to Konjoh that she did not work on September 25, but Konjoh refused to rescind that portion of the warning. Clearly, Konjoh did not investigate the situation completely and her inaction evinces support that the stated reason for the discipline was pretextual. *Joseph Chevrolet, Inc.*, 343 NLRB at 8; *Midnight Rose Hotel & Casino*, 343 NLRB at 1004.

With regard to Jacques' September 28 discipline, Konjoh testified decisively that after Jacques told her about her error she crossed out that portion of the discipline to indicate that she did not work on September 25. However, Konjoh's testimony was contradicted by the September 28 disciplinary form attached to Somerset's March 30, 2011 position statement, which did not reflect any portion of Jacques' discipline crossed out. Notwithstanding that Jacques did not commit the documentation error, Konjoh did not lower the discipline's level of severity. Thus, Konjoh was more concerned with ridding herself of Jacques than the appropriateness of the discipline meted out.

Furthermore, Konjoh testified that Patty Beck was the nurse who had failed to chart on September 25. Although Konjoh initially testified that she had issued Beck discipline for her failure to chart on September 25, after a break in her testimony, she

changed her testimony and instead admitted that Beck had received a verbal warning for not charting on another patient on September 25. Konjoh reluctantly admitted that Beck did not receive *any* discipline for the additional documentation error. Konjoh's failure to discipline Beck further evinces Konjoh's improper motivation in disciplining Jacques. *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 141 (1<sup>st</sup> Cir. 1981)

- (ii) Respondent's November 1 warning shows Konjoh's willingness to deviate from Somerset policies to justify Jacques' discipline.

Konjoh asserts that she issued Jacques discipline on November 1 for failing to properly fill out an incident report. Jacques called Konjoh and left a message explaining that she was not able to complete the incident report because the aide had left already, that she was aware of her charting responsibilities, was on top of it, and would obtain the necessary statement the next day. Despite Jacques' responsible behavior, Konjoh still issued her the discipline. Konjoh acknowledged that Jacques left a message explaining why she failed to properly complete one report, but Konjoh asserts that Jacques failed to address errors on two other reports. Konjoh's contention stands in contrast to Jacques' written response to the 11/1 discipline that claimed she completed three incident reports.

According to Somerset policy, Jacques had 24 hours to complete Accident/Incident Reports and Investigations forms. The policy also says that "the DON will be made aware of all such incidents occurring at the Center and will review and sign all completed reports." Konjoh inexplicably deviated from this policy to issue Jacques discipline. Konjoh's admission that she signed the reports confirmed that she in fact had received the completed reports from Jacques. That Konjoh still disciplined Jacques

indicates that her true motivation was discriminatory as the ALJ rightly concluded. See *McBurney Corp.*, 351 NLRB at 800-801.

- (iii) The ALJ properly found that Respondent's February 12 discipline and discharge of Jacques demonstrates Respondent's retaliation against the remaining leading Union supporter.

Somerset claims that Jacques was terminated for transcribing the wrong medication from the physician's order sheet and failing to transcribe the same medication onto the MARS on February 7, 2011 – a minor error in recording an oral order. Jacques was the assigned 3p.m. to 11p.m. charge nurse that night. She testified that that particular day was hectic with five new admissions, patient issues, family member questions as well as the facility's fax machines not working.

In addition, Jacques testified that after Engram indicated that Somerset was going to conduct an investigation into the documentation error, she questioned Engram as to why the 24 hour chart check did not pick up the error. Engram acknowledged that the 24 hour chart check missed the error. Somerset produced no witness or documentary evidence showing that it disciplined the night shift nurses for this failure. The ALJ rightly concluded that Somerset's disparate treatment of Jacques belies its assertion that it fired her for cause. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 950-951 (2003).

Moreover, Somerset's exaggeration of Jacques' misconduct relating to the transcription error is further evidence of anti-Union animus. It is undisputed that Jacques wrongly transcribed the order as regular aspirin rather than enteric-coated aspirin. Although Engram testified that the documentation error did not cause any harm, Engram testified this was a serious patient care issue. Contrary to Engram's testimony, the disciplinary records offered into evidence show that other nurses (e.g. Conteh and Moore)

committed similar errors yet received lesser corrective actions – verbal warnings – or were not disciplined at all (e.g. Smith). *Syracuse Scenery & Stage Lighting Co., Inc.*, 342 NLRB 672, 679 (2004); *Guardian Automotive Trim, Inc.*, 340 NLRB 475 fn 1 (2003). The ALJ correctly concluded that Somerset offered no credible evidence that it would have taken the same action in discharging Jacques regardless of her Union support.

Finally, Engram told Jacques that she had failed to chart on a patient post-status fall. Jacques admitted that she did not chart on the patient. Even though Engram testified that she conducted audits on MARS and TARS only if it was a new admission or if there was a specific complaint, Engram admitted that the post-status fall incident occurred the week prior to the transcription error and there was no specific complaint. That Engram deviated from her regular practice to monitor the work of union supporters is strong indicia of pretext.

d. Respondent treated Jacques disparately compared to other employees.

Somerset treated leading Union adherents more harshly than non-Union supporters accused of similar nursing errors. That Somerset treated Dande and Bockarie<sup>82</sup> more leniently and tolerated their serious medication and documentation errors leads to the conclusion that Somerset's defense is pretextual. *Allegheny Ludlum Corp.*, 320 NLRB 484, 505 (1995).

In Exception 76, Respondent contends that the ALJ failed to consider that comparators had different disciplinary history. This is laughable. The overwhelming evidence demonstrates that post-election, Somerset inconsistently disciplined employees

---

<sup>82</sup> Respondent argues that the ALJ erred when he found that Bockarie started working at Somerset on October 25, 2010 yet Bockarie testified, and documentary evidence shows, that he started working there on or about October 25, 2010. [Tr. 3160, R-142].

who engaged in similar misconduct, and did not follow progressive discipline in any consistent fashion. For example, LPN Patty Beck and RN Supervisor Alice Bisong each received verbal warnings for failing to properly complete incident reports yet Jacques received a second written warning for the same alleged infraction. Although Konjoh testified that failing to properly complete incidents reports was serious misconduct, Respondent offered no testimony as to how it determined the difference in discipline nor did it offer any documentary evidence to justify the difference in severity.

Similarly, Somerset issued verbal warnings to Sally Conteh and Michelle Moore for failing to transcribe an order onto MARS and POS yet this same infraction triggered Somerset's decision to terminate Jacques. Not coincidentally, Conteh underwent re-training on transcription. Although Conteh was afforded an opportunity to obtain additional training, Somerset did not offer Jacques the same option. This further demonstrates that Somerset treated Jacques disparately and is strong indicia of discriminatory motive. *Guardian Automotive Trim, Inc.*, 340 NLRB 475 fn 1 (2003).

e. Timing of Jacques' discharge illustrates animus.

Jacques worked for Somerset for 11 years with a relative clean disciplinary record. Konjoh, Engram and Illis reluctantly testified that Jacques was a good nurse and was used as a charge nurse – an assignment only offered to dependable, experienced nurses. Yet two weeks after the Hearing Officer's Report issued in January 2011, Jacques was summarily discharged for a minor work-related infraction. The ALJ correctly concluded that such a coincidence in time between Somerset's knowledge of Jacques' union activities and the disciplinary actions taken against her is strong evidence of an unlawful motive. *Sears, Roebuck & Co.*, 337 NLRB 443 (2002).

7. The clear record evidence supports the ALJ's conclusion that Respondent discharged Valarie Wells in retaliation for her Union activities.

**Exceptions # 45-48, 83-88, 103**

Valarie Wells, with more than 15 years experience working at Somerset, was fired for supporting the Union. Her disciplinary record prior to the September 2 vote was spotless. Konjoh's commission of the same errors in October and November 2010 resulted in no discipline.

- a. Wells was fully engaged in Union activities and the ALJ correctly found that Respondent knew of her Union support.

Although Respondent contends it had no knowledge of Wells' union activities, the copious record evidence belies this contention. Wells engaged her co-workers and supervisors Apgar and Southgate in Union-related discussions in her office and out at the nurses' station. She appeared in the Union flyer disseminated shortly before the election, and which Illis and Hutchens acknowledge seeing prior to the election. Wells' testimonial states that she is voting yes and her testimonial and picture appear on the side of the flyer that says "Our Opportunity to Vote Yes is Here!" Furthermore, Wells appeared in the YouTube video, explicitly stating she wanted a Union for education and respect. Wells showed up to vote on her day off and cast a challenged ballot. Konjoh acknowledged seeing Wells come in to vote. Furthermore, in the *Wright Line analysis*, the timing of Wells' disciplines and discharge falls immediately after the Union election and in the middle of Respondent's purge of Tyler, Napolitano, and five per diem aides.

Illis' feigned ignorance of Wells' union activity was rightly discredited by the ALJ because she acknowledged seeing the Union flyer prior to the election. Wells' testimonial makes clear her Union support. [Tr. 2848] Illis also acknowledged sitting in on every day of the post-election objections hearing in October and November 2010. [Tr.

3102]. Respondent filed these objections on September 9, ostensibly with the assistance of the facility administrator. The first two objections filed specifically address the Union flyer and YouTube video. For Illis to testify that she couldn't recall if there was an objection filed over the YouTube video [Tr. 3102-3] smacks of a purposeful lack of candor and a denial of the obvious.

One other example of Wells' Union support was brought to Illis' attention during the two-week period in which Illis and Konjoh peppered Wells with disciplines. At the unfair labor practice hearing, Wells relayed her conversation with aide Yendy Dautrauche in which the angel wings and halo comments were made. Illis admittedly overheard these remarks and chastised Wells for her attitude. Wells and Illis' testimony on this subject are similar. But their testimony deviates when Wells testified that she told Illis she felt like she was being picked on for little things that weren't a problem in the past and were a direct result of the Union victory. Illis sat in on Wells' testimony, but in her version, she omits reference to this part of the conversation, stating that Wells didn't say anything else. [Tr. 2850]. Illis' omission is borne out of convenience instead of candor and must not be credited in light of Wells' specific, detailed testimony on this subject.

Illis' credibility is further undermined by her testimony that prior to the election, she wasn't aware of any employees who supported the Union. This testimony is pure fiction.<sup>83</sup> First, Hutchens showed Illis the Union flyer which unmistakably states in bold print "We're Voting Yes for 1199SEIU." Second, Southgate testified that Illis attended and sometimes led management meetings during the August campaign in which she went

---

<sup>83</sup> Illis was also impeached on cross-examination regarding her awareness prior to August 3 that Somerset employees were talking about bringing in a union. Illis first testified that she was not aware of this. Illis, however, testified at the post-election objections hearing in the fall of 2010 that she was aware of these discussions. [Tr. 3071-2].

down the *Excelsior* List to identify pro-Union and anti-Union voters. In this connection, Illis only offered vague and very general testimony about the content, discussions, and participants at these meetings. [Tr. 2712]. Again, such selective testimony demonstrates a conscious effort to evade offering potentially harmful testimony on direct examination, and a concerted effort to be evasive and lacking candor in her cross-examination.<sup>84</sup>

b. The substantial record evidence supports the ALJ's conclusion that Respondent would not have disciplined and discharged Wells in the absence of her union activities.

As the ALJ correctly noted, prior to the September 2 election, Wells enjoyed a spotless disciplinary record as Somerset's staffing coordinator, despite her admissions that she occasionally made mistakes in performing her job. She held this position for more than five years and served under three separate administrators, five DONs, and Hutchens' regional management since 2008. Yet nobody during this time talked to her about the use of regular schedules for per diem aides, her use of a "cheat sheet" to document staffing needs (as requested by Meyer), or her reliance on per diem and part-time employees to fill scheduling gaps (as requested by McCarthy). Illis issued Wells no disciplines in August 2010 and raised no performance issues during this time either.<sup>85</sup>

---

<sup>84</sup> As two specific examples, Illis first testified on cross-examination that she did not recall any specific conversations with Somerset employees about their "issues." To combat Illis' evasive answer, Charging Party counsel showed Illis her August 30, 2010 memo to employees in which she states that "...I am committed to helping this team overcome its issues and want to be part of this Center's future, but only if the voters in our election give us the opportunity to work together without a union..." [GC-12, Tr. 3096-7]. Illis also testified that although she spoke with at least 10 employees at Somerset in August 2010, she could not recall the details of a single, specific conversation she had with any employee. [Tr. 3078].

<sup>85</sup> Respondent's assertion that it is undisputed that Illis spoke to Wells about her performance in August ignores the record evidence, and specifically, Wells' denial that Illis or Konjoh spoke to her about performance problems in August. [Tr. 1237]. Illis suggests there was constant communication in August regarding Wells' alleged performance deficiencies. Yet despite Illis' near obsessive post-election penchant to e-mail or otherwise document communications with Wells, Respondent offered no such documents from August 2010 into the record. It strains credulity to conclude that not a single documented conversation or e-mail exchange occurred in August despite Illis' supposed issues with Wells' performance. Instead, the ALJ correctly credited Wells' testimony that Illis never spoke to her about her performance (other than to tell her to continue doing what she was doing) in August 2010.

Immediately after the Union victory everything changed for Wells. Illis and Konjoh retaliated against Union supporters by more closely monitoring and more actively disciplining them, and ultimately discharging several of the leading Union adherents.

In Wells' case, Konjoh and Illis selected Wells' first day back from vacation to issue her a verbal warning. Although Konjoh and Illis deny that the intent of the September 7 meeting was to discipline Wells, subsequent disciplines list the September 7 meeting as either a verbal warning or written warning. At this meeting, Illis principally complained about the lack of reconciliation between the Smartlinx schedule optimizer and the written daily assignment sheets. Yet the examples of deficiencies offered Wells came from the day before. And the ALJ correctly found that by holding this meeting in the morning, Illis and Konjoh denied Wells an opportunity to return from her vacation and modify the schedules by 10:30 a.m. – the permitted window- a fact which Illis confirmed in her testimony [Tr. 3031].

Additionally, Illis complained about the confusion amongst employees who were on the daily assignment sheets, but not scheduled to work in Smartlinx and vice-versa. Such gripes were valid, but placing the blame on Wells plainly ignores Heedles' actions from the previous month. Heedles generated a new schedule, modifying employees' hours, shifts, and days, and had Wells post this schedule in the breakroom. One of Respondent's first acts after the filing of the petition was to transfer Heedles and rescind the schedule changes.<sup>86</sup> Yet Heedles had already entered these schedule changes in Smartlinx. Wells pointed this out to Illis and Konjoh at the September 7 meeting. In their testimony, Illis and Konjoh try to downplay both the significance of Heedles'

---

<sup>86</sup> Counsel for the Acting General Counsel agrees that Heedles was the Administrator as cited in Respondent's Exception 1. This appears to be a minor discrepancy given that the ALJ correctly identified Heedles' position on the same page and this has no impact on the ALJD. (ALJD 7:33-34).

inputted changes and Wells' vehemence that she was not to blame for the confusion. Wells' version of this discussion is more plausible and supported by the record evidence. Respondent's contention must suffer due to its inability or unwillingness to supply Counsel for the Acting General Counsel with these Heedles changes as requested in its subpoena *duces tecum* dated April 8, 2011 (Subpoena ¶11). By denying the Acting General Counsel access to these records, the best evidence lays in Wells' inherently credible accounting of the August/September scheduling chaos.

Respondent's rush to judgment is further evidenced in the September 15 discipline issued Wells. Wells acknowledged mistakenly omitting Dautrauche from the daily assignment sheet, but insisted that Mangal had submitted her vacation request after she had left for the weekend. Instead of affording Wells the chance to input Mangal's corrected schedule, Illis pounced on this supposed omission and issued Wells a written warning. Illis' sudden obsession with scheduling after the Union victory speaks to the unlawful motivation behind these disciplines. Her gratuitous derogatory remarks about Wells on the discipline, without showing the comments to Wells, demonstrate an attempt to exaggerate the alleged misconduct.

Respondent's closer monitoring of Wells continued as Konjoh issued her another written warning on September 16. This warning was for failing to hand-deliver a copy of the daily attendance form. Although Wells acknowledged that she failed to do this, she also confirmed that she placed this same document in plain sight at the nurses' station. Konjoh failed to address this fact in her testimony, perhaps because she did not want to draw attention to the disparate nature of the discipline. Konjoh issued Bockarie a verbal

warning for improper pain assessment of a patient [GC 110], but issued Wells a written warning for failing to give her an extra copy of a readily available document.

- c. Respondent's September 20 warning further illustrates Respondent's zeal to issue disciplines without fully investigating them first, and an unwillingness to reconsider these disciplines in light of credible evidence validating the discipline recipient's conduct.

Konjoh issued Wells a final warning on September 20 for allegedly failing to reconcile the Smartlinx schedules with the daily assignment sheets in at least five instances. Wells presented Konjoh with clear, uncontroverted evidence that two of these cited episodes were patently incorrect, yet nothing was done to remedy the discipline. For the Guerline incident, which the ALJ correctly cited as an example of Respondent's rush to judgment, Wells told Konjoh what happened and then presented her with the Smartlinx audit trail of changes verifying that it was Illis, not her, that made the incorrect Smartlinx entry. This evidence, contained in GC-77, is unassailable. Yet Konjoh never investigated nor did Illis accept her share of the blame for the error. Konjoh testified that after she presented Wells with the discipline, she spoke to Illis and asked her to look into the matter. [Tr. 2121]. This explanation rings hollow because nothing was done to remedy the discipline and Respondent terminated Wells the next day.

Furthermore, Wells complained to Konjoh that she did not cancel RN Greg (11-7 shift) as alleged in the write-up. Wells testified that she told Konjoh she never cancels an employee two shifts in advance and that she left a note for the evening supervisor to cancel Greg if he wasn't needed. Although Konjoh testified that Wells called Greg and told him not to come in even though he was needed [Tr. 2133], her earlier testimony about cancellation notice protocol bolsters Wells' account. Konjoh on direct examination testified that supervisors decide whether to cancel an employee before a shift begins

because they are the ones monitoring census trends. [Tr. 2095]. As a result, copious record evidence supports the ALJ's finding that Konjoh and Illis were prematurely assessing disciplines to Wells (and other Union adherents) in a manner consistent with disparate treatment and unlawful motivation.

The next day, Wells received her termination notice from Illis and Konjoh. Accused of a continued failure to reconcile Smartlinx with daily assignment schedules, Wells went from zero disciplines in more than five years as staffing coordinator – to disciplined and discharged within a two-week period.<sup>87</sup>

- d. Respondent cannot carry its *Wright Line* defense burden because it failed to discipline Konjoh for scheduling errors similar to those Wells committed.

Konjoh and Hutchens<sup>88</sup> explained the significance of reconciling the Smartlinx and daily assignment schedules. Konjoh testified that if employees were not reconciled in the Smartlinx system, the payroll person viewing the records would think that the employee worked when they did not. [Tr. 2096]. Hutchens opined that not reconciling discrepancies means that he can't manage labor on a real-time basis or monitor costs associated with labor. [1478-9]. Respondent, however, took no action against Konjoh's admitted failure to reconcile schedules during her brief tenure as staffing coordinator, the same allegedly significant misdeeds for which it terminated Wells. A review of GC 120

---

<sup>87</sup> Respondent raised a new issue at the hearing, suggesting that Wells was also somehow in violation of Respondent's use of technology policy by forwarding work-related e-mails to her personal e-mail account. Wells denied knowledge that such a policy existed and could not recall seeing an e-mail reminder of this policy in her inbox. [Tr. 1319]. Although the ALJ found that this issue was not fully litigated, the record evidence reveals that Respondent failed to prove that Wells read, received, understood, or was even aware of such a policy. The record is also bereft of any documentary evidence showing that this corporate policy was actually enforced against any other Somerset or Care One employee, or that this failure contributed to the discharge decision.

<sup>88</sup> Although Hutchens testified that there was increased scrutiny of the nursing department following the December 2009 survey, the ALJ correctly noted that there was no record evidence of Hutchens inquiring into Wells' performance before the election. This is true even though Hutchens had real-time access to SmartLinx and Wells worked for two years under his watch, yet was not disciplined until after the election.

and 121 reveals seven separate shifts covering six dates in October and November in which Konjoh failed to reconcile in Smartlinx. No discipline was issued to Konjoh as Respondent ignored the issue.<sup>89</sup> By abandoning reconciliation so quickly after Wells' departure, Respondent's *Wright Line* defense fails.

Additional Konjoh staffing coordinator performance problems were offered by Southgate. Southgate labeled Konjoh's performance in this capacity as "very erratic." Southgate cited frequent holes in the schedule and not knowing who was working or what shift employees were working as support for her description of Konjoh's performance. One galling example supplied by Southgate was an occasion when the shift change was approaching at 3:00 p.m., Konjoh hadn't supplied her with the daily assignment sheet, hadn't told her who was working the evening shift, and when she inquired about the situation, Konjoh simply stated that she was "working on it." To allow such performance failures to go unpunished while Wells' role as staffing coordinator was snuffed out points directly to Respondent's anti-Union animus and motivation for discharging Wells.

**Exceptions # 49-56, 93-96, 105**

8. Substantial evidence supports the ALJ's finding that Respondent violated Section 8(a)(3) of the Act by reducing per diem employee hours to prevent them from voting in a possible re-run election and in retaliation for their Union sympathies.

The motivating factor in Respondent's crusade to reduce (and in some cases eliminate) per diem employees' hours was anti-Union animus. Southgate revealed Respondent's true motivation in recounting her conversations with Konjoh. Shortly after the September 2 election, Konjoh instructed Southgate to stop using per diem aides

---

<sup>89</sup> A review of GC-134, which covers Charlotte D'Antignac's tenure as staffing coordinator in December 2010 reveals three Smartlinx reconciliation problems on three separate dates. No discipline was issued to D'Antignac for these errors and Illis admitted on cross-examination that she did not review D'Antignac's work for inaccuracies. [Tr. 3056].

unless she cleared it with her first. A few weeks later, Konjoh explained the reason for this policy reversal. Konjoh told Southgate that Somerset was contesting the election results and if another election was ordered, per diem employees needed to have worked a minimum number of hours to be eligible to vote. Therefore, Konjoh was preventing long-time per diem aides from working their regular schedules, or sometimes at all.

The timing of this blatant discriminatory practice fell immediately after the Union's victory and shortly after the filing of objections seeking to nullify the initial election results. This was no coincidence, however, as the per diem purge stands with the discharge of Union adherents as another retaliatory tactic designed to eviscerate Union support and ultimately help Respondent rid itself of the Union. *Thomas Cartage, Inc.*, 186 NLRB 157 (1970) (layoff of part-time employees so that they will be ineligible to vote in a re-run election violates Section 8(a)(3) of the Act).

a. Respondent's multiple proffered justifications for reducing per diem hours stand as shifting defenses, all of which are pretextual.

Respondent blames staffing coordinator Valarie Wells for setting per diem employees on regular schedules in contravention of Respondent's established policies.<sup>90</sup> Though accurate to say that per diem aides at Somerset generally enjoyed regularly scheduled hours (usually every other weekend shifts), to assert that corporate was unaware of this practice and it was first discovered during the August/September 2010 period is pure fiction.

Both Hutchens and John Korkorus testified that Hutchens and other corporate officials had real time access to Somerset employee hours, status, and shifts through

---

<sup>90</sup> Contrary to Respondent's assertion that Wells' actions undisputedly ran contrary to Somerset policies, Wells testified that former DON Rebecca McCarthy instructed her to use per diem and part-time employees to fill open shifts.

Smartlinx. Wells served as staffing coordinator prior to Hutchens assuming oversight for Somerset in September 2008. For two years, Hutchens accessed this real-time staffing data, four permanent DONs at Somerset accessed this information, and two administrators and an unknown cadre of human resources personnel also reviewed Smartlinx entries on a regular basis. It strains credulity to believe that none of these officials was aware of the regular scheduling of Somerset per diem aides.

In all likelihood, everyone referenced above was aware of the practice, each gave his or her blessing to Wells' scheduling efforts, and Hutchens' apology to employees during the August 2010 campaign explains why. Hutchens told employees that Somerset's numbers were up, beds were filled, and it was one of the better-run buildings in his portfolio. [Tr. 1013]. Therefore, Somerset's practice of regularly scheduling per diem aides became an imbedded part of Somerset's culture. And Respondent's contention that it discovered this practice during the course of the Union organizing campaign, and reversed this policy shortly after the Union election cannot be credited.

b. Respondent's cost considerations defense fails based on its use of LPNs to cover aide shifts.

Respondent also argues that cost considerations or economic inefficiencies drove it to significantly reduce Somerset per diem aide hours. The record evidence belies this contention. Per diem aides earned about \$2/hour more than part-time aides.<sup>91</sup> They received no benefits. The ostensible reason for significantly reducing per diem aide hours was to distribute these hours among cheaper part-time aides. But an examination of Respondent's October and November 2010 work schedules reveals that LPNs often performed aide work and often on the shifts that Annie Stubbs, Gertrudis Rodriguez,

---

<sup>91</sup> All employees received shift differential pay for working nights and weekends.

Daysi Aguilar, and Dominique Joseph regularly worked. LPNs Shanny Mangal, Sharon Smith, Mohammed Bockarie, Michelle Moore, and Doreen Dande worked a combined 17 shifts as aides in a two month window. None of the above referenced discriminatees was called to work these shifts and none of the five discriminatees worked a single shift at Somerset after September 2010. Despite Daysi Aguilar submitting a letter to Konjoh specifically indicating her availability to work the evening shift on October 9, Konjoh instead paid Shanny Mangal an LPN wage rate to perform aide work.<sup>92</sup>

For each of these 17 shifts, Somerset paid LPNs a significantly higher wage rate to perform aide work, these LPNs accrued more vacation and sick time, and increased the likelihood that Somerset would fully match their 401(k) contributions (up to 3%) because of their increased hours worked. Based on the above, it is clear that cost considerations had nothing to do with Somerset's per diem aide purge. Instead, as the ALJ correctly concluded, anti-Union animus, fed by the desire to remove as many Union supporters from any prospective voter eligibility list, motivated Respondent's unlawful actions here.

- c. Respondent's consistency and continuity of care defense fails because it replaced many long-tenured per diem aides with less qualified, less experienced per diem aides.

Respondent next asserts that its significant reduction in per diem aide hours was grounded in consistency and continuity of care concerns. On its face, this argument fails because Respondent replaced veteran per diem aides who consistently worked the same

---

<sup>92</sup> Respondent tries to explain away its resistance to calling Aguilar by noting that for continuity of care purposes, it preferred aides to work the same shift on both Saturday and Sunday. The record evidence again undermines this assertion. Mangal worked the day shift as an aide on Saturday 10/9 but did not work this shift the next day. Mangal worked the day shift on Saturday 10/23 but did not work this shift the next day. Furthermore, neither Mangal nor Moore nor Bockarie nor Dande worked the corresponding Saturday shift for the Sunday aide shifts they worked in November 2010.

schedules<sup>93</sup> with less experienced, less qualified per diem aides. Both before and after the September 2 election, Respondent hired or facilitated transfers of at least four new per diem aides. Such maneuvers at a time when election-eligible per diem aides were being phased out supports a conclusion that Respondent was more interested in stuffing the voter rolls with friendly, anti-Union personnel than in continuity or consistency of care.

The ALJ correctly credited Bockarie's testimony regarding Respondent's motivation for granting transfers. Illis contacted Bockarie shortly after the election. She told him that the Union won the first election, Somerset was seeking another election, and she was recruiting employees to come to Somerset to vote against the Union. Illis expedited the transfers of Bockarie and new hire per diem aide Abdulai Monsaray. Although Hutchens and Illis testified that transfers usually take between 1-2 months and prior work history is taken into account in analyzing transfer requests, Monsaray's transfer approval remains a mystery. He began working at Holmdel on August 13, 2010, and received a transfer to Somerset, effective November 14, 2010.<sup>94</sup> Bockarie's credited testimony on this subject supports Southgate's credited testimony that Somerset was no longer calling existing per diem aides in anticipation of a re-run election.

But Somerset desperately needed bodies to work the floor. Therefore, it hired Gerarda Jean (August 24), Edeisha Jarrett (September 24), Aminata Conteh (October 2010), and Mansaray (November 14) as per diem aides. Not only were these less

---

<sup>93</sup> Respondent's contention in its Brief in Support of Exceptions that the per diem aides in question "...really were not well-positioned to serve Somerset Valley in a per diem role at all" (page 74), is a fallacy considering that they had dutifully served this same employer in the same capacity for several years without incident.

<sup>94</sup> Respondent erroneously states in its Brief in Support of Exceptions that there was no evidence introduced of per diem employees from Holmdel transferring to Somerset. The record clearly shows, and the ALJ rightly found on page 50 of the ALJD, Mansaray transferred from Holmdel to Somerset as a per diem aide.

experienced aides, but they were still per diem aides, not the part-time or full-time aides who were supposed to assume an increased portion of “as needed” shifts.

A review of these four aides’ work records for October and November 2010 further undermines Respondent’s proffered defenses.<sup>95</sup> In early October, Jarrett simply assumed the day and evening shifts that Joseph, Aguilar, Stubbs, and Rodriguez had worked. Jean began working the every other weekend evening shift that Joseph and Aguilar previously worked. Jean worked the October 9 shift that Aguilar specifically told Konjoh she was available to work. By refusing to use Aguilar and instead filling aide schedule holes with an LPN and a new hire per diem aide, Respondent went to great lengths to avoid using per diem aides who voted in the union election. On the weekends that Jean did not work, Conteh started working the evening shifts. And Mansaray picked up the weekend slack on both day and evening shifts. His absurd scheduling reached its nadir when Somerset scheduled him to work back-to-back double shifts on November 20 and 21. Such a weekend schedule does contain continuity, but scheduling an aide to work 32 hours in a 48 hour window (without contacting any of the discriminatees to ascertain their availability) adversely impacts quality of care and again demonstrates the extreme lengths to which Respondent went to avoid scheduling Union-supporting per diem aides. Based on the above evidence, Respondent’s continuity of care argument fails and the ALJ correctly concluded that the hours of the affected per diem employees would not have been reduced in the absence of their union activities.

---

<sup>95</sup> Like in the earlier LPN review, several aides scheduled to work on Saturdays did not work the corresponding shift on Sunday. Examples are Edeisha Jarrett, who worked the day shift on Saturday October 2 but not the following day and Gerarda Jean, who worked the evening shift on Saturday November 20, but not the evening shift on Sunday November 21.

d. Respondent's "flexibility" defense is a pretext and shifting defense, further evidence of unlawful motivation.

Respondent's assertion that the five discriminatees lacked the requisite flexibility to continue as per diem aides under the new regime is pretextual, part of a shifting defense, and serves to underscore Respondent's anti-Union motivation.

According to Konjoh, Annie Stubbs indicated that she was only available to work weekdays on the day shift until 2:00 p.m. Respondent needed greater flexibility from its per diem aides and declined to call Stubbs for work. Such a position ignores Stubbs' two consecutive years of working weekends for Somerset, slots filled by Jarrett, Conteh, and Mansaray in October and November 2010. Furthermore, Stubbs told Konjoh that she had some availability on the night shift. This flies in the face of Respondent's flexibility argument. Stubbs' inherently credible testimony establishes that as a per diem aide she was willing to make herself available on weekends, days, and some night shifts (to complement her full-time job working the evening shift). And her position as Wells' go-to per diem contact speaks to her general flexibility filling in at Somerset. But Respondent chose to sacrifice a dedicated, responsible employee, with 25-years experience in the industry, in its zeal to purge Union adherents from its payroll records.

Stubbs is but one example of a per diem aide with a full-time job elsewhere. That is the nature of the industry and explains why Respondent's shifting defenses eventually landed on "flexibility." Respondent knew that there were built-in shifts that these women could not work, and that they could not accept full-time or part-time employment at Somerset, because they held full-time jobs elsewhere during these shifts. By relying on this defense, Respondent is attempting to insulate itself from liability for its clearly illegal motivations. And by shifting its defenses, Respondent confirms that all of its defenses

are pretextual and point to anti-Union animus as the true reason for its sudden per diem policy reversal. *Regal Health and Rehab Center, Inc.*, 354 NLRB No. 71 (2009).

(i) Respondent knew of Annie Stubbs' union support and violated Section 8(a)(3) of the Act by reducing her hours.

Respondent's assertion that it had no knowledge of Stubbs' union support is clearly contrary to the record evidence. Annie Stubbs had worked for Somerset since May 2009 on the weekend day shift and as a fill-in during the week. She had an unblemished attendance and disciplinary record. Southgate testified that Stubbs' Union sympathies were discussed during the August 2010 management meetings and Fleming noted that she worked at a Union facility. Stubbs' testimony attributes similar acknowledgments of her full-time Union job to both Konjoh and Carpio. Furthermore, during the August mandatory meetings, Stubbs spoke out about her pay cut and about the aides' collective grievance regarding trash bag accessibility. Such actions would certainly raise suspicions about her leanings, but Stubbs' appearance on the Union flyer confirmed her Union support. Despite Respondent's stubborn refusal to equate this Union flyer with Union support, Stubbs' Union support was clear.<sup>96</sup>

Stubbs worked at Somerset until September 19. While inquiring about night shift hours, Konjoh told Stubbs that she was not on the schedule for her next regular weekend shift and that she would call Stubbs when she needed her. According to Respondent's records, new hire Edeisha Jarrett worked Stubbs' regular day shift on Saturday, October 2. Stubbs never received a call back from Somerset and never worked there again.

---

<sup>96</sup> The ALJ correctly concluded that Hutchens' testimony regarding the Union flyer defies credulity. Hutchens testified that he didn't believe the flyer to be representative of who was supporting the Union and "I believe people on that flyer did not support the Union in my opinion." [Tr. 1661-2]. Such statements are laughable given the clear import of the language on the Union flyer- it reads "We're Voting Yes for 1199SEIU or "At Somerset We're Voting Yes for 1199SEIU." Beyond this obvious message, the testimonials often begin with "I'm voting yes" or "with the union." The ALJ properly credited Stubbs and Rodriguez's testimony on this point over Hutchens' absurd denials.

Stubbs' Union activity, Respondent's knowledge of such, Respondent anti-union animus, and the timing of her dispatch from Respondent's schedule clearly militate in favor of an unlawful reduction of hours. Southgate's credited testimony supplies the motive for Respondent's actions and even addresses Konjoh's dismay when Southgate tried to call Stubbs in to cover a post-election shift. Because Respondent's motivations were unlawful and its defenses pretextual, the ALJ correctly concluded that Respondent violated Section 8(a)(3) by reducing Stubbs' hours.

- (ii) Dominque Joseph communicated her Union support to Respondent and her hours were subsequently reduced in violation of Section 8(a)(3) of the Act.

Dominque Joseph worked for Somerset as a per diem aide for over two years. Her fatal employment mistake was to confide in Andrea Lee (whom she did not know was coordinating Somerset's anti-Union campaign) that the Union had benefitted her at her other job and would benefit Somerset employees. This testimony stands unrebutted.

Shortly after the election, Somerset removed Joseph from its nursing schedule. Joseph only found out when she arrived at work for her regular shift, could not punch in, and was told by Illis to go home and call Konjoh the following week. Joseph left three messages for Konjoh on three consecutive days but Konjoh never returned her calls.<sup>97</sup> Joseph has not worked at Somerset since September 2010. In lieu of calling Joseph in to work, Somerset paid LPN Mangal to work as an aide on Joseph's evening shift and gave new hire per diem aides Jarrett, Jean, Conteh, and Mansaray opportunities to work weekend evening shifts without ever calling Joseph.

---

<sup>97</sup> Contrary to Respondent's assertion in Exception 53, Joseph testified on cross-examination that she called Konjoh after her car was fixed, but did not speak to her. Joseph also testified that she left three more messages for Konjoh after Illis told her she was not on the schedule, but Konjoh never returned these calls.

Although Respondent denies knowledge of Joseph's union sympathies, Joseph's conversation with Andrea Lee stands unrebutted. Respondent's anti-Union animus is clear from the record and the timing of Joseph's reduction in hours mirrors Stubbs' fate. For the reasons advanced above, Respondent endeavored to eliminate as many per diem aide Union supporters as possible in advance of a possible re-run election. Joseph was a casualty of that purge in violation of Section 8(a)(3) of the Act.

(iii) Respondent knew of Gertrudis Rodriguez's union activities and violated Section 8(a)(3) of the Act by reducing her hours.

Rodriguez worked as an aide at Somerset for three and a half years. During the organizing campaign, Rodriguez appeared on the Union flyer and in the YouTube video. On the Union flyer, Rodriguez's name, picture, and testimonial appear under the heading of "Vamos a Votar si por 1199SEIU, and her testimonial on the YouTube video, which Hutchens and other managers acknowledge viewing prior to the election, makes obvious her support for the Union.

About two weekends after the election, Rodriguez no longer appeared on Somerset's weekend schedule. Rodriguez learned this by showing up for work, being told she was not on the schedule and that she should go home. A few weeks later, Rodriguez spoke with Konjoh, who told her that she would call her when she needed her. Rodriguez specified that she was only available to work on the day shift, the shift she had worked the last year. Konjoh offered Rodriguez a different schedule knowing that she could not work it. Rodriguez last worked for Somerset in September 2010, around the same time that Stubbs and Joseph lost their work privileges. For the same reasons attributable to Stubbs and Joseph, the ALJ correctly concluded that Respondent unlawfully reduced Rodriguez's hours in violation of Section 8(a)(3).

(iv) Respondent violated Section 8(a)(3) of the Act by reducing Rita Onyeike's hours.

Onyeike started working night shifts as a part-time aide in July 2010. On the evening of Sunday, September 12 she wore a purple scrub top to work emblazoned with the Union logo. At the end of her shift, Konjoh accosted her, threatened to call the police, and warned her not to return to work until she was called- and if she returned, never to wear the Union scrub top again.<sup>98</sup>

In short order, Onyeike received written notification that her job status was being changed from part-time to per diem status. Illis conducted an erroneous audit of Onyeike's work history.<sup>99</sup> Onyeike called Somerset to inquire about the letter and while speaking with Illis, Illis said that she should have known that by wearing the 1199 scrub Somerset would look at her as part of the Union. Onyeike asked if that was why Konjoh asked her to leave the facility and Illis said yes.

Onyeike never worked again at Somerset. She continually received calls shortly before her shift was to begin telling her not to come in to work due to a low census. Even when the census rebounded, Somerset never called Onyeike.

By wearing the Union scrub top, Onyeike made her Union sympathies open and obvious. In response, Somerset swiftly retaliated against her. Her status was shifted to per diem, Konjoh disciplined her for wearing the Union scrub top, and she was never called in to work again. For the reasons outlined above, the ALJ correctly concluded that Onyeike's reduction of hours violated Section 8(a)(3) of the Act.

---

<sup>98</sup> Although Respondent asserts that this incident never took place on the morning of the 13<sup>th</sup>, Onyeike's credited testimony is strengthened because that same day, Konjoh issued Onyeike a discipline for wearing the purple scrub top. Onyeike never received the discipline because she was never again allowed to work.

<sup>99</sup> The notification letter states that Onyeike had only worked 4 shifts. The ALJ correctly deduced that the record indicates she had worked about 10 shifts during this time.

(v) Respondent knew of Daysi Aguilar's union support and violated Section 8(a)(3) by reducing her hours.

Aguilar started working as an aide at Somerset in 2005. She voted in the election, but prior to doing so, she spotted roving observer Jillian Jacques and went to hug/greet her. Konjoh observed this exchange from about 30 feet away. Jacques motioned Aguilar away and Aguilar continued to the polling area to vote.

Less than two weeks later, Konjoh called Aguilar to inquire about her job status and to solicit her availability. The next day, September 14, Aguilar hand delivered a note to Somerset listing her availability on the day shift for September 25 and the evening shift for September 26, plus the evening shift for October 9 and the day shift for October 10. Konjoh never called Aguilar about the note.

The following week Konjoh made her animus towards Aguilar clear when she responded to a Wells e-mail by stating "I don't want to use Daisy (sic)." Konjoh further told Aguilar, upon her inquiry, that she wouldn't be needed for her suggested work dates in either September or October. Konjoh denied this 6-year employee the opportunity to work on October 9 and instead used LPN Shanny Mangal and new hire per diem aide Gerarda Jean to work in her place. Aguilar never worked at Somerset again.

For the same reasons attributable to Stubbs, Joseph, and Rodriguez, the ALJ correctly concluded that Respondent unlawfully reduced Aguilar's hours in violation of Section 8(a)(3).

9. The ALJ properly credited Acting General Counsel's witnesses  
Exceptions # 4, 21, 24, 52, 55, 57-60

In Respondent's Brief in Support of its Exception, it generally asserts that the ALJ made "conclusionary" credibility determinations favoring Acting General Counsel's witnesses' testimony when it conflicted with that of Respondent's witnesses and failed to

consider evidence that undermined certain Union witnesses' credibility and instead supports Respondent's assertions. It has long been the Board's policy to not overrule a Judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1951), enf'd 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). Respondent points out certain witness testimony that it claims directly conflicts with the ALJ's broad credibility determination that he failed to reconcile. Unlike Respondent's claim, the ALJ considered Respondent's arguments and properly found that as a whole group the Acting General Counsel's witnesses testified "straightforward, confident, consistent manner with respect to conversations and events which must have made an indelible mark on their memories" because the discussions occurred during "heightened tension in the facility due to the Union's organizing drive." In contrast, the ALJ found that Respondent's witnesses' testimony was inconsistent with each other, less than credible and exaggerated, offering specific examples to buttress his credibility assessment. Thus, the clear record evidence unmistakably supports the ALJ's credibility determination.

10. Respondent's affirmative defense is pretextual and fails to rebut Acting General Counsel's prima facie case.

**Exceptions # 11-16**

Somerset's defense here hinges on one accepting that its more stringent enforcement of policies was happenstance – that its new management team decided to tighten the reins in preparation for the State survey given the facility's 2009 State survey. Given that it took Somerset 9 months – and another citation in a complaint investigation in March 2010 – to change the management team,<sup>100</sup> the ALJ properly found that this

---

<sup>100</sup> The new management team recruited in August 2010 immediately following the filing of the Union's representation petition consisted of two veterans of failed Union organizing campaigns.

assertion makes no sense and simply cannot be believed. Respondent offered nothing but Hutchens' self-serving testimony that his decision to bring in a new management team was because of his concerns regarding the 2009 State survey, and Illis and Konjoh's unbelievable testimony that their decision to more actively issue disciplines had nothing to do with the Union, but rather everything to do with a crusade to tighten the reins on the clinical practice.<sup>101</sup> This heightened scrutiny occurred after the election and is belied by the 2010 State survey results.<sup>102</sup>

Hutchens' acknowledgement of the 2010 State survey as "not good" and resulting in Somerset's star rating being lowered to the bottom of nursing homes in Somerset County suggests that Somerset's post-election purge of experienced and well-trained nurses and aides, who also happened to support the Union, and replacing them with new hires and less experienced employees who transferred from Care One Holmdel exacerbated rather than improved its performance from the 2009 report.

#### IV. CONCLUSION

The entire record, a preponderance of the credible evidence, and the applicable case law prove that Respondent violated Sections 8(a)(1) and (3) of the Act as found by the ALJ. Acting General Counsel respectfully requests that the Board issue a broad

---

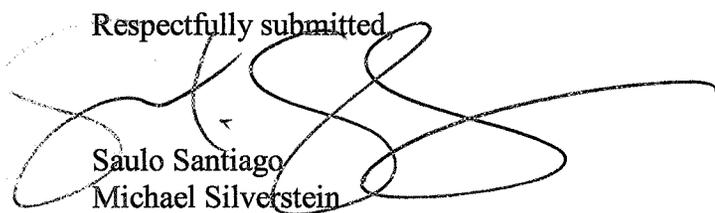
<sup>101</sup> Hutchens punched an irreparable hole in his credibility by testifying that Somerset's business and nursing practices are in a better place now than in August 2010. From a business perspective, Somerset housed about 55-60 residents in August 2010. Illis testified that there were currently about 40 residents at Somerset. From a clinical/nursing standpoint, Illis acknowledged that Somerset's December 2010 survey was "terrible," with Somerset being cited for 25 Federal and State deficiencies, many of which were categorized as substandard quality of care. [R-37, 38, Tr. 1486-7, 1680, 2675, 3112].

<sup>102</sup> Despite Respondent's contention that Somerset issued disciplines prior to the election, the overwhelming number of disciplines were issued after the Union campaign. Prior to the election, disciplines were rare, did not follow progressive discipline, and seldom involved documentation errors. The record is replete with examples of blank MARS/TARS prior to the election and no discipline was issued. However, this dramatically changed after the Union's victory.

order, with traditional reinstatement<sup>103</sup>, notice and make whole remedies, and for Respondent to comply with any other remedies deemed appropriate.

Dated at Newark, New Jersey this 29<sup>th</sup> day of February, 2012

Respectfully submitted,



Saulo Santiago  
Michael Silverstein  
Counsel for the Acting General Counsel

---

<sup>103</sup> In Exceptions 106-108, Respondent asserts that the ALJ erred in ordering that discriminatees be offered reinstatement because the LPNs were alleged to have committed serious patient care errors. At the hearing, Respondent offered no evidence, nor is there any evidence which suggests that the errors allegedly committed by the discriminatees were serious or resulted in actual harm of patients. Respondent argues that *Western Clinical Lab, Family Nursing Home, Big Three Industrial* and *Hoffman Plastic* support its contention that reinstatement is not appropriate here. The cases cited by Respondent are inapposite. In *NLRB v. Western Clinical Laboratory*, 571 F.2d 457, 461 (9<sup>th</sup> Cir. 1978), the Ninth Circuit remanded the case to the Board to decide credibility conflicts in the testimony relating to competency. Here, there was no evidence offered that the discriminatees were incompetent, nor is there any credibility conflict in the testimony in this regard. In *Family Nursing Home and Rehabilitation Center, Inc.*, 295 NLRB 923, 923 (1989), the Board affirmed the ALJ's recommended remedy that reinstatement was inappropriate given the discriminatee's violent behavior after she was notified of her termination. Simply put, these are not the facts involved in this case. In *Big Tree Industrial Gas & Equipment Co.*, 405 F.2d 1140, 1142-43 (5<sup>th</sup> Cir. 1969), the Fifth Circuit denied the Board's enforcement application regarding reinstatement because the discriminatee, a truck driver, had a previous record of driving misconduct with the relevant state agency and was classified as a habitual traffic offender under state law. In this instance, there is no record evidence finding that the discriminatees' were sanctioned or found in violation of any State nursing license regulations. Finally, there is no record evidence that reinstatement here contravenes any competing federal law. Thus, Respondent's reliance on *Hoffman Plastic v. NLRB*, 535 U.S. 137, 143-44 (2002) is invalid. Based on the above, Respondent's exceptions as to the remedy and Order must be rejected.

## CERTIFICATION

This is to certify that copies of the Acting General Counsel's Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's Decision have been duly served via electronic filing on the Executive Secretary on February 29, 2012 and on Respondent's counsel and Union's counsel via email on the same date as follows:

### ELECTRONIC FILING

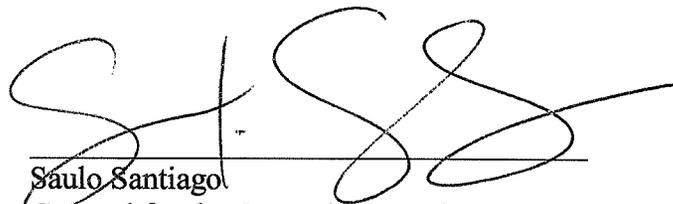
Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

### ELECTRONIC MAIL

Jay W. Kiesewetter, Esq.  
Littler Mendelson, P.C.  
3725 Champion Hills Drive  
Suite 3000  
Memphis, Tennessee 38125

Ellen Dichner, Esq.  
Gladstein, Reif & Meginniss, LLP  
817 Broadway, 6<sup>th</sup> Floor  
New York, New York 10003

Dated at Newark, New Jersey this 29<sup>th</sup> day of February, 2012.



Saulo Santiago  
Counsel for the General Counsel  
National Labor Relations Board - Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102  
Telephone: 973-645-3319