

San Benito Health Foundation and Hospital and Health Care Workers Union, Local 250, Service Employees International Union, AFL-CIO.
Case 32-CA-12356

August 14, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issue presented in this case is whether the Respondent discharged employee Elizabeth Garcia in violation of Section 8(a)(3) and (1) of the Act.¹ The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, San Benito Health Foundation, Hollister, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Discharging, or otherwise disciplining, employees, or otherwise restraining, coercing, or interfering with their exercise of rights guaranteed by Section 7 of the Act, because they have engaged in activities in support of a labor organization.”

2. Substitute the attached notice for that of the administrative law judge.

¹On May 10, 1995, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further contends that the judge's conduct of the hearing and his findings are tainted with bias, hostility, and prejudice against the Respondent. Upon our full review of the record and the decision of the administrative law judge, we find no merit in these allegations.

³We shall modify the recommended Order by relettering its affirmative paragraphs. We shall also substitute a notice that includes the Board's traditional remedial injunction against repetition of “like or related” unlawful conduct.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they have engaged in activities protected by the Act, including serving on a negotiating committee or serving as a union steward for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Elizabeth Garcia immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge, and that none of these records will ever be used against her in any way.

SAN BENITO HEALTH FOUNDATION

Barbara D. Davison, Esq., for the General Counsel.
Eugene Flemate, Esq., of San Jose, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me on August 2, 3, and 4, 1994. It is based on a charge originally filed on February 13, 1992, by Hospital and Health Care Workers Union, Local 250, Service Employees International Union, AFL-CIO (the Union). The charge alleged generally that San Benito Health Foundation (Respondent), committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On April 28, 1994, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section

8(a)(1) and (3) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a California nonprofit corporation, with an office and place of business in Hollister, California, where at all times material herein it has been engaged in the business of providing comprehensive health care services; that during the 12 months preceding the filing of the complaint, in the course and conduct of its business operations, it derived gross revenues in excess of \$250,000, and during the same period purchased and received at its facility mentioned above goods valued in excess of \$5000 directly from points outside the State of California.

Accordingly, I find and conclude that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal allegation in the complaint is that Respondent discharged its employee, Elizabeth Garcia, on or about January 17, 1992, because of her activities on behalf of the Union. Respondent asserts that the allegation is false. It states that she was discharged because she failed to do her work properly in that she failed to process billings which amounted to about \$65,000, thereby causing it to lose money.

B. *Background and Labor Relations History*

Respondent provides comprehensive health care services on an outpatient basis to residents of San Benito County, California. Its goal is to make such services available to the indigent population that lives and works in the area. Among its services are pediatric care, family planning, dental care, and basic medical care. Its income is primarily derived from the State, under grants which are renewed annually. It participates in Federal and state programs aimed at low income patients. Most billing is directed at collection of funds from such programs, primarily Medi-Cal.

In the performance of this work, Respondent employed approximately 35 persons at its Hollister facility, which was lo-

cated on Monterey Street at the time of the occurrence of all relevant events. These employees included medical professionals, as well as basic support personnel such as receptionists, medical record clerks, and clerks working in the billing department. Each department had a department head who reported directly to the executive director. The executive director was assisted by someone who performed the duties of personnel manager. At all times relevant herein, the executive director was Ben Cordova, and Elaine Cantu-Laughon was the assistant executive director.

Following an organizational campaign, an election and certification, the Union entered into its first collective-bargaining agreement with Respondent. Its term was October 1, 1990, through September 30, 1993.

Elizabeth Garcia served on the Union's negotiating committee, and after the agreement was reached, became a shop steward for the Union. In that capacity she performed such duties as dispute resolution, grievance filing, and wage reopener negotiations. There is no dispute about whether or not these activities on her part, which, after all, were carried out openly and obviously, were well known to Respondent.

C. *Elizabeth Garcia*

1. Garcia's work history

Elizabeth Garcia first worked for Respondent in February 1978, and served in a succession of jobs. She became its billing clerk in 1987. Eventually she was given the title of "patients' account supervisor." There is no dispute, however, that the position was nonsupervisory. In this job, as soon as all necessary information had been obtained from either the patient or the insurer, she billed patients' accounts. These included Medi-Cal, Media-Care-Care, grant programs, private insurers, corporate insurers, and self-payers. She was also responsible for troubleshooting the computer system. Because the system was inadequate, it was often "down," requiring her to process accounts by hand.

2. How Garcia's work was done

Garcia's work in billing accounts was generally triggered by her receipt of a form called an "encounter" form. This form was generated by Respondent, and "followed" a patient through each visit to the Respondent by the patient with each "provider" noting the treatment or supplies administered to the patient. Eventually, this form made its way to the billing department, and into Garcia's hands.

Although a great deal of time was spent at trial describing the minutia of the billing and/or collection process, I regard much of what was said as surplusage for purposes of this decision. A general overview, however, follows.

From time to time patients appeared at Respondent's facility for treatment lacking the requisite paperwork to enable processing of their bills. Such patients were not refused treatment, but were told to bring in the appropriate paperwork as soon as possible. Sometimes the patients did as they were instructed. Sometimes they didn't.

In the latter situation patients were billed directly. But, while a bill for which a patient had some sort of insurance was pending direct payment, the records underlying the bill were kept in a sort of "tickler file" in the billing department, which was physically reposed in a black metal box.

This method of keeping track of "unbillable" forms had its genesis before the arrival of Garcia in the billing department. Employee Debbie Diaz, a credible witness, testified as to how she had set up the system in 1986 by moving forms that had previously been kept in an accordion type folder in the reception area into the more substantial "black box." Garcia, a thoroughly credible witness, testified that she kept the system in place throughout her tenure as billing clerk. The system was well known in Respondent's facility, and was used by various other employees in addition to Garcia. Among other uses of this system was the practice of Garcia, despite the absence of any formal collection policy, of using as much time as possible to make telephone calls to jog the memories of those who "owed" additional paperwork, or bills. It is undisputed that many such calls were unsuccessful, and after it was found that the patient had given incorrect information, or had moved.

3. Garcia's need for help

It was not, however, always possible for Garcia to devote a great deal of time to such informal collection efforts. Respondent denied that she ever requested help from it. Both, however, Garcia and her immediate supervisor, Carlos Roman,¹ testified credibly as to requests made of higher management, specifically Ben Cordova, during routine departmental meetings to secure help for her to perform the duties of the billing department.

Additionally, Garcia credibly testified as to information she imparted to management concerning her need for help in the billing department in the course of management meetings, where she was in attendance in her role as shop steward.

Finally concerning the issue of whether or not Respondent was aware of Garcia's need for help in the billing department,² Garcia credibly testified about having informed man-

¹ Cordova hired Roman as Respondent's manager of its accounting department in October 1990, with the title of "Fiscal Officer." Roman became responsible for all Respondent's accounting, and, as such, ran the whole accounting department, including the accounts receivable clerk and the accounts payable clerk. Cordova introduced Roman to the employees and told them that Roman would be their supervisor. Thereafter Roman independently prepared the annual evaluations of employees in the accounting department, granted them time off, and approved employee timecards. Roman, a salaried employee, was not covered by the collective-bargaining agreement. Roman attended management meetings. On these facts I have no difficulty in finding that at all times material herein Roman was a supervisor within the meaning of Sec. 2(11) of the Act.

Roman was "laid off" by Respondent effective January 6, 1991.

² Genevieve Sanchez' testimony was initially to the effect that Garcia never raised the issue of needing help at any such meeting, but was later modified to allow for the possibility that Garcia had done so. Sanchez, still employed by Respondent, gave the impression of being biased in favor of Respondent.

Cantu-Laughon's testimony, also apparently biased in favor of Respondent, was initially to the effect that neither Garcia nor Roman ever mentioned anything concerning help for Garcia in the billing department, but she eventually admitted that Roman brought it up at almost every meeting, and that, indeed, Cordova told her that Roman had discussed getting additional help for the billing department, as requested by Roman and Garcia.

Cordova denied having heard such requests for help in the billing department. I discredit his denial, however, in view of his confessed desire to see Garcia's claims defeated, and in view of my highly un-

agement of that need during the course of various staff meetings. On a few occasions, Barbara Riesgo, the accounts payable clerk, or Diaz, the eligibility clerk, filled in and helped Garcia. But, usually all that happened was that Garcia was given some sort of assurance by Cordova that help would be provided following the move to a new facility, and, in one instance, help was actually provided in the form of a high school student being hired temporarily.

4. Garcia's evaluation

In any event, Garcia's work was obviously of no great hindrance to Respondent. For, as shown in her last appraisal, which was prepared by her immediate supervisor, Roman, she received ratings of "very good" in nine categories and "good" in the remaining six. She was urged to improve her supervisory skills through continuing education programs or any related programs, but was also recommended for a substantial wage increase.

5. Respondent's knowledge of Garcia's union activities

As noted earlier, the Union began its initial organizational campaign sometime after Garcia became Respondent's billing clerk. As also noted earlier, her activities on behalf of the Union were substantial, various, and obvious. Meanwhile, however, Cordova became Respondent's executive director before the first collective-bargaining agreement was reached between the parties, effective October 1, 1990.

6. Garcia's maternity leave

Garcia became pregnant, and went on maternity leave beginning in November 1991, with an anticipated return sometime in March 1992. While on leave she sometimes came to Respondent's facility to perform her duties as a steward for the Union.³ But her duties in the billing department were assigned to Riesgo and Diaz to perform in her absence.

7. Evidence of animus and motivation

In an effort to show that Respondent bore animus toward adherents of the Union, and that Cordova's motive in discharging Garcia was to retaliate against her union activities, counsel for the General Counsel elicited testimony from Carlos Roman about statements made by Cordova.

According to the testimony of Roman Cordova said to him one time after Sims had been fired that, "Katherine Sims is out, now we go on to the next one."⁴

favorable impression of his testimonial demeanor. Cordova was glib, and worked hard at appearing charming and honest. The effect was to produce just the opposite reaction in me. I am suspicious of any testimony by him which is not independently supported or corroborated. In short, I regard him to be a fabricator.

³ The only other union steward, Katherine Sims, was not available for such duties. She had been fired by Cordova early in 1991, allegedly for poor work performance.

⁴ As Roman recalled it:

Q. Okay. So he said that more than one time?

A. Yeah.

Q. And did he ever express any reason why, why he wanted her removed?

A. Mainly because she was part of the Union.

Q. Okay. And what words would he use to say that, as best as you can recall?

Continued

Also according to the testimony of Roman, in May 1991 Cordova met with him and the nursing supervisor, Perez. He recalled Cordova stating, during a discussion of his general frustrations over dealings between the Respondent and the Union, that he had to "get rid" of Garcia.⁵ Roman recalled

A. The strongest one I can remember is to get rid of her.

Q. Get rid of her?

A. Of her. That's about it. We have to get rid of her.

Q. Okay. Now, was it your impression that that was because of the Union or did he say it was because of the Union?

A. It wasn't related to work performance, but for Union matters.

Q. And he would say that?

A. Yeah.

⁵As testified to by Roman: (Questions by Flemate, except where shown otherwise.)

Q. The statement that occurred around May or June of '91. Where did that occur?

A. That occurred, that was again in his office. That was again in his office.

Q. Okay. And was anyone else present?

A. There was one person that was present but he is not here. It's Mr. Raul Perez.

Q. In May of '91 or June of '91?

A. May.

Q. Now you are sure it's May '91?

A. [No audible response.]

Q. And what was Raul Perez's job at that time?

A. He was head of the nursing department, the nurse department.

ADMINISTRATIVE LAW JUDGE HERZOG: You say Raul Perez was present at the May or June statement?

THE WITNESS: Um-hmm.

ADMINISTRATIVE LAW JUDGE HERZOG: And am I correct or am I incorrect in remembering that you earlier testified that that was supposed to have occurred in Mr. Cordova's office?

THE WITNESS: Right.

MR. FLEMATE: Did you ever comment on any of these three conversations with Mr. Cordova? Did you ever make any comment to him once he said this, these statements?

THE WITNESS: No, not really. I didn't comment anything. Like I said, one time I thought that when he said that we had to remove her that I suggested to relocate her in a different, different area, a different physical area.

ADMINISTRATIVE LAW JUDGE HERZOG: I thought you testified to that yesterday that you suggested to him that she could be put into a different location within the facility. Am I wrong?

THE WITNESS: No, you are right. When he said that we had to remove her I said, well, I would suggest her to be relocated in a different physical area in a different department.

ADMINISTRATIVE LAW JUDGE HERZOG: And I thought you testified yesterday that he made a response to your suggestion.

THE WITNESS: Responded to my suggestion?

ADMINISTRATIVE LAW JUDGE HERZOG: Yes, when you told Mr. Cordova that you were suggesting that she be moved to another location within the facility I believe—maybe I'm wrong about it—but I thought you testified yesterday that he responded to you.

THE WITNESS: No, no, he didn't respond to that.

ADMINISTRATIVE LAW JUDGE HERZOG: Okay.

By Mr. Flemate:

Q. Did Mr. Cordova ever mention any other reason that he wanted to get rid of Elizabeth Garcia?

A. No other—No other than being a union representative.

Q. Well, actually he didn't say because she was the union representative. You are putting that together based on the subject matter that you were talking about. Isn't that true? He didn't

that Cordova amplified by saying that Garcia was a threat to the administration and that he believed that she was leaking financial information to the Union.⁶ Roman sought to reas-

say, I want to get rid of her because she is a union representative. He didn't say that?

A. No, no, he didn't say that.

Q. Okay. What you are saying is that the topic was, his frustration with the union activities and then he would say, I have got to get rid of her or we have got to get rid of her, correct?

A. Correct.

Q. Okay. Did he ever say or do anything that suggested, was there any other reason as to why he wanted to get rid of her?

A. No, he didn't.

⁶Cordova's testimony concerning his conversations with Roman is as follows: (Questions by Mr. Flemate.)

. . . there were some meetings where we did discuss the union situation.

Q. What kinds of things would be discussed when you did discuss union matters with Mr. Roman?

A. My frustration that I shared with him on a number of occasions was the fact that on some of the items that we were talking about in regards to union issues that the Union was bringing up I was finding it rather interesting that what I considered privileged information was getting out. Sensitive information that I felt was of a personal nature regarding individuals and wages, etcetera. . . .

Q. Are you making reference to management proposals at bargaining sessions?

A. Yes.

Q. Okay. And before management would be able to make these proposals you got the impression that the Union already knew what the proposals were?

A. Before management sat down with the Union to negotiate these items it was indicated early on in the discussion that that information had already been shared or had already been communicated. . . .

Q. So although the contract was effective October 1st, 1990, come October '91 you were negotiating a wage reopener?

A. Yes.

Q. And then in 1992 you were negotiating a wage reopener?

A. Yes.

Q. So you are talking about some negotiation sessions that the comments were made by the union team rejecting out of hand your proposals before you even had made them?

A. Exactly.

Q. And what was Mr. Roman's response when you brought these concerns to him that you were frustrated that there seemed to be some leaks?

A. His response—It was clear that these types of figures had to come out of his department and his area and he tried to assure me that was not coming out of, that information was not coming out of his office, specifically him, or anyone else on his staff. . . .

Q. Okay. But notwithstanding his assurances, you still had your frustrations?

A. Yes.

Q. Did you ever suggest to him that there was a problem in the location of where Elizabeth Garcia was working?

A. Yes.

Q. And how did you bring that up?

A. Well, it was pretty obvious, like I suggested, the frustration I was having. . . . I—

Q. Okay. What about the suggestion that Elizabeth Garcia particularly—Did you ever raise with him that Elizabeth Garcia perhaps should be moved from the fiscal department?

A. Yes I did.

Q. When did that discussion take place?

sure Cordova that he was mistaken, and thereafter Garcia was never moved into any less sensitive area.

When the collective-bargaining agreement between the parties was reopened for wage negotiations in September 1991 Cordova remarked to Roman and Cantu-Laughon that he had to “get rid” of Garcia.⁷ Cordova later directed Roman to discipline Garcia for spending too much time on union business. Roman privately believed that Garcia was performing her work as she should, but did as he was told and spoke to Garcia. They reached agreement that she would limit her union duties to 1 hour each day, as the contract specified. She was not, however, ever disciplined for not performing her work.

Diaz, who took over as shop steward after Garcia went on maternity leave, testified that before she left the employ of Respondent in August 1992, Cordova told her that the employees would be better off without a union and that employees should just cooperate with the board of directors.

8. Garcia’s discharge

In late December 1991 or early January 1992 employee Evelia Gomez, from the front office, went to Cordova and asked what should be done with the items in the black box. Saying he didn’t know what she was asking about, Cordova and Gomez went to a closet in the billing department. There they found the black box.

A. I can’t remember the date but it was approximately when I got the first indication at our first meeting for bargaining sessions with the Union.

Q. Okay. Was there any resolution of your suggestion?

A. No.

Q. How did he take your suggestion? Did he agree with it or did he oppose it?

A. He—He opposed it. He felt like he had the confidence of his staff that was immediately around him.

Q. And what exactly did you have in mind when you said to move her? Were you talking about terminating her employment?

A. I was—What I meant and what we discussed was—I mean, we were all in tight quarters. There was just no room for anyone to be moved out anywhere in the facility. What I had suggested for him to do is to work out, either downstairs or down in the third level, some additional office space. If we couldn’t get just her situation isolated maybe we could get the situation all the way downstairs where they can all three work independently in different offices.

I pretty much left that on him because he would know what would be a workable situation versus a nonworkable situation. And as far as I, what I could see and what was happening and the type of indications I was getting, it was not a workable situation.

⁷ As testified to by Roman: (Questions by Flemate.)

A. The second time that I remember it clearly was by September.

Q. Why is it that you remember that so clearly in September of 91?

A. Well, I believe we had some union, he had some union confrontations in those special times. And that is why I recall more clearly that he said those, he made those remarks like, we have got to get rid of her. The incident, I mean—

Q. What was the incident that jogs your memory? You seem to be pretty clear to September of 91.

A. September. I think it was because the union contract had to be reviewed and some salary increases were due and we were processing some sort of reclassification for some people to get some salary increases. And then again, he was frustrated and he made that remark the second time. That was in September.

Cordova asked what it was used for. Gomez explained that it was used for pending claims when patients had not brought in the proper forms. Diaz chimed in saying that he should ask Garcia if he had any questions about the black box.

Cordova, however, went to Roman and asked what he knew of the matter. Roman confessed that he knew nothing about it. Cordova never asked Roman to inspect anything in the box, or asked anymore about it. Instead, Cordova said, according to Roman, that, “this time I’m going to get her.” Cordova then went to consult legal counsel regarding Garcia’s termination.

Thereafter, Cordova asked Garcia to come to the facility. She did so, and Cordova told her that he had found the black box, and asked her what it was. Garcia explained fully that it was used to followup on patients who hadn’t brought their paperwork. They discussed several examples, and Garcia explained that while the paperwork was pending the patients had all been billed individually, until such time as they provided the appropriate forms.

Garcia did confirm to Cordova that she had not sent out certain billing statements, saying they had been delayed by the reports he had asked to have prepared. She said that when she did the billings for the 60 to 80 patients daily at the clinic, prepare the reports that Cordova had asked for, and attend the computer system, there simply wasn’t time to keep up with the self-pay statements. Cordova kept insisting that what she was saying was that she hadn’t done her job, and Garcia kept insisting that was not at all what she was saying. The meeting ended with no resolution.

Cordova thereafter terminated Garcia without any further discussion or input from Roman. Weeks later, Cordova received a letter confirming her termination, citing as reasons:

Cordova learned on January 2, 1992, that billing statements to the Respondent’s patients had not been processed since September 1991;

Cordova learned in January 1992 that billing for various types of insurance had not been performed back to 1988, costing the Respondent approximately \$64,000;

Garcia’s failure to apprise management of needed assistance in management meetings since September, 1990.

A short time later, however, due to the demands of the clerks in the billing office and the reception area, Cordova reinstated the “black box” system of keeping track of paperwork for patients who had not brought their own.

9. Discussion and conclusions

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision.

Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would

have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

In this case I conclude that the General Counsel has made a strong case that Garcia was involved in protected activity preceding her discharge by Respondent. Garcia's credited testimony shows that she repeatedly performed work on behalf of the Union, such as serving on the negotiating committee and acting as union steward. It cannot be argued that such conduct is unprotected. The Board finds that the right of employees to organize for collective bargaining is a strong Section 7 right, "at the very core of the purpose for which the NLRB was enacted." *New Process Co.*, 290 NLRB 704, 705 (1988). In any litany of the ways in which employees organize themselves for collective bargaining, participation in negotiations, and in grieving must both surely rank very high. For this reason they are regarded as protected activities. Thus, Garcia's activities must generally be regarded as protected as well.

Thus, I find that this case is one to which *Wright Line* has application. Contrary to Respondent's position, the motivation of Respondent has clearly been placed in question through the testimony of Carlos Roman. For, surely, the testimony of a management official, a person who is clearly a supervisor, about the words spoken by the highest ranking official of Respondent concerning his motives in taking action against Garcia are highly relevant.

Respondent argues first that Roman is an incredible witness, and secondly that, in any case, Cordova's words are ambiguous.

As to Roman's credibility, I found him just contrary to Respondent's depiction. He is one of those witnesses encountered periodically whose testimony simply has the ring of truth about it. I was not troubled, as Respondent argues that I should be, by his lack of knowledge about some of the details of how Garcia performed her job. From my perspective, he appeared to know enough to do his own job, i.e., supervise her, while leaving the nitty-gritty details of how she performed to her own discretion. He seemed to be at pains to avoid exaggeration, and I could detect no bias at all against Respondent, whether on account of the manner in which his employment with Respondent ended or on account of some other reason.

Cordova's credibility, on the other hand, was continually impaired by his poor testimonial demeanor, his glibness, his willingness to fabricate while "looking-you-in-the-eye." But, in addition to his exceedingly poor testimonial demeanor, he repeatedly blandly switched stories when confronted with apparent inconsistencies.

One example was when he sought to portray himself as still in the process of decisionmaking when he had Garcia in to be interviewed preparatory to her termination; he testified that she might have saved her job if she had just not been so "arrogant." I believe that he was lying.

Another example was when he couldn't be pinned down as to just what the reasons for her discharge were. His later letter to Garcia was clear enough, and stated three reasons, all of which can be synthesized into her having used the "black box system." Yet, at trial he incredibly asserted at

one point that her use of the "black box system" was not a cause of her firing. Only to shift back to saying that it was the sole reason for her discharge.⁸

Still another example was when he sought to explain away the damning fact of his having reinstated the "black box system" only a short time after having used it for the dismissal of Garcia. According to him, it made all the difference that its reinstatement had been requested by "front office" personnel, and apparently it made no difference that its use had been claimed to have led to the loss of revenues by Respondent for years and years.

I find and conclude that Roman's testimony about what Cordova said to him concerning the reasons for Garcia's discharge is worthy of greater credence than any of Cordova's testimony.

Nor do I share Respondent's view that the testimony of Roman is ambiguous. Respondent would have it that Cordova's words, as testified to by Roman, merely reflected Cordova's "frustration" at the Union's actions, and his inability to cope with "leaks" which he clearly thought originated with Garcia's position in the fiscal department of Respondent. Respondent's position, however, fails to accord with the clear fact that Garcia was never reassigned to a less sensitive position, or moved to a location in the facility where her knowledge of confidential matters could be better controlled. Nor does it explain why, in dealing with the testimony of Roman concerning Cordova's words, I should not assign the most common and ordinary meaning to them. I see no apparent ambiguity to the words, "get rid of her," especially when used in a context such as the remarks concerning having just gotten rid of one union activist, Sims.

I find such evidence highly relevant to the issue of motivation. I further find that it also furnishes counsel for the General Counsel with the requisite proof of animus.

Accordingly, I find and conclude that counsel for the General Counsel has proven a strong prima facie case that Garcia was fired by Cordova precisely because of her union activities, and thus, in violation of Section 8(a)(3) and (1) of the Act.

It therefore becomes appropriate to turn to the defenses of Respondent, in order to determine whether or not "they demonstrate that the same action would have taken place even in the absence of the protected conduct."

⁸ As he testified:

ADMINISTRATIVE LAW JUDGE HERZOG: All right. Well, I gather you do recall that she explained to you. And I don't know what her words were but I'm assuming that the gist of them was along the line, you know, that you have got it wrong, I wasn't hiding things, I didn't do anything to prevent bills from being collected. Just the opposite this system here was designed to be a tickler, to help things. And if you assume as I am assuming that that was the explanation that she gave you my question simply had to be, whether or not you found that so utterly implausible that there was no way that it could be true?

THE WITNESS: Correct.

ADMINISTRATIVE LAW JUDGE HERZOG: All right. That's what I thought. Now was there any reason that you fired her other than the finding of the black box and the alarming contents about the money that you came across?

THE WITNESS: No, Sir.

ADMINISTRATIVE LAW JUDGE HERZOG: Nothing else contributed to it?

THE WITNESS: No, Sir.

The obvious beginning point of any examination of an employer's defenses is to look at the employer's stated reasons for its actions. This is so because, even in cases where valid grounds for discipline exist, an employer may neither use such grounds as a pretext for discrimination nor use them to bolster disciplinary actions undertaken on some other original basis. For, it is the "real motive" of the employer which is decisive. *NLRB v. Brown*, 380 U.S. 278, 287 (1965); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

Here, Respondent's original stated reasons were threefold, to wit:

Cordova learned on January 2, 1992, that billing statements to the Respondent's patients had not been processed since September 1991;

Cordova learned in January 1992 that billing for various types of insurance had not been performed back to 1988, costing the Respondent approximately \$64,000;

Garcia's failure to apprise management of needed assistance in management meetings since September 1990.

When I look at these three assertions, however, I find, based upon my credibility resolution of the conflicts between the testimonies of Garcia, Roman, and Cordova, that the first reason is simply untrue. As Garcia attempted repeatedly to explain to him, all the billing that needed to be done and which was consistent with the instructions and priorities assigned to her work by her supervisor, Roman, or Cordova through his demands for reports, had been done. What is germane here is that she had been doing her job as her supervisor wished her to do. And as he commended her for doing in her most recent appraisal. And in accord with the priorities set by him prior to her having gone on maternity leave. And according to the priorities demanded by Cordova's reports. True enough, Cordova didn't know about her system for keeping track of accounts that couldn't be processed in the usual way. And neither did Roman know of the full details. Yet, each was evidently satisfied for years with the result she obtained.

Similarly, when I examine the third assertion, I find, based upon the same credibility resolutions, that it is simply untrue as well. Garcia testified over and over about having requested help repeatedly of Cordova. Her testimony ultimately was corroborated by several other witnesses, including those of Respondent.

An employer's stated reason for discipline is the one which must be examined for validity, rather than some other reasons which may come to light after the employer has already announced its reason. And, if the stated reason is unconvincing, invalid or untrue, the very fact of its assertion may be viewed as tending to support the conclusion that an allegation of unlawful motivation is true. *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *McCain Foods*, 236 NLRB 447, 452-453 (1978); *Colorflo Decorator Products*, 228 NLRB 408, 418 (1977). Cf. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd. per curiam* (6th Cir. 1982). Here, I find and conclude that the assertion of reasons one and three supports the inference, which I draw, that Respondent harbored illegal motivation in asserting these reasons.

Thus, Respondent is left with only the second assertion to provide a defense that it would have taken the same action regardless of her protected activities. I regard it as axiomatic that if an employee actually performs work so poorly, or hides faulty work, so that it results in a substantial monetary loss for the employer then the employer is free to discharge that employee, regardless of past union or protected activities.

Of course, having once asserted a reason for its action, an employer may not thereafter shift to another or additional reason without risking an adverse inference being drawn from its inconsistency. *Zurn Industries*, 255 NLRB 632, 635 (1981), citing *A. J. Krajewski Mfg. Co. v. NLRB*, 413 F.2d 673, 675 (1st Cir. 1969); and *NLRB v. Taknor-Apex Co.*, 468 F.2d 692, 694 (1st Cir. 1972). For it is axiomatic that an employer's distortion and magnification of an employee's deficiencies casts a deep shadow over any claim that mere business judgment was involved in the employee's termination *Postal Service*, 256 NLRB 736, 738 (1981).

And that's what I believe has occurred here. Indeed, Respondent has asserted several different amounts that it claims that it lost by virtue of Garcia's misdeeds. They range from the original assertion of approximately \$65,000 in its answer, to approximately \$54,000 at trial, to the vastly inflated figure of "over \$200,000" in its brief. This latter figure is obviously based upon the testimony of Vicky Torres, who took over as Respondent's fiscal officer after the departure of Roman. Torres' demeanor during trial clearly showed her bias against Garcia, and I find her testimony at odds with the more credible testimony of Roman to the effect that Respondent lost nothing at all by virtue of any billings being delayed, or being in the "black box." As Roman and Garcia each credibly explained, bills were generated by the computer, and went out to each patient regardless of the fact that some paperwork was held in the black box pending its completion by the patient's compliance with instructions to bring in needed forms.

Thus, it has not been demonstrated to me that Respondent lost so much as a penny due to any actions taken or not taken by Garcia. The bills still went out, generated by the computer. And collections on bills were admittedly not Garcia's responsibility, but were merely something she had tried to do as time and circumstances permitted.

One key to understanding Respondent's motivations comes from considering that Garcia was discharged for doing a job poorly which wasn't her job at all. And using devices or methods that Respondent had no concern with previously.— True, Roman didn't know what methods she used to keep track of certain information. But, neither did Cordova before he jumped to the conclusion that her use of the black box system was responsible for financial losses by the Respondent. Where employees are selected for layoff or transfer, partly because of their alleged . . . poor work performance, yet have never been apprised of the employer's negative view of their work . . . attitude, and it further appears that the employer has not conducted an even rudimentary investigation of such dereliction, it may give rise to an inference of unlawful motivation. *K & M Electronics*, 283 NLRB 279 (1987).

Apparently it was assumed that Garcia had failed in her duties because the box was found in a closet. Yet, there is no evidence that she put the box in the closet. And it was

not discovered there until many weeks after her departure for maternity leave. Who knows how it got into the closet? I don't know. Certainly Respondent did not know when it disciplined her.

A violation is established where the evidence supports a finding that an employer has resorted to a campaign of "watchfully waiting for . . . union enthusiasts to give the . . . slightest reason or pretext to get rid of them because of their union activities." *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15, 21 (1st Cir. 1966). That seems to me to be precisely what occurred in this case. And, it is the only conclusion that accords with the evidence of Cordova's stated intent to "gether."

Cordova seems to have been a full race to judgment of a seasoned and superior employee, based upon her past record. Yet, the inference of unlawful motivation is doubly present when seasoned and superior employees are laid off or re-assigned, thereby apparently causing an employer to face the prospect of replacing them with someone unseasoned (much less when the employer fails and refuses to recall the seasoned and superior employee as vacancies occur, as here). It would seem that such a course of action by an employer would cost it substantial sums of money, precisely the opposite result which one presumes the employer hopes to occur, absent an unstated motive. An employer is not required to act logically, or consistently. But, when his actions fly in the face of his own seeming financial self-interest, they cannot avoid examination for evidence of intent to disguise an unlawful motivation. Compare *NLRB v. Davidson Rubber Co.*, 305 F.2d 166, 169 (1st Cir. 1962); *NLRB v. Stage Employees IATSE (Film Editors)*, 303 F.2d 515, 519 (9th Cir. 1962), cert. denied 371 U.S. 826 (1962).

Summarizing, I find and conclude that Respondent's asserted reasons for its actions fail to convince me that it would have taken the same course even absent Garcia's protected union activities.

In conclusion, I find and conclude that Garcia was discharged by Respondent in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee, Elizabeth Garcia, because she had engaged in protected and union activities.
4. The above unfair labor practices have an effect upon commerce as defined in the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that employee Elizabeth Garcia was unlawfully discharged, Respondent is ordered to offer her immediate reinstatement to her former position, displacing if necessary any replacement, or to a substantially equivalent position without loss of seniority and other privileges. It is further ordered that Elizabeth Garcia be made whole for lost

earnings resulting from her discharge, by payment to her of a sum of money equal to what she would have earned from the date of this suspension to the date of her return to work, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).⁹ Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further ordered that the Respondent remove from its records any references to the counseling, warning, and suspension mentioned, and provide Elizabeth Garcia written notice of such expunction, and inform her that the Respondent's unlawful conduct will not be used as a basis for further personnel actions against her.¹⁰

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, San Benito Health Foundation, Salinas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Discharging, or otherwise disciplining, employees, or otherwise restraining, coercing, or interfering with their exercise of rights guaranteed by Section 7 of the Act, because they have engaged in activities in support of a labor organization.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Offer Elizabeth Garcia immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

- (b) Remove from its files any reference to the unlawful discharge, and notify Elizabeth Garcia in writing that this has been done and that none of these records will ever be used against her in any way.

- (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

- (d) Post at its facility in Salinas, California, copies of the attached notice marked "Appendix."¹² Copies of the notice,

⁹See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁰See *Sterling Sugars*, 261 NLRB 472 (1982).

¹¹All outstanding motions inconsistent with this recommended Order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.