

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

American Federation of State, County and Municipal Employees, Council 31,	)	
	)	
Charging Party,	)	
	)	Case No. S-CA-20-024
and	)	S-CA-20-062
	)	S-CA-20-063
CGH Medical Center,	)	S-CA-20-087
	)	S-CA-20-226
Respondent.	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On August 23, 2019, November 18, 2019, January 30, 2020, and June 12, 2020 the American Federation of State, County and Municipal Employees, Council 31, (Charging Party or Union) filed charges with the Illinois Labor Relations Board’s State Panel (Board) alleging that the CGH Medical Center (Respondent) engaged in unfair labor practices within the meaning of Sections 10(a)(1) and 10(a)(2) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2016), as amended. The charges were investigated in accordance with Section 11 of the Act, and the Executive Director issued complaints for hearing on January 6, 2020 (Case No. S-CA-20-024), April 21, 2020 (Case Nos. S-CA-20-062 & -063), May 27, 2020 (Case No. S-CA-20-087), and December 2020 (Case No. S-CA-20-226). At the request of the parties, the cases were consolidated and also held in abeyance. A hearing was conducted on December 14, 15 & 16, 2021, via WebEx video conferencing, at which time the Union presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, and to argue orally.

The parties filed post-hearing briefs. After full consideration of the parties’ stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

**I. PRELIMINARY FINDINGS<sup>1</sup>**

The parties stipulate, and I find that:

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<sup>1</sup> The parties also entered into stipulations concerning the identification of certain exhibits, and these stipulations are incorporated into the statement of facts.

1. The Respondent, CGH Medical Center, is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act.
2. The Respondent is subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a-5) of the Act.
3. The Union, American Federation of State, County and Municipal Employees, Council 31, is a labor organization within the meaning of Section 3(i) of the Act.

## **II. ISSUES AND CONTENTIONS**

This consolidated case raises numerous issues, which fall into two broad but overlapping categories. The first group of issues concerns the Respondent's no-solicitation policy. Within this group, the first set of issues is whether the Respondent violated Section 10(a)(1) of the Act by allegedly maintaining an overly broad no-solicitation policy, by allegedly enforcing its no-solicitation policy more strictly in response to union organizing efforts, and by enforcing its no-solicitation policy in a discriminatory matter. Another issue related to the no-solicitation policy is whether the Respondent violated Sections 10(a)(2) and (1) of the Act when it issued a verbal warning to Brandi Barron on August 15, 2019, allegedly to discriminate against her because of her union activity.

The second group of issues concerns the Respondent's treatment of employee Brandi Barron following the verbal warning. These issues are whether the Respondent violated Sections 10(a)(2) and/or Section 10(a)(1) of the Act when it allegedly changed Barron's job duties, more closely scrutinized her work, issued her a five-day suspension, reduced her hours, and ultimately terminated her employment.

The Union alleges that the Respondent's no-solicitation policy is overly broad as written and as applied. It further asserts that the Respondent unlawfully enforced its no-solicitation policy in response to union organizing efforts and applied it in a discriminatory manner, to limit union solicitation and union discussions.

The Union next argues that the Respondent violated Sections 10(a)(2) and (1) of the Act by taking a number of adverse employment actions against Barron, a vocal union supporter. It asserts that the Respondent issued a verbal warning to Barron about the no-solicitation policy in whole or in part because of union animus. The Union suggests that the verbal warning qualified as an adverse employment action because the Respondent claimed that a verbal warning was part

of its disciplinary process and also referenced the warning in formal discipline it issued against Barron. The Union further asserts the Respondent's warning was based on union animus because the Respondent singled Barron out while tolerating non-work-related solicitation and speech throughout the clinics and hospital.

The Union next argues that the Respondent's decisions to change Barron's job duties and more closely scrutinize her work were additional instances of the Respondent's discrimination against Barron because of her union or protected, concerted activities. The Union notes that the Respondent changed her duties and began giving her work greater scrutiny immediately after she confronted President Paul Steinke about working conditions on behalf of other employees. The Union contends that the Respondent offered, suspicious, shifting and pretextual reasons for removing her obligation to perform rounding and directing her to test the new upgrades to the NextGen system and create educational documents instead. The Union argues that the Respondent removed her rounding duties and obligation to respond to non-scheduled training requests in order to limit her contact with other employees and her opportunities to discuss the union with them. The Union further argues that the Respondent added new duties, for which Barron was not trained, to set her up for failure.

The Union argues that the Respondent additionally discriminated against Barron when it suspended her for five days. It contends that the timing of the suspension, like the timing of the change in Barron's duties, was suspicious, occurring shortly after her discussion with Steinke. The Union notes that it also came on the heels of other discriminatory acts including the Respondent's change to Barron's duties. The Union further asserts that the Respondent's unlawful motive is evident from the fact that the basis for the discipline was not credible, and that the Respondent's agents failed to investigate the alleged misconduct, offered conflicting grounds for the suspension, revived stale matters, and demonstrated an intent to set Barron up for failure.

The Union likewise contends that the Respondent violated Sections 10(a)(2) and (1) of the Act when it reduced Barron's work hours. The Union argues that the Respondent's decision to reduce Barron's hours is tainted by its shifting and pretextual reasons for removing Barron's rounding and related duties because the removal of those duties justified the reduction in hours. The Union suggests that Director Matt Tichler's response to Barron's inquiry about supplementing her income with part-time work likewise demonstrates his animus towards her protected activities because he knowingly misrepresented the law so that she would agree to change her posi-

tion from part-time to full-time.

Finally, the Union concludes that the Respondent violated the Act when it terminated Barron's employment. It asserts that Respondent's decision to eliminate Barron's position was a pretext to remove one of the most vocal union supporters at CGH. The Union emphasizes that Barron's duties continue to be performed, albeit by a different title, and that the Respondent did not explain why it determined to remove Barron's duties and transfer them to another position. The Union also faults the Respondent for failing to give Barron preference in applying for a medical assistant position in lieu of termination.

The Respondent argues that its solicitation and distribution policy is lawful on its face and narrowly tailored. The Respondent denies that it discriminatorily enforced its policy in response to the Union's organizing efforts. It asserts that it did not knowingly allow solicitation in working areas. In the alternative, it distinguishes fundraisers and sales, which sometimes occurred in working areas, from pro- and anti-union solicitation and distribution. The Respondent denies that statements made by laboratory management interpreting the solicitation and distribution policy violated the Act. In the alternative, the Respondent argues that management corrected its misstatements and that no reasonable employee would have been coerced by them under the circumstances.

The Respondent denies that it discriminated against Barron in violation of Section 10(a)(2) and (1) of the Act when it talked to her about the solicitation and distribution policy. It reasons that the counseling was not an adverse action and that it treated Barron similarly to employees alleged to have advocated against the union.

The Respondent denies that it discriminated against Barron in violation of Section 10(a)(2) and (1) of the Act when it changed her job duties. The Respondent asserts that it did not subject Barron to an adverse employment action when it required Barron to create training materials because that obligation was an essential function of her job. It further argues that this decision was unrelated to Barron's union activity and instead motivated by its need for the materials. The Respondent further contends that there is no causal connection between Barron's union activity and the Respondent's decision to remove rounding from Barron's duties because there is no evidence that the decision-maker knew of Barron's protected activities.

The Respondent denies that it violated Sections 10(a)(2) and (1) of the Act when it monitored Barron's progress on educational materials and asked her to account for her time. It justi-

fies its inquiries into Barron's progress on the grounds that Barron was unresponsive and did not report back on her own. The Respondent contends that it asked Barron to account for her time because the quality and quantity of her work was not commensurate with the amount of time she purportedly spent on the assignment.

Next, the Respondent denies that it violated Sections 10(a)(2) and (1) of the Act when it issued Barron a suspension. The Respondent asserts that the suspension was unrelated to Barron's union activity and instead resulted solely from Barron's disregard of authority, insubordination in connection with a work assignment, and a litany of complaints submitted by employees, upon which the Respondent relied in good faith. The Respondent notes that there is no evidence of disparate treatment and further asserts that Barron's supervisor offered consistent reasons for issuing the suspension. In the alternative, the Respondent contends that it would have taken the same action notwithstanding Barron's union activity.

The Respondent denies that it violated Sections 10(a)(2) and (1) of the Act when it reduced Barron's hours, reasoning that it based its decision on its removal of her rounding duties. The Respondent contends that its removal of Barron's rounding duties was lawful and that its subsequent reduction of Barron's hours as a result of that earlier decision was likewise lawful.

Finally, the Respondent contends that it acted lawfully when it terminated Barron's employment. It asserts that it eliminated Barron's position for legitimate business reasons, to save costs and help alleviate the financial burden of the pandemic. It further emphasizes that Barron's position became redundant.

### **III. FINDINGS OF FACT**

#### **1. CGH Medical Center**

CGH Medical Center is a community hospital and clinic system. There is one main clinic attached to the hospital and 17 satellite clinics. Dr. Paul Steinke is CEO and President of CGH Medical Center. Shane Brown became the Vice President of CGH of Physician's Services in fall of 2019. In 2019 and 2020, Kristie Geil was the CGH Medical Center Vice President of Patient Care Services and Chief Nursing Officer. Mary Jean Derreberry held the positions of Director of Home Nursing and Nursing Professional Development from 2018 to 2020 and Director 2E Surgical, Ambulatory Care and Pain Clinic from 2002 to 2018. Sandi Baylor-Schmidt is the Director of Human Resources. Patty O'Brien is the Supervisor of Employee Relations.

Randy Davis is CGH's Chief Information Officer. Larry Brandon was the Director of the Electronic Medical Records (EMR) Department until January 2018, when Matt Tichler, formerly an application analyst, assumed the position.<sup>2</sup> The EMR Department supports employees of CGH and outpatient clinics on the use of NextGen, an electronic medical record charting system used to document day-to-day interactions between staff and patients.<sup>3</sup>

The Director of the EMR Department oversees four application analysts in the EMR department, Kevin Harshman, Ashley Roux, Arron Dry, and Greg Hepner. Harshman is the most senior of these application analysts.<sup>4</sup> The application analysts design templates for use on the NextGen system, train users on how to use the templates, and help users with other issues they encounter with the NextGen system. In 2017, the EMR Department employed a part-time EMR Trainer, who later left her employment there.

## 2. Brandi Barron Applies to the EMR Trainer Position and Becomes CGH's Full-Time EMR Trainer

Barron was a medical assistant at CGH from 2012 to 2017 first in the Surgical Podiatry Department and then at the Lynn Boulevard Clinic. In 2017, Barron applied for the position EMR Trainer in 2017 at the suggestion of Application Analyst Harshman, who had observed her use of the EMR system on the job and saw that she used the system better than most people. Barron did not see a posting for the EMR Trainer position before she applied.

The EMR Trainer job description states that the position holder is responsible for providing training to new and existing clinic staff on various functions and capabilities on the NextGen EMR, developing training materials for end users, and acting as a clinical liaison for other EMR department staff. The position requires Medical Assistant (MA) certification or higher and also requires proficiency in Microsoft Word.

Barron interviewed for the position. Then-Director Larry Brandon and then-Advance Application Analyst Matt Tichler conducted the first two interviews. During one of these interviews, Brandon informed Barron that the position of EMR Trainer was a full-time position. He noted that the person who previously held the position had worked only part time and that he, Brandon believed that training would be more effective if the EMR Trainer worked full time. At

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<sup>2</sup> Brandon assumed Tichler's former of application analyst and begin working from a remote location.

<sup>3</sup> The hospital uses a different medical records system.

<sup>4</sup> The record refers to him as a Senior Application Analyst and also as an Advanced Application Analyst.

hearing, Tichler further explained that the Respondent changed the position to full-time because the previous position holders were leaving because they were not getting enough hours and the department was not receiving applicants for the position when it was advertised as part-time.

Brandon also informed Barron of the position's duties and responsibilities. He stated that the EMR Trainer would be responsible for training new and current employees on how to use the medical records system. The EMR Trainer would be responsible for rounding 13 satellite clinics and the main clinic. When rounding, the EMR Trainer would be responsible for visiting different satellite clinics and being visible to employees to help them learn the NextGen system, if they needed it.

During one of the interviews, Brandon asked Barron whether she could use Microsoft Word. Barron replied that she had basic skills in Word, explaining that she could make bullet points. Tichler and Brandon indicated that she could learn on the job.

In April 2017, the Respondent offered Barron the position, and Barron accepted it. Barron began working in her position in May 2017, with a schedule of Monday through Friday 8 to 5 pm. As EMR Trainer, Barron trained CNAs, MAs, LPNs, RNs, nurse practitioners, medical assistants, physician's assistants, and doctors on how to use the Next Gen System. Barron would also go to employees' work locations a couple of times a week to perform training because they were unable to come to her. Providers would call or email her to ask her to perform training, which would last from one to six hours, and sometimes longer upon request. Barron would inform her supervisor via phone, email, text, or skype that she was going to a provider's office to assist them.

Barron performed rounding on a monthly basis. If no one needed her assistance while she was rounding, she would observe employees while they were working and would suggest short cuts to make their work more efficient or point out things they were missing. The frequency of Barron's visits to each clinic varied from once to twice a month. Barron would inform her supervisor via email, phone, text, or skype, as to where she was going.

In January 2018, Tichler assumed his position as EMR Director and became Barron's supervisor. In June of that year, Tichler issued Barron an evaluation in which he rated her overall as meeting standards but gave her an exceeds standards rating for her ability to demonstrate "flexibility to changing needs of the work when required." His comments included the following statement: "The results are there in that her rounding to the different clinics is beneficial in get-

ting the word out on any new updates as calls to the Help Desk are minimal after a major project goes live.”

### 3. Barron’s Performance-Related Events in April through June 2019

In April 2019, the director of the CGH daycare center, located across the street from the main clinic, informed Tichler that she believed Barron had clocked into work before dropping off her child at the day care center. The director informed Tichler that she noticed Barron going into the medical center building and then coming out again to the daycare center to drop off her child. She also reported that Barron had admitted to a staff member that she was already punched in when she dropped off her child.

On April 23, 2019, Tichler went to the daycare center to observe Barron. He saw that she went into the main clinic and then dropped off her child at day care afterward. He then checked Barron’s timecard and saw that Barron had punched in before dropping off her child at the day care.

Later that day, Tichler spoke to Barron about the incident and told her that her conduct was unacceptable. Barron explained that she was going to be rounding at the satellite clinics that day and thought she would be saving time, but she apologized for her conduct and said she would not do it again.<sup>5</sup> Tichler did not discipline Barron for this incident. After April 23, 2019, Barron never again clocked in before bringing her child to day care.

In the same month, CIO Davis informed Tichler about complaints he had received from providers that Barron had provided them with inadequate trainings. On April 30, 2019, Tichler addressed the matter with Barron by teaching her about the primary care templates on NextGen, instructing her to familiarize herself with them on her own.

On May 19, 2019, Tichler received a report from Becky Foy about Barron’s performance. Foy had received a report from Erika Stach, a nurse practitioner in surgery, claiming that Barron’s training was inadequate. Tichler did not investigate the complaint and did not speak to Barron about it. He did not have independent knowledge of this alleged complaint and did not

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<sup>5</sup> I credit Barron’s description of her response to Tichler over Tichler’s description. Although Tichler initially offered testimony that contradicted Barron’s account, he later admitted that his memory of her statements was unclear; and his initial descriptions of Barron’s statement are not relied upon. Tr. P. 625.



investigate it.<sup>6</sup>

In or around early June, 2019, Tichler met with Barron and Roux to discuss their roles in an up-coming multi-day training event, scheduled for June 6 & 7, 2019. To help effectuate further trainings on med module, Tichler instructed Barron to develop materials for the change in the template and to submit her work to Roux. Barron created some draft training documents and submitted them to Roux. The documents she provided included screenshots of the templates, but those screenshots did not include visual instructions with annotations because Barron did not know how to create such graphics. Roux created her own graphics in lieu of the ones Barron had inserted, and Barron noted that those graphics were colorful and better than hers had been. Between July and November 2019, Barron did not seek training to improve her skills in making graphics for educational training materials.

#### 4. Brandi Barron's Union Activity and Solicitation of Union Support

On June 8, 2019, the Union's organizational plan at CGH Medical Center went public. Barron was involved in the union organizing efforts. She signed a letter entitled "Open Letter to Our Coworkers," which listed the names and signatures of other union supporters at CGH Medical Center. The letter described the benefits of unionization and urged employees to sign cards in support of AFSCME to improve wages, benefits, and working conditions. The Union posted this open letter to a public Facebook page maintained by the Union. On August 4, 2019, it also mailed the open letter to all employees for whom the Union had an address.

Around his time, Barron spoke to employees at CGH Medical Center about the Union while she was clocked out on break or during lunch when both she and the other employees were clocked out.

#### 5. Solicitation and Distribution at CGH Medical Center

##### a. The Respondent's Written Policy

The Respondent maintains a policy addressing solicitation and distribution. It states the following in most relevant part:

[I]t is the policy of CGH Medical Center to prohibit solicitation of all kinds and

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<sup>6</sup>Tichler explained that he did not raise the issue with Barron because he had spoken with Barron a few weeks earlier about similar complaints and wanted to give Barron an opportunity to improve herself.

distribution of printed or written literature or other material on CGH Medical Center property.

The term “solicitation” includes, but is not limited to: asking employees to sign a petition, requesting employees to join or become a member of a group, soliciting an employee's support for a political candidate, asking employees to participate in wagers or gambling pools of any kind, or otherwise requesting employees' support or commitment with respect to causes, groups, or interests. Solicitation as here defined does not include fund raising activities on behalf of CGH Medical Center sponsored or endorsed charities.

Employees are prohibited from solicitation and distribution of any kind of while either party is on working time. Working time means the period between an employee[']s starting time and quitting time during which the employee is expected to be on duty and engaged in the performance of work. Working time excludes time the employee is not required to be engaged in the performance of work such as meal and/or break periods.

Solicitation of any kind is prohibited at all times in immediate patient care areas. Such areas include but are not limited to patient rooms, operating rooms, all areas where patients receive any type of treatment, all corridors adjoining any of the aforementioned, sitting rooms accessible to and used by patients and any places designated for the exclusive use of patients.

Distribution of any kind is prohibited at all times while in working areas. Working areas include patient care areas, kitchens, laundry or supply rooms, laboratories and offices. Employee locker rooms, employee restrooms, employee lounges and parking lots are not considered to be working areas.

Employees are not allowed to solicit or distribute materials in such a way as to interrupt or interfere with the work of other employees.

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Employees violating this policy are subject to disciplinary action up to and including discharge.

b. Testimony Regarding Solicitation/Distribution Practices at CGH Medical Center Facilities and Use of Workspace

Eleven employees testified on behalf of the Union about employees’ practices concerning discussion of non-work topics during work time in their respective departments and work areas and solicitation and distribution practices at CGH Medical Center Facilities. RN Jodi Thompson and CNA Nicole Tessendorf testified to practices in the Emergency Department, where they

both work. RN Manual Mooney and CNA Linda Bell testified to practices on the medical floor, which is on the third floor of the hospital, where they worked at all times material.<sup>7</sup> RN Faith Langenfeld (vascular clinic) and LPN Diane Gaumer (urology department) testified to practices on the third floor of the main clinic, which is attached to the hospital. RN Kami Shank testified to practices in the Surgery Department within the main clinic, where she worked at all times material. Medical Technologist Shelly Houzenga testified to practices in the laboratory, where she works. RN Darcie Bettner testified to practices in the CGH Home Nursing Department, located in the basement of the Lynn Boulevard Clinic, where she works. Medical Assistant Nicole Dornes testified to practices within the cardiology clinic. EMR Trainer Barron testified to practices within the EMR Department and her observation of practices in the clinics she visited while traveling to perform training.

Baylor-Schmidt offered testimony about her observations, from management's perspective.

c. Non-work discussions at work

All eleven Union witnesses testified consistently that in 2019 and in prior years, employees in their respective departments would discuss non-work-related topics while working. While each witness listed a different selection of commonly discussed topics, overall, the topics were wide-ranging. They included vacations, family, weekend plans, the news, sports, Christmas gifts, politics, religion, TV, and food. Prior to October 2019, employees in the emergency room also discussed the union on a daily basis. These discussions included pro and anti-union sentiments.

Such non-work discussions were frequent and occurred continuously through the day. Langenfeld stated that the discussions took place "every day throughout the day." Gaumer noted that the discussions occurred "every day, all day long." Thompson testified that employees would discuss non-work matters while working "all the time" and whenever they had a chance to talk.<sup>8</sup>

d. Non-work-related solicitations at work

Baylor-Schmidt testified that in cases where solicitations find their way into working are-

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<sup>7</sup> Bell worked there from 2016 to August 2019 and then September 25, 2019 through March 2020.

<sup>8</sup> She further noted that she was unaware of any complaints made to CGH management about those discussions.

as, or patient care areas, managers move them back to the break areas. If someone reports to HR that an employee is soliciting on work time in a work area, HR calls the manager and asks the manager to direct the employee to refrain from doing that in work areas or patient care areas on work time.

The eleven witnesses also testified to non-work-related solicitation at work that occurred in 2019 and in prior years. All eleven witnesses testified that employees engaged in a wide variety of non-work-related solicitation at work. Such solicitation included sales of Girl Scout cookies, wrapping paper, pizza kits, soaps, candles, bratwursts, Mary Kay makeup, Avon makeup, popcorn, bags, cakes, raffle tickets, pampered chef, chocolate bars, nail strips, protein shakes, and various fundraisers. Some employees also ran small businesses and sold their goods at work (e.g., a sign-making business). While not every type of solicitation occurred at each testifying employee's work location, each witnesses observed or participated in the solicitation of several different types of items.

All witnesses consistently testified that non-work-related solicitation occurred both in the breakrooms and in working areas/patient care areas. However, the particular types of solicitation varied by work location.

Thompson testified that in the Emergency Department, a couple of her coworkers would bring Mary Kay products and order forms to the nurse's station. The nurses' station has a counter, and the forms would be on the table where the nurses were sitting. If the nurses were busy, they would place the forms in the cubbyholes underneath the countertop. Thompson placed orders during work time and observed her co-workers doing so as well. Thompson testified that she did not have any personal knowledge as to whether management employees were aware of those materials being in the nurse's station. However, managers would approach while the materials were sitting out in plain view. She further noted that sports betting would also take place at the nurse's station. The candy bars sales would occur mostly in the breakroom, but sometimes people would bring them to the workstation. The forms for Girl Scout cookies would be in the breakroom. Thompson stated that employees solicited sales at the nurse's station every day during all the years she worked in the emergency room. Thompson noted that she previously worked in the clinics and observed that the same type of solicitation occurred at the nurse's station in the clinics and where the receptionist sat.

Tessendorf similarly testified that nurses would keep a Mary Kay book by the nurse's sta-

tion and that employees would place their orders in the book and return the book to the seller on work time. Employees would also pass around order forms for personalized bags during work time and employees would place orders while they were working. However, Tessendorf testified that she was not aware of whether any supervisors knew that this was happening. Employees also placed orders from products in the breakroom, including pizza, coffee cake, candy bars, and Girl Scout cookies. Employees would complete the forms and the seller would deliver the products to the breakroom.

Mooney testified that employees on the medical floor would sell candy bars at the nurse's station. The candy bars were in a box, and employees would take a candy bar and put money in the box. Mooney observed employees buying candy bars on work time. Employees also made sales in the breakroom by leaving order forms for products there.

Houzenga testified that employees in the laboratory engaged in solicitation in work areas such as the reception area and the conference room, which is used for laboratory staff meeting, vendor meetings, and training sessions. Employees would place the order forms and pamphlets in the conference rooms and people would fill them out to order. The solicitations in the conference room occurred throughout the year and included fundraisers or products such as bags, cakes, candles, popcorn, makeup, and laundry detergent. Laboratory Director Baker went in and out of the conference room on a daily basis, as did prior laboratory director, Susan McDonald. Houzenga saw Mary Kay cosmetic samples at the reception desk during work time.

RN Shank testified that employees in the surgery department would place forms for school fundraisers, selling wrapping paper, food items, and candles, on the counter of the nurse's station during work time. Employees would fill out the forms at the nurse's station or inform the seller orally of their order. During work time, the employees who were selling the goods would ask other employees if they wanted to buy anything. She noted that such solicitations also occurred in the breakroom. The solicitations would occur periodically through the year, including before the holidays.

Medical Assistant Dornes testified that employees in the cardiology clinic would engage in non-work-related solicitation in patient care areas including the reception desk and at the nurse's station. At these locations, employees would pass around order forms for products and would place orders. While Dornes testified that she would not necessarily know if any particular employee who was ordering a product was on break or punched out at the time, she conclud-

ed that the employees did so on work time. She testified that employees would place orders or talk about the product throughout the day, from beginning to end, and that employees do not normally take a break first thing in the morning. When the products arrived, the sellers would deliver the products to the nurse's desks. Dornes testified that she was not sure if supervisors were aware of the solicitations.

RN Bettner testified that employees in the Home Nursing Department engaged in non-work-related solicitation at work in the conference room, which is a work area used for charting, email communication, teaching, morning huddles, case conferences and competencies.<sup>9</sup> Employees would place order forms for products in the conference room and employees who wanted to buy the products would fill out the order forms throughout the day, from beginning of the day to the end of the day. While Bettner testified that she would not know whether employees were on or off the clock, she noted that she saw them coming from their desks to order. She also testified that she herself sold candles, Girl Scout cookies, nail strips, and other items on work time. Bettner testified that she even sold products to members of management in the conference room during work time. For example, in 2017, she sold Girl Scout cookies and bratwursts to then-Director of Home Nursing Judy Henches. In 2018 or 2019, she sold bratwursts and candles to then-Director of Home Nursing Mary Jean Derreberry. More recently, in 2021, Bettner observed at least one member of management engaged in similar solicitation activities. For example, Bettner observed Home Nursing Director Denise Wooden selling products in the Home Nursing area conference room, while people were working, as part of a fundraiser for a choir. Bettner testified that an individual unaffiliated with CGH would come to the Lynn Boulevard Clinic to sell Avon products.

LPN Diane Gaumer in the urology department on the third floor of the main clinic testified that she observed one or two occasions where employees would bring order forms for products to the nurse's stations. If employees purchased products, the seller would deliver them to the employees' desks or the workroom. Employees also placed order forms in the breakroom and purchased items there.

RN Faith Langenfeld in the vascular clinic on the third floor of the main clinic testified that employees would sell candy bars and protein shakes at the nurse's station. The box with

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<sup>9</sup> The conference room is not a patient care area because patient care in Home Nursing occurs at the patient's home. Home nursing also does not have a dedicated break room.

candy bars would remain at the nurse's station. Employees would take a candy bar and put money in an envelope. There would be a sign next to the candy bars, usually on the money envelope, that would identify that it was a fundraiser for a particular child. Langenfeld would observe people taking candy bars and paying for them throughout the day. The order form for pizzas was passed around the nurse's station while people were working, and employees would place orders while working. The individual who sold protein shakes worked at the nurse's station and employees would tell her what product they wanted so that she could order it. The order forms for Girl Scout cookies were in both the breakroom and at the nurse's station. Langenfeld observed employees placing orders throughout the workday. The seller delivered the cookies to employees' desks at the nurse's station. Employees also engaged in similar solicitations in the breakroom. Langenfeld observed two candy bar fundraisers and one pizza order.

CNA Linda Bell testified that employees engaged in non-work-related solicitation on the medical floor in both work areas such as the nurse's station, and in the breakroom. Employees would sell candy bars at the nurse's station. Employees would place money in an envelope, held by an employee responsible for the money, and they would take a candy bar. Another employee sold Avon and would leave the catalogues at the in the nurse's station. Similar solicitations for Avon, soap, and Girl Scout cookies occurred in the breakroom. One employee ran a sign-making business, took orders for signs at work, and brought the signs to the breakroom when he completed them. Bell testified that such sales would occur throughout the workday.

EMR Trainer Barron testified that she witnessed employees selling products at nurse's stations. One employee made and sold candles and maintained an arrangement of candles above her nurse's station. People would buy them from her. Other employees would sell candy bars for fundraisers for their children's events at their nurse's stations. They would put the bars on the desk and people would put money in an envelope and take a candy bar throughout the day. In 2019, Barron observed a receptionist in clinic administration had a fundraisers for her child advertised on the corner of her desk, and individuals at the work location would order things from her. However, Barron did not know whether anyone in CGH Human resources was aware of these sales.

e. Postings at work

In 2019 and in prior years, the Respondent maintained bulletin boards in both working

areas and breakrooms. Employees used them to post non-work-related notices including for-sale signs, notices of rentals, business cards, advertisements for babysitting, and notice of retirement teas, church events, fundraisers, and lunches, blood drives, and postings about labor laws.

During all times material, flyers appeared in employee breakrooms. They were posted on the on the tables, breakroom bulletin boards, and/or refrigerators. Thompson observed both pro- and anti-union flyers in her breakroom in early August 2019. Mooney similarly testified that he observed both pro- and anti-union flyers in his breakroom in early August 2019 and September 2019. Houzenga likewise testified that she saw both pro- and anti-union flyers in her breakroom in August 2019, and she noted that they remained there after the summer. The anti-union flyers observed by the Union's witnesses included those entitled "Oppose CGH Union," "Potential Losses with Unionization," and a flier advertising an "Employee Initiated Advocacy Group."

#### 6. Respondent Enforces its No Solicitation Policy in the Laboratory

On June 13, 2019, Laboratory Administrative Director Cheryl Baker sent an email to all lab staff, which stated the following in relevant part:

It was brought to my attention that there were union cards in the employee break room. I would like to refer everyone to CGH policy #120, see attached. You are not able to bring this type of solicitation into CGH. Also, I would like to point out that you are prohibited from solicitation/distribution of any kind while you are clocked in and on working time.

Employees subsequently complained to Baker about this email and Baker raised those complaints Baylor's Schmidt's attention. Baylor-Schmidt informed Baker that the policy allowed for such materials to be in the breakroom and accessible on breaks. She further explained to Baker that employees were permitted to approach others about the cards before or after work, but not in the patient care areas.

On July 30, 2019, Baker issued a second email to all employees, which stated the following in relevant part, and also quoted a portion of the Respondent's no-solicitation policy:<sup>10</sup>

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<sup>10</sup> Baylor-Schmidt learned about the email after Baker sent it.



I don't care if you are pro-union or anti-union, I will treat you exactly the same regardless of your position on this very divided issue. With that said, I have heard that there are some lab staff who are engaging in union solicitation with other staff while working. While you are here at work you are to be working and not stomping for or against the union! Our work area will remain off limits to these types of conversations per policy 120. The break room is an exception according to the policy, see attached..... If this activity is reported to me, I will be following and enforcing the policy.

7. Respondent Invites Employees to Optional Meetings About Unionization

In mid-June 2019, Dr. Steinke sent an email to all employees with the subject line "union activity information." He noted that he became aware that AFSCME representatives had visited employees' homes. He informed employees that CGH had provided AFSCME with employees' names, in response to a FOIA request, but not addresses or phone numbers. He further stated that the decision of whether to speak to AFSCME or join the union was up to them. He stated that he had heard that some employees had been told to sign a card as proof that the union had visited or because all their other coworkers had signed. He encouraged employees to file a "formal complaint" with the Illinois Labor Relations Board if they "experienced similar concerns." He concluded by stating, "my belief is that remaining union free helps us continue our caring tradition." He invited employees to attend optional meetings to further discuss the issues he raised in his email.

Similarly, on July 1, 2019, Beth Lancaster sent an email to all CGH employees regarding optional employee meetings to discuss the union and employees' potential questions about it. CNA Bell attended the noon meeting on July 1, 2019, which took place in the Ryberg Center of the hospital. Dr. Steinke was the main speaker. He said that the Union would make decisions for employees at CGH and that they would not have a say in what would occur. He also said that the Union would take dues and charge an initiation fee. He stated that unionization would change the relationship that employees had with their supervisors. He said that the hospital could be closed or sold because the Union came in and that the Union would make employees go on strike. Bell's testimony about this meeting is unrebutted and credited.

8. Alleged July 2019 Complaint About Barron's Performance

On July 25, 2019, Tichler spoke to a nurse practitioner in rheumatology, Cassie Sawyers, who reported that Barron had not performed an adequate training of Sawyer's coworker. Tich-

ler did not speak to the coworker, did not know the coworker's name, and did not do anything to investigate the complaint. Tichler testified that he spoke with Barron about Sawyer's complaint a couple days later, in his office. However, Barron flatly denied that Tichler had done so.

#### 9. Oppose CGH Union meeting

On August 8, 2019, a group entitled "Oppose CGH Union" hosted an event at the Candlelight restaurant in Sterling. Director of Nursing Geil was the guest speaker. Union witnesses testified that, beginning at around this time, they observed anti-union flyers posted in bulletin boards, in the break rooms, and also in some bathrooms. The anti-union flyers observed by the Union's witnesses included those entitled "Oppose CGH Union," "Potential Losses with Unionization," and a flyer advertising an "Employee Initiated Advocacy Group."

#### 10. Respondent Enforces its No-Solicitation Policy Against Barron

Baylor Schmidt testified that in August 2019 that she received approximately 15 complaints from CGH employees that Barron was doing non-work in patient care and other work areas and that she was bothering them. She relayed information regarding these complaints to CIO Davis, who informed Tichler that he had received complaints that Barron was soliciting employees to sign up for the union in work areas and during work time. Tichler then spoke to Baylor-Schmidt, who instructed him to speak with Barron and explain the no-solicitation policy to ensure that Barron understood it and to let her know that employees had complained about her breaking the policy repeatedly. Tichler did not investigate the alleged complaints and testified that he lacked personal knowledge that anyone else had investigated those alleged complaints.

On August 15, 2019, Tichler asked Barron to come to his office. Rebecca Foy, the Director of Clinic Administration was also present. Tichler informed Barron that he had received reports that Barron had violated the Respondent's no-solicitation policy and gave her a copy of the policy.

Tichler and Barron offered conflicting testimony about the specific statements each witness made at the meeting. I credit Barron's description of the event because it was more detailed and reflected a conversational exchange with specific statements describing the alleged complaints, the misconduct of which she had been accused, and her responses at each juncture. By contrast, Tichler did not specify how he had described the alleged complaints to Barron dur-

ing the meeting and simply stated in general terms that he “told her about the complaints that had been passed on to me about her soliciting employees to sign up for the union during working hours.” In addition, he did not categorically deny the statements that Barron claimed to have made during the most substantive part of the meeting, and instead claimed he could not recall. While there were aspects of the meeting that Barron likewise could not recall, i.e., whether Tichler gave her a copy of the policy or simply showed it to her, a lack of recall on this point does not render her testimony less credible than Tichler’s on the whole. Indeed, it is understandable that Barron, who stood accused of misconduct, would have better recall of the meeting’s accusations and the verbal exchanges than its administrative aspects. Accordingly, the description of the event, below, gives credence to Barron’s description.

Tichler informed Barron that he had been receiving complaints that Barron had been going around to employees and talking to them about the union but did not name anyone who had complained. He stated that talking about the Union was a direct violation of CGH’s no-solicitation policy. Barron replied that when she is out at the worksites, employees ask her questions about the union. She stated that if she could talk about the weather she could talk about the union. Tichler then added that Barron was violating the no-solicitation policy by asking people to sign a union card. Barron said that she was just answering questions. Tichler stated that if he received any more complaints from employees that Barron was talking to them about the Union, he would write her up. Tichler informed Barron that he was giving her a verbal warning. He did not discipline her for this incident.

Barron then informed Tichler that an employee at the Lynn Boulevard Clinic had recently told her that Roux had just been there asking employees to sign an anti-union petition. Tichler made no comment in response to this claim.

The Respondent’s disciplinary policy requires the department manager or supervisor to investigate the allegations to determine the facts; consult with human resources to determine the level of disciplinary action; complete an employee disciplinary notice as appropriate to document the nature of the violation, pertinent facts, and consequences for further occurrences; counsel the employee; advise the employee that related offenses within 12 months would result in further disciplinary action; and allow the employee to document her remarks on the notice. The department manager or supervisor must also provide the employee with a copy of the completed form and forward the original to Human Resources for inclusion in their personnel file. The pol-

icy includes disciplinary guidelines for a number of common types of misconduct. In each case with the exception of excessive absenteeism, the discipline for the first offense is a written warning, the discipline for the second offense is a 2-day suspension, and the discipline for the third offense is discharge.

Sometime after August 15, 2019, Tichler met with Roux in her office and conveyed what Barron had told him about her solicitation activities. Tichler told Roux that if she engaged in anti-union activities, it should not be during work hours or in working areas. Roux denied that she was violating the policy. However, she told Tichler that she would follow the policy that was in place about not doing non-work things on work time. At hearing, Tichler explained that there were no witnesses to this meeting because he had received no complaints about Roux whereas he had received reports of complaints about Barron.

#### 11. Barron Continues her Vocal Support of the Union Throughout September 2019

In September 2019, Barron made multiple posts on her personal Facebook page supporting the Union. At that time, Barron was Facebook friends with approximately 60 CGH employees including managers Matt Tichler, Julie Morris, Rebecca Foy, Jodi Gaffey, and Katie Morris.

On September 11, 2019, she stated in relevant part, “change starts with a voice...these changes will be successful when we come together as a union. Help us make these desired changes a reality. Do not let fear stop you from achieving what you deserve... We support the CGH Employee’s Union.” On September 18, 2019, she posted “Proud to be an AFSCME Council 31 union supporter.” On September 19, 2019, she posted “I keep seeing a lot of anti-union supporters making the statement, ‘I CHOOSE ME’. ‘If you want to go quickly, go alone. If you want to go far, go together’. With that being said... I CHOOSE WE. <3”

On September 12, 2019, Barron also made a post on the CGH employees union Facebook page, expressing why she supports a union at CGH.

On September 17, 2019, Barron gave a speech the City of Sterling city council meeting. She was wearing an AFSCME Council 31 t-shirt. There were 20 other CGH employees present at the meeting also wearing AFSCME t-shirts. A picture of Barron at that meeting appeared online at [saukvalley.com](http://saukvalley.com) alongside an article entitled “CHG employees file labor complaints.”

## 12. Alleged Complaints About Barron in September and October 2019 and Related Matters

On September 12, 2019, Tichler received a complaint from Nurse Manager Jodi Gaffney about Barron's performance. Gaffney informed Tichler that Barron was on her phone during a nurse's training and that the nurse did not learn anything. Tichler did not investigate this complaint and did not discuss the complaint with Barron. Barron testified that she never spends time texting or conducting personal calls while providing trainings. She noted that she sometimes checks her phone for texts because sometimes Tichler texts her.

On October 16, 2019,<sup>11</sup> Tichler received an email from Reception Director Maureen Franque, who manages the receptionists in the Clinic Administration Department. The email forwarded correspondence between Franque and one of her subordinates, Emily Jones, regarding Barron training of her. Jones complained that the training was redundant and unnecessary, as she was a returning employee who already knew the system. Jones further claimed that Barron had spent most of the time talking to Jones about the Union.

The following day, in his office, Tichler spoke to Barron about the complaint. Tichler summarized the contents of Jones's email but did not show Barron the email. Barron responded that Jones was a returning employee, that she had shown Jones a few things that took about 10 minutes, and that she let Jones play around with the system for the rest of the training time. Tichler did not investigate the complaint.

Barron testified regarding her experience training Jones. She testified that Jones was upset when Barron conducted the training because Jones believed that the training was a waste of time. Barron explained that refresher training was part of the process and that they needed to get through it. Barron showed Jones some of the new templates that Jones had never used before and went through a checklist. Barron testified that Jones was not responsive and spent time showing her pictures of her son on her Facebook page. Barron denies that she discussed the union with Jones. Barron explained that she knew Jones from when they worked together in the past and that Jones was never very nice to her, that she did not trust her, and that she would not discuss something with Jones that could get her in trouble at work.

## 13. Respondent Enforces Its No Solicitation Policy in the Emergency Department

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<sup>11</sup> Respondent's exhibit 9 indicates that Tichler received the email on October 16, 2019. However, Respondent's exhibit 24 states that Tichler received the email on October 18, 2019.

In late October 2019, Thompson attended AFSCME’s biennial convention in Springfield, away from work. When Thompson returned, she told her coworkers about the event and discussed the information shared by AFSCME’s president. Charge Nurse Abigail Coyle approached Thompson and said, “you’re not supposed to be talking about the Union or anything.”

A couple days later, Emergency Room Supervisor Sarah Alvarez Brown called Thompson into her office. Assistant Nurse Manager Kevin Fulk was also president. Brown said that it had come to her attention Thompson was talking about Union activities on the clock and that under CGH policy, employees are not supposed to talk about anything Union related while on the clock.

Brown provided Thompson the CGH no-solicitation policy and said that if she was talking about the union off the clock, she had to make sure that the person she was talking to was also punched out. Thompson replied that she was not soliciting, she was just sharing the history of the union. Brown replied that she heard Thompson was trying to get signatures and talking about the Union. Thompson testified that no member of management had ever told her to stop talking about anything other than the union while on work time.

#### 14. Barron Continues Organizing and Advocacy Efforts in October

On October 22, 2019, Barron posted the following on her personal Facebook page: “Having a Union is having a voice. We are the ones doing the work; therefore, our voice matters. Now is the time to sign a card and cast your vote. Stand with us. Give us the opportunity to fight for what really matters to us as the employees and for every patient at CGH. Contact me to vote. It will be confidential.” The background image of the post stated “I AM A UNION MEMBER & I VOTE.”

#### 15. Tichler Directs Barron to Engage in Rounding

On November 5, 2019, Tichler and Barron had a phone conversation about her responsibilities to help employees with the NextGen system. Tichler said that because of the approaching upgrade, Barron was to be out rounding and helping people, as requested. The other employees in the EMR department would work on getting ready for the upgrade by testing it.<sup>12</sup>

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<sup>12</sup> He testified that he could not recall this conversation but did not expressly deny that it had occurred. Accordingly, I credit Barron’s account because her memory was clearer.

## 16. Barron Continues Advocacy Efforts in November 2019

At noon on November 7, 2019, Barron attended a town hall meeting in the Ryberg auditorium of CGH Medical Center, where Dr. Steinke was the speaker. Approximately 40 CGH employees attended. Management representatives at the meeting included Vice President Shane Brown, Director of Nursing Kristie Geil, and Chief Medical Officer William Bird. HR employees were also present. Steinke stated that CGH wanted to open a Behavioral Health Unit at the hospital. During the meeting, employees raised concerns about understaffing. Steinke replied that he was unaware of understaffing issues. Barron raised her hand and asked Steinke about the understaffing issues at the main clinic in the cardiology department. Steinke repeated that he was unaware of understaffing issues. Barron informed him that she had received complaints about understaffing from two nurses in cardiology. She further informed Steinke that the understaffing issues had gotten worse because the Respondent had added two new providers to the group without increasing the number of nurses. She emphasized that this was a threat to patient safety. Steinke replied that that was “a very bold statement to make.” Barron replied that it was the truth.

After the town hall meeting ended, Barron and another employee, Diane Ramirez, stayed to talk to Steinke. They both complained to Steinke about the fact that it was unfair for employees to have to take earned time off on federal holidays. Ramirez then left, and Barron continued her discussion with Steinke. She complained about the fact that CGH also had no bereavement leave or maternity leave and that CGH paid housekeepers too little. Steinke asked Barron why she was the only one to approach him with these issues. Barron replied that the other employees were afraid of him. He responded by stating, “if you want to let people know that if they have issues, that they can come and talk to me.” Barron stated that she would relay the message, but that if employees had more issues that they did not feel comfortable presenting to Steinke, she would be back to talk to him.

Later that day on November 7, 2019, Barron made a Facebook post about management exploiting workers.

## 17. Tichler Directs Barron to Create Educational Documents and Respondent Removes Barron’s Rounding and Call-Response Duties

Tichler attended a NextGen user conference in Florida and was out of the office from

November 7, 2019 until November 14, 2019.

On November 7, 2019 at 11:05 pm, after Tichler arrived in Florida, he sent an email to Barron directing her to create educational materials on how to use the SOAP and Exam templates on the NextGen system. Tichler noted that the Respondent had a lot of new providers starting and commented that it would help if Barron handed out the educational materials during training so that they could review them if Barron was unavailable for questions. At hearing, Tichler testified that he did not have any discussions with anyone in CGH management before sending this email. However, he could not explain what inspired him to send Barron an email at 11:05 pm on a Friday night after driving to Florida, and he could not explain why he failed to give Barron the instructions in person, the day before he left for the conference. He did not deny knowledge of the events that transpired at the town hall meeting and the interactions between Barron and Steinke earlier that day.

Sometime on Sunday, November 10, 2019, Tichler received reports from Baylor Schmidt stating that she had received complaints that Barron was “out and about” in different areas of the medical center on November 8, 2019. That night, at 9:52 pm, Tichler sent another email to Barron and copied Application Analyst Harshman. Tichler informed Barron that she would no longer be performing Clinic Rounding but that she could continue to perform new employee trainings if those were already scheduled on her calendar. He explained that Brown had taken over clinic operations and that things were “up in the air” because of that recent change. Tichler stated that if someone called Barron for help with EMR, Barron should inform Harshman, who would take care of the matter. As a result of Tichler’s directive, Barron was not permitted to help providers or new employees on issues they were having with the Next Gen system if they called for help, and she was also no longer permitted to perform rounding.

In this email, Tichler also directed Barron to work on educational documents including the “Nursing Entry Template, the “SOAP,” “Primary Care Exam Template,” and “Assess/Plan Template.” He stated, “these documents should include plenty of screenshots and [be] informative enough that someone could look at them and be able to understand how to use the template.” Tichler also stated, “if you finish these before I get back, let me know and I can send you more templates that we want educational material for.”

At hearing, Tichler testified that Brown made the decision to halt clinic rounding because Brown was reassessing the training structure and frequency within clinic operations. Tichler ex-



plained that he had learned of Brown's decision a few weeks earlier but had waited until November 10, 2019, to tell Barron to stop rounding because it was at that point that he needed her to work on the educational materials.<sup>13</sup> He stated that all members of the EMR department would be testing the upgrade to the NextGen system, and it was important to have training materials available to providers so that they could avoid calling the EMR department for technical help during that time. However, Tichler also testified that he could not recall when he realized that the department needed training materials.

On Monday, November 11, 2019, Tichler texted Barron and asked her to call him when she punched in that day. He indicated that his request for a phone call was related to the email he had sent Barron the night before. He further explained that he needed to know where Barron had been on Friday, whom she had been training, and why. Before then, Barron had never received any such inquiries from Tichler. As of the morning of November 11, 2019, Barron had not responded to Tichler's November 7, 2019 email and had not provided Tichler with any of the training materials he had asked her to create.

When Barron called Tichler later that day, Tichler discussed the assignment he had given Barron on November 7, 2019, and Barron indicated that she understood it. He also asked Barron about her whereabouts on November 8, 2019. Barron informed Tichler that she had received a request for training from a nurse at Ready care and then made her way back to the main clinic by stopping at a couple of other offices to check in on employees. Tichler testified that he inquired about Barron's whereabouts because Baylor-Schmidt informed him that Barron was present in different areas on November 8, 2019, when Tichler expected that she would be working on educational materials.<sup>14</sup> However, as of November 8, 2019, Barron was still responsible for rounding and for responding to requests for assistance in the field.

On November 11, 2019, at 5:30 pm after business hours, Tichler emailed Barron to ask her how she was proceeding on the assignment he gave her. He asked her to send him what she had so far so that he could "see if [she was] on the right track."

On November 12, 2019, at 9:00 am. Barron replied to Tichler's email stating that she had never been given instructions on formatting but that she had done her best. She attached copies of her work. At hearing, Tichler disputed Barron's claim that he had not given her sufficient in-

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<sup>13</sup> Tr. P 633.

<sup>14</sup> Prior to that date, Baylor-Schmidt had not typically asked Tichler why Barron was in different areas.

structions but admitted that he understood Barron was having some trouble either understanding his instructions or knowing how to follow through on them completely.

Tichler responded at 9:30 am that day. He explained that the documents should be laid out the way Barron would train a provider. He also stated that the documents should be consolidated. Tichler reviewed the materials on his phone and did not obtain a good grasp of them.

At 1:03 pm that day, Tichler sent another email to Barron, after he had had an opportunity to review the documents on his laptop, rather than on his phone. He stated that the amount of work reflected in the documents Barron provided was less than what she should have completed in an 8-hour day. He emphasized that she should have completed more when she was not performing follow-up trainings or rounding. He asked Barron what else she had done the previous day and how long each task had taken. He also asked her to send him what she had worked on that day.

Less than an hour later, Barron replied to Tichler via email. She asked him to call her and stated, "I do not understand the task." Shortly after Barron sent this email, she and Tichler spoke on the phone for approximately 20 minutes. Barron conveyed her frustration in using Microsoft Word to create the educational documents.

Tichler and Barron offered different accounts of Barron's statements during that phone call. I credit Barron's account because it is consistent with the email she sent Tichler the following day, in which she explained the nature of her struggles, and it is also more consistent with the stated length of the call (20 minutes) as it is considerably more detailed than Tichler's account. Tichler testified that Barron simply stated that she did not know how to do screenshots within Word and how to place them in the document. Barron, by contrast, credibly denied stating that she did not know how to make screenshots. Instead, she testified that she told Tichler that she was frustrated because she was not comfortable using Microsoft Word to format the materials and that she was having difficulties creating graphics on the screenshot. Specifically, she explained that she was having trouble adding the verbiage to the document while maintaining the boxes she had created to annotate the screenshots: Every time she added more information, the lines and boxes she had added to the screenshot would move. During this conversation, Tichler did not offer to provide her with any training in Word.

After Tichler spoke to Barron, he reviewed the six Word documents Barron had completed on November 11, 2019 and sent him the morning of November 12, 2019. He opened the in-

formation tab within Word to view the meta data and determine when the documents were created and modified. He saw that the documents were created on July 18, 2019. He looked closer at the screenshots and saw that they appeared to have been taken on July 18, 2019.<sup>15</sup> The metadata does not show what was in the document when it was created on July 18, 2019 or what work was done to edit the document on November 11, 2019.

At hearing, Barron explained the July 2019 timestamps on the Word documents and the screenshots. Barron initially created the Word documents on July 18, 2019 for a new employee who had asked for a printout of the screen she would need to use to room a patient. At that time, Barron took screenshots of the templates, copied and pasted them into the Word documents, printed each page individually, and handed the packet to the employee who requested it. In November 2019, she found those screenshots in the Word documents and reopened them for use in the training documents she made in November. Barron further testified that she had planned the layout of the documents with pen and paper because she was not adept at Word. In doing so, she condensed a longer document into short instructions. She then copied what she had written down on paper into a Word document.

Both Barron and Tichler testified that, for purposes of training and creating training documents, it did not matter when the screenshot was taken, because the template would look the same.

#### 18. Barron Meets with VP Shane Brown on November 12, 2019

On November 12, 2019, Barron met with Vice President Brown on the fourth floor to discuss her supervisor, Matt Tichler. She explained that Tichler was scrutinizing her work and was not being helpful when she asked for additional training. Brown said that he did not understand why Barron was coming to him with this issue. At hearing Barron explained that Tichler and Tichler's supervisor, Randy Davis, were both in Florida and were unavailable at the time.

#### 19. Further Communication between Barron and Tichler About Educational Materials in November 2019

At 8:28 am on November 13, 2019, Tichler asked Barron via email about her progress af-

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<sup>15</sup> Tichler testified that the timestamps were more significant than the editing time, which varied by document. The editing time reflects the amount of time for which the document is open but not the amount of time working while the document was closed.

ter they had spoken. He asked her to send him what she had worked on the day before. He also informed her that he had done some research and found tutorials and videos on how to use Word. At hearing, Tichler testified that proficiency in Word was an “aspect” of Barron’s job but that he was unaware of whether Barron had ever been provided training in Word since she accepted the position of EMR trainer.

At 9:59 am on November 13, 2019, Barron responded to Tichler’s email, stating that she had asked Harshman to show her some features he liked to use and that he had explained to her how to make training documents better. Barron informed Tichler that she had edited the training documents and worked on the nurse assessment, nurse office entry, and HPI portion. She asked Tichler if he could tell her how to combine individual documents into one without copying and pasting them. She also thanked Tichler for the help he had provided her earlier, over the phone.

At 1:25 pm on November 13, 2019, Tichler responded by asking Barron to send him what she had and stating that they could work on putting all the documents together later.

At 4:44 pm on November 13, 2019, Tichler sent Barron a text stating that he was on the road and could not check email but wanted to ensure that Barron had emailed him the documents she had worked on that day and the day before. Barron responded via text stating that she would send him the documents. She noted that while Harshman had taught her a lot, it was still taking her a long time to sort things out. She asked Tichler why she needed to send him the work she had performed each day. She asked whether there were other employees in the department subjected to that requirement. She informed Tichler that she was preparing hourly time allocations for each day. She further stated that her difficulties in performing this work were due to a lack of training and requested that CGH provide her with education that would qualify her for this work and give her the chance to become successful. She specifically asked Tichler, on behalf of CGH, to look into whether the Sauk Valley Community College had any courses that she could take to help her learn. Barron then took photos of the training documents she had created and texted them to Tichler, explaining that she did not have time to email them to him.

Tichler did not take any action to see if there were any courses that she could take at the community college that might help her. He did not offer to arrange for any in-person training on Word.<sup>16</sup>

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<sup>16</sup> Tichler testified that he could not recall any instance, prior to that text, in which Barron had requested additional training. However, he did not expressly deny that Barron had made earlier requests.

At 5:26 pm on November 13, 2019, Barron wrote an email to Tichler stating that she had learned a very important piece of information from Harshman related to the creation of annotated screenshots. She noted that when she attempted to insert the “master information” into its “proper spot,” all her boxes moved. She learned that to prevent this movement, she would need to take a new screenshot after adding her boxes. She then attached the materials she had completed.

At 9:28 pm on November 13, 2019, Tichler responded via email to both Barron’s earlier text and her most recent email. Commenting on the work product, he said, “these documents are looking good and starting to come together.” He offered two small formatting suggestions, to eliminate the spacing between bullet points and to make the bullet points bold. He also stated that it was within his authority to ask employees for progress and that he was asking Barron for updates because HR had received “multiple complaints” that Barron was not doing her job. At hearing, Tichler testified that he wanted to see Barron’s progress to ensure that she was on the right track. Prior to receiving this email, no one had ever told Barron that they had complaints about Barron not doing her job. In this email Tichler also asked Barron to send him her time allocation document and stated that when he returned from his trip, he would show her how to keep track of her time within the Access Database, as other EMR Department employees did.

At 8:46 am on November 14, 2019, Barron took pictures of the hand-written accounting of her time and texted them to Tichler.

At 4:32 pm on November 14, 2019, Barron emailed Tichler the training documents she had completed. They did not represent the entirety of what Tichler had requested, but he testified at hearing that the materials were getting better.

Later that day, Tichler texted Barron and told her to keep working on the educational documents. He told her that in the following week, she would help test the EMR upgrade before it was launched. Barron had never previously assisted with testing of the EMR software. She testified that, in the past, the individuals who prepared the upgrades were the ones who tested it. However, she conceded that this was the first upgrade that CGH had effectuated since the Respondent had hired her. Tichler showed her how to access the system and how to test it. In testing, Barron responsible for clicking around in the system, and performing steps that a provider would typically take. Barron testified that no one had previously informed her that testing upgrades was part of her job as EMR trainer. It is not included in her job description, though it is

included in the Application Analyst job description.

At the end of the workday on November 14, 2019, Barron emailed Tichler the document she had worked on that day.

#### 20. Mid-November 2019 Complaint About Barron's Performance

On November 15, 2019, Kristi Pierce, an LPN at CGH Medical Center, sent an email to Baylor-Schmidt about Barron, and copied Tichler on the email. Pierce is the primary nurse for Amanda Dawson in Family Practice, and schedules training for Dawson. The email alleged that Barron provided Dawson with inadequate and untimely training.

Pierce and Barron offered conflicting accounts of the incident that spurred the email, most notably, its timing. Pierce testified that the incident occurred one or two days before she sent the email on November 15, 2019, whereas Barron testified that the incident occurred months earlier. I credit Barron's account of the timing because Pierce's email documenting the alleged interaction conspicuously omits any reference to when the incident occurred. In addition, Pierce's testimony on the whole demonstrates that her recollection of the incident's timing is inaccurate. Pierce claimed that when she contacted the EMR department for assistance in training Dawson, they informed her that Barron was responsible for on-site training and that they could not send anyone else. Yet, Barron was no longer responsible for responding to calls when Pierce claimed to have contacted the EMR department on Dawson's behalf, one to two days prior to November 15, 2019. Indeed, Tichler had removed such responsibilities from Barron five days earlier and was sending other employees to handle such calls. Barron was still performing scheduled training, but only those that had been placed on her schedule prior to November 10, 2019. Thus, the incident could not have occurred at any time after November 10, 2019, as Pierce claimed.

Pierce and Barron also offered conflicting substantive accounts of the training incident. I credit Barron's description because Pierce's testimony as to timing was unreliable. Barron credibly asserted that she made two dedicated attempts to train Dawson, the first of which occurred on September 18, 2019, but that Dawson canceled both. Pierce flagged Barron down for a third training attempt when Barron was waiting to assist another provider, but by the time Barron was finished with the first provider, Dawson had solved her issue with NextGen and no longer needed help.

Tichler did not take any action to investigate the allegations in Pierce's email and testified that he did not know whether anyone else had investigated them.

#### 21. Baylor-Schmidt, Tichler, and O'Brien Decide to Issue Barron a 5-day Suspension

In November 2019, Baylor-Schmidt spoke to Tichler about Barron's performance. She informed Tichler that she received a report from VP of Physician's Services Brown that Barron had complained to him about Tichler. Based on Brown's report, Baylor Schmidt thought that Barron was trying to get Tichler in trouble and believed that such conduct violated the Respondent's standards of behavior. At hearing, Baylor-Schmidt explained that Barron was in violation of those standards because she did not approach Tichler, the individual involved, and went to someone uninvolved in the matter. Tichler discussed this incident with Baylor-Schmidt but did not do anything else to investigate Barron's complaint to Brown. Baylor Schmidt also informed Tichler that she had received reports from employees that Barron had complained to others about Tichler's assignment requiring her to create educational materials.

During this conversation Tichler shared information about Barron's work history. Tichler informed Baylor-Schmidt about the incident that occurred on April 23, 2019, when Barron decided to punch in before taking her child to day care. He also conveyed that Barron had refused to do her job. Baylor-Schmidt viewed the day-care incident as time-theft.

At the close of this meeting, Baylor-Schmidt recommended that Tichler issue Barron a 5-day suspension and told Tichler to work with O'Brien on the write up. Baylor-Schmidt testified that she based her disciplinary recommendation on the fact that Tichler had described Barron engaging in alleged insubordination, by complaining about him to an uninvolved vice president and refusing to do her job, and by engaging in time theft in April 2019. Baylor-Schmidt commented that there was no "statute of limitations" on breaking really big rules, such as those prohibiting time theft. She also remarked that if she had known about the infraction in April 2019, she would have taken action on it then.

Baylor Schmidt testified that she believed the five-day suspension was also consistent with the discipline issued to other employees for similar misconduct. At hearing, Baylor-Schmidt discussed two employees who had previously received similar discipline, Ms. Jacobe,<sup>17</sup> who was insubordinate to her manager and falsified her timecard, and Tom Schrader, who left a

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<sup>17</sup> Jacobe's first name does not appear in the record.

scalpel lying on the patient's stomach during a procedure instead of placing it on the table and was insubordinate to his supervisor during the investigation of that event by refusing to carry out a reasonable instruction from his manager.

Around the time Baylor-Schmidt called Tichler, she also called O'Brien to consult on the appropriate level of discipline for Barron. O'Brien agreed with Baylor-Schmidt's assessment that Barron should receive a five-day suspension because there were multiple instances of alleged misconduct, specifically alleged insubordination and reported performance issues. In reaching this conclusion, O'Brien reviewed discipline that the Respondent had issued in cases where employees had engaged in both insubordination and poor performance.

Tichler spoke with O'Brien, and O'Brien informed him that she believed a five-day suspension was appropriate for Barron's infractions. Tichler agreed and O'Brien explained to Tichler how he should complete the discipline form.

The Respondent's progressive discipline policy states that the supervisor's responsibility regarding discipline is to investigate[] thoroughly to determine the facts of the matter." Tichler admitted that he did not investigate any of the complaints he had received about Barron before suspending her.

## 22. Meeting with Barron to Issue the 5-Day Suspension

On November 18, 2019, Tichler, O'Brien, and Barron met in the HR conference room, where Tichler and O'Brien issued Barron a 5-day suspension. Tichler provided Barron a disciplinary form that included the following relevant sections, (1) disciplinary steps taken, which documents the current discipline and any past disciplinary action taken against the employee (2) standard of behavior needing improvement, (3) nature of the violation, and (4) supervisory reports.

Under "disciplinary steps taken," the form documented the then-issued five-day suspension but cites no earlier discipline initiated against Barron. Under "standard of behavior needing improvement" the form listed respect, communication, ownership, and accountability. Under "nature of violation," the form listed workplace behavior indicating inattention to duties, direct disregard for authority, and insubordination. Under "supervisory remarks," Tichler drafted comments, which he grouped into five paragraphs. During the meeting, Tichler and O'Brien discussed each paragraph of the disciplinary document.



The first paragraph referenced Tichler's April 23, 2019 discussion with Barron regarding her decision to clock in before dropping her child off at the day care. Tichler testified that this was not a basis for the suspension but was listed because it was evidence of misuse of CGH time. Tichler explained that the incident was included in the suspension notice because all the listed incidents "portrayed the misuse of CGH time or inadequate trainings." Baylor-Schmidt, by contrast, testified that this incident was a basis for Barron's suspension.

The second paragraph referenced the verbal warning Tichler issued Barron on August 15, 2019 for violating the Respondent's no-solicitation policy. Tichler testified that this was not a basis for the suspension but was listed because it was evidence of Barron's misuse of CGH time.

The third paragraph referenced one specific complaint made by an employee on October 18, 2019, who was unnamed in the document, and 15+ complaints made by other unnamed employees since October 18, 2019 about Barron being present in their work area and bothering them with non-work-related matters. In the disciplinary document, Tichler characterized this conduct as a misuse of CGH time. At the meeting, O'Brien likewise informed Barron that she had misused CGH time by engaging in such conduct and noted that Barron had previously received a verbal warning for solicitation and misuse of CGH time. She further noted that CGH had received complaints that Barron had provided inadequate training. Barron denied that she had misused time and explained that when she receives a call for assistance, she sometimes has to wait for the provider to finish with a patient.

When Tichler spoke about the 15+ complaints he had received about Barron's performance, Barron asked who made the complaints and asked for copies of them. O'Brien stated this information was irrelevant and did not provide her with copies of the complaints.

At hearing, Tichler conceded that he did not know the details of the 15+ complaints referenced as a group in the disciplinary document and that his knowledge of those complaints and their timing was based entirely on the information provided to him by Baylor Schmidt. O'Brien similarly testified that the 15 complaints that served as the basis for the suspension were relayed to her by Baylor-Schmidt and that she did not investigate them. O'Brien testified that she did not have any personal knowledge that anyone had vetted those complaints, and she had not told Tichler that he had an obligation to investigate them. Baylor-Schmidt testified that the 15 complaints she received about Barron being present in employees' work area and bothering them with non-work-related matters occurred before August 15, 2019.

The fourth paragraph stated that Barron had complained to others about Tichler's assignment requiring her to complete educational documents pertaining to the department's training on NextGen templates. At the meeting O'Brien asserted that she had heard from others that Barron had complained to them about Tichler's decision to assign her the duty of creating educational assignments. Barron denied that she had ever used those words but admitted that she had told people she was working on educational documents and that it was difficult for her. Tichler testified that this paragraph served as the basis for the suspension. In finding that Barron's conduct warranted discipline, Tichler relied on statements made to him by Brown and Baylor-Schmidt but did not talk to Barron or otherwise perform an investigation of the allegations.

The fifth paragraph stated that on November 11, 2019, Barron misrepresented the reason for her lack of progress on the educational documents Tichler had directed her to draft. According to Tichler, Barron informed him that she was lagging in her progress because it was "really hard to do something when I have never done it before." He asserted that she had created such documents before because the documents and the screen shots they contained indicated that she had created them in July 2019, months earlier.

At the end of the meeting, O'Brien instructed Barron to prepare a corrective action plan. The disciplinary document concludes by stating that "termination will occur after the next occurrence...if any part of the Corrective Action Plan is not followed, termination will be the next step."

At hearing, Tichler testified that the "big reason" for the suspension was Barron's insubordination and disregard of his authority. She had complained to his supervisor, Brown, and asked Brown how he, Tichler had the authority to give her the assignment of creating educational materials. Tichler further testified that another basis for the suspension was "the inadequate trainings—all of the complaints" that he had received. Tichler asserted that the supervisory remarks served to explain what led to the suspension and played a role in determining the level of discipline.

### 23. Meeting About Barron's Corrective Action Plan

On November 26, 2019, Barron met with Tichler and O'Brien to review the corrective action plan she had completed. Barron brought a short, typed corrective action plan to the meeting. O'Brien stated that Barron's corrective action plan was deficient and that she needed to add

to it.

Barron testified that O'Brien told Barron what to write, word for word. However, O'Brien denied this claim and offered a more nuanced and plausible description of the encounter, which I credit here. O'Brien testified that she asked Barron to think about the concerns that Tichler had brought to Barron's attention and asked if she could specify anything more related to those issues. She, Tichler, and Barron then discussed what Barron could add to the plan to make it more specific. Barron herself vocalized some statements, and O'Brien said, "write that down...that sounds good." During the meeting O'Brien stated that Barron needed to work on how people perceived her. She said that some people believed her to be intimidating and unapproachable. O'Brien suggested that Barron smile more.

After Barron added to the corrective action plan, O'Brien gave the document to Tichler to review. He told O'Brien that he wanted to ensure that Barron was aware that the creation of training documents was one of her essential functions. O'Brien added a sentence stating that, and Barron then signed the document. Barron then signed the document because O'Brien said that her employment would not continue if she did not sign.

#### 24. Tichler Requires Barron to Submit Formal, Electronic Time Allocation

Beginning in December 2019, Tichler required Barron to submit time allocations in the Access Database. That database is used by the salaried employees in the Medical Records Department, who do not clock in and about. Tichler testified that he required Barron to keep track of her time within the Access Database to ensure that the department was testing everything in the upgrade and spending enough time on testing the upgrade. The salaried employees in the EMR department would joke about how they had not completed their time allocations for the prior 8 months.

#### 25. The Union files its Majority Interest Petition

On December 5, 2019, the Union filed a majority interest petition in Case No. S-RC-20-030 seeking to represent certain professional and non-professional job titles and classifications employed by Respondent, including Barron's position of EMR Trainer.

On January 6, 2020, the Respondent objected to the Union's petition. In most relevant part, the Respondent claimed that Barron's position of EMR Trainer lacked a community of in-

terest with the other petitioned-for positions and stated the following: “This inclusion is particularly perplexing, other than the fact that the one individual holding the position is one of the Union’s most vocal supporters.”

#### 26. Reduction in Hours/Placement on “Low Census”

In mid-January Tichler and O’Brien decided to place Barron on a “low census” schedule, which reduced her hours from full-time to part-time. On January 17, 2020, Tichler asked Barron to come to his office, where he informed her of his decision. Tichler then explained that he was placing Barron on “low census” because the audit he ran on her computer did not match the time allocation she had provided and also because there were fewer trainings for her to conduct. At hearing, Tichler conceded that he placed Barron on low census because she had less work to do after the Respondent removed rounding from her duties on November 10, 2019.

Barron asked Tichler whether she would resume rounding. Tichler replied that she would not because he had received too many complaints that she was misusing CGH time and bothering people. Tichler then informed Barron that she could take the “low census” as unpaid time or she could use her own paid time off.

Barron asked Tichler whether she could apply for two open medical assistant positions. Tichler stated that he was not sure the hospital wanted an employee working two different positions. He stated that, even though she was working less than 40 hours a week, as soon as she started working another job at CGH, she would be getting paid at the over-time rate because she was technically a full-time employee in her current position. Tichler then asked Barron whether she wanted him to make her position formally a part-time position. If she did, he would start the process right away. Barron replied that she did not want her position to formally change to a part-time position.

The parties’ witnesses disagree about the circumstances under which CGH uses the term “low census.” The Union’s witnesses<sup>18</sup> consistently testified that CHG uses the term low census when patient load drops and when there are more employees than needed to care for the relatively low number of patients. Tessendorf and Thompson stated that CGH applied low census status to those employees who volunteered to accept it. Thompson added that if she preferred to work,

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<sup>18</sup> Of the Union’s witnesses, four testified about low census including Thompson, Tessendorf, Mooney, and Barron.

CGH would ask a different employee if they wished to work low census. Employees who accepted placement on low census had the option of taking paid time off or unpaid leave. Barron, Mooney, and Tessendorf testified that, in their experience and observation, prior to January 2020, the term low census had only been used for CNAs and RNs when there was low patient volume. Thompson testified that the term was used with respect to all employees who interacted with patients including CNAs, nurses, and receptionists. Barron testified that the EMR department had never used the term “low census” in reference to training, and that when she served as EMR Trainer she had worked through periods when there was low patient census at the hospital.

However, O’Brien testified that the Respondent places employees anywhere within the organization on low census where the volume of work is insufficient to occupy the time of the entire staffing. She noted that “low census” is a general term used by HR whenever work volume “ebbs and flows.” O’Brien testified that a low census determination may be made irrespective of patient levels and that the low census determination is made, more generally, based on the volume of individuals CGH needs to serve. As an example, O’Brien noted that there would be reduced need for clinical and educational training if CGH was not hiring new providers. However, she conceded that there was a relationship between patient levels and provider levels, noting that CGH hires fewer providers when there are fewer patients.

O’Brien further conceded that Barron had worked full time through prior periods when there was a low patient count in the hospital. Tichler also noted that he had no knowledge of CGH ever using the term low census with respect to staffing in the EMR Department, though he was unaware of any rule that low census was to be used only for clinical employees.

On January 20, 2020, Tichler gave Barron written notice that she would be placed on low census and provided her a schedule for the rest of the week. He reiterated that she could use earned time off or take unpaid time off for the time that she was not working. He further stated that when Barron was not performing trainings, he wanted her to work on the educational documents and to send him her progress at the end of each day.

Barron remained on a low-census schedule from January 17, 2020 to March 2020, when the clinics closed. Although her low-census schedule varied in January, Tichler established a regular low-census schedule for Barron in mid-February. While Barron worked low census, the Respondent organized Barron’s scheduled trainings around the dates she worked. If a provider called or messaged the EMR department asking for assistance while Barron was off, one of the

other analysts, Ashley Roux, Kevin Harshman, Aaron Dry, or Greg Hepner, would perform that work. Tichler testified that this is work Barron would have performed had she been scheduled to work during the time of the requests unless she was unavailable, or the request concerned a technical issue outside her expertise.

On February 11, 2020, Barron emailed Tichler to request her hours for rest of February. Tichler provided them and noted that she would work an average of 25 hours a week. He stated that if this scheduled worked, he would approach HR about changing the position from 1.0, a full-time position, to a .65 position, a part-time position.

Later that day, Barron emailed Tichler stating there were postings for part-time and as-needed positions for which she believed she was qualified. She requested the opportunity to make up her lost hours by working in one of these positions. That day, Tichler responded that she would need to go through the proper channels to apply for those positions.

On February 12, 2020, Tichler sent an email to Barron referencing her desire to supplement her reduced hours with a part-time or as-needed position. He stated the following: “If that is what you need to do that is fine however I do want to point out that currently you are still at 1.0 [full-time] so if you were to apply, unless someone really needs someone, they’re not going to be willing to pay Overtime starting from the 1st minute you work because you’re still getting 40 hours/week, it’s just that some are low census. Now if you want me to change your status to Part-Time so you can apply for those other positions, let me know and we can start that process today.” Barron did not apply for those positions because of Tichler’s email indicating that CGH would not hire her while she was in a full-time position.

Barron was an hourly employee, paid based on the number of hours she worked. When she was working a reduced, low-census schedule, she received less than full time pay. Tichler conceded that, to receive overtime pay, Barron would have had to work more than 40 hours in a week. And during the weeks that she worked low census, she worked less than 40 hours each week.

## 27. Barron’s Layoff

At the start of the pandemic in March 2020, the Respondent asked its managers to identify non-essential personnel. Tichler identified Barron’s position as non-essential because the clinics were shut down and were not hiring new employees who might need training. Respond-

ent laid off Barron on March 16, 2020. During this time, CGH Medical Center laid off over 300 other employees.

## 28. Barron's Termination

After the layoffs in March 2020, CGH attempted to further reduce costs. Baylor-Schmidt testified that she informed Tichler that she believed that there were other ways that EMR training could be accomplished, and that Barron's position appeared redundant. Tichler agreed. During the pandemic, CGH lost approximately \$3 million, and it reduced its staff from 1608 employees to approximately 1460<sup>19</sup> employees.

On June 9, 2020, Barron met with Tichler and Baylor-Schmidt in Baylor-Schmidt's office, where Baylor-Schmidt informed Barron that her position was being eliminated. I credit Barron's assertion that Baylor-Schmidt did the talking. On the whole, Barron's assertion to this effect is more credible than testimony from the Respondent's witnesses claiming that Tichler conveyed the key points. First, the meeting occurred in Baylor-Schmidt's office and the memorandum that the Respondent provided to Barron conveying the termination decision was addressed to her from Human Resources. Furthermore, the Respondent's stated reason for the termination decision concerned the Respondent's broader operations ("restructuring of services"), on which a human resources director would speak with greater authority.

Turning to the contents of the meeting, Baylor-Schmidt said that managers in departments were reviewing the positions under them and CGH determined that Barron's position was nonessential. She explained that CGH was not hiring new employees during the pandemic who might need training.<sup>20</sup> In addition, Baylor Schmidt stated that CGH could not financially support Barron's position. Baylor-Schmidt gave Barron a memorandum notifying her of this decision which stated that, "[d]ue to the restructuring of services as a result of the COVID-19 pandemic, your position will no longer be necessary effective Tuesday, June 9th, 2020."<sup>21</sup>

The Respondent subsequently transferred Barron's duties to a newly-created nurse educa-

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<sup>19</sup> This is the number of employees as of the date of hearing in this matter.

<sup>20</sup> In June 2020, Barron observed that CGH was posting to hire for new positions, but it is not clear that those positions would have required training on the EMR system.

<sup>21</sup> Barron asked if there were any job openings at CGH and whether she would be given preference for such open positions. Baylor-Schmidt informed Barron that she would not receive any preference in hiring for open positions and that positions would be filled based on qualifications. However, she noted that CGH would consider Barron an internal candidate for the length of her severance period, which would allow Barron to apply for CGH jobs in a more abbreviated manner.

tor position, which serves to provide clinic training during orientation of new employees including LPNs, RNs, CNAs, and MAs, to ensure they are competent to perform their jobs. The witnesses offered conflicting testimony about when the Respondent created and filled the nurse educator position. I credit Barron's testimony that the Respondent created and posted for the nurse educator position after the Respondent terminated her employment. The testimony offered by the Respondent's witness is less credible on the whole because it conflicts. Baylor-Schmidt testified that the Respondent created and filled the nurse educator position shortly after Shane Brown took over as Vice President, which occurred in fall 2019. Tichler testified that the Respondent created and filled the nurse educator position sometime in 2020 and indicated that position was in existence at the time the Respondent terminated Barron's employment. However, he could not recall whether the Respondent hired the nurse educator before or after March of that year.

#### **IV. DISCUSSION AND ANALYSIS**

##### **1. No Solicitation and Distribution Policy**

The Respondent violated Section 10(a)(1) of the Act by maintaining an overly broad and ambiguous no-solicitation policy, by more strictly enforcing its no-solicitation policy in response to Union activity, by applying its no-solicitation policy to discriminate against Union-related discussions, by threatening employees with discipline under the no-solicitation policy for discussing the Union, and by applying its no-solicitation policy in a discriminatory manner.

Section 6 of the Act protects "concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection." 5 ILCS 315/6. An employer violates Section 10(a)(1) of the Act when it engages in conduct which reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights protected by the Act. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012); City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); Clerk of the Circuit Court of Cook Cnty., 7 PERI ¶ 2019 (IL SLRB 1991); City of Chi., 3 PERI ¶ 3011 (IL LLRB 1987); Ill., Dep't. of Cent. Mgmt. Servs. (Dept. of Conservation), 2 PERI ¶ 2032 (IL SLRB 1986). A showing of illegal motive is not required to prove a violation of Section 10(a)(1) of the Act. City of Mattoon, 11 PERI ¶ 2016; Clerk of the Circuit Court, 7 PERI ¶ 2019. Instead, the test is whether the employer's conduct, viewed objectively from the standpoint of a reasonable employee, had a tendency to interfere with, restrain or coerce the employee



in the exercise of a right guaranteed by the Act. Clerk of the Circuit Court, 7 PERI ¶ 2019. There is no requirement of proof that the employees were actually coerced in order to establish a violation of Section 10(a)(1) of the Act. Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007).

In County of Cook, the court adopted and applied the approach set forth by the NLRB in Lutheran Heritage to determine whether an employer's work rule violates the IPLRA. County of Cook, 2017 IL App (1st) 152993, ¶ 53. Under Lutheran Heritage, a rule that explicitly restricts protected activity is unlawful. County of Cook, 2017 IL App (1st) 152993, ¶ 51, citing Martin Luther Memorial Home, Inc. "Lutheran Heritage", 343 NLRB 646, 646 (2004). If the rule does not explicitly restrict protected activity, the rule is unlawful under any of the following conditions: (1) employees would reasonably construe the language to prohibit protected activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of protected rights. County of Cook, 2017 IL App (1st) 152993, ¶ 51.<sup>22</sup>

The Board has also recognized that application of a facially neutral work rule is a violation of the Act where the Respondent applies it in a discriminatory manner. City of Lake Forest, 29 PERI ¶ 52; Chicago Transit Authority, 32 PERI ¶ 178 (IL LRB-LP 2007) (addressing no-solicitation rule but finding no discriminatory application); Chicago Transit Authority, 20 PERI ¶ 80 n. 9 (IL LRB-LP 2004); see also Palatine Community Consolidated School District #15, 18 PERI ¶1043 (IL ELRB 2002).

Similarly, an employer's more stringent enforcement of its work rules is unlawful when it is a consequence of employee participation in protected activity. In Re Schrock Cabinet Co, 339 NLRB 182, 183-4 (2003).<sup>23</sup>

Turning to no-solicitation rules, at issue here, employers may generally ban solicitations on working time,<sup>24</sup> and such bans are presumptively valid in the absence of evidence that they were adopted or enforced in a discriminatory manner. Chicago Transit Authority, 34 PERI ¶ 160

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<sup>22</sup>Although the National Labor Relations Board overruled Lutheran Heritage, its principles remain law in Illinois by virtue of the Illinois Appellate Court's decision in Cook County, *supra*. The Boeing Co., 365 NLRB No. 154 (2017) *overruling* Lutheran Heritage, 343 NLRB 646 (2004).

<sup>23</sup> The principle outlined in this case was also cited in a non-precedential RDO. See State of Illinois, 35 PERI ¶172 (IL LRB-SP ALJ 2019).

<sup>24</sup> Working time connotes periods when employees are performing actual job duties, periods which do not include the employees' own time such as lunch and break periods. Our Way, Inc., 268 NLRB 394, 395 (1983).

(IL LRB-LP 2018); Chicago Transit Authority, 20 PERI ¶ 80 n. 9 (stating principle). By contrast, a rule against solicitation is presumptively invalid if it prohibits solicitation on the employees' own time. Chicago Transit Authority, 20 PERI ¶ 80 n. 9; Our Way, Inc., 268 NLRB 394 (1983); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

However, health care institutions have greater latitude in restricting solicitation because a “tranquil atmosphere is essential to carrying out” a hospital’s primary function of patient care. NLRB v. Baptist Hospital, 442 U.S. 773 (1979); Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978); St. John's Hosp., 222 NLRB 1150, 1150 (1976) (quote). Such institutions may bar solicitation even on non-working time in specific locations, due to concerns about the potential for disruption to patient care: The “prohibition of solicitation...in immediate patient care areas, even during employees' nonworking time, is presumptively lawful.” Brockton Hospital, 333 NLRB 1367, 1368 (2001). However, restrictions of solicitation on non-working time and in non-working areas are presumptively unlawful unless the health care institution can show that the ban is necessary to avoid disruption of healthcare operations or disturbance of patients. Baptist Hospital, 442 U.S. at 780; Beth Israel Hospital, 437 U.S. at 507; Holy Cross Health, 370 NLRB No. 16 (2020); Brockton Hospital, 333 NLRB at 1368. Thus, the presumption places the burden on the health care institution to show, with “respect to the areas to which [the rule] applies, that union solicitation may adversely affect patients.” Baptist Hospital, 442 U.S. at 781.

#### 4. Analysis of the Rule on its Face

Applying the above-referenced principles here, the Respondent’s no-solicitation policy violates Section 10(a)(1) of the Act because it is overly broad and ambiguous.

The Respondent’s no-solicitation policy is overly broad and presumptively unlawful because it prohibits solicitation in areas that are not “immediate patient care areas.” In St. John's Hospital & School of Nursing, the NLRB defined immediate patient-care areas as areas “such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas;” the Supreme Court approved of the standard applied in that case. Baptist Hospital, 442 U.S. at 779-81; St. John's Hospital & School of Nursing, 222 NLRB at 1150 (quote), enfd. in part 557 F.2d 1368 (10th Cir. 1977); see also Holy Cross Health, 370 NLRB No. 16; see also In Re the Carney Hosp., 350 NLRB 627, 628 & 643-4 (2007). Here, however, the Respondent’s prohibition on solicitation expands beyond “immediate patient care areas” be-

cause it includes patient-care-adjacent corridors and sitting rooms. The Respondent cannot re-characterize these areas as “immediate patient care areas” by relying on the overinclusive definition of that phrase set forth in its no-solicitation policy. See Holy Cross Health, 370 NLRB No. 16 n. 3 (“By defining ‘immediate patient care areas’ to include such non-care areas as patient lounges, waiting areas, corridors, sitting rooms, elevators, stairways, or ‘[areas] on the unit where patients are or can be present,’ the Hospital has coopted the legal language and expanded it to an unlawful degree.”).

Furthermore, the Respondent has not rebutted the presumption of unlawfulness by presenting evidence that its restriction on solicitation in sitting rooms and corridors adjacent to patient care areas is “necessary to avoid disruption of health-care operations or disturbance of patients.” Beth Israel Hospital v. NLRB, 437 U.S. at 507 (discussing standard). There is no evidence in the record concerning the Respondent’s use of corridors or sitting rooms for immediate patient care. For example, there is no evidence that the hallways are crowded, that the Respondent uses them as storage rooms for equipment that may be called upon for use at a moment’s notice, or that the Respondent conducts physical therapy or other treatments in the corridors. Such evidence is similarly lacking with respect to sitting rooms used by patients. The Respondent also introduced no testimony or documentary evidence to show that union solicitation in patient-care-adjacent corridors and sitting rooms would have an adverse effect on patient recovery. The gap in the record on these points renders this case distinguishable from others in which the courts found no-solicitation rules lawful when applied to corridors and/or patient sitting rooms. Cf. Baptist Hosp., Inc., 442 U.S. at 784; cf. Baylor Univ. Med. Ctr. v. NLRB, 578 F.2d 351, 355 (D.C. Cir. 1978), vacated in part, 439 U.S. 9 (1978).

The Respondent’s no-solicitation policy is also overly broad by virtue of its policy statement, which includes a blanket prohibition on all solicitation: “[I]t is the policy of CGH Medical Center to prohibit solicitation of all kinds...on CGH Medical Center property.” Such a prohibition is presumptively invalid because it does not allow employees to solicit on non-working time in non-immediate patient care areas. Furthermore, the Respondent has not demonstrated special circumstances that would justify such a broad prohibition. See cases supra.

The more specific provisions of the policy do not cure the defects of the broad prohibition against solicitation because the conflicting provisions in the policy render it ambiguous, and the policy remains overly broad even if the summary statement is disregarded. Ambiguity in a

rule is construed against the rule's drafter. Holy Cross Health, 370 NLRB No. 16; St. Joseph's Hospital, 263 NLRB 375, 377 (1982). However, in some cases where a handbook contains an ambiguous summary of a no-solicitation policy that directs employees to refer to a more specific, and facially lawful provision, a reasonable employee would be expected to disregard the shorter summary provision in favor of the more detailed description of the policy. Mediaone of Greater Florida, Inc., 340 NLRB 277, 277-78, n.4 (2003). Here, the policy is ambiguous because there is a conflict between the broad prohibition against solicitation and the more specific and permissive provisions that follow it later on. Furthermore, the specific provisions in the policy do not dispel the coercive effects of this ambiguity because those specifics are themselves unlawfully over broad, as discussed above. Cf. Mediaone of Greater Florida, Inc., 340 NLRB at 277-78 n. 4.

#### 5. The Policy as Applied

##### a. Stricter Enforcement of No-Solicitation Policy in Response to Union Activity

The Respondent violated Section 10(a)(1) of the Act when it announced a stricter interpretation of its no-solicitation policy in response to union activity.

An employer's more stringent enforcement of its work rules is unlawful when it is a consequence of employee participation in protected activity. See supra. Here, the Respondent took action to expand its prohibition against solicitation after Laboratory Director Baker received reports that there were union cards in the breakroom. In response to these reports, Baker announced an interpretation of the policy that was unlawfully over broad in that employees would reasonably construe it as barring solicitation on non-working time and non-immediate-patient-care areas. Baker explained to employees that she had received reports about union cards in the breakroom and she informed them in broad terms that “you are not able to bring this type of solicitation into CGH.” Based on this email, employees would reasonably believe that they could not engage in union solicitation in the breakroom on their own time, and they would also reasonably conclude that Baker’s announcement was a response to their union activity. For both these reasons, Baker’s email interferes with, restrains, and coerces employees in the exercise of their protected rights to engage in union solicitation on non-working time and in non-patient care areas.

Baker’s email remains unlawful despite the fact that certain employees complained to HR

about it and continued to engage in union solicitation in the breakroom. The test for finding a violation under Section 10(a)(1) of the Act is objective and does not depend on whether any individual was actually coerced in the exercise of their protected rights. Vill. of Calumet Park, 23 PERI ¶ 108. By extension, evidence that some employees protested the unlawfully applied rule does not render its application lawful.

Contrary to the Respondent's contention, the Respondent did not subsequently cure the coercive effect of Baker's email on employees' exercise of statutory rights. An employer can avoid a finding that it violated the Act if it effectively repudiates its prior unlawful conduct. State of Illinois, Departments of Central Management Services and Corrections, 25 PERI ¶ 12 (IL LRB-SP 2009) (no effective repudiation found). To be effective, the repudiation must be timely, unambiguous, specific in nature to the unlawful conduct, and free from other proscribed conduct. State of Illinois, Departments of Central Management Services and Corrections, 25 PERI ¶ 12. Furthermore, there must be adequate publication of the repudiation to the employees involved, and the employer must not have engaged in any proscribed conduct after the publication. Id. Lastly, the repudiation must assure the employees that the employer will not interfere with employees' protected rights in the future. State of Illinois, Departments of Central Management Services and Corrections, 25 PERI ¶ 12; see also United States Service Industries, 324 NLRB 834, 837-838 (1997); Passavant Memorial Area Hospital, 237 NLRB 138, 138-9 (1978).

Here, however, the Respondent did not adequately repudiate Baker's unlawful conduct with Baker's second email, dated July 30, 2019. Baker's second email was not sufficiently clear because Baker did not admit to any wrongdoing in her earlier email. In addition, Baker's second email failed to assure employees that the Respondent would not interfere with employees' protected rights in the future. Finally, Baker's second email was not devoid of proscribed conduct, as discussed more fully below, because employees would reasonably construe it to prohibit all discussions about unions during working time with allowing other types of discussions. See Advancepierre Foods, Inc., 366 NLRB No. 133 (2018); Voith Indus. Services, Inc., 363 NLRB 1038, 1041 (2016); Passavant Memorial Area Hospital, 237 NLRB at 139.

b. Respondent Interpreted and Applied Its No-Solicitation Policy to Discriminate Against Union Discussions

The Respondent violated Section 10(a)(1) of the Act by interpreting and applying its no-

solicitation policy to discriminate against Union discussions and by threatening employees with discipline, pursuant to the no-solicitation policy, if they engaged in further union discussions on work time.

i. Baker's July 30 Email to Laboratory Staff

The Respondent violated Section 10(a)(1) of the Act when Laboratory Director Baker, on July 30, 2019, disseminated an interpretation of the Respondent's no-solicitation policy that employees would reasonably understand as prohibiting conversations about unions while allowing conversations about other matters.

An employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. Jensen Enterprises, Inc., 339 NLRB 877, 878 (2003). "However, an employer violates the Act when employees are forbidden to discuss unionization but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign." Jensen Enterprises, Inc., 339 NLRB at 878 (quote); see also Secure Solutions (USA) Inc., 364 NLRB No. 92 (2016).

Here, Baker's email of July 30, 2019 would reasonably lead employees to believe that mere "conversations" about the union are prohibited by the Respondent's no-solicitation policy during work time, while other types of conversations are allowed. Baker's email expressly singled out union-related conversations, stating, "while you are here at work you are to be working and not stomping for or against the union! Our work area will remain off limits to **these types of conversations** per [the no-solicitation] policy...." (Emphasis added).

Baker's email does not simply summarize the no-solicitation policy because it includes a new term, "conversations," and bars certain conversations based on their union-related content. Yet, solicitation and conversation are different. Solicitation in the context of an organizational campaign "usually means asking someone to join the union by signing his name to an authorization card." W.W. Grainger, 229 NLRB 161, 166 (1977). It is "not the same thing as talking about a union or a union meeting or whether a union is good or bad." W.W. Grainger, 229 NLRB at 166. Accordingly, a conversation in which an employee talks favorably about unionization or provides information about the union is not solicitation, standing alone. Here, however, Baker

failed to explain the distinction between conversations and solicitations recognized by labor boards when describing the “conversations” prohibited by the Respondent’s no-solicitation policy. In turn, Baker’s email has the reasonable tendency to chill employees’ exercise of their right to engage in union-related conversations at work that do not qualify as solicitation.

The Respondent’s repeated, express warnings to employees to refrain from discussing the Union at work further support the finding that Baker’s email conveys the message that union-related conversations are prohibited by the no-solicitation policy. Such repeated warnings are consistent with the plain language of Baker’s email and give her email authoritative meaning. Thus, a reasonable employee would view Baker’s email as prohibiting even those work-time conversations about the Union that fall short of solicitation. Conagra Foods, Inc., 361 NLRB 944, 947 (2014) (considering “employer’s vigorous efforts to restrict discussions about the unions” when assessing employer’s letter interpreting its no-solicitation policy), enf. in part and set aside in part, 813 F.3d 1079 (8th Cir. 2016); see also The Roomstore, 357 NLRB No. 143, slip op. at 1 fn. 3 (2011) (same).

Contrary to the Respondent’s suggestion, Baker’s attachment of the policy to her email does not provide sufficient clarity or otherwise dispel the email’s chilling impact on employees’ protected rights. At best, it underscores the ambiguities present in the email on its face, and such ambiguities must be construed against the Respondent. Holy Cross Health, 370 NLRB No. 16; St. Joseph's Hospital, 263 NLRB at 377.

ii. Further Discriminatory Prohibition of Union Discussions and Accompanying Threats of Discipline – Employees Barron and Thompson

The Respondent engaged in similar unlawful conduct with respect to employee Barron, in the EMR Department, and employee Thompson, in the Emergency Department, when it told them they could not discuss the Union on work time and threatened them with discipline if they did so in the future.

As discussed above, an employer may not forbid discussions about the union while allowing discussions about other subjects. Jensen Enterprises, Inc., 339 NLRB at 878. In addition, threats of discipline for engaging in union activities violate Section 10(a)(1) of the Act. Chicago Transit Auth. v. Illinois Labor Relations Bd., 386 Ill. App. 3d 556, 572-3 (1st Dist. 2008).

Here, The Respondent freely allowed employees to discuss a wide range of topics during work time (e.g., family, politics, religion, food, etc.), but expressly informed employees Barron and Thompson that they could not discuss the Union. The Respondent also threatened them with discipline if they discussed the Union on work time in the future. On August 15, 2019, Tichler informed Barron that talking about the Union was a direct violation of the Respondent’s no-solicitation policy, and that he would “write her up” if he received any more complaints from employees that she was talking to them about the Union. Similarly, in October 2019, ER Supervisor Brown informed RN Thompson that employees are not supposed to talk about anything Union related on the clock, indicated that Thompson’s conduct in this respect contravened the no-solicitation policy, and gave her a copy of the policy, which warns that violators are “subject to disciplinary action.” While both employees’ supervisors suspected that their respective subordinates had tried to solicit signatures for union cards, the supervisors repeated their broader admonitions against union discussions *after* the employees denied that they had solicited signatures. Thus, a reasonable employee would conclude that mere discussions about the union on work time were a violation of the Respondent’s no-solicitation policy, irrespective of whether they were seeking signatures in the course of those discussions. Emergency One, Inc., 306 NLRB 800, 806 (1992) (employer unlawfully restricted conversations about union while permitting general conversations); Capitol Emi Music, 311 NLRB 997, 1010 & n. 4 (1993) (both no-talking rule and related threat to deal severely with anyone found talking about union during work hours deemed unlawful), enforcement granted sub nom. Capitol EMI Music, Inc. v. N.L.R.B., 23 F.3d 399 (4th Cir. 1994).

c. Respondent Applied Its No-Solicitation Policy to Discriminate Against Union Solicitation

The Respondent also enforced its no-solicitation policy in a discriminatory manner against perceived Union solicitation, in violation of Section 10(a)(1) of the Act.

An employer violates Section 10(a)(1) of the Act when it discriminatorily enforces a no-solicitation policy. Chicago Transit Authority, 34 PERI ¶ 160 (noting principle but finding no violation as to solicitation); Waubonsee Community College, 24 PERI ¶ 63 (IL IELRB 2008).

Here, the Respondent formally warned employees against soliciting for the Union on work time, while it knowingly permitted extensive non-union solicitation on work time and in



work areas. For example, RN Thompson testified that employees solicited sales at the nurse's station every day, and that order forms for products such as Mary Kay cosmetics would be in plain view when managers approached. Houzenga noted that employees would conduct solicitation in the laboratory conference room by selling products such as bags, cakes, candles, popcorn, makeup, and laundry detergent, and by promoting fundraisers. She indicated that current and former laboratory directors were aware of this activity because they went in and out of the conference room daily. RN Langenfeld and Barron both testified that they observed employees buying candy bars at the nurses' stations throughout the day. Barron additionally testified that a receptionist in clinic administration advertised a fundraiser for her child at the corner of her desk and that employees would order things from her. Another employee sold candles and maintained an arrangement of those candles above the nurses' station so others could see and buy them. RN Bettner testified that employees in the Home Nursing Department bought and sold a variety of items in a conference room, also used for work. She herself sold candles, Girl Scout cookies, nail strips, and bratwursts in work areas and on work time. Where, as here, the solicitations are so extensive and significant, the Respondent cannot lawfully deny the same privilege for union-related solicitation. New York Tel. Co., 304 NLRB 183 (1991) (applying similar analysis to bulk distribution of products).

There is insufficient support for the Respondent's suggestion that members of management diligently removed all such solicitations as they became aware of them. The Respondent's sole piece of support for this claim is testimony by HR Manager Baylor-Schmidt, who visited hospital areas on a daily basis. However, the testimony of the employees is granted greater weight because it is detailed, consistent, and derives from their frequent, and in some cases, near constant, presence at their respective work sites during work time. The complete absence of any warnings, memos, or threats of discipline to employees for non-union-related solicitation further supports the conclusion, drawn from employees' testimony, that such solicitation was routinely tolerated by management.

Nor is there adequate support for the Respondent's suggestion that the remaining solicitation in work areas, described in detail by the Union's witnesses, simply went unnoticed by management. The widespread solicitation by employees justifies an inference that the Respondent had knowledge of it. S. Nassau Hosp., 274 NLRB 1181, 1182 (1985). And as discussed below, this inference is significantly strengthened by the fact that the solicitations occurred in the pres-

ence of supervisors, were directed at supervisors, and were also conducted by supervisors. George Washington Univ. Hosp., 227 NLRB 1362, 1373 (1977), enforcement granted in part, denied in part sub nom. George Washington Univ. Hosp., Div. of George Washington Univ. v. N.L.R.B., 77-1182, 1978 WL 4100 (D.C. Cir. May 2, 1978).

Here, several employees testified that the solicitations occurred continuously and in plain view at the nurses' stations, in conference rooms, and at the receptionists' desks. At least three employees (Thompson, Houzenga, and Bettner) indicated that the solicitations were conducted in the presence of supervisors. RN Bettner additionally testified that she personally sold products in the Home Nursing conference room to two successive Directors of Home Nursing—Girl Scout cookies and bratwursts to Director Henches in 2017 and bratwursts and candles to Director Derberry in 2018 or 2019. More recently, in 2021, Bettner witnessed Nursing Director Wooden selling products in the conference room, while employees were working, to raise money for a choir. S. Nassau Hosp., 274 NLRB at 1182 (inferring Respondent's knowledge of widespread solicitation even in the absence of direct testimony that supervisors observed these transactions); see also George Washington Univ. Hosp., 227 NLRB at 1373 (discriminatory enforcement found where non-union solicitations were commonly conducted in various offices by supervisors, of supervisors, or in the presence of supervisors).

Contrary to the Respondent's assertion, there is no need to engage in any additional comparative analysis of union solicitation and sales solicitation before determining that the Respondent engaged in discriminatory enforcement of its policy. The Board has never required this type of comparative assessment, and the Illinois Educational Labor Relations Board has rejected such an analytical approach, advocated by the Respondent here. Waubonsee Community College, 24 PERI ¶ 63 n. 3.

In Waubonsee Community College, the IELRB held that the respondent discriminated against union solicitation when it refused the union's requests to rent college facilities while allowing other groups to use its facilities for a wide range of solicitation including bake sales, book sales, military recruitment, seminars, and conferences. Waubonsee Community College, 24 PERI ¶ 63. In so holding, the IELRB declined to conduct an analysis of whether the union's proposed use of the respondent's premises was similar to the types of solicitation that the Respondent previously permitted. Id. It acknowledged that the NLRB had then-recently narrowed the standard

for discrimination, requiring an analysis of similarity.<sup>25</sup> Id. at n. 3. However, the IELRB concluded that the “National Labor Relations Board’s traditional standard for discrimination better conform[ed] to [the IELRB’s] statutory mandate to protect employees' statutory right to organization.” Id. (rejecting framework adopted by the NLRB in The Guard Publ'g Co.).

Similarly, here, it is appropriate to conclude that the Respondent discriminated against Union solicitation where it barred Union solicitation on working time while permitting a wide variety of other solicitation in work areas and on working time. In reaching this conclusion, it is unnecessary to analyze how union solicitation compares to the various other types of solicitation the Respondent routinely permitted.

2. Section 10(a)(2) Allegations – verbal reprimand, change in duties & increased scrutiny, suspension, reduction in hours, termination

The Respondent violated Sections 10(a)(2) and (1) of the Act when it removed Barron’s duties to round and respond to calls in the field, subjected Barron’s work to heightened scrutiny, issued Barron a five-day suspension, and terminated her employment. However, the Respondent did not violate Section 10(a)(2) and (1) of the Act when it issued Barron a verbal warning on August 15, 2019.

Section 10(a)(2) of the Act makes it an unfair labor practice for an employer “to discriminate in regard to hire or tenure of employment...in order to encourage or discourage membership in or other support for any labor organization.” 5 ILCS 315/10(a)(2).

To establish a prima facie case that the employer violated Section 10(a)(2) of the Act, the charging party must prove by a preponderance of the evidence that: (1) the employee engaged in union and/or protected concerted activity, (2) the employer was aware of that activity, and (3) the employer took adverse action against the employee as result of her involvement in that activity to encourage or discourage union membership or support. City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989); Illinois State Toll Highway Authority, 25 PERI ¶ 4 (IL LRB-SP 2009); City of Elmhurst, 17 PERI ¶ 2040 (IL LRB-SP 2001); Vill. of Schiller Park, 13 PERI ¶ 2047 (IL SLRB 1997); Macon Cnty. Highway Dept., 4 PERI ¶ 2018 (IL SLRB 1988).

The charging party may demonstrate the requisite causal connection through circumstantial or direct evidence including expressions of hostility toward union activity, together with

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<sup>25</sup> See The Guard Publ'g Co., 351 NLRB 1110, 1118 (2007).

knowledge of the employee's union activities; timing; disparate treatment or targeting of union supporters; inconsistencies in the reasons offered by the respondent for the adverse action; and shifting explanations for the adverse action. City of Burbank, 128 Ill. 2d at 346.

Once the charging party establishes a prima facie case, the respondent can avoid a finding that it violated the Act by demonstrating that it would have taken the adverse action for a legitimate business reason, notwithstanding the respondent's union animus. City of Burbank, 128 Ill. 2d at 346. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. Id. If the proffered reasons are merely litigation figments or were not in fact relied upon, then the employer's reasons are pretextual and the inquiry ends. Id. However, when legitimate reasons for the adverse employment action are advanced and are found to be relied upon at least in part, then the case may be characterized as a "dual motive" case, and the respondent must establish, by a preponderance of the evidence, that it would have taken the action notwithstanding the employee's union activity. Id. at 346-7.

a. Protected Concerted Activity / Union Activity

Barron engaged in union activity and other protected concerted activities.

Examples of union activity that satisfy the first prong of the 10(a)(2) test are active involvement in a union's organizing campaign, serving as a union steward, serving as a local union president, and serving on a negotiating committee. Vill. of Oak Park, 28 PERI ¶ 111 (IL LRB-SP 2012); Ill. State Toll Hwy. Auth., 25 PERI ¶ 4; City of Princeton (Fire Dep't), 22 PERI ¶ 139 (IL LRB-SP 2006).

Here, Barron engaged union activity beginning in June 2019 through November 2019 because she was active in the Union's organizing campaign at that time. On June 8, 2019, she signed an open letter to co-workers, which urged employees to sign cards in support of the Union. Around this time, she also spoke to CGH employees about the Union. In September 2019, Barron made multiple posts on her personal Facebook page supporting the Union, which urged her Facebook friends, many of whom were CGH employees, to likewise support the Union. She also made a post on the Union's Facebook page, explaining her reasons for supporting the Union. And on September 17, 2019, Barron spoke up at a City of Sterling city council meeting while wearing an AFSCME t-shirt. Barron continued her union activity in October 2019, by

making a post on her personal Facebook page urging employees to “sign a card,” and to “contact [her]” to vote for the Union, stating “I am a union member & I vote.”

Notably, the Respondent acknowledged Barron’s strident union advocacy in its January 6, 2020, response to the Union’s petition to represent CGH employees. It argued that the Union’s proposed inclusion of Barron’s position in the bargaining unit made little sense except for the fact that “the individual holding the [EMR Trainer] position is one of the Union’s most vocal supporters.”

Barron also engaged in protected, concerted activity, separate and apart from the union-specific protected, concerted activity discussed above. All union activity is concerted activity, but not all protected concerted activity is union activity. County of DuPage (DuPage Care Center), 36 PERI ¶ 114 (IL LRB-SP 2020). The actions of an individual employee are “concerted activity” when they are undertaken “with or on the other authority of” other employees and in furtherance of a group concern. Oak Brook Park District, 31 PERI ¶ 193 (IL LRB-SP 2015); City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997); Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993); see also Schaumburg Sch. Dist. v. Ill. Educ. Labor Relations Bd., 247 Ill. App. 3d 439, 456 (1st Dist. 1993). Employees do not need to formally select a specific employee to complain on their behalf; however, the speaker “must be actually, not impliedly, representing the views of other employees.” Oak Brook Park District, 31 PERI ¶ 193; City of Decatur, 14 PERI ¶ 2004. Where one employee speaks to another about their terms and conditions of employment and relies on that second employee to act as a liaison to management, the second employee’s action is concerted even if she was not expressly appointed or nominated as a spokesperson. TM Group, Inc., 357 NLRB 1186, 1199 (2011).

Concerted activity is protected if it is engaged in for the purpose of collective bargaining, for other mutual aid or protection, or if it is aimed at improving wages and terms and conditions of employment. Office of the Chief Judge of the Circuit Court of Cook County, 37 PERI ¶ 34 (IL LRB-SP 2020); Village of New Athens, 29 PERI ¶ 27 (IL LRB-SP 2012); County of Cook (Management Information Services), 11 PERI ¶ 3012 (IL LLRB 1995). As long as the employee’s conduct is lawful and not indefensible in its context, it is generally deemed to be protected. Office of the Chief Judge of the Circuit Court of Cook County, 37 PERI ¶ 34; County of Cook, 27 PERI ¶ 57 (IL LRB-LP 2011).

Barron engaged in protected concerted activity during and after the town hall meeting on

November 7, 2019, when she spoke to Dr. Steinke about employees' working conditions. During that meeting Barron acted with other employees in complaining about understaffing issues. Other employees raised staffing concerns with Steinke first, and when he denied that there was a problem, Barron supported her colleagues by relaying the specific understaffing concerns that cardiology nurses had brought to her attention. Barron similarly engaged in protected concerted activity when she spoke to Steinke after the meeting because she approached Steinke with another employee, Ramirez, to raise their shared concerns about the Respondent's policy of requiring employees to use earned time off for federal holidays. Loyalhanna Health Care Associates, 332 NLRB 933, 941 (2000) (employees who complained together about wages, staffing levels, and working conditions engaged in protected concerted activity).

Barron continued to engage in protected concerted activity after Ramirez left, when she complained to Steinke about the absence of maternity leave and the low pay for housekeeping staff. Barron indicated that employees had selected her as their representative to speak on their behalf regarding working conditions, and Steinke acknowledged his understanding of this dynamic. Their exchange makes this clear: When Steinke asked Barron why she was the only one approaching him about these issues, Barron explained that other employees were afraid of him. Steinke then expressed his understanding that Barron was the conduit for other employees' concerns, telling Barron to "let people know that if they have issues...they can come to and talk to me." Barron confirmed that she was acting on behalf of other employees, as their liaison to management, noting that she would relay the message but would be back to talk to Steinke if the employees still did not feel comfortable coming to him directly.

Finally, Barron's comments to Steinke after Ramirez's departure satisfy the first prong of the Burbank test, even if the Board finds that Barron was not in fact acting with or on behalf of employees at that time. The Act should be interpreted to protect employees from retaliation or discrimination on the basis of union and/or protected, concerted activity even when the employer is mistaken in its belief that the employee engaged in such activities. United States Service Industries, 314 NLRB 30, 31 (1994) ("[A]ctions taken by an employer against an employee based on the employer's belief that the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity."); Metropolitan Orthopedic Assn., 237 NLRB 427, 427 n.3 (1978) ("The discharge of 4 employees in a unit of 13 employees because of Respondent's belief, albeit mis-

taken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act”); see also Sys. Analyzer Corp., 171 NLRB 45, 51 (1968).<sup>26</sup> Here, Steinke believed that Barron was acting on behalf of other employees because he asked her to relay messages to them, and asked Barron to encourage them to come to him directly instead of speaking through her. Barron then confirmed Steinke’s understanding that she was serving as employees’ liaison to management about their workplace concerns by informing him that if employees still felt uncomfortable approaching him directly, she would be back to speak to him on their behalf. Thus, Steinke’s understanding that Barron was raising workplace complaints on behalf of others, even if found to be mistaken, is sufficient to support the first prong of the test.

b. Knowledge

The Respondent’s agents knew of Barron’s union activity and her protected, concerted activity.

An employer can be found to have knowledge of an employee's protected activity through direct or circumstantial evidence. Rockford Twp. Hwy. Dep’t v. State Labor Rel. Bd., 153 Ill. App. 3d 863, 881 (2d Dist. 1987). Knowledge of an employee's protected activity must be specifically imputed to an appropriate agent of the employer who is in some manner responsible for the alleged adverse employment action. Macon Cnty. Bd. and Macon Cnty. Hwy. Dep’t, 4 PERI ¶ 2018. A manager's or a supervisor's knowledge of an employee's union activities will ordinarily be imputed to the employer, but a fact-finder may not do so in light of affirmative contrary evidence. Macon Cnty. Bd. and Macon Cnty. Hwy. Dep’t, 4 PERI ¶ 2018. Knowledge of employees’ protected activity can also be imputed to the respondent's decision-maker where one of the Respondent’s higher-ranking officials was present at the time of the employee’s protected activity and the protected action was public. County of Cook, 31 PERI ¶ 108 (IL LRB-LP 2014).

Here, Barron’s union activity was known to all members of management involved in the decisions to take alleged adverse actions against Barron. Tichler and Baylor-Schmidt were aware of Barron’s union activity in August, when they received reports that Barron was allegedly soliciting Union support on work time. Tichler was also aware of Barron’s subsequent Union advocacy on her Facebook page from September through October 2019 because he was her Fa-

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<sup>26</sup> Board ALJs have previously applied this analysis. Village of Sleepy Hollow, 30 PERI ¶ 17 (IL LRB-SP ALJ 2013); Lemont Fire Protection District, 14 PERI ¶ 2037 (IL SLRB ALJ 1998).

cebook friend. Tichler's knowledge of Barron's subsequent union activity is appropriately imputed to all other decision-makers, including Vice President Brown and Baylor-Schmidt, absent evidence that they did not know of it; and in this case, neither denied such knowledge.

The relevant decision-makers must also be deemed to have knowledge of Barron's protected concerted exchange with President Steinke on November 7, 2019, where none of the decision-makers expressly denied such knowledge. The first part of Barron's exchange was highly public and arguably contentious. Barron, a mere EMR trainer, confronted the head of the medical center, President Steinke, in front of 40 employees, including Vice President Brown, Director of Nursing Geil, Chief Medical Officer Bird, and members of HR. She not only joined employees in emphasizing the problem of understaffing, she also stated that such understaffing was a threat to patient safety, a claim that Steinke characterized as "bold."

Moreover, none of the Respondent's decision-makers denied knowledge of this exchange. Although Tichler testified that he had no discussions with members of management on November 7, 2019, during his journey to and arrival in Florida for the NextGen Conference, he never denied having simply received contemporaneous information about the exchange, nor did he expressly deny knowledge of it. County of Cook, 31 PERI ¶ 108 (absent affirmative evidence to the contrary, Board assumed decision-makers would know of "so public an action" as providing testimony before the Board, where one of respondent's high-ranking officials was present).

### c. Verbal Warning

The Respondent did not violate Section 10(a)(2) and (1) of the Act when it issued Barron a verbal warning on August 15, 2019.

Barron engaged in union activity by discussing the Union with her co-workers and answering their questions about the Union while at their worksites.

The Respondent's decision-makers Baylor-Schmidt and Tichler were aware of Barron's union activities because Baylor-Schmidt received reports that Barron had engaged in solicitation for the union, and she relayed them to Tichler.

However, the Respondent did not take adverse action against Barron when Tichler gave her a verbal warning. While an action does not need to have an adverse tangible result or adverse financial consequence to constitute an adverse employment action under the Act, there must be some qualitative change in or actual harm to an employee's terms or conditions of employment.



City of Chicago v. Ill. Local Labor Relations Bd., 182 Ill. App. 3d 588, 594-95 (1st Dist. 1988); County of Cook/Hektoen Institute, 30 PERI ¶ 252 (IL LRB-LP 2014). Examples of adverse employment actions include, but are not limited to, “discharge, discipline, assignment to more onerous duties or working conditions, layoff, reduction in pay, hours or benefits, imposition of new working conditions or denial of advancement.” Ill. Dep’t of Central Mgmt. Servs. (Dep’t of Emp’t Sec.), 11 PERI ¶ 2022 n. 3 (IL SLRB 1995).

In the context of representation cases, the Board has long held that employer action constitutes discipline if it is documented and can serve as the basis for future disciplinary action, that is, it functions as part of a progressive disciplinary system. Metropolitan Alliance of Police v. Illinois Labor Relations Board, 362 Ill. App. 3d 469, 478 (2nd Dist. 2005); Village of Hinsdale, 22 PERI ¶ 176 (IL LRB-SP 2006). It has also held that verbal reprimands that are not recorded are not discipline within the meaning of the Act. University (Department of Safety), 17 PERI ¶ 2005 (IL LRB-SP 2000).

In keeping with these principles, the Board has held in the unfair labor practice context that informal oral warnings can qualify as discipline provided that they are recorded for future reference. Chicago Transit Authority, 19 PERI ¶ 34 (IL LRB-LP 2003). This is true even if the Respondent does not categorize such warnings as disciplinary. Chicago Transit Authority, 19 PERI ¶ 34.

Here, however, the Respondent’s verbal warning to Barron was not documented at the time the incident occurred or in the four months that followed. Barron did not receive any record of the discussion, nor did she receive a disciplinary notice. The Union has also failed to present any evidence that the Respondent documented the warning, internally, for its own records. It is clear that Tichler recalled the incident because he referenced the earlier warning in a later suspension, but this is unsurprising given that he has few subordinates.

There is also insufficient evidence that the verbal warning issued to Barron qualifies as part of the Respondent’s progressive discipline policy. The policy does not list verbal warnings as separate step in the process. To the contrary, the policy guidelines state that a written warning is the appropriate disciplinary penalty for most first-time rule violations.<sup>27</sup> The disciplinary policy does mention counseling, a term some witnesses used interchangeably with verbal warning,

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<sup>27</sup> Severe misconduct can warrant greater discipline, and attendance issues are addressed in a separate policy, which was not introduced at hearing.

but the policy does not classify counseling as an independent and solitary response to employee misconduct. Rather, the policy provides that counseling accompanies a written warning and takes place after the supervisor completes an employee disciplinary notice but before the employee signs the form.

Baylor-Schmidt's testimony about the disciplinary process is consistent with this interpretation. She repeatedly testified that Barron's verbal warning did not qualify as discipline under the Respondent's policy. Although she noted that the Respondent listed the verbal warning in Barron's subsequent November 2019 suspension, it did so as "part of the [Respondent's] disciplinary process," pursuant to which a supervisor must "describe the interactions [they] had with the employee that led up to the suspension."<sup>28</sup> This explanation is also consistent with the language of the disciplinary policy, which states that the employee disciplinary notice must document "pertinent facts."

The Union correctly notes that the Respondent clearly deemed the verbal warning relevant to the subsequent suspension because the Respondent referenced the warning in the suspension notice. However, the Respondent's failure to document the verbal warning at the time it occurred or soon thereafter, and the absence of evidence that a warning constitutes a defined step under the Respondent's disciplinary policy, weighs against the finding that the warning is discipline.

Thus, the Respondent did not violate Sections 10(a)(2) and (1) of the Act because the verbal warning was not itself an adverse employment action sufficient to satisfy the Charging Party's prima facie burden under the Burbank test.<sup>29</sup>

#### d. Removal of Rounding and Call-Response Duties

The Respondent violated Sections 10(a)(2) and (1) of the Act when it removed Barron's

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<sup>28</sup> See Tr. p. 517 for quoted text and Tr. pp. 515-517 for context.

<sup>29</sup> There is no merit to the Respondent's suggestion that all allegations arising from the Respondent's verbal warning must be dismissed where the Section 10(a)(2) allegation has failed for lack of an adverse employment action. The complaint separately alleges that the Respondent's violated Section 10(a)(1) of the Act, independently, by issuing a verbal warning that interfered with, restrained or coerced public employees in the exercise of their protected rights. See Complaint S-CA-20-024 P 12 & 20. Furthermore, it is clear that the Respondent's verbal warning included a threat that Barron would receive discipline if she engaged in further discussions about the union on working time. Thus, it is appropriate to conduct a threat-based analysis, under which the Respondent's motive is irrelevant. Slater v. Illinois Labor Relations Bd., Local Panel, 2019 IL App (1st) 181007, ¶ 22.

duties to round and respond to calls in the field.

As noted above, Barron engaged in union and protected, concerted activities from June through November 2019, most recently on November, 7, 2019, and decision-makers Brown and Tichler knew of it.

In addition, the Respondent took adverse action against Barron when it removed her core job duties of rounding and responding to calls in the field and directed her to instead create educational documents and test the NextGen upgrades. An adverse employment action requires some qualitative change in or actual harm to an employee's terms or conditions of employment, though that harm need not be financial. City of Chicago, 182 Ill. App. 3d at 594-95; County of Cook/Hektoen Institute, 30 PERI ¶ 252. Here, the Respondent significantly diminished Barron's responsibilities when it removed Barron's rounding and call-response duties because those duties were a large and important part of her job. Rounding was highlighted during Barron's interview for the position, and Supervisor Tichler previously lauded her for the quality of her performance of this task. Furthermore, the Respondent's decision to remove these duties reduced Barron's work overall and justified the Respondent's later decision to cut Barron's hours after she finished testing, which was merely a short-term assignment.

The Respondent's removal of Barron's rounding and call-response duties was additionally adverse because it served to isolate Barron, a vocal union supporter, from employees in the clinics and the hospital. The Board has recognized that a respondent's change to an employee's terms and conditions of employment may support a discrimination claim if it serves to isolate an employee from others and limit her union activity. Cf. Clerk of the Circuit Court of Champaign County, 8 PERI ¶ 2025 (IL SLRB 1992) (acknowledging principle but finding no evidence of isolation). The National Labor Relations Board has similarly held that an employer engages in unlawful discrimination when it takes action to isolate a vocal union supporter to impede organizational activities or confines the union supporter to an area where they would be "less effective in proselytizing for the Union." Mid-Am. Mach., 238 NLRB 537, 547 (1978) (employer unlawfully "effectuate[d] a quarantine which would keep the most effective union leader away" from the other employees); Daylight Grocery Co., 147 NLRB 733, 738 (1964) (quote; addressing transfer). Here, the Respondent significantly diminished Barron's interactions with hospital and clinic employees when it removed her rounding and call-response duties and redirected her to perform tasks that would keep her at her desk in the EMR Department.

Next, the Respondent removed Barron's rounding and call-response duties for unlawful reasons, to isolate her from fellow employees, with whom she previously interacted on a frequent basis, and to constrain her ability to talk about the Union and working conditions. First, the timing of the Respondent's decision to remove Barron's rounding and call duties is suspicious because it occurred only three days after Barron publicly confronted President Steinke about staffing issues conveyed to her by nurses in the cardiology department. County of DuPage and DuPage County Sheriff, 30 PERI ¶ 115 (IL LRB-SP 2013) (timing of adverse action suspicious where it occurred two days after employer obtained knowledge of employees' protected activity). This close timing is rendered even more suspect where Tichler, just five days earlier, instructed Barron to round in preparation for the upgrade of the NextGen system. The Respondent's sudden and unexplained change in priorities is therefore reasonably attributed to Barron's protected, concerted activities of November 7, 2019, during which she voiced concerns about working conditions shared with her by employees in a different department.

Next, Tichler's explanation of the Respondent's reasons for removing Barron's rounding and call-response duties are suspicious and implausible. Tichler claimed that he instructed Barron to cease performing those duties because his supervisor, Vice President Brown, decided to reassess the training structure and frequency within clinic operations. However, Tichler admitted that he had known about Brown's alleged decision weeks before he told Barron, on November 10, 2019, to cease rounding and call-response duties, yet did not adequately explain why he waited to convey the decision to Barron. Tichler's reliance on Brown's decision warrants additional skepticism where Tichler flouted it on November 5, 2019, by directing Barron to focus on rounding in anticipation of the NextGen upgrade. Only after Barron openly confronted President Steinke about staffing issues did Brown's alleged managerial reassessment of training operations, conveyed to Tichler weeks earlier, become grounds to justify Tichler's removal of Barron's core duties.

Tichler's stated need for Barron to create educational materials and assist in testing the NextGen upgrades do not adequately explain Tichler's delay or his abrupt change of course because significant questions remain concerning his decision-making process. For example, Tichler could not recall when he realized that the department needed new training materials requiring Barron's attention. He also could not explain why he decided to give Barron the directive to create educational materials at 11 pm after his long drive to Florida on the very day of Barron's

heated public discussion with Steinke.<sup>30</sup> Nor did Tichler explain why he failed to give Barron the directive before he left for Florida, a day earlier. Finally, Tichler did not explain why he needed Barron to conduct testing of the NextGen system when testing was not included in her job description and was a function previously performed solely by the application analysts, who were responsible for preparing the NextGen upgrades.

Tichler's reasons for removing Barron's rounding and call-response duties are also shifting. Tichler initially informed Barron that he removed these duties because of Brown's managerial decision to reassess clinic training. However, when Barron sought to resume rounding after she completed the assigned educational documents and testing, Tichler offered a different reason why such duties had been removed and would not be restored. He explained that he had received too many complaints that Barron was misusing time and bothering people. Notably absent from Tichler's explanation was any reference to Brown's managerial decision to reassess clinic training, the reason Tichler initially offered for removing Barron's rounding duties.

Furthermore, Tichler's reference to the "many complaints" he had received about Barron "bothering people" is an implicit admission that Barron's union activity and related contact with her co-workers, bore on the Respondent's decision to remove her rounding duties. HR Director Baylor-Schmidt used similar language to reference the 15 complaints she allegedly received in August 2019 to denote Barron's alleged solicitation of union support on work time. Tichler's adoption of Baylor-Schmidt's language in this context can reasonably be viewed as referring to the same thing.

Finally, the Respondent's unlawful restrictions on union solicitation and Tichler's earlier threat of discipline against Barron for discussing the Union on work time further demonstrate that the Respondent removed Barron's rounding and call duties to limit her ability to organize in support of the Union and discuss working conditions. Austal Usa, LLC, 356 NLRB 363, 364 (2010) (union animus also shown by unlawful restrictions on discussions of the union and solicitation as well as unlawful threats).

For the reasons set forth above, the Respondent has not set forth a legitimate, non-shifting explanation for its decision to remove Barron's rounding and call-response duties. While the Respondent characterizes its change as a simple reassessment of management's priorities, the

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<sup>30</sup> While Tichler denied having discussions with any member of management before he sent the email directing Barron to create educational materials, he did not expressly deny knowledge of Barron's interaction with Steinke at the town hall meeting earlier that day.

legitimacy of its claim is significantly undercut by Tichler's shifting explanations, discussed above, and the ample evidence of suspicious circumstances surrounding the Respondent's decision-making process.

Thus, the Respondent violated Section 10(a)(2) and (1) of the Act when it removed Barron's rounding duties and redirected her to solitary assignments because it did so to isolate her from hospital and clinic employees and limit her ability to organize support for the union and discuss working conditions.

e. Heightened Scrutiny of Barron's Work

The Respondent violated Sections 10(a)(2) and (1) of the Act when it subjected Barron's work to heightened scrutiny.

As noted above, Barron engaged in union and protected, concerted activities from June through November 2019, most recently on November, 7, 2019, and decision-maker Tichler knew of it.

In addition, the Respondent took adverse action against Barron when the Respondent held Barron's work to the strictest scrutiny. As the appellate court observed, it would be "contrary to the law itself" if "an employee whose employer consistently intimidated and harassed him or her and constantly subjected his or her work performance to the strictest scrutiny, would have no recourse under the Act." City of Chicago, 182 Ill. App. 3d at 595 (quote); see also City of Markham, 7 PERI ¶ 2021 (IL SLRB 1991) (heightened scrutiny of employee's work warranting inference of unlawful motive). Here, the Respondent gave unusual scrutiny to Barron's work by requiring her to report on her whereabouts, to submit her work each day, and to document her time in 15-minute increments, first on paper and then electronically.

Furthermore, the preponderance of the evidence demonstrates that the Respondent imposed such heightened scrutiny because of Barron's union and protected, concerted activities, to discourage support for the Union. First, the timing of the Respondent's decision to closely scrutinize Barron's work and whereabouts is suspicious because it began just days after her public confrontation with President Steinke about staffing levels on November 7, 2019. Baylor-Schmidt contacted Tichler to ask why Barron had been "out and about" on November 8, 2019, and on November 10, 2019, Tichler directed Barron to tell him whom she had been training, and why, though he had never made such detailed inquiries before. Then, beginning on November

11, 2019, Tichler asked Barron to send him what she had worked on each day. The following day, Tichler began requesting daily updates on what Barron had done each day and how much time it had taken. On November 13, 2019, Tichler informed Barron that he would soon be requiring her to keep track of her time in an electronic format, using the Access Database, which tracks employees time in 15-minute increments. County of DuPage and DuPage County Sheriff, 30 PERI ¶ 115 (two days between protected activity and adverse action is suspicious).

The onset of this increased scrutiny additionally warrants an inference of unlawful motive where it occurred in tandem with the Respondent's unlawful attempt to isolate Barron from other employees by assigning her desk duties and removing her duty to round. Given this cluster of events, it stands to reason that the Respondent began closely tracking Barron's work and whereabouts to ensure that the Respondent's isolation tactic had worked, and that Barron was, in fact, staying away from employees at the hospital and clinics.

Second, Tichler's various explanations for his increased scrutiny of Barron work are shifting, inconsistent with his other actions, and/or facially implausible, as discussed below. For example, Tichler offered shifting reasons for why he requested progress reports on Barron's educational documents. He testified that he asked for such reports to ensure she was on the right track with them, but at the time Barron asked him about the new requirement in November 2019, Tichler stated that he wanted updates because HR had received multiple complaints that Barron was not doing her job.

Similarly, Barron's alleged delay in providing Tichler with the requested educational documents is an implausible reason for the considerable scrutiny that Tichler imposed on her work, when viewed in context. The delay was minor because only two business days elapsed between Barron's receipt of the assignment (Friday, November 8) and her submission of work (Tuesday, November 12). More importantly, the Respondent's claim of delay presupposes that Barron received a deadline for the completion of work, when in fact neither Tichler's initial email (November 7) or his follow-up (November 10) provided one. To the contrary, Tichler's follow-up email expressed the understanding that Barron might not finish the assignment until he got back from Florida. He stated, "if you finish these before I get back, let me know and I can send you more [work of the same kind]." Only on November 12, 2019, did Barron become aware that Tichler expected to receive a draft of the requested document, and Barron complied that day.

Likewise, Tichler's stated concern over Barron's lack of progress on the educational documents is a pretextual basis for the heightened scrutiny because it is incongruent with his failure to provide Barron with the instruction and training he knew she needed to succeed in the assignment. Tichler was aware that Barron lacked the skills to create the types of graphics the EMR department required for their educational documents. Barron informed Tichler during her interview that she had only very basic abilities in Word. Tichler also knew that the last time he asked Barron to create educational documents, another employee, Roux, had to redo her graphics. Yet, Tichler made clear in his November 2019 directives that he expected Barron to create similarly annotated graphics,<sup>31</sup> which she was incapable of creating before. He understood that she was having difficulty with the assignment, and, as of November 12, 2019, knew the nature of her struggles in detail but did not then offer her any training. He later mentioned that he had found some tutorials on YouTube but declined to identify any particular tutorials that he had vetted as helpful. He also declined to arrange any in-person training on Word, though she requested it. See County of Dekalb & State's Attorney of Dekalb County, 6 PERI ¶ 2053 (discharge of employee on grounds that she was a security risk was deemed unlawful where decision-maker's actions were not consistent with a "sincere belief" that employee was in fact a security risk).

Finally, Tichler offered an implausible reason for asking Barron to track her time in 15-minute increments in the Access Database. Tichler testified that he asked Barron to use the Access Database to help accurately track the amount of testing on system upgrades performed by the EMR Department on the whole. However, the Access Database had little practical application for tracking the EMR department's testing time because the analysts who were responsible for the lion's share of testing, routinely ignored their tracking obligations and joked about how they were eight months behind. Moreover, Tichler continued to require Barron to document her time in the Access Data base well after testing had concluded.

For the reasons set forth above, the Respondent has failed to present a legitimate explanation for its increased scrutiny of Barron's work because each proffered explanation is shifting, pretextual and/or implausible.

In sum, the Respondent violated Section 10(a)(2) and (1) of the Act by subjecting Barron's work and whereabouts to increased scrutiny because of her union and protected, concerted

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<sup>31</sup> He stated, "these documents should include plenty of screenshots and [be] informative enough that someone could look at them and be able to understand how to use the template."



activity, and for the purpose of discouraging support for the Union.

f. Five-day suspension

The Respondent violated Sections 10(a)(2) and (1) of the Act when it issued Barron a five-day suspension.

As noted above, Barron engaged in union activity and protected, concerted activity, and key decision-makers Tichler and Baylor-Schmidt were aware of it. In addition, there is little dispute that the Respondent subjected Barron to an adverse employment action when it issued her a five-day suspension.

Turning to the issue of motive, the preponderance of the evidence demonstrates that the Respondent issued the suspension to discriminate against Barron because of her protected activities and to discourage support for the Union.

First, the Respondent's agents offered shifting reasons for issuing Barron a five-day suspension. Baylor-Schmidt testified the Respondent based the discipline in part on Barron's alleged time theft, committed in April 2019, and even emphasized the severity of the offense, noting that there is no "statute of limitations" for the violation of "really big rules." However, Tichler testified that Barron's April 2019 timekeeping incident was not a basis for the suspension and instead served as background information.

Next, the Respondent's reliance on the April 2019 time theft violation in support of the disciplinary action in November 2019 is inconsistent with its other actions. Baylor-Schmidt indicated that Barron's April 2019 actions were a severe violation of the Respondent's rules; yet Tichler saw fit to let the April incident pass without documenting it. It became objectionable to the Respondent only seven months later, after Barron became a vocal union advocate and organizer. Baylor-Schmidt testified that she would have taken action on this matter earlier, had she known about it. But this assertion does little to rehabilitate the Respondent's inconsistent positions. If the infraction was as severe as Baylor-Schmidt claimed, then Tichler's failure to take action on the matter in April, while raising the issue to Baylor-Schmidt's attention for the first time seven months later, is itself evidence of unlawful motive. County of Williamson and Sheriff of Williamson County, 14 PERI ¶ 2016 (IL SLRB 1998) (strong inference of unlawful motive where employee's alleged misconduct went unpunished for three months before serving as the basis for his discharge); see also City of Markham, 7 PERI ¶ 2021 (respondent suspended em-

ployee on “trumped up charges” where it relied on incident that was resolved three months earlier).

In addition, the Respondent’s agents failed to investigate the key allegations that underpinned the disciplinary decision. An employer’s failure to investigate a matter before issuing discipline raises the inference that the employer harbored an unlawful motive. County of DuPage and DuPage County Sheriff, 30 PERI ¶ 115; North Shore Sanitary District, 9 PERI ¶ 2014 (IL SLRB 1993); Cnty. of DeKalb and DeKalb Cnty. State's Attorney, 6 PERI ¶ 2053 (IL SLRB 1990). Here, Tichler testified that “all the complaints” referenced in paragraph three of the disciplinary document served as the basis for Barron’s suspension. However, Tichler failed to investigate the specific complaint of Barron’s inadequate training, that he received on October 18, 2019, and likewise failed to investigate the remaining collection of “15+ complaints” purportedly made against Barron since October 18, 2019. Indeed, there is no reliable evidence that anyone investigated them. Tichler and O’Brien both admitted that their knowledge of the complaints was based entirely on information they received from Baylor-Schmidt, who did not claim to have investigated them either.

The Respondent similarly failed to investigate the allegation that Barron disrespected her manager Tichler, by allegedly complaining about “how [he] could make her” create educational documents. Tichler’s conclusion that Barron had disrespected him was based entirely on reports made to him by Brown and Baylor-Schmidt; he did not ask for Barron’s perspective or consider her side. “The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are [likewise] clear indicia of discriminatory intent.” New Orleans Cold Storage & Warehouse Co., Ltd., 326 NLRB 1471, 1477 (1998), *enfd.* 201 F.3d 592 (5th Cir.2000).

Furthermore, the disciplinary action is based in part on exaggerations, which is further evidence of the Respondent’s unlawful motive. See City of Chicago, 11 PERI ¶ 3008 (IL LLRB 1995). The suspension references “15+ complaints” made by unnamed employees since October 18, 2019, alleging that Barron was “bothering them.” However, there is no reliable evidence that employees complained in such numbers during the timeframe alleged in the suspension notice. Baylor-Schmidt testified that she received 15 complaints from employees claiming that Barron was in employees’ work areas and bothering them, but she made clear that she received those complaints prior to August 15, 2019—far earlier than the October-November time period refer-

enced in the suspension notice. And although Baylor-Schmidt contacted Tichler on November 10, 2019 to relay complaints she received that Barron was “out and about” two days earlier, there is no reliable evidence that those complaints accused Barron of “bothering employees” while they were working, as the suspension notice alleges.<sup>32</sup> City of Chicago, 11 PERI ¶ 3008 (exaggerated characterizations of employee’s alleged misconduct supported finding of animus towards his protected activities).

The disciplinary action is also based on patently disingenuous claims. Tichler asserted that Barron misrepresented her ability to perform the assigned task of creating educational documents by claiming she could not make screenshots. However, both the testimony and documentary evidence show that Barron’s difficulties were unrelated to making screenshots, i.e., capturing them. Rather, she had trouble annotating the screenshots and maintaining the annotations while she added more text. Tichler’s claim, that he believed Barron was lying about her capabilities, is further undercut by his testimony that he understood that Barron was struggling with the task of creating educational documents, and his suggestion that she review some YouTube tutorials to help her with Microsoft Word. Indeed, he admitted that he was aware of Barron’s earlier difficulty in creating sufficiently instructive graphics in July 2019, because he knew that another employee had to redo Barron’s work. Barron’s minimal capabilities in Word were no secret; she freely disclosed her limitations during her interview with Tichler for the EMR Trainer position. Tichler’s focus on the date Barron took the screenshots, while disregarding Barron’s clear struggles and requests for formal training, demonstrates a commitment to an established course of disciplinary action and, in turn, an unlawful motive.

Next, the Respondent’s earlier conduct toward Barron and other union advocates supports the conclusion that the Respondent harbored an unlawful motive in issuing Barron the five-day suspension. The Respondent sought to isolate Barron, the most active union advocate, from her fellow employees by removing her rounding and call response duties. Cnty. of DeKalb and DeKalb Cnty. State's Attorney, 6 PERI ¶2053 (attempt to isolate most active union advocate contributed to finding that the employee’s discharge was motivated by union animus). The Re-

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<sup>32</sup> The record contains evidence of a complaint lodged against Barron by LPN Pierce on November 15, 2019. However, the disciplinary notice contains no reference to this specific complaint, and it also does not fall under the broader catchall of 15+ of complaints alleging Barron was “bothering employees” during work time because it does not set forth such an allegation. Rather, Pierce’s complaint simply alleges that Barron’s training of Primary Nurse Dawson was inadequate and untimely.

spondent also levied unsubstantiated accusations against Barron and others for soliciting union support on work time, issued unlawful threats against protected activities, and imposed unlawful restrictions on union discussions and union solicitation. Such factors lend weight to a finding of unlawful motive. See Austal Usa, LLC, 356 NLRB at 364.

Finally, the timing of the Respondent's decision to impose discipline against Barron is suspicious because it followed Barron's continuing and consistent expressions of Union support in September and October 2019 and occurred just a week and a half after her public exchange with Dr. Steinke on November 7, 2019. It also occurred in close proximity to the Respondent's decision, a week earlier, to limit Barron's duties in an attempt to isolate her from fellow employees. Sarah P. Culbertson Memorial Hosp., 25 PERI ¶ 11 (IL LRB-SP 2009) ("few weeks" between employees' testimony before board and adverse action sufficient to demonstrate proximity indicative of animus); Vill. of Calumet Park, 23 PERI ¶ 108 (three weeks demonstrates proximity).

Thus, the Respondent suspended Barron because of her union and protected, concerted activities to discourage support for the Union, and the shifting, exaggerated, and disingenuous grounds for the discipline preclude a finding that the Respondent suspended Barron for legitimate reasons. County of Dekalb & State's Attorney of Dekalb County, 6 PERI ¶ 2053 n. 13 (declining to apply mixed motive analysis where there was "compelling evidence" of pretext).

In the alternative, even if the Board finds that some select parts of the disciplinary notice are based on legitimate grounds, the Respondent cannot demonstrate that it would have issued Barron the suspension in the absence of her protected activities. In cases where a respondent contends that an adverse employment action is based on an aggregation of the employees' listed misconduct, the illegitimacy of even one stated basis for the discipline will undermine the Respondent's claim that it would have taken the same action notwithstanding the employee's protected activities. County of Bureau and Bureau County Sheriff, 29 PERI ¶ 163 (IL LRB-SP 2013) aff'd County of Bureau v. Illinois Labor Relations Bd., 2014 IL App (3d) 130271-U, ¶ 112. Here, the Respondent's witnesses each asserted that the Respondent issued Barron the five day suspension based on multiple instances of misconduct, which fell into at least two categories, running the gamut from time theft and insubordination to the catch-all category of poor perfor-

mance.<sup>33</sup> However, the allegation regarding time-theft in April 2019 was clearly a pretext to discrimination and does not support the disciplinary action, since the matter only became worthy of disciplinary attention seven months after it occurred, when Barron intensified her protected activities. The complaints proffered as evidence of Barron's poor performance/misuse of time are likewise pretextual where their numbers are exaggerated and the investigation into them non-existent. Likewise, Tichler's allegation that Barron refused to perform her duties are pretextual because they are based on his contention that she lied about her capabilities, when he had ample reason to know that her skills in Word were exceedingly limited.

While there may be some truthful parts of the discipline notice, i.e., Barron did complain to Brown about Tichler, the Respondent has not demonstrated that it would have issued Barron a 5-day suspension for that infraction, standing alone. Rather, the preponderance of the evidence demonstrates that the Respondent sought to build a case against Barron, the Union's most vocal supporter, during the height of the Union's organizing drive, which culminated with the Union's filing of a majority interest petition, just nine days after Barron served her suspension.

Thus, the Respondent violated Section 10(a)(2) and (1) of the Act when it issued Barron a 5-day suspension.

g. Reduction in hours

The Respondent violated Sections 10(a)(2) and (1) of the Act when it reduced Barron's hours.

As discussed above, Barron engaged in protected concerted and union activity, and the Respondent's decision-maker, Tichler, was aware of it. Furthermore, it is clear that the Respondent's decision to reduce Barron's hours qualifies as an adverse employment action because it caused Barron, an hourly worker, to lose pay.

Turning to the related questions of causation and motive, the lawfulness of the Respondent's decision to reduce Barron's hours turns on the lawfulness of the Respondent's earlier decision to remove Barron's rounding duties. Indeed, the parties generally agree that the Respondent

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<sup>33</sup>Tichler characterized Barron's complaint to his supervisor as both insubordination and disregard of Tichler's authority, and he viewed Barron's poor performance, as judged by the complaints he received, as another basis for the suspension. Baylor-Schmidt grouped Barron's misconduct into two broad categories, insubordination (which included both Barron's complaints about Tichler and alleged refusal to do her job) and time theft. O'Brien asserted that the discipline was based on insubordination and reported performance issues.

reduced Barron's hours because she did not have enough work to fill her scheduled time after the Respondent removed her rounding duties and her temporary assignment of testing had concluded.

As discussed above, the Respondent eliminated Barron's rounding and call-response duties for unlawful reasons, to isolate an outspoken union advocate from her fellow employees during a contentious union organizing campaign and to discourage support for the union and discussion of working conditions. In turn, the Respondent's decision to reduce Barron's hours is likewise tainted by unlawful motive because it flowed inescapably from the Respondent's earlier decision to eliminate Barron's key interactive duties.

In addition, Tichler's concurrent attempt to discourage Barron, on false grounds, from applying to other CGH positions is evidence of unlawful motive because it highlights the Respondent's goal of limiting Barron's contact with other employees and removing her from service. When Barron asked Tichler about applying to a Medical Assistant position at CGH to make up for her lost hours, Tichler informed her that CHG would not hire her while she still held her full-time EMR trainer position because it would need to pay her overtime for any work she performed. However, Tichler later admitted that he understood CGH would not need to pay Barron overtime unless she worked more than 40 hours total because she was paid on an hourly basis. He likewise knew that Barron was then working only 25-27 hours a week as an EMR Trainer and that she therefore could have taken on part-time work at CGH without requiring the Respondent to pay her overtime.<sup>34</sup>

A finding of unlawful motive is further warranted based here on the Respondent's other unlawful conduct including its discriminatory application of its no-solicitation policy, threats against employees for engaging in union discussions, and its decision to issue Barron a suspension on exaggerated, shifting, and pretextual grounds. See discussion supra.

Finally, the Respondent has not offered a legitimate, non-discriminatory reason for reducing Barron's hours because the Respondent based its decision on its earlier, unlawful removal of Barron's rounding and call-response duties.

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<sup>34</sup>It is also telling that Tichler used these misrepresentations to pressure Barron, albeit unsuccessfully, to accept a reclassification of position to part-time status. While Tichler proposed part-time status as a solution to Barron's financial distress that would allow her to secure another part-time position at CGH, he effectively sought obtain Barron's endorsement of an unlawful course of conduct that began with the removal of her rounding duties.

Thus, the Respondent violated Sections 10(a)(2) and (1) of the Act when it reduced Barron's hours.

#### h. Termination

The Respondent violated Section 10(a)(2) and (1) of the Act when it terminated Barron's employment.

As discussed above, Barron engaged in both protected, concerted and union activity, and the Respondent's decision-makers were aware of it. Furthermore, it is clear that the Respondent's decision to terminate Barron's employment qualifies as an adverse employment action. City of Chicago., 182 Ill. App. 3d at 594-95; Ill. Dep't of Central Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶ 2022 n. 3.

Next, the preponderance of the evidence demonstrates that the Respondent harbored animus towards Barron's protected union and concerted activities. This is amply demonstrated by the Respondent's pattern of conduct in this case, which includes the following: the Respondent's discriminatory application of its no-solicitation policy and its threats of discipline against Barron and others for engaging in union-related discussions; the Respondent's removal of Barron's key rounding and call-response duties and attempt to isolate her from fellow employees during a contentious organizing campaign; the Respondent's decision to issue Barron a five-day suspension on specious and pretextual grounds; and the Respondent's subsequent decision to reduce Barron's hours by relying on an earlier, unlawful decision to eliminate her duties to round and respond to calls in the field. See discussion supra.

The Respondent's proffered explanation for its decision—economic hardship due to the pandemic—appears at first blush to be legitimate, but a closer examination reveals it to be a pretext to discrimination. The Respondent has not shown that its decision to terminate Barron's employment furthered its goals of economic savings because the Respondent created and filled a new position, after it terminated Barron's employment, and transferred Barron's duties to that position. While the new position, nurse educator, performed a broader range of duties than Barron did as EMR Trainer, the Respondent has not shown that its elimination of Barron's position and the transfer of Barron's duties to this newly created position conferred an overall economic benefit. For example, the Respondent has not shown that it paid the nurse educator less or that the nurse educator position represented a consolidation of previously-existing positions. Thus, Barron's work is still being done, but the Respondent has not shown that it now costs less. Old

Tucson Corp., 269 NLRB 492, 494 (1984)(economic justification for discharge rejected where there was no evidence that respondent saved a significant amount of money by hiring new employee and discharging union advocate); see also Direct Transit, 309 NLRB 629, 631 (1992) (addressing closure of a facility).

The Respondent may suggest that efficiencies remained where the nurse educator performed nurse-competency training in addition to EMR training; however, this observation does not support the Respondent's economic justification without further explanation and evidence. The Respondent's efficiency rationale rests on the premise that the nurse educator position was needed, independent of its EMR Training functions, and that the Respondent made the frugal decision to combine EMR training and other types of training instead of having a dedicated EMR Trainer. However, the Respondent did not explain how it effectuated clinic training for nurses in the past or how it came to its decision that it now needed a nurse educator to perform this function. This hole in the record makes it more difficult to argue that the Respondent eliminated Barron's positions and transferred her duties to the nurse educator position for reasons of efficiency and economy.

The Respondent's failure to provide a consistent and verifiable timeline for when it created the nurse educator position and decided to transfer Barron's duties to that new position is likewise suspicious. Baylor-Schmidt, the individual who first identified Barron's position as a candidate for termination, could not recall precisely when the Respondent first hired the nurse educator and simply stated that the hire occurred "shortly after" VP Brown assumed his position (fall of 2019). Tichler was similarly vague, and the testimony he provided conflicted with Baylor-Schmidt's. He stated that the Respondent created the position and filled it later, in 2020, and indicated that the nurse educator position was in place at the time of Barron's termination. However, even he could not specify whether the Respondent hired the nurse educator before or after March 2020, when the pandemic and related layoffs began. If the Respondent had simply transferred Barron's duties to a position that predated the Respondent's economic hardships, as the Respondent argues on brief, surely the Respondent's witnesses would have been capable of conveying that in a clear and compelling manner. County of Williamson, 14 PERI ¶ 2011 (IL SLRB 1996) (record lacked clear evidence that respondent believed, before eliminating positions of two union advocates, that their duties could be performed more efficiently by other employees).



The defects in the Respondent's evidence on this point bear directly on the legitimacy of the Respondent's proffered economic justification. To illustrate, if the Respondent hired the nurse educator in fall of 2019, as Baylor-Schmidt indicated, or indeed at any point prior to March 2020, the Respondent's decision to eliminate Barron's position in June 2020 would appear more clearly motivated by economics. Under those circumstances, the Respondent's elimination of Barron's position would represent the Respondent's decision to consolidate existing positions for economic savings. However, if the Respondent hired a new employee into a position created after the economic exigencies of the pandemic became apparent in March 2020, then the Respondent's decision to transfer Barron's duties to the new position would not have a clear economic benefit absent evidence that the new position costs less. Under this latter scenario, the Respondent's reliance on the well-publicized economic hardships imposed by the pandemic would then appear to be a pretext to hide the Respondent's true discriminatory motive—the removal of a key union advocate.

The Respondent's failure to refute Barron's testimony, that it hired the nurse educator after Barron's June 2020 termination, is likewise telling. The Respondent has within its possession concrete information concerning its decision to hire the nurse educator yet failed to cure the considerable ambiguities concerning the timing of its decision. If Barron had been wrong about the claimed timing, surely the Respondent, which maintains employment records, could easily have shown that Barron was mistaken. See County of Cook, 31 PERI ¶ 108 (applying similar analysis). The need for such clarification was particularly keen in this case where the Respondent's witnesses did not provide consistent testimony about when the Respondent created the nurse educator position and hired an employee in that position to perform Barron's duties.

Finally, the Respondent's decision to hire the nurse educator sometime after it terminated Barron's employment is inconsistent with the Respondent's assertion that Barron's position was redundant at the time of its elimination.

In the absence of a demonstrably legitimate explanation for the Respondent's decision to terminate Barron's employment, it is appropriate to conclude that the Respondent terminated Barron's employment to rid itself of its most vocal union adherent and to discourage support for the union.

In the alternative, even assuming that the Respondent was motivated in part by economic considerations in eliminating Barron's position, there is insufficient evidence that the Respond-

ent would have taken the same action in the absence of Barron's protected activities. When there is a strong showing of unlawful motivation, the respondent's defense burden is substantial. Bally's Atlantic City, 355 NLRB 1319, 1321 (2010). Here, the Respondent demonstrated a pattern of discriminatory conduct against Barron and union activity more broadly. It then eliminated Barron's position, purportedly to save money, but subsequently created and filled a new position to which it transferred Barron's duties. Although the Respondent conducted a broader scale reduction in force at the onset of the pandemic, it has not shown that Barron's position would have been included in that reduction had she not been one of the most vocal union advocates.

Thus, the Respondent violated Section 10(a)(2) and (1) of the Act when it terminated Barron's employment.

## **V. CONCLUSIONS OF LAW**

1. The Respondent violated Section 10(a)(1) of the Act by maintaining an overly broad and ambiguous no-solicitation policy.
2. The Respondent violated Section 10(a)(1) of the Act when it announced a stricter interpretation of its no-solicitation policy in response to union activity.
3. The Respondent violated Section 10(a)(1) of the Act by interpreting and applying its no-solicitation policy to discriminate against union discussions and by threatening employees with discipline, pursuant to the no-solicitation policy if they engaged in further union discussions on work time.
4. The Respondent violated Section 10(a)(1) of the Act by enforcing its no-solicitation policy to discriminate against Union solicitation.
5. The Respondent did not violate Section 10(a)(2) and (1) of the Act when it issued Barron a verbal warning on August 15, 2019.
6. The Respondent violated Sections 10(a)(2) and (1) of the Act when it removed Barron's duties to round and respond to calls in the field.
7. The Respondent violated Sections 10(a)(2) and (1) of the Act when it subjected Barron's work to heightened scrutiny.
8. The Respondent violated Sections 10(a)(2) and (1) of the Act when it issued Barron a five-day suspension.
9. The Respondent violated Section 10(a)(2) and (1) of the Act when it terminated

Barron's employment.

**VI. RECOMMENDED ORDER**

IT IS HEREBY ORDERED that the Respondent, its officers and agents, shall:

- 1) Cease and desist from:
  - a. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act;
  - b. Maintaining an overly broad no-solicitation policy;
  - c. Announcing stricter interpretations of its no-solicitation policy in response to union activity;
  - d. Interpreting and applying its no-solicitation policy to discriminate against union discussions and by threatening employees with discipline, pursuant to the no-solicitation policy, if they engaged in further union discussions on work time;
  - e. Enforcing its no-solicitation policy to discriminate against Union solicitation;
  - f. Discriminating against Brandi Barron, or any of its other employees, for engaging in union or protected concerted activity.
- 2) Take the following affirmative action necessary to effectuate the policies of the Act:
  - a. Modify its no-solicitation policy in accordance with this decision to limit the prohibition of solicitation to de facto "immediate patient care areas";
  - b. Rescind the five-day suspension it issued to Brandi Barron, remove all reference to the suspension from her personnel file, and make her whole with respect to wages lost during the five-day suspension, plus interest at a rate of seven percent per annum.
  - c. Offer Brandi Barron immediate and full reinstatement to her former position as EMR Trainer and make her whole for any loss of earnings she may have suffered because of her termination, including back pay plus interest at a rate of seven percent per annum.
  - d. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondent will take reasonable efforts to ensure that the no-

tices are not altered, defaced or covered by any other material.

- e. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondent has taken to comply with this order.

**VII. EXCEPTIONS**

Pursuant to Section 1200.135 of the Board’s Rules, parties may file exceptions to the Administrative Law Judge’s Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge’s Recommendation. Within seven days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the Board’s General Counsel, at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board’s designated email address for electronic filings, at ILRB.Filing@Illinois.gov. All filing must be served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board’s Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

**Issued at Chicago, Illinois this 17th day of May, 2022**

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

# NOTICE TO EMPLOYEES

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## FROM THE ILLINOIS LABOR RELATIONS BOARD

### Case Nos. S-CA-20-024, -062, 063, 087, 226

The Illinois Labor Relations Board, State Panel, has found that CGH Medical Center has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from maintaining an overly broad no-solicitation policy.

WE WILL cease and desist from announcing stricter interpretations of our no-solicitation policy in response to union activity.

WE WILL cease and desist from interpreting and applying our no-solicitation policy to discriminate against union discussions and by threatening employees with discipline, pursuant to the no-solicitation policy, if they engage union discussions on work time.

WE WILL cease and desist from enforcing our no-solicitation policy to discriminate against Union solicitation.

WE WILL cease and desist from discriminating against Brandi Barron, or any of our other employees, for engaging in union or protected concerted activity.

WE WILL cease and desist from, in any like or related manner, interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL modify our no-solicitation policy to limit the prohibition of solicitation to *de facto* "immediate patient care areas."

WE WILL rescind the five-day suspension we issued to Brandi Barron, remove all reference to the suspension from her personnel file, and make her whole with respect to wages lost during the five-day suspension, plus interest at a rate of seven percent per annum.

WE WILL offer Brandi Barron immediate and full reinstatement to her former position as EMR Trainer and make her whole for any loss of earnings she may have suffered because of her termination, including back pay plus interest at a rate of seven percent per annum.

DATE \_\_\_\_\_

\_\_\_\_\_  
CGH Medical Center  
(Employer)

## ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor  
Springfield, Illinois 62702  
(217) 785-3155

160 North LaSalle Street, Suite S-400  
Chicago, Illinois 60601-3103  
(312) 793-6400

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**THIS IS AN OFFICIAL GOVERNMENT NOTICE  
AND MUST NOT BE DEFACED.**

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