JD–08–07
Kenmore, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KENMORE MERCY HOSPITAL
and
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1133

Cases 3–CA-25830 and 3–CA–25831

*Linda Leslie, Esq.,* for the General Counsel.
*Micheal R. Moravec, Esq. (Phillips Lytle, LLP),* of Buffalo, New York, for the Respondent.

# DECISION

## STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Buffalo, New York, on September 18–19, 2006. The charges in Cases 3–CA-25830 and 3–25831 were filed April 11, 2006, by the Communications Workers of America, Local 1133 (the Union). The charge in Case 3–CA–25831 was amended on May 18, 2006. The consolidated complaint issued June 30, 2006. The consolidated complaint alleges that Kenmore Mercy Hospital (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by informing an employee (Ayanna Tramount), that she was not allowed on the Respondent's premises and was prohibited from talking to other employees. The consolidated complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule permitting employees access to the premises only during authorized work hours, and by disciplining employee Patricia Nowak, for violating that rule. The complaint further alleges that the Respondent's discipline of Nowak violates Section 8(a)(3) of the Act because the rule was selectively and disparately enforced against her. The Respondent denies any unlawful conduct.

On the entire record, including my credibility determinations based on the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole and, after considering the briefs filed by the parties, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent is a New York corporation with an office and place of business in Kenmore, New York, where it operates a hospital providing inpatient and outpatient care. The Respondent derived gross revenues in excess of $250,000 and purchased and received goods values in excess of $5,000 which originated outside the State of New York during the 12 months preceding June 30, 2006. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Case 3–CA–25830*

##### 1. The facts

During the summer and fall of 2005,[1] the Union attempted to organize the Respondent's technical employees. Patricia Nowak was employed by the Respondent as a radiological technologist for approximately 13 years. In September, Nowak actively and openly demonstrated her support for the Union. She wore and distributed union campaign paraphernalia and spoke with coworkers about union representation. It is undisputed that the Respondent was aware of her union activities.

Nowak credibly testified, without refutation, that near the end of October she was told by Clare Brady, her supervisor, that she had to clock out and leave at the end of her shift (Tr. 17). Previously Nowak had worked until her replacement arrived. Nowak had never received such an order during her tenure. Brady attributed the change to budget constraints. On the day that Brady spoke with Nowak, she was present when Nowak clocked out and watched Nowak leave the department.

On November 14, Nowak clocked out and went from the first to the third floor and knocked on the door of the radiology department's staff office. Mariella Ceranski, a respiratory therapist employee who was alone in the office, opened the door. Nowak introduced herself and told Ceranski that she worked in the radiology department. Nowak asked Ceranski if she and her coworkers were happy, or if they would be interested in joining a union. Ceranski replied that she was happy and was not interested in joining or discussing a union. Nowak thanked Ceranski and left. Nowak estimated that the conversation took about 20 seconds.

[1] All dates are in 2005 unless otherwise indicated.

On November 17, Brady gave Nowak a written warning that was predicated on Ceranski's complaint. Brady further stated that Nowak "had no right going after hours and conducting non-business activities." (Tr. 20.) Nowak responded that she had done nothing wrong, had only asked Ceranski one question, and the entire conversation lasted for about 20 seconds. Nowak also wrote a rebuttal.

The written warning specifically indicates that Brady had told Nowak that it was inappropriate for Nowak to remain on the premises after her shift ("disobeying instructions") and refers to Nowak's visit as "[d]eliberately interfering with . . . the work of another employee." Ceranski testified that she thought that the conversation was inappropriate and that it made her uncomfortable. The warning also cites a violation of the Respondent's "Visiting and Visitors (HR–094–PC)" rule. This rule is memorized in the Respondent's "Catholic Health System Human Resources Summary of Policies" handout, which states:

> Visiting and Visitors (HR–094–PC)
>
> Employees may be on the premises only during authorized work hours. An employee who is on the premises in a non-employee role may not be covered as an employee for the purposes of Worker's Compensation payments.
>
> An employee may not have personal visitors or make personal visits to other employees or to patients during work hours. Personal visits are permitted only during break time and away from work sites. Examples of acceptable places to visiting [sic] are the cafeteria, or lobby of the facility in which the employee works, or outside the building. If there is an emergency situation or other reason to request an exception, the employee may get permission from their manager.
> [GC Exh. 2 at 25.]

Pamela Nicastro, the Respondent's human resources director, testified that no employee has ever been disciplined for violating the rule. The parties agree that the policy has been in effect since on or about December 1, 2001 (Tr. 7).

Counsel for the General Counsel presented Deborah Arnet, Vanessa Quinn, and Renee Marriott as witnesses. They are registered nurses and each has been employed by the Respondent for at least 16 years. They testified in a credible manner and their veracity was not challenged. Collectively they testified that they had been in the hospital, outside of their working hours, but within working areas. They also stated that supervisors were aware of their presence and nonworking status. They were dressed in street clothes in working areas and were discussing non-business subjects with employees who were working. None were ever disciplined.

2. Discussion

The parties contend that the Board's holding in *Tri-County Medical Center,* 222 NLRB 1089 (1976), is controlling. In *Tri-County,* the Board held that a "no-access" rule is valid

> only if it (1) limits access solely with respect to the interior of the plant [or] other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. [Id.]

Counsel for the General Counsel contends that the Respondent's no-access rule is unlawful on its face because it does not define "premises" as being limited to the interior of the plant or other working areas, and it makes no mention of off-duty employees.

The Respondent contends that the rule is clear when read in the context of the second paragraph which permits personal visits with other employees only during breaktime and away from worksites, such as the cafeteria or outside the building. Thus, the Respondent concludes that it is clear that there is no restriction on off-duty employees being outside the building. I disagree. The second paragraph, like the first, makes no mention of off-duty employees. "Outside the building" is listed as one example of a location away from the worksites where employees can go, while on breaktime, for personal visits with other employees or patients. The first sentence of the second paragraph may be read as a total prohibition of visitors, as well as personal visits, with other employees or patients during working hours. Consistent with such a reading, the second sentence only references "personal visits," not "visitors." In either case "breaktime" and "worksites," are terms not generally associated with "off-duty employees." At most, the Respondent's contention creates an ambiguity, and any ambiguity must be construed against the Respondent. E.g., *Lafayette Park Hotel,* 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (where the Board found unlawful a no-access rule that required employees to leave the premises immediately after completion of their shift).

Except where justified by legitimate business reasons, a rule that denies off-duty employees access to parking lots, gates, and other outside nonworking areas will be found invalid. The language in the Respondent's human resources summary of policies "Visiting and Visitors (HR–094–PC)," set forth above, does not satisfy the requirements in *Tri-County*, supra, that are necessary to constitute a valid no-access rule for off-duty employees. Nor has the Respondent offered any legitimate justification for maintaining such an overly broad no-access rule for off-duty employees.

Counsel for the General Counsel additionally contends that the Respondent's rule is unlawful because it is not uniformly applied to all off-duty employees. The record amply demonstrates that off-duty employees were frequently observed inside the hospital engaging in nonbusiness activities and conversation by members of supervision. There is no evidence that

any off-duty employee received any counseling or discipline, whatsoever. Indeed, Nicastro, the human resources director, admitted that no employee had ever been disciplined for violating the rule, except for Nowak. Thus, I agree with the counsel for the General Counsel that the record demonstrates that the Respondent has not applied its no-access rule uniformly.

In agreeing with the counsel for the General Counsel that the Respondent has not applied its no-access rule uniformly, I specifically reject the Respondent's contentions to the contrary. The Respondent attempts to distinguish Nowak's action from that of other employees because an employee complained the conversation interfered with the employee's work, because Nowak went to another unit, and because Nowak knocked on a closed door. I find "going to another unit," and "knocking on a closed door" to be distinctions without significance. The door was the entrance to the respiratory therapy staff office, it was not Ceranski's office. Ceranski indicated that not everyone who knocks on the door, or enters the office, does so for work related reasons (Tr. 129). She testified that she usually goes to that office to say hello to staff members, to review the workload, and "kind of get a feel for the day." It is clear that Ceranski had no expectation of being alone. Ceranski never stated or indicated that the 20-second query caused any disruption to her usual routine. Ceranski testified, as did Nicastro, that the only reason for her complaint was that Nowak's topic—union representation—made her uncomfortable.

Contrary to the statements in the written warning, Ceranski did not complain about Nowak interfering or delaying her work. Nor could Nowak possibly have set out to "deliberately" interfere or delay another employee—Nowak was unaware that there was an employee behind the door. The instructions and the rule that Nowak is accused of disobeying, in the written warning, is the unlawful no-access rule and the verbal instruction issued by Brady based on that unlawful rule. It is because of the unlawful instruction by Brady, which the Respondent apparently considers a prior verbal warning, that the warning was written rather than verbal. (GC Exh. 2 at 16, R. Exh. 3.) Thus, the Respondent's specific contention that "there is no evidence to establish or even suggest that the same warning would not have been issued had Ms. Ceranski complained that Ms. Nowak contacted her to sell something, to support a political candidate or for any other reason" as well as its contention that the written warning "was given because an employee complained that she was interrupted while she was working," (R. Br. 10–11) are rejected because they are not supported by the credible evidence.

Accordingly, I find that the no-access rule for off-duty employees, contained in the Respondent's "Catholic Health Systems Human Resources Summary of Policies," "Visiting and Visitors (HR–094–PC)," unlawfully interferes with employees' Section 7 rights and thus is invalid, unenforceable, and violates Section 8(a)(1) of the Act. *Baptist Medical Center,* 338 NLRB 346, 382, and cases cited (2002); *Golub Corp.,* 338 NLRB 515, 515–516 (2002). See generally *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646, 655 (2004).

It is also evident that the written warning was issued to Nowak because she violated the Respondent's overly broad no-access rule. The written warning references the unlawful rule, quotes from the unlawful rule and paraphrases the unlawful rule—"It is not appropriate for you to remain on premises beyond your assigned shift." The paraphrase is used in the "Previous Corrective Action for Same or Similar Offense" section. That section characterizes Brady's instructions to Nowak as a previous corrective action for the same offense. By doing so the

Respondent attempts to justify issuing Nowak a more severe "written warning" for a second offense, as opposed to a verbal warning for a first offense. (GC Exh. 2 at 16, R. Exh. 3.) In this regard, I note that Nowak credibly testified, without refutation, that Brady told her that Brady's instructions–that Nowak had to clock out and leave immediately, were based on budget constraints. Brady was not called to testify.

Counsel for the General Counsel contends that because the disciplinary action taken against Nowak was based on the Respondent's unlawful no-access rule, the resulting disciplinary action—the written warning—is likewise unlawful. Longstanding Board and court precedent supports this contention. E.g., *Gould, Inc.,* 260 NLRB 54, 54 fn. 4, 62–63 (1982); *NLRB v. McCullough Environmental Services,* 5 F.3d 923, 931 fn. 9 (5th Cir. 1993). Aside from arguing that the rule is lawful, the Respondent does not dispute the precedent.

Accordingly, I find that when the Respondent issued employee Patricia Nowak a written warning for violating its unlawful, overly broad no-access rule, set forth in the Respondent's "Catholic Health Systems Human Resources Summary of Policies," "Visiting and Visitors (HR–094–PC)," it violated Section 8(a)(1) of the Act.

Counsel for the General Counsel also argues that the written warning issued to Nowak constitutes a violation of Section **Error! Not a valid link.**of the Act. "Nowak was undisputedly engaged in protected activity [discussing the union] for which she was disciplined under an unlawful policy that was disparately applied." Furthermore, argues counsel for the General Counsel, where the conduct for which the Respondent claims to have disciplined the employee is the protected activity the *Wright Line* analysis (251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982)), is not required. *Saia Motor Freight Line,* 333 NLRB 784, and cited cases (2001). Moreover, counsel for the General Counsel contends that Nowak did not lose the protection of the Act because Ceranski felt uncomfortable about discussing the Union. See *Chartwells, Compass Group, USA, Inc.,* 342 NLRB 1155, 1156–1157 (2004). I agree with the counsel for the General Counsel's argument that Nowak did not lose the protection of the Act and in doing so I note that the Respondent does not contend otherwise.

Lastly, counsel for the General Counsel submits that the application of the analytical framework set forth in *Wright Line,* supra, would also result in finding a violation. (GC Br. 11.) Under *Wright Line,* the General Counsel must introduce persuasive evidence that animus toward the protected activity was a substantial or motivating factor in the Respondent's action. To sustain the initial burden, the General Counsel must show (1) that the employee was engaged in protected concerted activity; (2) that the Respondent had knowledge of the activity; and (3) that the activity was a substantial or motivating reason for the Respondent's adverse action. *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999). The first two elements have clearly been established by counsel for the General Counsel and the Respondent does not argue otherwise.

Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence and the inferences drawn from that evidence. E.g., *Abbey Transportation Service,* 284 NLRB 698, 701 (1987); *FPC Molding, Inc. v. NLRB,* 64 F.3d 935, 942 (4th Cir. 1994); *Shattuck Denn Mining Corp.,* 362 F.2d 466, 470 (9th Cir. 1966). All of the circumstances in the case should be considered in making this determination. Among the

various factors that the Board has found to support an inference of animus are suspicious timing, disparate treatment, and false or pretextual reasons given to explain the Respondent's action. *Dynabil Industries,* 330 NLRB 360, 362–363 (1999); *Hewlett Packard Co.,* 341 NLRB 492, 498–499 (2004). "A finding of pretext necessarily means that the reasons advanced by the [Respondent] either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Suspicious timing alone may be sufficient to establish that union animus was a motivating factor in the decision to discipline. *Scharff Inc.,* 321 NLRB 202, 217 (1996); *NLRB v. Rain Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984). Thus, within a month of Nowak's active and open support for the Union she was told by Supervisor Brady that she could no longer remain at work until her relief arrived, as she had previously done, but had to punch out and leave the area immediately at the end of her shift. The only explanation offered by Brady was that the change in policy was a consequence of budget constraints. Assuming the truthfulness of that statement, it should apply only to the need for Nowak to punch out at the end of her shift and forego overtime. The Respondent offered no explanation why Brady also told Nowak that she had to leave the area immediately. Brady reinforced her instructions by stationing herself in the area where Nowak clocked out and observing Nowak as she left the department. I find that the Respondent's action, shortly after Nowak started to openly engage in union and protected activities, supports an inference of animus.

Blatant disparity is also persuasive evidence of motivation. *Fluor Daniel, Inc.,* 304 NLRB 970, 970–971 (1991). As set forth above, the record is replete with testimony by witnesses for the General Counsel that they remained inside the hospital after their shift and spoke about nonbusiness subjects, with working employees and supervisors. Indeed, it is undisputed that employee Dickerson received an award for the extensive amount of time that she spent in the hospital while off duty. Conversely, the record establishes that Nowak is the only employee to ever receive a reprimand for violating the Respondent's overly broad, unlawful, no-access rule.

I also find, as set forth above, that the reasons advanced by the Respondent for the written warning given to Nowak are false and a pretext for its real motive which was to discriminate against her because of her union activity.

Notwithstanding the Respondent's reliance on Brady's "Previous Corrective Action" taken against Nowak, Brady did not testify. Nowak testified that although Brady was no longer employed by the Respondent she still worked in the hospital. The Respondent cross-examined Nowak regarding Brady's statement, but offered no financial records to support that statement. Had Brady been truthful in telling Nowak that budget constraints prevented her from staying past the end of her shift, it should have been easy for the Respondent to produce some document in support of that statement. *Rogers Electric, Inc.,* 346 NLRB No. 53, slip op. at 12 (2006) (failure to provide documentary evidence supporting claim of economic justification is, itself, evidence of pretext). According to Nowak, Brady simply told her to clock out and leave the department at the end of her shift. Other than the statement contained in the written warning, there is no evidence that Brady verbally reprimanded Nowak, or that there was any reason for her to do so.

Nowak credibly testified that she did not need approval to work overtime. Accordingly, there is no credible evidence that Nowak previously received a corrective action for the "same or similar offense," or any offense. Thus, the written warning appears to be excessive and inconsistent with the Respondent's system of progressive discipline. (GC Exh. 2 at 16; R. Exh. 3.) (*Tubular Corp. of America,* 337 NLRB 99, 99 (2001).

The Respondent also falsely described Nowak's conduct in the written warning. In the warning Nowak is accused of "Deliberately interfering with . . . the work of another employee." Based on testimony of Ceranski and Nowak, Nowak could not have deliberately interfered with Ceranski because Nowak was unaware that anyone was behind the door. Moreover, Ceranski never complained that her work was interfered with, or delayed, by the 20-second query.

Based on the foregoing, I find that Brady's claim that the restrictions placed on Nowak were based on budgetary restrains, is a pretext. I find that the real reason was that the Respondent wanted to prevent Nowak from engaging in union activity. In addition to finding that the written warning was based on an unlawful rule, I find that its issuance was a continuation of the pretext. Thus, the Respondent construed Brady's instructions as "corrective action" in order to give a more severe warning to Nowak. The written warning also distorts Nowak's actions and Ceranski's reaction in an attempt to justify the unlawful discipline.

Having determined that the reasons advanced by the Respondent for reprimanding Nowak are false and a pretext for its actual motive in taking that action, there is no need to further address the reasons because a finding of pretext "leav[es] intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981). Alternatively, because the Respondent's reasons for issuing a written warning to Nowak are unsupportable under the standards it normally applies to its other employees, I conclude that the Respondent has not proven that it would have taken the same action in the absence of Nowak's protected activity. *Hospital San Pablo,* 327 NLRB 300, 300 (1998), enfd. 207 F.3d 67 (1st Cir. 2000).

For all the foregoing reasons, I conclude that the Respondent by selectively and disparately enforcing its "Visiting and Visitors (HR–094–PC)" rule against Patricia Nowak, because of her union activity, violated Section 8(a)(1) and (3) of the Act.

### *A. Case 3–CA–25831*

#### 1. The facts

Based on paragraph 6 of the complaint, counsel for the General Counsel contends that on November 4, 2005, JoAnn Koons, an admitted supervisor, by a telephone message and subsequent telephone call, informed employee Tramont that Tramont was not allowed on the Respondent's premises and was prohibited from talking to other employees. Thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

Ayanna Tramont was employed as a part-time cardiac technician in the EKG department. Her job classification was included in the unit petitioned for by the Union. Tramont testified that she spoke with other employees about the Union and her interest in being represented by the Union.

On November 4, JoAnn Koons, the supervisor of cardiology and neurology services, received information that Stephanie Cutolo, also a cardiac technician in the EKG department, was afraid to come to work because she was worried about a confrontation with Tramont. Koons called Cutolo and confirmed the information. She told Cutolo to report to her office when she got to work and they would meet with Dawn McDonald, a human resources assistant. Koons called McDonald, and according to McDonald, Koons told her of Cutolo's concerns, that Tramont was coming into the office that day, and was scheduled to work the weekend. Because of the time restriction, they decided to tell Tramont that she was placed on paid administrative leave and not to return to work until she was contacted. McDonald did not recall providing any other specifics.

Koons claims that she left a message on Tramont's answering machine asking her to return the call "as soon as possible, I needed to understand what was going on and what the problem was and to please call me as soon as possible." Koons testified that after Tramont called back, she told Tramont that "until we could figure it all out that we would be placing her on administrative leave and that she was not to come to the hospital and she was not to talk to her coworkers." She later states, "I told her that she wasn't to talk to—I believe I told her Jean, Eric or Stephanie or Laura. (Tr. 121–122.)

Tramont testified that the phone message said that she "was being put on administrative leave and that I was not to talk to any employee or come on the premises under any circumstances." (Tr. 65.) Tramont testified that when she did contact Koons, Koons merely repeated her instructions, and at some point Koons explained that the reason for placing Tramont on administrative leave was under investigation. The subject matter and the outcome of the investigation are not in issue

2. Discussion

For the reasons set forth below, I find that either version of Koons' statement is overly broad and could reasonably encompass and restrict protected Section 7 communications and thereby violates Section 8(a)(1) of the Act.

In general, an employer must demonstrate that a legitimate and substantial business justification exists for a rule, such as the no-communication rule announced by Koons, that adversely impacts employees' Section 7 rights. E.g., *Caesar's Palace,* 336 NLRB 271, 272 (2001) (employer had substantial business justifications for promulgating no-communication rule during a drug investigation involving allegations of a management coverup that justified the intrusion on employees' Section 7 rights, including ensuring that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated). Additionally, such a prohibition must not be overly broad and should be narrowly tailored and limited in time and scope. See e.g., *Lockheed Martin Astronautics,* 330 NLRB 422, 423 (2000) ("[w]e

recognize that the [employer] has obligations under other statutes, including the ADA, that may in some circumstances justify the prohibition of certain kinds of speech and conduct . . . however, any such prohibitions must be narrowly tailored in order to avoid unnecessarily depriving employees of their Section 7 rights") (citation omitted).

I reject the Respondent's claim of a "justifiable business reason" for its rule. The only justification for its no-communication rule is that the Respondent was concerned with avoiding a physical or verbal confrontation at its facility between employees. (R. Br. 7.) The application of a overly broad no-communication rule preventing Tramont from talking with her coworkers is far greater than that which is necessary to alleviate the Respondent's concern. It is also evident that the Respondent was without sufficient information, when Koons announced the rule, to justify such a broad, all encompassing rule. Twice during her testimony Koons said that she and McDonald just "wanted to figure out what was going on."

No attempt was made by the Respondent to narrowly tailor or limit the rule in time or scope. Thus, Tramont was not scheduled to work on Friday, the day she spoke with Koons, and the day Cutolo was scheduled to work. Tramont was assigned to work the weekend, Cutolo was not. Respondent offers no explanation for the overriding restriction that was placed solely on Tramont to stay away from the hospital until further notice. The rule was not limited to the duration of the investigation or the subject matter. Thus, the Respondent has failed to establish business reasons which outweigh Tramont's Section 7 rights to engage in concerted activities. *Westside Community Mental Health Center,* 327 NLRB 661, 666 (1999).

Accordingly, I find that the Respondent's no-communication, no-access rule is overly broad and violates Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

1. The Respondent, Kenmore Mercy Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Communications Workers of America, Local 1133, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instructing employee Ayanna Tramont on November 4, 2005, not to talk to employees or come on the hospital premises under any circumstances, the Respondent violated Section 8(a)(1) of the Act.

4. By maintaining the "Visiting and Visitors (HR–094–PC)" rule, that states:

> Employees may be on the premises only during authorized work hours. An employee who is on the premises in a non-employee role may not be covered as an employee for the purposes of Worker's Compensation payments,

in its "Catholic Health Systems Human Resources Summary of Policies" handout, since December 1, 2001, the Respondent has violated Section 8(a)(1) of the Act.

5. By enforcing its "Visiting and Visitors (HR–094–PC)," rule and by disciplining employee Patricia Nowak on November 17, 2006, under this rule, the Respondent violated Section 8(a)(1) of the Act.

6. By enforcing its "Visiting and Visitors (HR–094–PC)," rule selectively and disparately against employee Patricia Nowak due to her union activity, the Respondent violated Section 8(a)(3) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that the Respondent be ordered to remove from its records all copies of, and references to, the unlawful written warning it issued to employee Patricia Nowak on November 17, 2005, and to notify her in writing that this has been done. Further, I shall recommend that the Respondent rescind the unlawful "Visiting and Visitors (HR–094–PC)" rule contained in its most recent "Catholic Health Systems Human Resources Summary of Policies."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

## ORDER

The Respondent, Kenmore Mercy Hospital, Kenmore, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees who are being disciplined from talking to other employees or coming on the premises under any circumstances.

(b) Maintaining and enforcing the "Visiting and Visitors (HR–094–PC)" rule.

(c) Disciplining employees for violating the "Visiting and Visitors (HR–094–PC)" rule.

(d) Selectively and disparately disciplining employees under the "Visiting and Visitors (HR–094–PC)" rule because they engaged in protected concerted activities and because of their union activities.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

(a) Rescind the "Visiting and Visitors (HR–094–PC)" rule contained in the "Catholic Health Systems Human Resources Summary of Policies" handout to employees.

(b) Furnish all current employees with inserts for its current "Catholic Health Systems Human Resources Summary of Policies" handout to employees that (1) advise that the unlawful no-access rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all current employees a revised handout that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful written warning, and within 3 days thereafter, notify employee Patricia Nowak in writing that this has been done and that the written warning will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in Kenmore, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 4, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 6, 2007

_____
John T. Clark
Administrative Law Judge

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from speaking with other employees about terms and conditions of employment.

WE WILL NOT maintain and enforce the "Visiting and Visitors (HR–094–PC)" rule that states:

> Employees may be on the premises only during authorized work hours. An employee who is on the premises in a non-employee role may not be covered as an employee for the purposes of Worker's Compensation payments.

or enforce such a rule against employees engaging in union activity, while permitting off-duty employees to remain on the premises for other purposes.

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

WE WILL rescind the "Visiting and Visitors (HR–094–PC)" rule contained in the "Catholic Health Systems Human Resources Summary of Policies" handout to employees.

WE WILL furnish all of you with inserts for our current "Catholic Health Systems Human Resources Summary of Policies" handout to employees that (1) advises you that the unlawful "Visiting and Visitors (HR–094–PC)"rule has been rescinded, or (2) provides the language of a lawful rule; or WE WILL publish and distribute to all of you a revised handout that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning issued to employee Patricia Nowak, and within 3 days thereafter notify employee Patricia Nowak in writing that this has been done and that the written

warning will not be used against her in any way.

KENMORE MERCY HOSPITAL

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

130 S. Elmwood Avenue
Suite 630
Buffalo, New York 14202
Hours: 8:30 a.m. to 5 p.m.
716-551-4931.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.