

American Geri-Care, Inc. and Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL-CIO and Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO.
Cases 29-CA-7629, 29-RC-4765, and 29-CA-7679

September 30, 1981

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On June 15, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the Charging Party filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order,³ as

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We note, however, that the correct spelling of the alleged discriminatee's name is Shirley Anenburn.

The Administrative Law Judge found, at sec. IV.A.4, par. 1, of his Decision, that Assistant Director of Nursing Wilson gave Anenburn permission to leave the Home, on November 20. This is incorrect. It was Assistant Director of Nursing Palma who gave Anenburn permission to leave the Home on that date. The Administrative Law Judge also found, at sec. IV.B.2, par. 3, of his Decision, that employee Charles testified that Director of Nursing Services Milano had promised the employees a good "package deal" if they voted for management. Charles actually testified that Milano had promised employees a good "contract" if they voted for management. This discrepancy does not detract from our agreement with the Administrative Law Judge's legal conclusions on the issue.

² In arguing that Anenburn was lawfully discharged, Respondent alleges that Assistant Director of Nursing Palma was also discharged for the same incident. The discharge of Palma in no way affects our finding that Anenburn was unlawfully discharged.

Because Respondent's asserted lawful reason for the discharge of Shirley Anenburn is pretextual, as the Administrative Law Judge found, Member Jenkins considers the Administrative Law Judge's reliance on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), to be unnecessary, though it does not invalidate his conclusion.

³ Member Jenkins would award interest on the backpay due in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

modified herein.⁴ We shall direct that a second election be held.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, American Geri-Care, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(c) and re-letter the subsequent paragraph accordingly:

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

2. Substitute the attached notice for that of the Administrative Law Judge.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

⁴ We have modified the Administrative Law Judge's recommended Order to include a provision that all pertinent records be made available to the Board for the purpose of computing backpay. We have also modified the Administrative Law Judge's proposed notice to conform with his recommended Order.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT harass or discharge you for engaging in union activities.

WE WILL NOT promise or grant you benefits to induce you to vote against a union.

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

WE WILL offer Shirley Anenburn full and immediate reinstatement to her former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, plus interest.

AMERICAN GERI-CARE, INC.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in New York City on October 16, 28, and 29, November 25 and 26, December 10 and 17, 1980, and January 7, 8, and 12, 1981. Charges were filed by Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO (herein called Local 144), on November 28, 1979, and by Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO (herein called Local 6), on January 4, 1980. Complaints were issued on January 10 and February 29, 1980, alleging that American Geri-Care, Inc. (herein called Respondent), violated Section 8(a)(1), (2), (3), and (4) of the National Labor Relations Act, as amended. Respondent filed answers denying the commission of the alleged unfair labor practices.

On October 29, 1979,¹ Local 144 filed a representation petition in a unit of registered nurses employed by Respondent. On November 15 the parties entered into a Stipulation for Certification Upon Consent Election. Pursuant thereto a secret ballot election was held on December 20. Of the approximately 13 eligible voters, 9 valid ballots were cast, 1 of which was challenged. Of the eight valid votes counted, five were cast against the participating labor organizations, three were cast for Local 144, and none was cast for Local 6.

On December 28 Local 144 filed timely objections to the election. On April 28, 1980, the Regional Director for Region 29 issued a "Report On Objections and Order Consolidating Cases and Notice of Hearing." With respect to the objections to the conduct of the election, the Regional Director recommended that Objections 2, 5, and 6 be overruled and that a hearing be held on the issues raised by Objections 1, 3, and 4 and the allegations

in the complaints in Cases 29-CA-7629 and 29-CA-7679. The cases were consolidated for the purpose of hearing, ruling, and decision by an administrative law judge.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by counsel for Respondent and counsel for Local 144.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, with its principal office and place of business in Brooklyn, New York, provides health care, staffing, and related services. During the 12 months preceding the issuance of the complaint, Respondent performed services valued in excess of \$50,000 for various nursing homes, including the Aischel Avraham Nursing Home, which has an annual gross revenue in excess of \$100,000. Respondent admits that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 144 and Local 6 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The complaint in Case 29-CA-7629 alleges that Respondent violated the Act by harassing, discharging, and failing to reinstate an employee because of her union activities and for soliciting employees to join Local 6. The complaint in Case 29-CA-7679 alleges that Respondent violated the Act by directing its employees to vote against both Local 6 and Local 144 and by promising benefits on the day before the election was to take place. Pursuant to the report on objections to the election, I am to decide whether unlawful promises of benefits were made by Respondent during the period between the filing of the petition and the date of the election, and whether in the 24-hour period prior to the election Respondent directed the employees not to vote for the Unions and conferred upon them an unlawful benefit. The issues, accordingly, are:

1. Whether Respondent harassed, discharged, and failed to reinstate one of its employees for her union activities.

2. Whether this employee was a supervisor.

3. Whether Respondent solicited employees to join Local 6.

4. Whether Respondent unlawfully promised benefits to its employees.

5. Whether Respondent held a meeting in the 24-hour period prior to the election at which time it instructed employees to vote against the Unions and at which time it conferred an unlawful benefit.

¹ All dates refer to 1979 unless otherwise specified.

IV. THE FACTS

A. *Case 29-CA-7629*

1. Background

On October 29 Local 144 filed a representation petition in Case 29-RC-4765 for a unit of registered nurses employed by Respondent at Aischel Avraham Nursing Home in Brooklyn, New York (herein the Home). On November 15, Respondent, Local 144, and Local 6 executed a Stipulation for Certification Upon Consent Election. On the same day Shirley Annenburn, a registered nurse at the Home, was subpoenaed to appear at the Board's office in Region 29 on behalf of Local 144 at a representation hearing in Case 29-RC-4765. On November 16 Annenburn was handed a warning slip for latenesses occurring during the period from September 8 through November 3. On November 17 Annenburn's request for leave, which had been submitted a month earlier, was rejected. On November 20 Annenburn's request for half a day off was denied and on November 21 Annenburn was discharged.

Approximately 2 weeks prior to the election Evelyn Milano, director of nursing services for Respondent, held a meeting with approximately eight of the registered nurses. At this time Milano told the employees that they should vote for management. The election took place on December 20 at which time five votes were cast against the participating labor organizations and three votes were cast for Local 144.

2. Supervisory status of Annenburn

Shirley Annenburn was employed at the Home from July 18 until November 21 as a charge nurse on the third floor of the Home. She was supervised by Elsa Wilson, assistant director of nursing. She worked the morning shift from 7 a.m. until 3:30 p.m. and had under her a licensed practical nurse and five or six aides. Annenburn credibly testified that she assigned work to the employees on her floor but she did not hire, fire, promote, transfer, or recommend the suspension or transfer of any employees. She testified that her duties and responsibilities were the same as the other registered nurses at the Home. Yasmin Damji, also a charge nurse of the Home, similarly testified with respect to her duties. She credibly testified that she did not have authority to hire, fire, or suspend employees. She testified that as part of her professional responsibilities she directed the aides and orderlies on her floor. She further credibly testified that if one of the employees would come to her with a problem she would send that employee to her supervisor. Evelyn Milano, director of nursing services, testified that all registered nurses had the authority to reprimand employees and to issue warning slips. However, Juanita Palma, assistant director of nursing, credibly testified that before a charge nurse gave a warning slip she had to inform her supervisor, and that she did not know of any registered nurses having given anyone a warning slip. Elsa Wilson, assistant director of nursing since May 1980, testified that Annenburn was not a supervisor and Gary Stern, a corporate officer of Respondent, testified that the only su-

perisors were the director and assistant director of nursing and the in-service coordinator.

3. Harassment of Annenburn

Paragraph 10 of the complaint in Case 29-CA-7629 alleges that during the period November 16-20 Respondent harassed Annenburn by issuing a written warning to her, by denying her vacation, by requiring her to submit a doctor's note for being absent, by denying her time off, and by engaging in increased surveillance of her work.

Annenburn testified that in October 1979 she signed an authorization card for Local 144 and attended a meeting conducted by Local 144. She also testified that she spoke with several employees of Respondent concerning Local 144. Palma, who impressed me as being a particularly credible witness, testified that around November 7 Milano told her that Annenburn had attended a union meeting. Palma further testified:

Q. Ms. Palma, do you recall any other conversations that you had with Ms. Milano with respect to Mrs. Annenburn?

A. Yes, Ms. Milano said that if they . . . put a two-union in the building, she would have to leave, she told us, she told us in front of the supervisors.

As previously stated, on November 15 Annenburn was subpoenaed to appear at Region 29 on behalf of Local 144 at a representation hearing in Case 29-RC-4765. Annenburn testified that Stern and Milano were also present at the hearing. Stern corroborated this testimony.

a. *Written warning*

The complaint in Case 29-CA-7629 alleges that one of the ways in which Respondent harassed Annenburn was by issuing a written warning to her during the period immediately following her appearance at a Board hearing. Annenburn credibly testified that on November 16 Wilson handed her a warning slip for latenesses occurring during the period from September 8 through November 3, the majority of these occurring in October. Annenburn credibly testified that she had been given verbal permission for the latenesses and she further credibly testified that this was the first time that she was issued a written warning for being late.

I credit Annenburn's testimony and find that the warning slip was issued because of Annenburn's involvement with Local 144 and her appearance pursuant to subpoena at a hearing conducted by the National Labor Relations Board on November 15.

b. *Denial of vacation*

On October 19 Annenburn requested 2 weeks' leave for purposes of her wedding, the leave to commence on December 29. On November 16, the day after receiving the warning slip with respect to the latenesses, Annenburn received a written rejection of her request for leave. Although Milano denied knowledge that Annenburn requested the leave for purposes of getting married, I credit Palma's testimony that around November 7 Milano told her that she knew Annenburn requested

leave because she was getting married. Palma further credibly testified as follows:

Q. Were there any other conversations that you can recall having with Ms. Milano as it relates to Mrs. Annenburn?

A. Yes, it's about the time when Mrs. Annenburn was requesting the time off, I mean days off, I think.

Q. Do you recall what was said?

A. She said she was not going to give her the time off and she wants her out.

Although Annenburn requested time off as early as October 19, the denial came immediately on the heels of the warning slip, which was given the day after Annenburn's appearance at the Board hearing. I find that the refusal to grant the leave was another step in the harassment of Annenburn for her union-related activities.

c. Refusal to submit doctor's note and denial of half a day off

The complaint further alleges that Respondent harassed Annenburn by requiring that she submit a doctor's note after being absent 1 day because of illness and by denying her request for half a day off. Annenburn testified that she was ill on November 18 and was off duty on November 19. On November 20, when she appeared for work, she was asked to submit a doctor's note. Respondent's Exhibit 6 clearly states that anyone who is ill a day prior to a day off must submit a note from a physician before restarting duty. I find that, with respect to the request for a doctor's note, the General Counsel has not sustained his burden of showing that such request was made to harass Annenburn because of her union activities.

At the beginning of the shift on November 20 Annenburn testified that she asked for half a day off. Milano testified that Annenburn asked to leave at 12 o'clock that day at which point Milano stated, "It's very short notice, I can't possibly get someone to replace you now."

Based on the testimony, I find that the General Counsel has not sustained his burden of showing that the denial of half a day off was a part of Respondent's harassment of Annenburn for her union activities.

d. Surveillance of Annenburn's work

The complaint alleges that subsequent to November 16 Rabbi Wurtzberger, the Home chaplain, engaged in increased surveillance of Annenburn's work. Annenburn testified that subsequent to November 16 Rabbi Wurtzberger was "just continuously on my heels all the time, always around—like I said, if I'm in the elevator, he's there. If I'm in the coffee shop—wherever I am the rabbi is there." No one substantiated Annenburn's allegation of surveillance. In uncontroverted testimony Stern stated that Rabbi Wurtzberger was not an employee of Respondent nor was he an agent of Respondent. This was corroborated by Milano. Based upon the testimony, the General Counsel has not sustained his burden of showing that Rabbi Wurtzberger was an agent of Respondent nor that he engaged in surveillance of Annenburn's work.

4. Discharge of Annenburn

Annenburn testified that on the morning of November 20, while she was doing her nursing duties on the third floor, she received a telephone call telling her that her mother had taken ill. Annenburn also testified that a call had been placed earlier that morning to the Home with the information that Annenburn's mother had taken ill. Annenburn then proceeded to the nursing office to find out why she had not received the prior call. Annenburn encountered Wilson in the elevator, on her way to the nursing office. After a short conversation Wilson gave Annenburn permission to leave, at which time Annenburn returned to the third floor, took her coat, punched out, and went home. Later that evening, Annenburn received a telephone call from Milano who said that Annenburn would be required to bring a note from a physician stating that Annenburn's mother was hospitalized. Annenburn replied that her mother was a diabetic and had taken ill but was not hospitalized and that Annenburn would not be able to produce a note from a physician.

Annenburn further testified that on November 21, when she came to work, her punchcard was not in the usual place. When she got to the third floor she was told that she was wanted in the nursing office. Annenburn then met with Stern who, after refusing to meet with her in the presence of another employee, told her, "[Y]ou may go home and don't come back."

Stern testified that Annenburn was discharged because "she abandoned a dying patient." The patient involved was Serena Dimant, who was a patient on the third floor of the Home. Palma testified that on the morning of November 20 she was paged by Annenburn who stated that she would need help on the third floor because Dimant was having difficulty breathing. When Palma arrived in the patient's room she observed Annenburn checking the patient's vital signs. Palma asked Annenburn to get oxygen and administer it to the patient. Palma testified that Annenburn administered the oxygen to the patient and, while Annenburn was attending the patient, Palma went to call for an ambulance. Palma testified that Annenburn was performing her duties properly as they related to Dimant. Palma further testified that Annenburn was an "efficient nurse" and "she brought the oxygen right away to the patient [a]nd she did what she ha[d] to do."²

Annenburn credibly testified that "from the time I began working, until one day after I came to the Labor Board, I had no problem from my supervisors. I had no complaints from them as to my job." She also credibly testified that she was commended by both Milano and the in-service instructor for the work she was performing on the third floor.

Annenburn's and Palma's testimony was in large measure corroborated by the testimony of Wilson, Annenburn's supervisor and, since May 1980, assistant director of nursing. Wilson testified that she observed Palma and Hackshaw, a licensed practical nurse, administering to

² As noted earlier, I found Palma a truthful witness and, accordingly, I credit her testimony.

Dimant. Wilson testified that Annenburn was also on the floor at that time. She further testified that Palma gave Annenburn permission to leave the Home that day. In this regard Stern conceded that Palma had the authority to give permission to Annenburn to leave.

Both Milano and Stern testified that they were dissatisfied with Annenburn for leaving a sick patient and accordingly decided that she would be terminated. I regard this reason as clearly pretextual. The evidence is uncontroverted that one or two registered nurses, namely, Palma and Wilson, and a licensed practical nurse, Hackshaw, were administering to Dimant. In addition, I credit the testimony of Palma that Annenburn was taking proper care of the patient and administered oxygen to her when it became necessary. Furthermore, Milano conceded that both she and Stern knew, before they terminated Annenburn, that Palma had given permission to Annenburn to leave the Home.

I find that Annenburn gave proper care to the patient, Dimant. She was then given permission by Palma, who had authority to give such permission, to leave the Home. Milano and Stern knew that she was given that permission before they terminated her. I find that Annenburn's termination was a culmination of events which started with the giving of the warning notice and then the refusal to approve the request for leave. These actions were taken by Respondent because of Annenburn's activity on behalf of Local 144 and because of her appearance at the Board hearing on November 15.

5. Offer of reinstatement

The complaint alleges that Respondent has failed to reinstate Annenburn to her former position of employment. Respondent, on the other hand, claims that an offer of reinstatement was made. Respondent's Exhibit 3 is the confirmation copy of a telegram dated January 25, 1980, addressed to Annenburn which states, "You are hereby offered reinstatement at American Geri-Care, Inc. This position will be held open for you until Wednesday, January 30, 12 noon." Respondent's Exhibit 1 is the confirmation of a telegram dated January 30, 1980, again addressed to Annenburn, which states, "Having not heard from you regarding our offer of reinstatement at American Geri-Care, Inc., we wish to inform you that we are extending our offer of reinstatement until 12 noon, Friday, February 2." Annenburn testified that she received both of the telegrams; however, she believed that one of them was received after the deadline. She did not know which of the two telegrams was received after the deadline.

6. Solicitation of employees to join Local 6

The complaint in Case 29-CA-7629 alleges that during November and December Respondent solicited its employees to sign cards designating Local 6 as their representative for collective-bargaining purposes and urged and solicited its employees to join Local 6. Wilson testified that she "mentioned to Mrs. Annenburn that a man from Local 6 was on the floor." She denied that she ever directed Annenburn to sign a card for Local 6. She further testified that she did not have any conversations

with Annenburn with regard to Local 6. While on direct examination Annenburn testified that Wilson asked her to speak to a representative from Local 6 and to sign a card for Local 6, on cross-examination Annenburn conceded that Wilson simply told her "there is a man downstairs that represents Local 6." Annenburn further testified on cross-examination that Wilson did not show her a card for Local 6, that she did not meet the Local 6 representative, and that "he wasn't there on my time." Damji credibly testified that no one ever told her to vote for Local 6 and Palma credibly testified that she did not know of anyone being asked to sign a card for Local 6. Other than Annenburn's testimony on direct examination, which was modified on cross-examination, there was no testimony that the employees were urged or solicited to vote for Local 6. Accordingly, the General Counsel has not sustained his burden of proving this allegation and the allegation is therefore dismissed.

B. Case 29-CA-7679

1. Direction to vote against the Unions

Paragraph 9 of the complaint in Case 29-CA-7679 alleges that on or about December 19 Milano directed the employees to vote against both Local 6 and Local 144 and "particularly to vote against Local 6." William Perry, president of Local 6, testified that he overheard a conversation between Milano and four or five nurses "to vote against the union; but if you have to vote, you and your co-workers, be sure do not vote or something like that, do not place your mark in the box that would reflect a vote for Local 6." When questioned as to the date of the meeting, Perry testified, "It could have been the eighteenth, it could have been the nineteenth, it could have been the seventeenth." When asked to describe the people who were at the meeting, Perry testified:

A. I think maybe one was a man, or two, I'm not sure now.

Q. You're not sure?

A. Yeah, and there was women there too. It was a year ago. I got fifteen other cases on my mind already.

Damji testified that, approximately 2 weeks before Christmas, Milano had a meeting with herself, a Mrs. Charles and a Mrs. Varges, at which time Milano told them that she would like them to vote for management. Charles testified concerning the meeting at which Damji was present, and stated that there was only one such meeting.³ She testified that Milano stated, "[T]he Company has a good package deal for the RN's and that she couldn't say specifically because that was illegal." She further testified that Milano showed them a sample ballot similar to the General Counsel's Exhibit 5 but that no "X" was placed in any of the boxes. In addition, Charles

³ While Charles testified that the meeting took place on December 19, she also testified that Damji was present at the meeting and there was only one such meeting. I credit Damji's testimony that this meeting took place 2 weeks before Christmas and conclude that Charles was mistaken about the date. In this regard, Respondent's motion to strike Charles' testimony is denied.

testified that she did not recall Perry's presence at the meeting. Milano testified that there was a meeting between herself and the registered nurses "a couple of weeks before the election." She testified that Damji and Charles attended the meeting, at which time she told the nurses "that management had been fair to them and that I felt that they should vote for management." She further testified that she did not speak to an assembled group of registered nurses on December 19.

I credit Damji's and Milano's testimony that the meeting took place several weeks prior to the election. In his testimony, Perry was very uncertain as to the precise events. He thought that the day of the meeting may have been December 17, 18, or 19 and he could not recall who was at the meeting. His remarks were, "It was a year ago. I got fifteen other cases on my mind already." His uncertainty as to the events is further evidenced by his testimony that the General Counsel's Exhibit 5 was handed out at that meeting. That exhibit shows an "X" in the box marked Local 144. I credit Charles' testimony, however, that the sample ballot which was handed out contained no "X" in any of the boxes.

In view of Perry's testimony that he was standing approximately 10 to 15 feet away from the group, and that Milano's back was towards him, I believe that he was mistaken as to some of the events as to which he testified. The evidence does not sustain the allegation that the meeting took place on December 19. In addition, no witness other than Perry testified that Milano told the nurses to vote against the Unions and "particularly to vote against Local 6." Accordingly, the General Counsel has not sustained his burden of proof and the allegation is dismissed.

2. Promise of benefits

Paragraph 10 of the complaint in Case 29-CA-7679 alleges that on or about December 19 Respondent promised, and on or about January 3, 1980, Respondent granted, wage increases and other benefits to its employees, to induce them to vote against the Unions. The parties stipulated that the registered nurses received a wage increase and an additional week's vacation, effective January 1, 1980.

Damji testified that at the meeting held 2 weeks before Christmas Milano told the nurses to vote for management. She further testified that Milano said, "[T]he nursing home is already negotiating pay raises and benefits that the employees were asking for, and that the employees should vote for management." Charles testified that Milano said the following at the meeting:

A. Yes, we were also told if we should vote for Administration that's when we would have the good contract. It would be showed to us the day after the election, as long as Administration wins the election.

Q. Did there come a time after that meeting when there was a change in your salary?

A. Yes, we get a raise of pay.

Q. Do you recall when you received such a raise?

A. Maybe a month later.

As stated above, I have found that the meeting took place not on December 19, but approximately 10 days to 2 weeks previously. I credit Charles' testimony that Milano said that if the employees voted for management they would get a good contract and that "the company had a good package deal for the RN's." I find that this constituted an unlawful promise of benefits and that effective January 1, 1980, the employees were granted a wage increase and were given an additional week's vacation.

C. Objections to the Election

Objection 1 to the election alleges that, during the period between the filing of the petition and the date of the election, Respondent attempted to induce its employees to abandon their support of Local 144 by making unlawful promises of benefits. As discussed above, I have found that approximately 10 days prior to the election Respondent made an unlawful promise of benefits.

Objections 3 and 4 allege that, during the 24-hour period prior to the election, Respondent held a meeting of its employees at which time it attempted to induce them to abandon their support of Local 144 and also conferred upon them an unlawful benefit. As I found above, the record does not sustain the allegation that such a meeting took place during the 24-hour period prior to the election.

V. DISCUSSION AND CONCLUSIONS

A. Supervisory Status of Annenburn

Respondent and Local 6 contend that Annenburn's duties as charge nurse were such as to require a finding that Annenburn was a "supervisor" within the meaning of Section 2(11) of the Act.

Based on the testimony, detailed above, I find that the duties and responsibilities of Annenburn, as charge nurse, were the same as the other registered nurses at the Home. As part of her professional responsibilities, Annenburn directed the aides and orderlies on her floor. She did not have authority to hire, fire, or suspend employees.

As the Board stated in *Meharry Medical College*, 219 NLRB 488, 490 (1975):

[I]t appears that charge nurses do not exercise any real supervisory authority on behalf of management over employees. Rather, their duties are for the most part routine, involving the general direction of employees in the performance of their normal patient care duties and, as such, the charge nurses function more in the nature of lead persons. Even assuming that charge nurses may exercise some supervisory authority, the fact that they may do so only for a short period of time and on a sporadic basis would not require their exclusion from the unit. Accordingly, based on the evidence discussed above, we find that charge nurses are not supervisors

Under Board cases, Annenburn's duties as charge nurse do not bring her into the category of "supervisor." See *Wing Memorial Hospital Association*, 217 NLRB 1015 (1975); *Eventide South, a Division of Geriatrics, Inc.*, 239 NLRB 287 (1978). Indeed, Milano conceded that Annenburn was not a supervisor and Stern testified that the only supervisors were the director and assistant director of nursing and the in-service coordinator. Accordingly, I conclude that Annenburn was not a "supervisor" within the meaning of Section 2(11) of the Act.

B. Harassment and Discharge of Annenburn

As detailed above, in October Annenburn signed an authorization card for Local 144 and attended a meeting conducted by Local 144. On November 15 she was subpoenaed to appear at a Board representation hearing on behalf of Local 144. I find that the warning issued to her on November 16 and the denial of vacation on November 17 were steps taken by Respondent because of Annenburn's activities on behalf of Local 144 and because of her attendance at the representation hearing. These acts by Respondent constitute violations of Section 8(a)(1) and (4) of the Act.

With respect to Respondent's discharge of Annenburn, Respondent clearly knew of Annenburn's union activity. On November 7 Milano told Palma that Annenburn had attended a union meeting. In addition, Stern and Milano were present at the representation hearing at which Annenburn appeared pursuant to subpoena. Also, Respondent's animus towards Local 144 has been demonstrated. I have credited Palma's testimony that Milano said, "[I]f they put . . . two-union[s] in the building, she would have to leave." Finally, by adducing the evidence of the discharge occurring within a few days of Annenburn's appearance at the Board hearing, and upon the heels of the warning and the denial of vacation, the General Counsel has made a *prima facie* showing to support the inference that protected activity was a motivating factor in Respondent's decision to discharge. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

As noted above, I regard Respondent's contention that Annenburn was terminated for leaving a sick patient as mere pretext. Clearly, therefore, Respondent has not shown that the "same action would have taken place even in the absence of the protected conduct." See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Accordingly, I conclude that Respondent, by its discharge of Annenburn, violated Section 8(a)(1), (3), and (4) of the Act.

C. Offer of Reinstatement

The record contains confirmation copies of two telegrams sent by Respondent to Annenburn, offering reinstatement. Annenburn testified that she believed one of the telegrams was received after the deadline stated in the telegram. She did not know which of the two telegrams was received after the deadline.

An offer of reinstatement may be effective if it was made in good faith and in a manner in which it could reasonably be anticipated that the employee would receive timely notice of the offer. See *Knickerbocker Plastic Co., Inc.*, 132 NLRB 1209, 1236 (1961). While Annen-

burn testified that she received one of the telegrams after the deadline, and the other shortly before the deadline, the record does not contain any details concerning the circumstances surrounding the alleged delay in Annenburn receiving notification of the telegrams. Because the matter has not been fully litigated, I am unable to decide whether Respondent's offer tolled its backpay liability and satisfied its reinstatement obligation. In accordance with Board precedent, the resolution of this should be left to the compliance stage of the proceeding. See *Airports Service Lines, Inc.*, 218 NLRB 1160, 1161 (1975).

D. Promise and Grant of Benefits

Section 8(a)(1) of the Act proscribes an employer's promise of benefits to its employees to influence them to refrain from supporting a union. *N.L.R.B. v. Exchange Parts Company*, 375 U.S. 405 (1964). The promise of benefits need not be explicit to violate the Act. The Board has held that an implied promise of benefits also violates Section 8(a)(1). See *Servomation, Inc.*, 237 NLRB 48, 52 (1978), *enfd.* 603 F.2d 762 (9th Cir. 1979).

In *Arrow Molded Plastics, Inc.*, 243 NLRB 1211, 1214, 1215 (1979), the Board found a violation of Section 8(a)(1) for an implied promise of benefits. The employer's representative stated that, "our policy is to pay equal or greater than what is being paid in our area for similar work by similar companies." In addition, the employer's representative testified that he informed employees that he "hoped to prepare recommendations . . . but had received legal advice not to do so because it might be considered an implied promise of benefit . . . that would be an unfair labor practice . . ."

I have credited Charles' testimony that Milano told the employees that "the company had a good package deal for the RN's and that she couldn't say specifically because it was illegal." This testimony is strikingly similar to that in *Arrow, supra*, where the Board found a violation of Section 8(a)(1).

Accordingly, I conclude that Respondent unlawfully promised benefits to its employees in violation of Section 8(a)(1). In addition, the subsequent grant of benefits, soon after the election took place, also violated Section 8(a)(1). See *The Stride Rite Corporation*, 228 NLRB 224 (1977).

E. Objections to the Election

As indicated above, I have found that the record does not sustain the allegation that Respondent held a meeting of its employees during the 24-hour period prior to the election. Accordingly, Objections 3 and 4 are overruled.

Objection 1 alleges that Respondent attempted to induce its employees to abandon their support of Local 144 by making an unlawful promise of benefits. I have found that during the preelection period Respondent promised benefits in violation of Section 8(a)(1). This, *a fortiori*, is a ground for setting aside the election. See *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962); *Derby Refining Company*, 235 NLRB 12, 17 (1978).

In addition, I have found that Respondent engaged in unfair labor practices through its harassment and discharge of Annenburn for her union-related activities. As

the Board stated in *Dal-Tex, supra* at 1786, "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election." See also *Highview, Incorporated*, 231 NLRB 1251, 1259 (1977).

Accordingly, I conclude that Respondent, by its conduct, interfered with the "laboratory conditions" required for a free election. Such conduct mandates that the election be set aside.

CONCLUSIONS OF LAW

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

2. Local 144 and Local 6 are labor organizations within the meaning of Section 2(5) of the Act.

3. By issuing a warning slip and denying a request for leave to Shirley Annenburn because of her union-related activities and because of her appearance at a representation hearing, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act.

4. By discharging Annenburn for her union-related activities and because of her appearance at a representation hearing, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1), (3), and (4) of the Act.

5. By promising and granting employees benefits to induce them to refrain from supporting Local 144 and Local 6, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

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

Respondent having discharged Shirley Annenburn in violation of the Act, I find it necessary to order Respondent to offer her full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings that she may have suffered from the time of her termination to the date of Respondent's offer of reinstatement.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁴

⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁵

The Respondent, American Geri-Care, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Harassing and discharging employees for activities protected by Section 7 of the Act.

(b) Promising and granting benefits to employees to induce them to vote against a union.

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

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

(a) Offer Shirley Annenburn immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held on December 20, 1979, in Case 29-RC-4765 is hereby set aside and said case is hereby remanded to the Regional Director for Region 29 for the purpose of conducting a new election.

IT IS FURTHER ORDERED that those allegations of the complaints as to which no violations have been found are hereby dismissed.

⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁶ In the event that 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."