

Woonsocket Health Centre and United Health Care Employees, a Division of Rhode Island Workers Union, Local 76, Service Employees International Union, AFL-CIO-CLC. Case 1-CA-14998

September 28, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND TRUESDALE

On June 14, 1979, Administrative Law Judge Almira Stevenson issued the attached Decision in this proceeding.¹ Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

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,² and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.³

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, Woonsocket Health Centre, Woonsocket, Rhode Island, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

“(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.”

¹ The General Counsel moved to consolidate this case with Cases 1-CA-13014 *et al.* and 1-RC-15107, 245 NLRB 652 (1979), in view of his request for a bargaining order. The motion is denied. In accordance with the majority views as set forth in *United Dairy Farmers, Cooperative Association*, 242 NLRB 1026 (1979), Member Truesdale agrees with the Administrative Law Judge that a bargaining order is not an appropriate remedy here. Chairman Fanning and Member Jenkins would consolidate the cases and consider whether to issue a bargaining order, but will abide by the majority position of the Board that that remedy is inappropriate, and therefore join in denying the motion.

² We find totally without merit Respondent's allegations of prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated bias against Respondent in her analysis of discussion of the evidence.

³ A broad injunctive order is not warranted since Respondent only engaged in one violation of Sec. 8(a)(3) and one of Sec. 8(a)(1). A narrow order is sufficient to remedy the violations and we will modify the Order accordingly. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

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

APPENDIX

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

WE WILL NOT discharge or otherwise discriminate against any employees to discourage membership in or support of the United Health Care Employees, A Division of Rhode Island Workers Union, Local 76, Service Employees International Union, AFL-CIO-CLC, or any other union.

WE WILL NOT promulgate, maintain, or enforce our rule prohibiting distribution of literature or Nursing Centre property.

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

WE WILL offer Anita Calascibetta immediate and full reinstatement to the job she had before her discharge on September 26, 1978, or, if her job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges.

WE WILL make whole Anita Calascibetta for any loss of pay she may have suffered as a result of her discriminatory discharge, plus interest.

WOONSOCKET HEALTH CENTRE

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This case was heard in Boston, Massachusetts, April 3 and 4, 1979. The charge was served on Respondent September 27, 1978. The complaint was issued March 21, 1979. Respondent duly filed an answer and amended it at the hearing. The issues are whether or not Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by instituting an overly broad no-distribution rule; whether it violated Sections 8(a)(1) and (3) of the Act by discharging Anita Calascibetta; and whether a *Gissel*¹ bargaining order is an appropriate remedy.²

¹ *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

² No issue is raised as to jurisdiction. The complaint alleges, the answer admits, and I find that Respondent meets the Board's standard for the assertion of jurisdiction over nursing homes. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I. UNFAIR LABOR PRACTICES

A. *Facts*

Since February 1978 Respondent health center has been wholly owned by Norma and Pasquale Pezzelli. Pasquale Pezzelli takes no active part in the operation of the health center. It is run by Norma Pezzelli, who is administrator, and their daughter, Lauren Pezzelli Iadevaia, assistant administrator. Shirley Cook is director of nursing.

The union organization campaign with which we are here concerned began in July 1978.³ Union-employee meetings were held at the homes of employees on August 7 and 21, 1978. The parties stipulated that between August 7 and the end of September 1978, 42 employees in the admittedly appropriate unit of approximately 167 service and maintenance employees had executed union authorization cards. On September 15, 1978, management distributed to employees of the health center a manual entitled "Personnel Policies," which listed as one of several causes for disciplinary action the following:

8. Posting notices without prior authority of the Administrator, or distribution of literature on Nursing Home property.

On September 26, 1978, nurses aide Anita Calascibetta was discharged. Calascibetta was the most active union advocate. She signed an authorization card, attended both Union-employee meetings, and obtained more signed authorization cards than any other employee. Calascibetta testified as follows with regard to her discharge:

At 10 or 15 minutes after 2 p.m. on September 25, 1978, Calascibetta encountered Kenney Gaulin, a somewhat retarded young man on the health center maintenance staff, in the employees' smoking room on afternoon break. No patients are allowed in the smoking room and none was present at the time. As Gaulin left the room, Calascibetta handed him a union authorization card, saying, "[h]ere, boy, here's your card." Gaulin took the card and left the room without saying anything. Calascibetta had spoken to Gaulin only once before, about 2 weeks prior to September 25, when the first started work; at that time she asked him how he liked his job and whether he was "going to be here for a while." Gaulin replied that he loved the job and "wanted to be here for a long time." So Calascibetta then asked him, "[a]re you interested in the union?" and he responded, "I guess so." Calascibetta then told him, "I haven't got no cards with me. Next time I see you, if I have a card, I'll give you one." Calascibetta testified that Gaulin did not seem upset on either of these occasions when she spoke to him. I credit the testimony set forth above because it was undisputed. The Respondent's explanation of the reasons for its failure to put Gaulin on the stand was in my

opinion unsatisfactory, and therefore justifies the inference that Gaulin's testimony would have been unfavorable to Respondent.⁴ I find that Calascibetta engaged in no misconduct in soliciting Gaulin's signature on a union authorization card.

Shortly after Calascibetta returned to her duty station subsequent to giving Gaulin the authorization card on the 25th, she was summoned to the assistant administrator's office. The following account of the relevant remarks made during the interview between Assistant Administrator Iadevaia and Calascibetta is based on an amalgam of the testimony of the two participants. In some respects, Calascibetta was in my opinion prone to exaggerate, and Iadevaia's memory was admittedly faulty. The facts as found reflect the probabilities in light of my estimate of the relative reliability of these witnesses and the entire record.

Iadevaia told Calascibetta, "You know, you can get fired for this?" Calascibetta responded, "For what?" and Iadevaia said for disturbing the floor and giving unauthorized literature to Kenney Gaulin. Calascibetta denied disturbing the floor, and informed Iadevaia she had given Gaulin a union authorization card while both were on their breaks. Iadevaia then handed Calascibetta a copy of the company "Personnel Policies" manual, instructed her to read rule number 8 (set out above), and told her that one of the reasons for her discharge was violation of that rule. Iadevaia added, however, that she wanted to think about the matter overnight and directed Calascibetta to report to her at 9:30 the next morning. When the two met on September 26, Iadevaia told Calascibetta she had not changed her mind, and handed her a termination slip giving the reasons for discharge as "disrupting other depts—passing unauthorized literature." Iadevaia testified that by disrupting other departments, she meant upsetting Kenney Gaulin, and by passing unauthorized literature, she meant giving a union card to Gaulin.

Iadevaia testified she discharged Calascibetta because: (1) Calascibetta had harassed a patient some months before in March 1978, at which time Iadevaia had counseled her on her manner with patients and warned her that a repeat of such conduct could result in termination; (2) Director of Nursing Cook reported two or three subsequent occasions in August 1978 when Calascibetta harassed patients or their families; (3) the "straw that broke the camel's back" occurred when Maintenance Supervisor Leo Theroux came to her office and said Calascibetta had upset one of his men terribly by "trying to force him into signing something"; and (4) Calascibetta's "attitude . . . it seemed that she was unable to keep control of herself, to keep her cool."

Calascibetta admitted coming on strong on two occasions with patients or their families and being reprimanded for it. There is no doubt that her personality is a forceful one. It is also possible that Gaulin became unaccountably upset after Calascibetta gave him the union authorization card. But it is clear that Iadevaia was aware of Gaulin's handicaps and there is no indication that the maintenance department was disrupted or its work interfered with. In these circumstances, and in view of overwhelming evidence that Calascibetta was good at her job as a nurses aide, as Iadevaia rated

³ A Decision of Administrative Law Judge Henry L. Jalette in Cases I-CA-13014 etc. and I-RC-15107, issued June 21, 1978, gives an account of a previous campaign among Respondent's employees begun by the Union in January 1977 and culminating in an NLRB election May 6, 1977. The Union lost the election and filed objections and unfair labor practice charges. Judge Jalette found that Respondent committed numerous unfair labor practices and recommended that the election be set aside. That decision is now before the Board on exceptions.

⁴ *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, fn. 1 (1977).

her on her termination slip, inasmuch as management tolerated alleged repetitions of forceful conduct by Calascibetta despite having warned her about it in the past; and that Calascibetta's past transgressions were not referred to on her termination slip or in her discharge interview; and in view of Iadevaia's knowledge of Gaulin's handicaps, I find that neither "disrupting other departments" nor Calascibetta's job performance played any significant part in Iadevaia's decision to terminate her.

I further find that the operative factor in the discharge decision was Calascibetta's violation of the company rule prohibiting "distribution of literature on Nursing Home property," by, as Iadevaia admitted, giving a union authorization card to Kenney Gaulin.

B. Conclusions

It now seems to be established that a company rule prohibiting employee solicitation on nonworking time is applicable to health care institutions such as this, as is a rule prohibiting distribution on nonworking time in nonworking area absent evidence that such a rule is necessary to avoid disrupting health care operations or disturbing patients.⁵ The Respondent's rule prohibiting distribution of literature on nursing home property clearly falls within the legal proscription and, as Respondent offered no evidence that the rule is necessary as required, I conclude that Respondent violated Section 8(a)(1) of the Act by promulgating the aforesaid rule and maintaining it in effect.

I further find that Calascibetta was discharged on September 26, 1978, mainly because she violated this rule by giving a union authorization card to another employee while they were both on break time in the employee smoking room, was an area of the center which patients never frequented, at a time when no patients were present, and during which time Calascibetta engaged in no misconduct. I conclude that Respondent thereby violated Sections 8(a)(1) and (3) of the Act.⁶

II. REMEDY

In order to effectuate the policies of the Act, I recommend that Respondent be ordered to cease and desist from the unfair labor practices found and, in view of the nature thereof, to cease and desist from infringing in any other manner on its employees' rights guaranteed by the Act.

Having found that Respondent discriminatorily discharged Anita Calascibetta, I also recommend that it be ordered to offer her immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and to make her whole for any loss of

earnings suffered by reason of the discrimination against her. *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest shall be paid on the backpay due as provided in *Florida Steel Corporation*, 231 NLRB 651, and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

The General Counsel's request for a bargaining order under *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, (1969), is denied. Aside from other considerations, the Board has never issued a bargaining order as a remedy for Section 8(a)(1) and (3) violations where, as here, the Union has never represented a majority of the employees in the appropriate unit; the violations found herein would not, in any event, justify such a remedy; and the unfair labor practices found by Judge Jalette in Cases I-CA-13014, etc. are still on exceptions before the Board and have not been adopted in a final Board Decision and Order.

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

ORDER⁷

The Respondent, Woonsocket Health Centre, Woonsocket, Rhode Island, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee to discourage membership in or support of United Health Care Employees, A Division of Rhode Island Workers Union, Local 76, Service Employees International Union, AFL-CIO-CLC, or any other union.

(b) Promulgating, maintaining, or enforcing its rule prohibiting distribution of literature on Nursing Centre property.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Offer Anita Calascibetta immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for lost earnings in the manner set forth in the section of this Decision entitled "Remedy."

(b) Rescind its rule prohibiting distribution of literature on nursing home property.

(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 records necessary to analyze the amount of backpay due under the terms of this recommended Order.

⁵ *Beth Israel Hospital v. N.L.R.B.*, 98 S.Ct 2463 (1978).

⁶ *Beth Israel Hospital v. N.L.R.B.*, *supra*; *National Nursing Home Consultants, Inc., d/b/a Clermont Nursing and Convalescent Home*, 223 NLRB 13 (1976); *Summit Nursing and Convalescent Home, Inc.*, 196 NLRB 769 (1972); *Accord, Publishers Printing Co., Inc.*, 233 NLRB 1070 (1977); *Capitol Records, Inc.*, 233 NLRB 1041 (1977). I find it unnecessary to rule on other contentions of the parties, as a determination thereof would not affect my conclusions of law nor my recommendations as to the appropriate remedy.

⁷ 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.

(d) Post at its facility in Woonsocket, Rhode Island, copies of the attached notice.⁸ Copies of the notice on forms provided by the Regional Director for Region 1, after being daily signed by an authorized representative of Respondent,

⁸ 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."

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

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