

Capital Americana Inc. d/b/a Americana Nursing Center, Indianapolis Midtown, and Indianapolis Americana, Inc. d/b/a/ Americana Nursing Center, Indianapolis-East and Retail Clerks Local Union No. 725, Retail Clerks International Association, AFL-CIO. Cases 25-CA-4366-1, 25-CA-4366-2, and 25-CA-4366-3

August 14, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
KENNEDY AND PENELLO

On March 6, 1972, Trial Examiner John F. Funke issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed a brief in answer to the General Counsel's exceptions.

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 Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions to the extent consistent herewith.

We cannot agree with the Trial Examiner that the General Counsel met his burden of proving that the discharges of employees Gwen Pettigrew and Wilma Kirkhoff were discriminatorily motivated. It is well established that suspicion or conjecture cannot substitute for proof of unlawful motivation.

In this case, the Employer came forward with substantial evidence to establish that the discharges were caused by the unsatisfactory work performance and attitude of the alleged discriminatees. Kirkhoff was advised in February 1971 by Administrator McGowan that her work, appearance, and attitude were unsatisfactory and would have to be improved. Also, evidence indicated that during April 1971 friction developed between Pettigrew and Kirkhoff on one side and nurses aide Storms on the other side. Charge Nurse Bess, Director of Nurses Fridlin, and nurses aide Brake each testified that Storms was a very competent aide. Nonetheless, because of the friction, it was necessary to transfer Storms to another floor. Further, a feud arose between Pettigrew and Kirkhoff. The evidence established that the feud caused serious tension and disharmony among all the employees on the floor. Finally, evidence was adduced to show that the discharges were made by McGowan after he received evaluations of the work of the alleged discriminatees. The evaluations, giving

Pettigrew and Kirkhoff an overall rating of unsatisfactory, were prepared and delivered by Fridlin to McGowan on the morning of June 7, 1971. Pettigrew and Kirkhoff were terminated later the same day.¹

This record furnishes no basis for questioning the rating of unsatisfactory set forth in the evaluations or their timing. Uncontradicted evidence shows that it was the Employer's uniform practice to make such evaluations on the annual anniversary of an employee's last wage increase. As both Pettigrew and Kirkhoff received their last increase in June 1970, the evaluations completed on June 7, 1971, were timed to accord with Respondent's practice. Since the misconduct of the discharges relied on in the evaluations is undisputed, it is apparent that the General Counsel has failed to refute Respondent's defense to the 8(a)(3) allegation. In these circumstances, we find that the evidence does not preponderate in favor of finding that Pettigrew and Kirkhoff were discharged in violation of Section 8(a)(3).² Accordingly, as we agree with the Trial Examiner's dismissal of the remaining allegations, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

¹ Although the Trial Examiner relies on the fact that Bess testified that in the period immediately preceding the discharge the friction between Pettigrew and Kirkhoff had become bearable, Bess also testified that she concurred in the decision to discharge them on the basis of the evaluation of their performance, which covered the entire year.

² We also note, in passing, that there is no evidence of union animus, the union activities of Pettigrew and Kirkhoff were minimal, and the Trial Examiner's finding that Respondent had knowledge of their union activities is based upon questionable evidence. In this latter regard the Trial Examiner credited Bess' testimony that McGowan stated during the course of a meeting on the date of discharge that Pettigrew and Kirkhoff were among those talking about the Union. On cross-examination, however, Bess indicated that she was not entirely sure what McGowan had said but could only recall that he said something about having heard of a union.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JOHN F. FUNKE, Trial Examiner: This case was brought before the National Labor Relations Board upon:

1. Charges filed by Retail Clerks Local Union No. 275, Retail Clerks International Association, herein the Union, against American Nursing Center, East, herein the East facility, on July 11, 1971, and American Nursing Center,¹ Midtown,² herein the Midtown facility, on June 11 and August 30, 1971, alleging Respondents (the two facilities will be referred to jointly as Respondents), violated Section 8(a)(1) and (3) of the Act.

¹ Corrected to read Indianapolis Americana, Inc. d/b/a American Nursing Center, Indianapolis-East

² The answer corrected the titles of certain alleged supervisors and the dates of discharge of two employees

2. An order consolidating the cases and a consolidated complaint of the General Counsel against Respondents alleging Respondents violated Section 8(a)(1) and (3) of the Act issued on September 10, 1971

3. Answer of Capital Americana, Inc., denying the commission of any unfair labor practices.

4. A hearing held by me at Indianapolis, Indiana, on December 8, 9, and 10, 1971.

5. Briefs filed by the General Counsel and Respondent on January 31, 1972.³

Upon the entire record in this case and from my observation of the witnesses while testifying, I make the following:

FINDINGS

I. THE BUSINESS OF RESPONDENTS

Capital Americana Inc., d/b/a Americana Nursing Center, Indianapolis Midtown, and Indianapolis American, Inc., d/b/a American Nursing Center, Indianapolis-East, are separate corporations related as a single enterprise to a group of corporations operating nursing homes in nine states with headquarters at Monticello, Indiana.⁴ Respondents in their nursing operations receive income in excess of \$100,000 annually. Respondents purchase and cause to be transferred from States other than the State of Indiana to their homes in Indianapolis goods and material valued in excess of \$50,000 annually

Respondents are engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

The consolidated complaint alleges that Respondents discharged five employees in violation of Section 8(a)(3) of the Act. These employees, together with the facility at which he was employed and the date of discharge (as amended at the hearing) were:

Herman Schrader, Midtown facility—June 29, 1971⁵

Jeannye Turner⁶—July 23

Gwin Pettigrew, East facility—June 7

Wilma E. Kirkhoff, East facility—June 7

Stella Manning, Midtown facility—June 3

The evidence will be considered in the order set forth above.

A. Herman Schrader

Schrader was employed by the Midtown facility on April 1, as a security officer and for general custodial work. He worked from 9 p.m. to 6:30 a.m. and received \$3.25 per hour. During the first 2 weeks of his employment he was

given no custodial duties but checked and set up his own security system (security had previously been maintained by a commercial security organization). At the end of the 2 weeks he was given a list of custodial duties for his approval or for suggestions by Assistant Administrator Fred Moon.⁷ Schrader made no suggestions, changes, or complaints according to Moon. Schrader was discharged on June 29 for his alleged failure to perform his custodial duties properly.

Schrader testified that after he had been employed at Midtown for about 4 weeks he received complaints about working conditions from the girls employed as nurses aides and Schrader told them he would contact a union representative. He did reach a Mr. Sanford of the Union who told him he or another representative would be in touch with the aides. For some time after that Schrader talked to the girls as they left at night and answered their questions, to the best of his ability, about the Union. He estimated he talked to about 12 girls. This was the extent of Schrader's union activity.

About the middle of May, Schrader was called into Facility Director Cogil's office where Cogil and Moon discussed complaints about his work. According to Schrader, he was accused of having told a supervisor, Mrs. Middleton, that she was to be fired. Schrader denied this but admitted he was instructed to apologize to Mrs. Middleton and did so. He was also accused of starting rumors (undefined) about Cogil and Moon to which Schrader testified, credibly, that when working with women one had to deal with rumors. Schrader's reply to this criticism was ambiguous but he stated it made Cogil and Moon happy. The third topic, Schrader's alleged neglect of his custodial duties, was passed over lightly although Cogil told him to get together with Moon and work it out. Schrader told Moon that he could not perform both his custodial and his security duties properly and that he thought security more important.⁸ He received no further reprimand until the day of his discharge.

On June 29 Cogil came in about 6:30 a.m., called Schrader to his office, and first asked him to resign and then told him he was finished. He was charged with having cursed three supervisors and with leaving the main dining room, the feeder dining room, and the hall dirty. Schrader told Cogil, "It's a kind of meager reason to get rid of an employee just because of not doing janitorial duties." As to the charge that he cursed three supervisors, Schrader made the perhaps unusual reply that he did not believe it. No supervisor or nurses aide testified as to this charge.⁹ Despite his protests he was terminated.

Arthur Cogil, administrator at Midtown from December 1969 until August 15, 1971, testified that he hired Schrader to replace the security service which had been operating at Midtown and also to perform custodial services which had been performed by Midtown's regular custodial staff. He

activities room 3 times weekly, laundry room 3 times weekly, replace light bulbs, and put up the flag at dawn

⁸ Schrader admitted on cross-examination that he was not able to complete his janitorial duties. He also testified that he was instructed to make his rounds for security check once an hour. Schrader thought the check should be made every 15 minutes and followed the dictates of his own judgment

⁹ Resp Exh 15 was rejected as hearsay on this issue

³ The case was ably briefed and ably tried

⁴ Americana Nursing Centers, Inc., is the parent corporation

⁵ Unless otherwise noted all dates hereafter refer to 1971

⁶ Turner did not appear at the hearing and the complaint is dismissed as to Turner

⁷ Resp Exh 7 lists the first floor duties as check to see if flag is down, secure doors, vacuum lobby carpet, and dust mop and wet mop patients dining room, feeders dining room, hall elevators, P.T. and O.T. Depts.

testified that Schrader's first responsibility upon arrival at 9 p.m. was to check all doors and windows on the first floor and to check that no unauthorized persons were in the building. He was to make hourly rounds thereafter and to check employees as they entered or exited from the building for their own protection. Since Cogil did not work the hours Schrader did he saw him only when he (Cogil) came in early. He and Schrader would chat about the job and Cogil stated he had occasion to point out to Schrader things (unspecified) he had not done. He also testified that he had received complaints from Moon, his assistant, that Schrader was not performing his janitorial work properly. Schrader was discharged solely for his failure to perform these duties and Cogil stated he was, at the time of discharge, unaware of Schrader's union activity.

Fred Moon was assistant administrator at Midtown. He was present at the hiring of Schrader who was told he would be given 2 weeks to work on the well. At the end of that time he gave Schrader the list of custodial duties, *supra*, required to be performed and stated Schrader voiced no objections. In the second week of May he was present at a brief conference in Cogil's office at which Schrader was told he would have to do better on the custodial work. Moon stated that he came in early one morning a week to relieve Schrader and that he usually stopped by on Thursday nights after he left school. From his observation on these occasions he would point out Schrader's failure to complete his cleaning assignments. In these discussions Schrader stressed his security problems which Moon thought were not too important. On this issue of the relative importance of the two functions Moon and Schrader never agreed and this led to his termination.

Conclusions

The case of Schrader, as do the cases of the other discharges, presents the familiar and usually difficult problem of determining the motive of an employer in discharging an employee from interference drawn from testimony and evidence often in direct conflict. No precise formulae have been devised and the initial decision is left largely to the intuition, if not the speculation, of the Trial Examiner.

I do not find that the allegation that Schrader was discharged in violation of Section 8(a)(3) of the Act is sustained by a fair preponderance of the evidence. Schrader was employed for only a short period of time and his union activity consisted only in advising the girls who worked nights that if they had complaints they might well seek union affiliation and in contacting a union organizer on their behalf. It was stipulated that he was not a member of the bargaining unit nor eligible to vote in the election. It is true that Respondents expressed their opposition to the Union in letters and speeches to their employees at both the Midtown and the East facilities but it engaged in no unlawful conduct in its antiunion campaign. There were no interrogations, no threats, nor any promises of benefit to any employee. This leaves the case of Schrader and the other alleged discriminatees free from any cloud of

¹⁰ Schrader admitted that he attached greater weight to his security duties and that on that point he not only disagreed with Moon but was unwilling to subordinate security to custody

accompanying unlawful conduct designed to frustrate union organization.

I think a fair reading of the testimony, and particularly Schrader's testimony, will convince the reader that a serious breach existed between Cogil and Moon, on the one hand, and Schrader, on the other, in their concept of the relative importance of his own functions.¹⁰ Schrader understandably attached more importance to his security duties which were more prestigious, more interesting, and less taxing than mopping floors. On the other hand, Cogil and Moon, as may be gathered not only from their testimony but from the impressive list of janitorial functions to be performed, obviously attached far lesser significance to security. Since neither Cogil nor Moon worked the same hours there was no opportunity to observe Schrader's allotment of time between his jobs. Judgment was based solely on observation of results which, in the case of his janitorial duties, were tangible. For the same reason there was no opportunity for observation of his on-the-job performance and for more specific and constructive criticism. The conclusion could be reached that the complaints against Schrader were trifling and that his alleged derelictions were not serious enough to merit discharge. That, of course, is substituting the Trial Examiner's judgment for that of management. The defect in the General Counsel's case is that there is little evidence, apart from *per se* inference, that either Cogil or Moon knew of Schrader's activity in bringing the aides and the Union together (Cogil denied that he had any such knowledge). I find some difficulty in accepting such an inference where the activity took place on a night shift divorced from close managerial supervision. I find greater difficulty in finding that, even had Cogil or Moon such knowledge, that the discharge was attributable to such activity. The discharge of Schrader, who was not a member of the bargaining unit, could not foreseeably have impact on the union campaign or the forthcoming election. His union activity was not sufficiently prominent to accomplish such a purpose. In any event I am unwilling to make a finding of violation based on one inference supported only by another inference. I do not find the discharge of Schrader violated the Act.

B. Pettigrew and Kirkhoff

The cases of Pettigrew and Kirkhoff are to a large extent interwoven and they will be considered together.

Pettigrew, hired in March 1970, and Kirkhoff, hired in December 1969, were both employed as nurses aides on the second shift (3 to 11 p.m.) at the East facility. Both worked on the second floor. General McGowan was the administrator at this facility, Betty Mirkle was his assistant, Carol Fridlin was director of nurses and Karen Bess was charge nurse on the second floor.

The first difficulty either had with management was on February 26¹¹ when Kirkhoff was called to McGowan's office. Kirkhoff's first testimony was that she was called to the office and charged with being mean to a patient, a charge later admitted to be untrue. On cross-examination

¹¹ While Kirkhoff fixes the date as December 1970, I find the interview took place in February, although I do not consider the date of particular import

she admitted that she was told, as McGowan had testified, that she was charged with poor performance, poor appearance, and poor attitude. She was also told she would have to report for work on time, attend service meetings, cease her involvement in employees' cliques, and stop discussing her personal affairs with patients and their families. She denied McGowan's testimony that she was threatened with discharge and asked for another chance.¹²

The immediate supervisor of Pettigrew and Kirkhoff was Karen Bess who left the East facility on July 4. The first of Bess' problems with Pettigrew and Kirkhoff (she was charge nurse for about 5-1/2 months prior to leaving the facility) concerned their treatment of a new nurses aide on the second floor, Betty Storms. This consisted in complaining to Bess that Storms was not doing her work and that they had to double up and do it for her. As a result Storms, who was a treatment aide, was transferred to the first floor despite Bess' opinion that she was an excellent nurse. The transfer was effected by Fridlin who stated that it was due to complaints about Storm from Pettigrew and Kirkhoff and complaints about their treatment of Storm which she received from two other nurses aides, Irma Brake and Rita Leath, to the effect that Pettigrew and Kirkhoff refused to eat with her and "ostracized" her.¹³ According to Fridlin the transfer was effected in April, according to Pettigrew it took place 4 months or longer before their discharge.

The second major concern with Pettigrew and Kirkhoff related to a "feud" which occurred between them. The duration of this feud, its origin, and its termination are subject to confused and contradictory testimony. According to Pettigrew it arose about 3 weeks before they were fired when she was asked by Leath to assist her with treatment of a patient. She agreed and Kirkhoff later complained that this took her (Pettigrew) away from helping other nurses on the floor. The feud or tension, as Pettigrew described it, lasted only 3 or 4 days before the two of them straightened it out. Nevertheless Pettigrew admitted that on a night later in May Fridlin remained to discuss the problem with Leath, Kirkhoff, and herself. Pettigrew and Kirkhoff then told Fridlin they had resolved the problem. Kirkhoff could not remember what occasioned the feud or when it started but testified it did not last very long and was ended about 2 to 3 weeks before they were terminated. She also testified that Fridlin remained one night to discuss the problem with Pettigrew, Leath, and herself and that they told her everything had been worked out.

Carol Fridlin testified that she had received complaints from Bess that Pettigrew and Kirkhoff were disrupting the second shift by refusing to speak to each other and by coming to her with their complaints about each other.¹⁴ Bess finally called Fridlin and asked her to come in on the second shift and talk to them. On the evening of May 25

Fridlin worked until 9 p.m. and asked Pettigrew and Kirkhoff if they had anything to talk over and was told the problem was settled. According to Fridlin this was not completely true because she also testified that after this meeting of May 25 she asked Bess about the situation and was told they had gone into a cold war, that they still questioned her orders and were neither following her orders or performing their work properly. During the week before their termination Kirkhoff came to her office to report that Pettigrew was not performing her job and accused Pettigrew of taking some of the facility property to her home. Pettigrew, on the other hand, complained to her that Kirkhoff was not doing her proper share of the workload.¹⁵ On June 7 Fridlin received a complaint from a sister of a patient stating the patient, identified as Mr. Thornberry, stated that he did not want to be treated anymore by Kirkhoff because she had refused to give him basic treatment.

Bess testified that there was a period of 1-1/2 to 2 months when Pettigrew and Kirkhoff were not speaking and that the other aides were complaining to her about the situation, all of which detracted from the efficient operation of the floor. (There were only five aides to a floor.) Bess complained to Fridlin who agreed to stay late one night to resolve it (May 25). Bess did not testify as to the results of this meeting except that she did state that the relationship between Pettigrew and Kirkhoff and between the two and the other nurses aide was no longer unbearable.

Kirkhoff signed a union authorization on June 2 and Pettigrew signed one on June 3. Both testified that thereafter they assisted in preparing a list of employees to give the Union so that they could be solicited. They also testified that they discussed the Union with other aides on lunch and coffee breaks but neither testified that these discussions took place in the presence of any supervisor. Kirkhoff, however, did testify that on June 2 she told Bess that she had been asked to sign a union card but had refused because she was afraid she might be fired if she did.¹⁶

Turning to the date of discharge Bess testified that she was called to McGowan's office by Fridlin about 12:30 p.m. McGowan told her he wanted her to know he was discharging two of her aides, Pettigrew and Kirkhoff, because "they had caused enough trouble and were causing so much tension among the employees that the other nurses aides had threatened to quit if there wasn't something done about their employment and their work." (The complainants were not named.) McGowan told her he had no alternative but to fire them and then asked her if she had heard of any union activity. She related her conversation with Kirkhoff, above, and McGowan then told her there was some talk of a union and that Pettigrew

about having a man in her room Brake complained to Bess about this and also reprimanded Kirkhoff

¹⁵ Two evaluation reports (Resp Exhs. 1 and 2) were prepared by Fridlin, dated June 7, which stated both Pettigrew and Kirkhoff were terminated

¹⁶ This conversation was confirmed by Bess Bess also testified that she told Kirkhoff that if a union had been started she (Bess) would have been informed by either McGowan or Fridlin and that Kirkhoff had nothing to worry about

¹² McGowan testified that an evaluation of Kirkhoff's work had been prepared in February and that from that evaluation, made by Fridlin, it had been decided to discharge her. He relented when Kirkhoff asked for another chance

¹³ This was confirmed, in substance, by Brake. Leath was no longer in the employ of East and did not appear

¹⁴ This allegation is confirmed, in substantial part, by that of Irma Brake. Brake also testified to an incident, denied by Kirkhoff, in which Kirkhoff "teased" a patient, almost blind, identified as Mrs. Henderson.

and Kirkhoff were "some of the people" who were talking about it.

McGowan testified that he told both Fridlin and Bess at this meeting that a petition for an election had been filed at Midtown and that he expected union activity at East. He denied telling Bess that he had knowledge of union activity on the part of Pettigrew or Kirkhoff and denied that he had any such knowledge. He did have knowledge of or at least suspicion of union activity acquired from Fridlin who in turn had been told by Powers, a charge nurse, that an employee discharged the previous week had called Powers, told her there was union activity in the plant, and had asked if that was the reason for her discharge. Fridlin confirmed that at this meeting she told McGowan of her conversation with Powers and also testified that she had at that time no knowledge of any union activity on the part of Pettigrew or Kirkhoff. Contradicting Bess, she stated McGowan made no statement at this meeting that he was aware of union activity on the part of either Pettigrew or Kirkhoff.

The terminations were effected expeditiously. Pettigrew testified that she picked up her paycheck about noon on June 7 and then returned home. She reported to work for her shift about 2:30 p.m., went to the employees' dining room, and was told by Bess that McGowan was looking for her. She went to McGowan's office where McGowan and Fridlin were waiting and she was told by McGowan that she was being terminated. When she asked why she was told that she was the cause of tension among the second floor employees and was also told that she had some patient's property at her home. When she denied this McGowan made no reply but gave her 2 weeks' severance pay and told to leave the building without talking to anyone. On the way out she met Kirkhoff and told her what had happened. She had never before been accused of appropriating patient's property.

Kirkhoff testified that she met Pettigrew on her way in to reporting for work and that when she went in she was told by Fridlin that McGowan wanted to see her. She and Fridlin went to McGowan's office where he told her she was terminating her because she had caused "disharmony on the floor." On asking for further explanation she was told she was being let go and not to stay in the building and McGowan arranged to have his assistant, Mrs. Mikel, drive her home.

McGowan testified that Pettigrew and Kirkhoff were terminated for unsatisfactory work and were based on evaluations received on that day from Fridlin.¹⁷ There was no discussion of these evaluation reports with either dischargee. Nor was it explained why these evaluation reports were submitted on that day with respect to Pettigrew and Kirkhoff only or why these reports which were issued on the anniversary of an employee's last pay raise were made for Pettigrew and Kirkhoff on that particular day. (It was not established that this was their anniversary date.)

This summary does not include every detail of the testimony relating to the work performance of Pettigrew

and Kirkhoff or the reasons for their termination but it does embrace the substantial and material portions of such testimony. It is sufficient for the purposes of reaching decision.

Conclusions

Agreeing that the case is arguable and that reasonable men could reach contrary conclusions I find that Pettigrew and Kirkhoff were discharged in violation of Section 8(a)(3) of the Act for the following reasons.

I find Bess a truthful and credible witness. At the time of the hearing she was no longer in the employ of Respondents and was, in that sense, a neutral witness. It was true, however, that she seemed on good terms with management at East and that Pettigrew and Kirkhoff had caused her aggravation in the performance of her duties as charge nurse. There would be no reason for her to favor the dischargees but her testimony indicated to me that she was favoring no party; she was favoring the truth. I must credit, first, her testimony that after she asked Fridlin to come in and talk to Pettigrew and Kirkhoff about their feud on May 25 she made no further complaints. She was satisfied with the "cooling off" of their relations if not completely satisfied with their relations with the other aides on the second floor. The situation was no longer, as she described it, unbearable. I also credit her testimony that McGowan, when he told her what he had heard of union activity did state that he had heard Pettigrew and Kirkhoff were the leaders. While it is true that she did testify that she could not recall McGowan's words verbatim I cannot infer that this would include his specific mention of Pettigrew and Kirkhoff. (She was not specifically cross-examined on this point.)

As to the testimony of management, specifically McGowan and Fridlin, as to the poor and unsatisfactory work performance and the unharmonious relationships between Pettigrew and Kirkhoff and the other nurses this had all continued over some period of time prior to Fridlin's confrontation with them on May 25. Fridlin was satisfied on that date with their response that they had settled their differences and no overt act occurred after that date to cast doubt on their reconciliation. Fridlin did testify that after that date both Pettigrew and Kirkhoff came to her with complaints about each other but since Fridlin did not work their hours this testimony is dubious. Prior to May 25 Fridlin had relied on Bess for her information as to the second shift and her direct contacts with Pettigrew and Kirkhoff were infrequent.

Thus the sequence of events favors the conclusion that the dischargees were discriminatory. Fridlin was satisfied with the results of her interview with Pettigrew and Kirkhoff on May 25 and Bess thereafter made no complaints and, in fact, found the situation bearable. When, however, McGowan learned from Fridlin that there was union activity at the facility and learned that Pettigrew and Kirkhoff were involved in it¹⁸ they were precipitately discharged for conduct and performance relating back to a period prior to May 25.

While Bess testified that she could not remember McGowan's exact words at this meeting she did not retract her testimony that he identified Pettigrew and Kirkhoff as among those talking union

¹⁷ Resp. Exhs 1 and 2

¹⁸ This conclusion is based solely on the credited testimony of Bess that McGowan designated them by name during the noon conference on June 7

C. Stella Manning

Stella Manning was employed as a nurses aide at the Midtown facility from May 1970 until she was discharged on June 3, 1971. Her assignment was to the fourth floor and she worked from 8 a.m. to 4 p.m. Her charge nurse was Mrs. White or Viola Hackerd, who substituted as charge nurse.

In May 1971 she signed a union card at her home but engaged in no other union activity.

On June 2 Manning was assigned to assist in the feeder dining room where patients were served from 10 a.m. to 11 a.m.¹⁹ The aides, according to Manning, rotated some of their duties in accordance with a list prepared by Virginia Baker, director of nurses. On June 3 Manning was given a union button by another employee and put it on her uniform about 10 a.m. She testified it was about the size of a dime and that other aides wore similar buttons at work. On this morning Margaret Jacks, assistant director of nurses, called Mrs. White and instructed her to send Manning to the feeder room. She told White it was not her turn to go and when she was again told to go she went to see Fred Moon, the assistant administrator. She told him what had happened and he sent her back upstairs where she finished making her beds. Shortly thereafter Jacks came up to the floor, told her she was fired, and to get her hat and coat and leave. Manning went back again to Moon who called in Baker and Jacks, who told him Manning was fired for refusing to report to the feeder room. Moon, according to Manning, told them he thought it was a silly reason for firing her but the discharge struck. Manning testified that prior to this incident she had received no complaints or reprimands about her work.

Virginia Baker testified that she came to Midtown in January 1971 and had been employed as director of nurses since March 8. In her opinion standards of discipline and job performance had been lax at Midtown and she made efforts to correct this situation, including a reduction to writing of any incidents involving nurses aides. These would be kept by Baker and a copy placed in the aide's personnel folder.

Baker testified that on April 22 Manning came down from the fourth floor and sat down at the nurses' station on the third floor where Baker had her office. Told to report to the break area if she was on break or to return to work if she was not, Manning told her her (Manning's) work was finished. Directly ordered to return, Manning did but Baker stated she heard her cursing as she went down the hall. (The report of this incident was received as Resp. Exh. 10.) Baker had another conversation with Manning later that day in which she told Manning she was off the fourth floor too much, that complaints had been received from her coworkers and patients, and that she was subject to discharge if she did not improve. On May 28 Baker received a call for additional help from the dining rooms and when she found Manning making a bed on the fourth floor told her to report downstairs. When Manning

refused, Baker told her to go or go home. Manning then went down. (The report was received as Resp. Exh. 12.)

As to June 3, Baker testified that after Manning's refusal to report to the feeder room she and Jacks discussed her work and decided to terminate her and that both she and Jacks were present at the interview in Noon's office where Manning's shortcomings were reviewed. Manning stated that it was unfair to assign her to the feeder room so often, a charge that did not impress Baker. Under further examination Baker stated that she did not recognize a union button until after one had been pointed out to her and that she had not noticed Manning wearing one that day. She was aware that on or about June 2 the Midtown facility had received a letter from the Union demanding recognition.

Margaret Jacks testified that she had been employed by Midtown as assistant director of nurses since March, when Baker had been appointed director. On May 29 she received a page from the dining room that more help was needed. She called Mrs. Hackerd, on that day the charge nurse on the fourth floor, and Manning answered the call. She asked Manning to go to the dining room and when Manning refused because she had been there the day before she told Manning to either report or go home. Later Jacks passed the dining room and saw Manning helping out. (The report of this incident was received as Resp. Exh. 13.)

On June 3 Jacks had received another call from the dining room for help and that she called Mrs. White, then charge nurse on the fourth floor, and told her to send down an aide. Later White came down and told her Manning had refused to go. Jacks then told White to send Manning home, but Manning, according to Jacks, refused to go home. (This information she received from White.)²⁰ Jacks and Baker then conferred on Manning's record and decided to discharge her. Jacks then went to the fourth floor, found Manning making a bed, and told her she was terminated. It was then that the discharge "conference" took place in Moon's office at which time Manning's deficiencies were reviewed and during which, according to Jacks, Manning remained "rather mute."

Three other witnesses, Georgia Malone, a nurses aide, Ethel Morgan, a treatment aide, and Violet Hackerd, a substitute charge nurse, testified at some length to Manning's deficiencies particularly her habit of using the telephone for personal calls and visiting on the third floor.

Conclusions

I find, largely on the testimony of Baker and Jacks, that Manning was discharged for cause, chiefly a lack of cooperation amounting almost to insubordination. Baker had taken over as director of nurses in March and according to her own testimony proceeded to impose a stricter discipline upon the employees. She gave the impression of being something of a martinet and expressed a no-nonsense attitude toward effective performance.

After her initial warning to Manning to remain on her floor on April 22, Manning on May 28 refused to accept an

Jacks' testimony as to the facts related by White is hearsay and has been disregarded, except her testimony as to what White told her

¹⁹ The feeder dining room was on the second floor. Patients who required assistance with their meals were served there.

²⁰ White was no longer employed at Midtown and was not a witness.

order to report to the dining room until ordered by Baker to report or go home. On the next day Jacks ordered Manning to help in the dining room and again met a refusal on the ground Manning had been there the day before. Again she was given the option of working or going home and took the assignment. On June 2 Manning again worked in the feeder room. The next day when help was again required she refused to report and, as she testified, saw Moon and then went back upstairs where Jacks found her making beds. Baker and Jacks then decided to fire her.

Placing some emphasis upon the fact that a sterner discipline is required of those attending the sick and the aged that is customarily required in other service industries I think Manning's discharge was warranted. Had her union activity been more prominent and open the decision would be more difficult but it consisted only in signing a card at home. It is true that she put on a union button "about the size of a dime" just prior to her difficulties with Jacks on June 3, but that rather insignificant gesture was, according to Baker and Jacks, unnoticed.²¹ In any event it could not serve to establish an immunity against discharge for her own intransigence.

Upon the foregoing findings and upon the entire record in this case I make the following:

CONCLUSIONS OF LAW

1. By discharging two employees on June 7 for the

²¹ Other employees wore similar buttons that day

purpose of discouraging membership in a labor organization Respondent East facility violated Section 8(a)(3) and (1) of the Act.

2. The aforesaid unfair labor practices is an unfair labor practice within the meaning of Section 2(6) and (7) of the Act.

3. Respondent Midtown facility did not violate Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found the Respondent East facility engaged in and is engaging in certain unfair labor practices it will be recommended that it cease and desist from the same and take certain affirmative action necessary to effectuate the policies of the Act.

Having found the Respondent East facility discharged Gwen Pettigrew and Wilma Kirkhoff in violation of Section 8(a)(3) and (1) of the Act it will be recommended that it offer Gwen Pettigrew and Wilma Kirkhoff full and immediate reinstatement to their former jobs as nurses aides, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay or other monetary loss they may have suffered. Such loss is to be computed on a quarterly basis with interest at 6 percent per annum.

[Recommended Order is omitted from publication.]