Alle-Kiski Medical Center *and* United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC. Case 6–CA–32356 (1)(2)

June 23, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 24, 2002, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The General Counsel filed limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified[2] and set forth below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Alle-Kiski Medical Center, Natrona Heights, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully monitoring, photographing, videotaping, and engaging in surveillance of employees engaged in protected concerted activities;

(b) Confiscating union literature from employees.

(c) Maintaining and enforcing the following provisions of it policy number 800.085 issued January 6, 2000, regarding solicitation and distribution by its employees:

> Solicitation and distribution are prohibited during working time for both the employee soliciting and the employee being solicited. Employees are not allowed at anytime to solicit in patient areas. Employees are not allowed at any time to distribute printed materials, literature or handouts in any patient areas or other locations, including but not limited to the cafeteria or gift shop, where such activity may cause annoyance, harassment or embarrassment of patients, visitors or other employees or if such activity may cause littering, impede pedestrian traffic or otherwise interfere with efficient operations.

(d) Discriminatorily issuing written warnings to employees for violation of the aforementioned solicitation and distribution policy.

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

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

(a) Rescind and cease enforcing the aforementioned provisions of policy number 800.085 issued January 6, 2000, regarding solicitation and distribution by its employees.

(b) Rescind the written warning issued to Diane Lang on October 11, 2001, and, within 14 days from the date of this Order, remove from its files any reference to the unlawful warning, and, within 3 days thereafter, notify her in writing that this has been done and that the discipline will not be used against her in any way.

(c) Within 14 days after service by the Region, post at its facilities in Natrona Heights, Pennsylvania, copies of the attached noticed marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

[1] The General Counsel's exceptions are limited to the judge's recommended notice. There are no exceptions to the judge's findings on the merits.

[2] We shall revise the judge's recommended Order and notice to include the Board's standard language requiring the Respondent to rescind the unlawful written warning. We shall also delete the following paragraphs of the recommended Order: 1(e), which requires the Respondent to cease and desist from "(d)iscriminating against employees in regard to any term of employment to encourage or discourage membership in any labor organization"; 2(b), which requires the Respondent to return to employee Sharon Hugo the union literature that it confiscated from her; and 2(d) and (e), which require the Respondent to make employee Diane Lang whole and to preserve the records necessary for the computation of backpay. The language in these paragraphs is not part of the standard remedy for the violations found. See *Cooper Health System*, 327 NLRB 1159, 1165 (1999) (confiscation of union literature); *St. Joseph Hospital*, 337 NLRB 94, 95 (2001) (written warning). Finally, we shall modify the judge's recommended Order in accordance with our decision in *Excel Container*, 325 NLRB 17 (1997).

[3] In accordance with the General Counsel's limited exceptions, we shall include in the notice the standard "expunction" language with respect to the unlawful no-solicitation/no-distribution policy. See *Cooper Health System*, supra. We shall also correct the reference to unlawful "discharge" by substituting "written warnings," which is the specific discipline found unlawful here.

However, we shall not grant the General Counsel's request to include in the notice a paragraph stating that the Respondent will allow lawful solicitations and distributions on its property. This is not a standard remedy for maintaining and enforcing an overly-broad no-solicitation/no-distribution rule. See *Cooper Health System*, supra.

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

defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 29, 2001.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully monitor, photograph, videotape, or engage in surveillance of employees engaged in protected concerted activities.

WE WILL NOT confiscate union literature from employees.

WE WILL NOT maintain and enforce the following provisions of our policy number 800.085 issued January 6, 2000, regarding solicitation and distribution by employees:

> Solicitation and distribution are prohibited during working time for both the employee soliciting and the employee being solicited. Employees are not allowed at anytime to solicit in patient areas. Employees are not allowed at any time to distribute printed materials, literature or handouts in any patient areas or other locations, including but not limited to the cafeteria or gift shop, where such activity may cause annoyance, harassment or embarrassment of patients, visitors or other employees or if such activity may cause littering, impede pedestrian traffic or otherwise interfere with efficient operations.

WE WILL NOT discriminatorily issue written warnings to employees for violations of the aforementioned solicitation and distribution policy.

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

WE WILL rescind and cease enforcing the aforementioned provisions of policy 800.085 issued January 6, 2002, regarding solicitation and distribution by employees.

WE WILL rescind the written warning issued to Diane Lang on October 11, 2001, and, within 14 days of the Board's Order, remove from our files any reference to the unlawful warning, and WE WILL, within 3 days thereafter**,** notify her in writing that this has been done and that the discipline will not be used against her in any way.

ALLE-KISKI MEDICAL CENTER

Janice A. Sauchin, Esq., for the General Counsel.
Donald Ladlov, Esq. (Cohen & Grigsby), of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard by me on March 13, 2002, in Pittsburgh, Pennsylvania, pursuant to charges originally filed on October 12, 2001, and subsequently amended on December 19, 2001, against the Alle-Kiski Medical Center (the Respondent) by United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC (the Union). On December 20, 2001, the Regional Director for Region 6 of the National Labor Relations Board (the Board) issued a complaint based on the aforementioned charges. The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by maintaining an overly broad no-solicitation/no-distribution rule, confiscating union literature, unlawfully monitoring union activity, and discriminatorily enforcing its no-solicitation/no-distribution rule.

On January 3, 2002, the Respondent timely filed its answer, among other things, admitting the jurisdictional allegations, the labor organization status of the Union, the supervisory status of Ray Andra, director of human resources, and Michael Harlovic, director of nursing. The Respondent also admitted the supervisor status of two other employees, Lorraine Azzarone, Clinical Director, and Jim Gentile, supervisor/security.[1] The Respondent generally denied committing any unfair labor practices.

Based on my review and consideration of the entire record of this case and my observation of the witnesses and their de-

[1] The complaint averred that Azzarone and Gentile were titled nursing supervisor and director of security, respectively. The Respondent's answer corrected their position titles, but did not deny their supervisor/agent status with the hospital.

meanor, as well as the arguments and briefs of the General Counsel and the Respondent,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania not-for-profit corporation, with offices and facilities in Natrona Heights, Pennsylvania, has been engaged in the operation of an acute care hospital which provides in-patient and out-patient medical and professional services for the public. The Respondent admits, and I find, that in conducting its business operations during the last 12 months, it purchased and received at its facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent further admits, and I find, that is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find and conclude, that at all material times, that the United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a not-for-profit Pennsylvania corporation that employs over 1300 employees. It operates an outpatient physical therapy center, a nursing school, two outpatient phlebotomy drawing sites, and Allegheny Valley Hospital, where the occurrences at issue here took place.

Allegheny Valley Hospital (the hospital) is a 257-bed acute care hospital that provides a full range of inpatient and outpatient medical services. It is located on 1301 Carlisle Street, Natrona Heights, Pennsylvania. Hospital employees park in an adjacent parking garage (the garage lot), a parking lot (the lower lot), located downhill of the hospital, a lot located near the rear of the hospital (the rear lot), and a lot that is leased by the hospital (the Allegheny Ludlum or AL lot). The lower lot accommodates approximately 200 vehicles. The rear lot can accommodate between 50 and 75 vehicles, and the AL lot accommodates between 150 and 200 vehicles.

The hospital has several entrances. The main entrance is located near the front of the building and is used by patients, visitors, and employees. This is the primary entrance for patients and visitors. Patients are discharged through the main entrance (often assisted by a nurse for pickup in a vehicle standing by). In addition to the main entrance, employees may use between three and four employee entrances.[3] These employee entrances are rarely, if ever, used by patients and visitors.

The main entrance leads to the main lobby of the hospital. Notably, the hospital cafeteria is a located a few feet from the main entrance, off the main lobby. The hospital has a gift shop, but the record does not clearly indicate where it is located in the building but it seems to be on the first floor level near the main entrance. Patients, visitors, and employees patronize the cafeteria and gift shop.

B. The 8(a)(1) Violations

1. The alleged surveillance of employees engaged in union activity on August 29 and October 11, 2001

The complaint in paragraph 8 alleges that the Respondent, through its security officers acting under the direction of its Security Supervisor Jim Gentile, surveilled employees engaged in union activities on August 29 and October 11, 2001. To establish this charge, the General Counsel called as witnesses Matthew Lewis, Jack Allen, Diane Lang, and Karen Allen.

a. The alleged August 29, 2001 surveillance

Matthew Lewis testified that he is an organizer for the Union. He stated that he received a call from a nonprofessional employee working for an entity called Pro Lab who was interested in the Union. Lewis stated that after meeting with a group of employees and filing a petition for representation, he was informed that Pro Lab was owned and operated by the Respondent.[4] Lewis stated that the Union determined that Pro Lab employees were not an appropriate bargaining unit. Nevertheless, the Union decided to commence a campaign to gather support for the Union among the Respondent's nonprofessional employees working at the hospital.

According to Lewis, he and three other union organizers (Justin Toner, Sandy Thompson, and Terry Robinson)[5] on three separate occasions distributed union handbills to Respondent's employees on August 29, 2001. The first handbilling session was between 6 and 8 a.m., the second was between 2:30 and 4 p.m., and the last was between 10:30 p.m. and midnight. During the morning session, Lewis stated that the union organizers solicited employees around the garage lot; but initially two of the four organizers were handbilling within the lot. According to Lewis, a security guard approached the two organizers who were on the lot and escorted them off. Lewis said the guard stood and monitored the organizers for the remainder of the morning session.[6]

---

[2] The Charging Party did not submit a separate brief.

[3] There is no evidence or testimony regarding how many or with what frequency employees use the employee entrances or if any one is more popular than the others.

[4] Lewis did not specify when he received the telephone call from an unidentified phlebotomist employed at Pro Lab or when the Union actually commenced the campaign to organize the Respondent's employees. However, according to his testimony both these events evidently took place sometime before he and other union organizers handbilled on August 29, 2001. Lewis' handbilling activities are discussed below.

[5] Toner, Thompson, and Robinson did not testify at the hearing.

[6] Respondent's security guard Pam Scholl's August 29, 2001 incident report indicates that she was the guard that monitored the union organizers. In the report, Scholl notes that Security Supervisor Gentile ordered her to go to the lower lot to "check on people in garage lot handing out fliers." The report indicates that Scholl monitored the

Lewis stated that he and the other union organizers had been distributing union materials during the afternoon on August 29, 2001, for around 15–20 minutes when two security guards approached their area. According to Lewis, the two guards stationed themselves approximately 20 yards away and appeared to be videotaping and photographing their activities. Lewis stated that one guard seemed to be videotaping while the other was taking still photographs as Lewis and the other organizers distributed handbills. Lewis admitted that he was not sure if the guards were actually recording, but said that the video camera and the still camera were pointed in the direction of the union organizers for about 20 minutes while the organizers approached and offered handbills to employees exiting the lot.[7]

b. The alleged October 11, 2001 surveillance

Lewis stated that the Respondent again engaged in surveillance of employee union activities on October 11, 2001. According to Lewis, he and fellow Union Organizers Sandy Thompson and Justin Toner returned to the hospital on that day to solicit further union support; also, Jack Allen, the husband of employee Karen Allen, and employee Diane Lang volunteered to help in the effort. Lewis stated that between 6:30 and 8 a.m., and again in the afternoon between 2:30 and 4 p.m., the union organizers distributed handbills and authorization cards near the entrance to the garage lot; Jack Allen distributed materials near the entrance to the AL lot. According to Lewis, none of the October 11, 2001 solicitors set foot on hospital property.

Diane Lang testified that she has been employed by the Respondent for about 14 years, and that she distributed the union materials on hospital property near the main entrance to the hospital on October 11, 2001. Lang said that she purposefully approached only persons she knew to be employees of the hospital. Lang stated that after she had handbilled for about 20 to 30 minutes, Andra and a security guard approached her. According to Lang, Andra asked if she had union literature, to which she said, "[Y]es." Lang stated that Andra then told her she had to leave and that she was then escorted off the property by the guard. Lang said that she then walked down to the garage lot where the union organizers were soliciting and after a few minutes walked over to the AL lot where Jack Allen was. Lang stated that she was followed by a security guard as she walked from the garage lot to the AL lot and, as she left the AL lot to go to work, the same security guard who followed her to the AL lot stopped her before she could enter hospital property. According to Lang, the guard only let her pass after she identified herself as an employee. Lang said she was then stopped once again by Security Supervisor Gentile and another guard and again had to identify herself as an employee.[8]

Jack Allen testified that around 6:30 a.m. on October 11, 2001, security guard Palmer[9] parked her marked security Jeep in the AL lot where he was soliciting, about 20–30 feet away from where he was standing, and monitored his activities for about 30 minutes from inside the vehicle. He further testified that although 10 or 15 employees passed by him, none accepted a handbill.[10] According to Allen, employees looked over at the parked security Jeep and then refused the literature. Allen noted that several employees had accepted handbills before the guard arrived.

According to Allen, he and the union organizers also solicited on October 11, 2001, in the afternoon outside the lower lot. They distributed handbills and authorization cards to employees without incident.[11]

c. Legal principles applicable to the surveillance issue

It is well settled that an employer may lawfully surveil employees engaged in protected activities in the open, and on or near the employer's premises. *Roadway Package System*, 302 NLRB 961 (1991); *Southwire Co.*, 277 NLRB 377 (1985); *Porta Systems Co.*, 238 NLRB 192 (1978). In *Basic Metal & Salvage Co.*, 322 NLRB 462 (1996), the Board held that a supervisor's conspicuous observation of employees openly meeting with a union organizer approximately 100 feet away from the employer's property under an expressway was not unlawful because the employees did not attempt to conceal their activities.

However, if the conspicuous surveillance interferes with the lawful activity, then there may be a violation of Section 8(a)(1). In *Carry Cos. of Illinois*, 311 NLRB 1058 (1993), the Board affirmed the administrative law judge's finding that respondent violated Section 8(a)(1) of the Act when its supervisor and an off-duty police officer watched, from a distance of 2 or 3 feet, a union agent lawfully trying to distribute union literature. Significantly, the supervisor and off-duty police officer monitored

activities of the union organizers until 8 a.m. and gave Gentile a copy of the flier that was being distributed. According to Ray Andra, the Respondent's human resources director, no daily activity reports (which provide a detailed account of the guards' daily activities), are available for August 29, 2001, because these documents are only kept for 4 or 5 months. Scholl did not testify at the hearing.

[7] In response to Lewis' allegations regarding videotaping and photographing, Andra testified that Allegheny Valley Hospital did not own a video camera; however, Andra admitted that the security department owns a Polaroid camera. Andra stated that after conducting an internal investigation, he was unable to produce any photographs that were taken on August 29, 2001.

[8] Lang's testimony regarding a security guard being with Andra when he approached her near the main entrance, and the security guard escorting her off the property is supported by security guard Spicher's October 11, 2001 daily activity report. Lang's testimony, regarding a security guard following her from the garage lot the AL lot and then stopping her, is supported by security guard Palmer's daily activity report. See GC Exh. 4. Neither Spicher nor Palmer testified at the hearing.

[9] Jack Allen identified the guard as a woman named "Dawn" whom he had met previously during a social event. GC Exh. 4 indicates that the guard who surveilled union activities near the AL lot at the relevant time was named "Dawn Palmer."

[10] Jack Allen is not an employee of the Respondent; he is employee Karen Allen's husband. He acted as a volunteer for the organizing effort. Allen testified he was given to understand by Lewis that the Respondent's employees parked at the AL lot and walked from there to the hospital. Allen stated he approached people he surmised were employees of the hospital and asked them to accept the handbills.

[11] Security guard Ortmann's daily activity report supports Allen's testimony regarding the October 11, 2001 afternoon session. The report indicates that Ortmann was on duty at the time and that he monitored the solicitation taking place. The report indicates that Ortmann intermittently monitored the activities until 4:30 p.m. (See GC Exh. 4.)

the union agent for the duration of the solicitation period and the employees seemed intimidated by their presence.

With regard to surveillance through videotaping and photographing, the Board has generally found a lower threshold for holding an employer in violation of Section 8(a)(1). Although employers have the right to maintain security measures necessary to the furtherance of legitimate business interests during union activity, videotaping and photographing of the activity can only be justified if the surveillance serves a legitimate security objective, *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), or if the employer can demonstrate that it had a reasonable basis to believe misconduct would occur. *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir. 1976).

d. Discussion

The General Counsel contends that the Respondent, in addition to unlawfully monitoring employees engaged in protected activities, videotaped and photographed them on August 29, 2001. The General Counsel also contends that the Respondent unlawfully monitored the employees distributing and accepting handbills on October 11, 2001. The General Counsel maintains that the Respondent's actions constitute an unlawful surveillance of union activities in violation of Section 8(a)(1) of the Act.

The Respondent denies the General Counsel's allegations regarding its purported videotaping and photographing on August 29, 2001. It maintains that any monitoring that took place on August 29 and October 11, 2001, was not unlawful under the Act.

I note at the outset that the testimony of the General Counsel's witnesses is largely uncontested or corroborated by other evidence of record, except perhaps that relating to the alleged videotaping and photographing. With regard to the videotaping and photographing, the Respondent flatly denies Matthew Lewis' testimony. Ray Andra, the Respondent's human resources director, claimed that the hospital did not even own a video camera and that an internal investigation determined that no pictures were taken on August 29, 2001. Nevertheless, I find Lewis' truthful demeanor on the stand, coupled with consistency of his account of the events that took place on August 29 and October 11, 2001, to be highly credible. Therefore, I credit his testimony regarding his observations of the Respondent's videotaping and photographing on August 29, 2001.[12]

As noted above, videotaping and photographing of employees engaged in union activities can only be justified through a legitimate security objective or a reasonable belief that misconduct would occur. No legitimate security objective behind the videotaping was evident on this record, nor was one advanced by the Respondent. Moreover, the surrounding circumstances did not indicate any security risk posed by the union organizers. Notably, a security guard's August 29, 2001 incident report indicates that the union organizers who were initially on the lot peacefully left when asked. This report makes no mention of any further attempt by the solicitors to re-enter hospital property, and the record generally is devoid of any evidence suggesting that the union organizers entered or made any further attempt to enter hospital property to solicit. In my view, the record discloses no legitimate security objective to justify videotaping and photographing employees engaged in union activities. Generally, it is clear that the solicitation events were peaceful and that the solicitors were cooperative with security personnel.

Assuming, arguendo, that no videotaping or photographing took place, I would find and conclude that the Respondent nevertheless violated Section 8(a)(1) by unlawfully monitoring and observing employees on August 29 and October 11, 2001. As stated above, it is well settled that open surveillance of employees engaged in protected activities on or near the employer's premises is lawful. However, the surveillance may be unlawful if the manner in which it is done is so obtrusive and conspicuous as to interfere with the exercise of employees' Section 7 rights. In my view, the Respondent did not observe the union activity that was occurring near its property in an unobtrusive fashion. Rather, the Respondent sent uniformed security guards to stand watch over the activity. The guards stood (or parked) nearby and were in plain sight of employees passing by. One security guard even followed Lang to the parking lot and then back to the hospital. That the monitoring may have reasonably chilled the employees' Section 7 rights is evidenced by Lewis and Allen's credible testimony that employees seemed less willing and, in some circumstances, completely refused to accept union literature in the presence of the security guards.

On the above reasoning, I find that Respondent violated Section 8(a)(1) of the Act by unlawfully surveilling employees engaged in union activity on August 29 and October 11, 2001, as alleged.

2. The alleged confiscation of union literature from employee Sharon Hugo

The complaint in paragraph 9 alleges that the Respondent confiscated union literature from its employees. To establish this charge, the General Counsel called current employee Sharon Hugo.

Sharon Hugo[13] testified that on October 11, 2001, an unidentified security guard grabbed a prounion handbill out of her hands as she was exiting the lower lot in her car. She stated that she was stopped at the road, outside of the lot, checking for traffic when Lewis gave her the handbill. She stated that a guard then approached her car and took the handbill away from her saying, "these are illegal." (Tr. 51.)

Security Director Andra testified and admitted that one of the hospital's security guards did indeed take a handbill from Hugo, but maintained the confiscation was justified because the handbill was unlawfully distributed.[14]

With regard to confiscation of union literature, the Board has held that confiscation violates Section 8(a)(1) of the Act because it interferes with employees' protected right to receive

[12] Notably, my finding is buttressed by the Respondent's failure to call the security guards involved in observing Lewis and the other solicitors.

[13] Hugo testified that she has been employed as a cook by the Respondent for more than 6 years.

[14] Aside from Andra's testimony, the Respondent offered no further proof regarding the lawfulness of handbill's distribution.

union literature. *Romar Refuse Removal*, 314 NLRB 658 (1994). Further, confiscation is unlawful even where the union literature was unlawfully distributed. *NCR Corp.*, 313 NLRB 574 (1993).

The General Counsel contends that the guard's confiscation of union literature from Hugo's hands violated Section 8(a)(1) of the Act. The Respondent maintains the confiscation was not unlawful because the union literature was unlawfully distributed.

I fully credit Hugo's testimony about the incident, there essentially being no denial of the underlying facts by the Respondent.

Turning to the issue at hand, the Board has made clear that confiscation of union literature is a violation of Section 8(a)(1) because it interferes with employees' Section 7 rights. I find that the Respondent, through one of its security guards, unlawfully confiscated union literature from Sharon Hugo in violation of Section 8(a)(1) of the Act.

3. The alleged maintenance and enforcement of an unlawful no-solicitation/no-distribution rule

The complaint in paragraphs 10 and 11 alleges that the Respondent maintained and promulgated an overly broad and facially invalid no-solicitation, no-distribution policy.

It is undisputed that the Respondent's no-solicitation/no-distribution policy is outlined in a five-page, single-spaced document issued on January 6, 2000. In relevant part, the policy states:

> Solicitation and distribution are prohibited during working time for both the employee soliciting and the employee being solicited. *Employees are not allowed at anytime to solicit in patient areas. Employees are not allowed at any time to distribute printed materials, literature or handouts in any patient areas or other locations, including but not limited to the cafeteria or gift shop, where such activity may cause annoyance, harassment or embarrassment of patients, visitors or other employees or if such activity may cause littering, impede pedestrian traffic or otherwise interfere with efficient operations.* [GC Exh. 2 (emphasis added).]

"Patient areas" is defined as,

> Areas devoted to the care and treatment of patients or *readily accessible thereto.* Such areas include, *not by way of limitation*, the patient's room, diagnostic rooms, examination rooms, treatment rooms, operating rooms, nursing stations, *patient or visitor waiting areas, smoking area, all elevators used by patients and their visitors*, collection points for transportation of patients, patient care corridors, patient admission areas, discharge areas and solariums [emphasis added].

The policy further states, "The Human Resources Department is responsible for the interpretation of this policy and assisting Supervisors with administration of this policy." (GC Exh. 2.)

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), the Supreme Court held that hospitals may only prohibit all solicitation in immediate patient areas (areas devoted strictly to patient care). In areas other than immediate patient areas, such as lounges and cafeterias, solicitation during nonworking time must be allowed absent a showing of disruption to patient care. Thus, any no-solicitation/no-distribution rule in a hospital that prohibits all solicitation in areas other than immediate patient areas is in violation of Section 8(a)(1) of the Act, absent a showing of disruption to patient care.

In *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), the Court further developed its definition of "immediate patient areas" to include corridors and sitting rooms on floors of a hospital housing either patients' rooms or operating and therapy rooms. Not included are cafeterias, gift shops, and lobbies on the first floor of the hospital. In areas not characterized as "immediate patient areas," the hospital must demonstrate that the "needs of essential patient care" would be adversely affected in order to ban all solicitation.

The General Counsel alleges that the Respondent's no-solicitation/no-distribution policy is overly broad and facially invalid because it could reasonably be read to prohibit all employee solicitation on hospital property.

The Respondent, however, contends that the hospital's no-solicitation/no-distribution rule is not overbroad and does not prohibit all employee solicitation. In support of this position, Andra testified that employees could "distribute literature in nonpatient care areas during nonwork time. These areas include such places as locker rooms, restrooms, break rooms [and the smoking area]." (Tr. 138.)[15]

In my view, the Respondent's policy falls short of *Beth Israel's* requirement. Moreover, in fact, the Respondent offered no evidence of any disruption to patient care which could be attributed to soliciting and distributing materials by the unionists here. Verily, the Respondent offered no evidence of lower threshold annoyance, harassment or embarrassment, littering, or blocking of pedestrian traffic to justify its prohibition of solicitation during nonworking time in nonworking areas.

Therefore, I would find and conclude that the Respondent's no-solicitation/no-distribution rule is overbroad and is in violation of the Section 8(a)(1) of the Act on its face and by the Respondent's enforcement thereof.

C. The Alleged Discriminatory Enforcement of the Respondent's No-Solicitation/No-Distribution Policy: The 8(a)(3) Violation

The complaint in paragraphs 12, 13, and 15 alleges that the Respondent discriminatorily enforced its no-solicitation/no-distribution rule against its employee and thus interfered with, restrained, and coerced employees' exercise of their rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) and (3). To establish this charge, the General Counsel called Diane Lang and Karen Allen.

Lang testified that after being allowed to pass the security guards and enter the hospital, most of her workday passed without incident on October 11, 2001. However, towards the end of her shift, she was called into a meeting with Clinical Director Lorraine Azzarone and Director of Nursing Michael Harlovic at which she was issued a disciplinary warning for

[15] The General Counsel asked Andra to specify in greater detail what was and was not a patient area. Andra replied, "[A]ny area in which we have patients [is] normally deemed [a] patient area." (Tr. 140.) He went on to say the lobby, main entrance, cafeteria, and gift shop were patient areas because patients could be at any one of those locations.

violating the hospital's no-solicitation/no-distribution rule. The written warning (GC Exh. 10) stated that she violated the hospital's no-solicitation/no-distribution policy and that "employees are not permitted to solicit on hospital premises." The warning also stated that any future infractions might result in further disciplinary action and/or termination. Lang said that she refused to sign the warning and wrote in the employee comments section, "I was not aware of policy" and that she "left [the main entrance] when asked."

Lang also testified about numerous nonwork-related solicitations by employees on hospital property. According to Lang, Unit Supervisor Mary Stirland sells Avon products in the hospital and attracts customers by leaving catalogs in nurses' stations. Lang stated that purchased products are often left in the nurses' stations for pickup as well. Lang also described fliers advertising hoagie (see GC Exh. 12) sales to benefit a local high school that are kept on walls in patient areas during the school year. She stated that posters and attached mail-in post cards for the Society of Gastroenterology Nurses and Associates (SGNA)[16] are posted in patient areas. Lang also stated that a Survivor[17] pool sheet was kept in a patient area. Lang also testified that she saw Stirland and Azzarone's names among the many employees who paid to enter the pool. Lang stated that the Ladies Auxiliary annually held a book sale and Christmas tree raffle in the hospital lobby.[18] She stated that announcements for the book sale and raffle were posted throughout the hospital. Lang testified that six fully decorated Christmas trees were kept in the lobby as further advertisement for the raffle. As a final example of permitted solicitation, Lang stated that the American Cancer Society annually sold daffodils and recruited participants for its marathon in the main lobby and outside the cafeteria.[19]

Karen Allen[20] confirmed Lang's statements regarding unpunished and permitted solicitations in her testimony. Allen added that an employee also kept a Girl Scout cookie list in a patient area.

The Respondent called Andra to rebut the charges. Andra testified that Lang was not disciplined because of her union activities, but rather because she violated the hospital's no-solicitation/no-distribution policy. Andra distinguished between Lang's solicitation activities and other solicitations at the hospital by stating that the others did not violate the hospital's policy. Andra stated that Lang's activities near the main entrance at 6:30 a.m. were against the hospital's policy because they impeded pedestrian traffic.[21] However, he also stated that he was not aware of any patient complaints regarding Lang's activities. On examination by the General Counsel, Andra testified that although employees could not generally solicit in the hallways for extended period of times, members of the Ladies Auxiliary, "Daffodil Days, and the Cancer Society" were permitted to solicit. Andra did not deny that other solicitations pointed out by Lang did not occur.

Andra admitted that Lang was the first person disciplined under the hospital's no-solicitation/no-distribution policy. Andra also admitted that he had a "pretty good idea" (Tr. 167) that Lang was distributing union materials on the morning of October 11, 2001, but was not sure of it.[22] Andra denied Lang's assertion that he asked Lang if she was distributing union literature. Andra maintained that he merely asked her what she was distributing.

Andra also testified that he discussed the discipline of Lang with Harlovic and together they decided that a formal written disciplinary warning was appropriate under the circumstances.[23]

1. Discussion of applicable legal principles

In determining whether an employer has violated Section 8(a)(3) and (1) of the Act by encouraging or discouraging union membership by discrimination in regard to hire or tenure of employment or any term or condition of employment, the Board applies the analysis found in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel bears the initial burden of establishing a prima facie violation of the Act by "showing sufficient support that protected concerted conduct was a substantial or motivating factor in the employer's decision to discharge." Thus, a prima facie 8(a)(3) violation can be established by demonstrating that the employee engaged in a protected concerted activity, that the employer was aware of the activity, employer animus towards unionization existed, and there was a subsequent adverse impact on the employee's working conditions. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

Once a prima facie case is established, the burden shifts to the employer to demonstrate that the same decision would have been made in the absence of protected conduct. An employer cannot simply present a legitimate reason for its action, but must demonstrate by a preponderance of the evidence that it would have taken the same course of action against the employee regardless of the protected activity. *Kellwood Co.*, 299 NLRB 1026, 1028 (1990). It should be remembered that a preponderance of the evidence does not require that all evidence be favorable to the employer's position. *Merrilat Indus-*

[16] SGNA is a professional organization for nurses and endotechs that offers certification and courses. It also distributes regular news bulletins to members. See GC Exh. 13, a copy of a SGNA mail-in card of the type referred to by Lang.

[17] "Survivor" was a popular reality-based weekly television program in which one member of the cast was voted off each week. See GC Exh. 14, the Survivor pool with highlighted references to Stirland and Azzarone's participation in the pool.

[18] See GC Exh. 15, a copy of a Ladies' Auxiliary leaflet announcing a book sale.

[19] See GC Exh. 20, a copy of the Alle-Kiski Medical Center's Daffodil Day event sponsored by the American Cancer Society for March 20–22, 2001.

[20] Karen Allen stated that she has been employed by the Respondent as a unit secretary for than 25 years.

[21] Andra also stated, and Karen Allen confirmed, that many patients requiring surgery and other in-patient services checked into the hospital between 6:30 and 8 a.m.

[22] When pressed by the General Counsel, Andra said that he was pretty sure that Lang was soliciting union support because of the Union's earlier solicitation on August 29, 2001, and because he saw other union supporters soliciting near the parking lots that same morning.

[23] Neither Azzarone nor Harlovic testified at the hearing.

tries, 307 NLRB 1301, 1303 (1992). If the employer does not meet its burden, then its justification is considered pretextual and the employer is deemed to have unlawfully discriminated against the employee.

Under some circumstances, the Board will infer animus from the record as a whole, even in the absence of direct evidence. *Flour Daniel, Inc.*, 304 NLRB 970 (1991).

In *Funk Mfg. Co.*, 301 NLRB 111 (1991), the Board held that discrimination, in violation of Section 8(a)(3), may be inferred where a rule that is not routinely enforced is enforced against open and active union support. See also *Cooper Health System*, 327 NLRB 1159 (1999).

With regard to excepting charitable organizations from general no-solicitation/no-distribution rules, the Board has held that an employer may permit a small number of charitable organizations to solicit without violating the Act. *Hammery Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982). However, where the charitable exceptions occurred frequently and/or for an extended period of time, the Board has found discriminatory application of the no-solicitation/no-distribution rule in violation of Section 8(a)(3). *Albertson's, Inc.*, 332 NLRB 1132 (2000); *Price Chopper, Inc.*, 163 F.3d 1177 (10th Cir. 1998); *Great Scott, Inc.*, 39 F.3d 678 (6th Cir. 1994).

2. Discussion

The General Counsel contends that the Respondent discriminatorily enforced its no-solicitation/no-distribution rule in regard to the hire or tenure or conditions of employment of employee Lang in violation of Section 8(a)(1) and (3) of the Act. The Respondent denies this contention.

As a preliminary matter, I credit the testimony of both Lang and Allen. In my view, they both were very confident, answered all questions in a straightforward fashion, and their accounts were internally and externally consistent with each other.[24] I credit Lang's testimony over Andra's regarding whether Andra asked Lang if she was distributing union literature. It is very likely that Andra did ask Lang if she was distributing union literature. In my view, Andra's unwillingness to unequivocally say whether he knew that Lang was distributing union literature detracts from his credibility. Also, he seemed guarded and made qualifications throughout his testimony.

Accordingly, I find and conclude that the General Counsel established a prima facie case, under the *Wright Line* analysis, that the Respondent unlawfully discriminated against Lang. First, it is undisputed that Lang was engaged in solicitation in support of the Union.[25] Second, the General Counsel sufficiently established that the Respondent was aware of Lang's union activities. It is clear from the record that Andra knew of the Union's previous solicitation and saw other union solicitors around the hospital's parking lots. I believe he confronted Lang, knowing she was engaged in prounion solicitation. Third, the record as a whole demonstrates the Respondent's animus towards the Union. Notably, support for union animus is amply provided in my above findings of 8(a)(1) violations by the Respondent. Finally, there was an adverse impact on Lang's employment conditions because she was issued a formal warning and now has a blemish on her previously untarnished employment record.[26]

The Respondent's principal defense to the discrimination charge is that it uniformly enforces its no-solicitation/no-distribution rule. The Respondent claims that other organizations and individuals were allowed to solicit on hospital property because those solicitations were not contrary to the hospital's no-solicitation policy, while Lang's activities violated the policy. The Respondent argues that the fact that Lang was engaged in union activities was not a consideration in her discipline.

However, as I have previously herein found, the Respondent's no-solicitation/no-distribution policy is overly broad. The policy, as written, does not make any clear differentiation between Lang's solicitation and the types of solicitation permitted by the Respondent. In my view, the only perceivable distinction between Lang's activity and permitted solicitation is that Lang was soliciting in favor of the Union. It thus cannot be gainsaid that Lang's union activities had no part in the Respondent's decision to discipline her.

In its brief the Respondent cited a General Counsel memorandum[27] that purportedly outlined the Board's policy regarding permissible charitable exceptions to a general no-solicitation/no-distribution rule. However, according to Board law, these exceptions do not apply where the charitable solicitation occurred frequently and/or for an extended period of time. The record here clearly demonstrates that the Cancer Society, Ladies Auxiliary, and daffodil sales solicited for extended periods of time on an annual basis. Also, Lang cited, with no rebuttal, several examples of permitted noncharitable solicitation by the Respondent (e.g., Avon products being sold in nurses' stations and a Survivor pool). Thus, the Respondent's argument regarding charitable exceptions[28] is also rejected.

Accordingly, I would find and conclude that the Respondent violated Section 8(a)(1) and (3) of the Act in disciplining Lang on October 11, 2001.

CONCLUSIONS OF LAW

1. Alle-Kiski Medical Center, the Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[24] It should also be noted that the security guards' daily activity reports corroborated Lang's testimony.

[25] The Respondent did not argue that Lang's solicitation was not a protected activity under the Act.

[26] Lang testified that she had never received a disciplinary warning prior to October 11, 2001.

[27] The cited memorandum was described by the Respondent as Office of the General Counsel Memorandum GC 01-06 re: Fundraising Following Recent Tragedy (September 28, 2001). A copy was not provided in the brief. I was unable to find a copy of this policy. I have relied instead on the Board authority cited herein to resolve this issue.

[28] It should be noted that the Board's exceptions apply to otherwise lawful no-solicitation/no-distribution rules. I have determined that the instant policy is unlawful in its entirety.

3. By monitoring employees engaged in union activities, through its security guards, the Respondent violated Section 8(a)(1) of the Act.

4. By maintaining and enforcing an overly broad, facially invalid no-solicitation/no-distribution rule, the Respondent violated Section 8(a)(1) of the Act.

5. By confiscating union literature from an employee, the Respondent violated Section 8(a)(1) of the Act.

6. By disciplining employee Diane Lang because of her union activities in order to discourage employees from engaging in these and other protected activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

7. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. For purposes of the present order, the Respondent has not violated the Act in any other way, manner, or respect.

REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act and post the appropriate notice to its employees.

It is recommended that the Respondent rescind the written discipline issued to employee Diane Lang; remove any reference to her discipline from all of the Respondent's records; and make her whole for any loss of earnings and benefits she may have suffered as a result of the Respondent's discrimination against her, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any net earnings, plus interest as computed in accordance *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, that the Respondent rescind its solicitation and distribution policy consistent with the findings and conclusions herein stated.

[Recommended Order omitted from publication.]