

**Union of Security Personnel of Hospitals and Health Related Facilities and International Brotherhood of Security Personnel, Officers & Guards, its Successor and alter ego (The Church Charity Foundation of Long Island, Inc., St. John's Episcopal Hospital-South Shore Division) and Jeffrey Pinkney.** Case 29-CB-4450

26 August 1983

### DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 30 November 1982 Administrative Law Judge Steven Davis issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and International Brotherhood of Security Personnel, Officers & Guards (Respondent Brotherhood) filed a reply brief.

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,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### 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 and hereby orders that the Respondent, Union of Security Personnel of Hospitals and Health Related Facilities, its officers, agents, and representatives, shall take the action set forth in said recommended Order.

IT IS FURTHER ORDERED that the complaint insofar as it pertains to International Brotherhood of Security Personnel, Officers & Guards be, and it hereby is, dismissed.

<sup>1</sup> We agree with the Administrative Law Judge's finding, for the reasons set forth by him, that Respondent Brotherhood is not a successor or alter ego of Respondent Union of Security Personnel of Hospitals and Health Related Facilities (Respondent USP) and that Respondent Brotherhood had no duty to represent employee Jeffrey Pinkney concerning his grievance inasmuch as Pinkney was discharged 7 months before Respondent Brotherhood's representative status arose as a result of certification by this Board. We therefore find that while Respondent Brotherhood had knowledge of Respondent USP's unfair labor practices as to Pinkney, it is not liable for any of the backpay which the Administrative Law Judge properly ordered Respondent USP to pay to make Pinkney whole for any loss he may have suffered as a result of Respondent USP's violations of Sec. 8(b)(1)(A) of the Act.

### DECISION

#### STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge: Pursuant to a charge filed on February 2, 1981, by Jeffrey Pinkney, a complaint was issued by the Regional Director for Region 29 of the National Labor Relations Board on October 28, 1981. The complaint, as amended at the hearing, alleged that Union of Security Personnel of Hospitals and Health Related Facilities, herein called USP, and the International Brotherhood of Security Personnel, Officers & Guards, herein called Respondent Brotherhood, failed to file a grievance or file for arbitration concerning the discharge of Pinkney and have therefore unlawfully failed to properly represent him in violation of Section 8(b)(1)(A) of the Act. The complaint also alleges that Respondent Brotherhood is and has been the successor and alter ego of USP.

Respondent Brotherhood filed an answer and was represented at the hearing by its president, L. Joseph Overton. USP did not file an answer and made no appearance at the hearing.<sup>1</sup> The hearing was held before me on June 14, 17, and 18, 1982.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by Respondent Brotherhood, I make the following:<sup>2</sup>

#### FINDINGS OF FACT

##### I. JURISDICTION

The Employer, The Church Charity Foundation of Long Island, Inc., a not-for-profit New York corporation, has been engaged in the operation of a voluntary hospital called the St. John's Episcopal Hospital-South Shore Division, located at 327 Beach 19 Street, Far Rockaway, New York. During the past year, in the course of its operations, the Employer derived gross revenues in excess of \$250,000, and during that period it purchased and received at its Far Rockaway hospital supplies and medicines valued in excess of \$50,000 directly from points outside New York. I accordingly find and conclude that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATIONS

The evidence establishes that USP and Respondent Brotherhood are labor organizations within the meaning of the Act. Both organizations: (a) have been certified by the Board to represent employees following Board elections; (b) admit employees to membership; (c) have collective-bargaining agreements with employers; (d) have offices for the conduct of business; and (e) represent employees for the purpose of collective bargaining.<sup>3</sup>

<sup>1</sup> USP was properly served with the charge and the complaint.

<sup>2</sup> The material facts involved herein are not at issue.

<sup>3</sup> USP filed its constitution and bylaws and certain annual reports with the U.S. Department of Labor.

I accordingly find and conclude that USP and Respondent Brotherhood are labor organizations within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Facts

##### 1. Events relating to Overton and Pinkney

L. Joseph Overton began to work for USP on a consultant basis in late 1977 or 1978. His duties were to give advice and assistance to USP regarding contracts and grievances and he would sometimes accompany USP officials to bargaining sessions. Overton continued acting in this capacity for USP until about April 1981 at which time USP President Victor Creightney decided that he no longer wanted Overton's assistance. Overton, who was never a member or officer of USP, was paid his expenses by USP and was not a salaried employee of that Union.

On July 11, 1978, USP was certified by the Board to represent the security guards employed by the Employer at the Far Rockaway location, and on January 23, 1979, the Employer and USP entered into a collective-bargaining agreement, which ran from June 23, 1978, to December 31, 1980. Overton did not participate in negotiations for that contract. Participants for USP included shop steward Kenneth Signer and alternate steward James Aulissio.

Jeffrey Pinkney was hired by the Employer in January 1979 as a messenger, and was promoted to security guard in August 1979. He was a member of USP, but never held office nor was a candidate for office in USP.

On August 18, 1980, Pinkney was ordered to search for and apprehend two trespassers in the hospital.<sup>4</sup> Upon locating the two men he ordered them to place their hands against the wall. One, Larry Bryant, complied with that command but the other, John Bryant, did not and began moving toward the exit door while at the same time placing one hand behind his back. At that time Larry Bryant took his hands from the wall and also placed one hand behind his back. Pinkney then hit John Bryant with his nightstick and placed them both under arrest. New York City Police arrived shortly thereafter and issued summonses to the Bryants. Pinkney filled out an incident report in which he stated that he struck John Bryant.

Pinkney did not report to work on August 19 because his wife was in labor.

On August 20, shop steward Kenneth Signer phoned Pinkney who related the incident to him. Signer asked Pinkney if he was in any danger during the confrontation and Pinkney replied that he was not. Signer then said that Pinkney "implicated" himself in "doing wrong" by recording in the incident report that he hit one intruder. Signer then asked Pinkney to call Director of Security Artie Ellis. Pinkney called Ellis and told him the facts of the episode. Ellis responded that Pinkney was suspended pending his investigation of the event. Pinkney then immediately called Signer and told him that he had just

been suspended. Signer stated that he would contact USP regarding his suspension.

The following day, August 21, Ellis called Pinkney and told him that he was discharged. Pinkney told Ellis that he hit John Bryant because he did not move fast enough. Pinkney immediately called steward Signer and told him that he had been fired. Signer replied that he had been trying to call the Union, and had left his (Signer's) name and phone number with the Union's answering service. Signer promised to call Pinkney with any news.

The same day, August 21, the Employer sent a registered letter to USP advising it that it had terminated Pinkney "due to the fact that he again exhibited very poor judgment in the execution of his duties." A postal receipt for the letter indicates that it was received by USP on August 29.<sup>5</sup> The reason for the discharge as set forth on the counseling report form was the use of unnecessary force, in "complete disregard of departmental procedures," to subdue an unauthorized visitor in the hospital.<sup>6</sup> When Pinkney came to the hospital on or about August 26 to pick up his check, he was asked to sign the counseling form. He refused, having been previously warned by Signer not to sign anything. Pinkney did not ask that a union representative be present at that meeting and none was there.<sup>7</sup>

In the last week in August, Pinkney phoned steward Signer and asked him the status of his case. Signer replied that he had still been unable to speak with the union officials. Signer told Pinkney the phone number of USP. Pinkney immediately called the Union and left his name and phone number with the Union's answering service. He called each day thereafter until finally, on September 4, he spoke with USP Treasurer John Gourdine. Pinkney told him that he had been discharged and related part of the incident to him. Gourdine interrupted Pinkney's recitation of the story and asked whether Pinkney hit Bryant because he did not listen to him. Pinkney denied that that was the reason for striking the man. Gourdine then said: "I will get this thing into arbitration and see how far we can go with it," and that he would contact Pinkney with any news.

In late September, Pinkney called Gourdine and told him that he was trying to receive welfare benefits and needed a letter from USP stating whether his medical benefits from the Employer had terminated with his discharge. On October 1, Gourdine sent a letter to Pinkney which stated that he:

... was terminated August 21, 1980 [sic] his medical coverage ended the last day in August 31, 1980.

<sup>5</sup> The parties' contract provides that the Employer must notify the Union within 48 hours of a discharge, and that if the Union desires to contest the discharge it must give written notice thereof to the Employer within 10 working days from the date of receipt of the notice of discharge.

<sup>6</sup> The form also stated, "due to this incident and a previous warning and suspension because of your use of poor judgment you are being terminated." Pinkney denied that that sentence was included on the form that he was asked to sign on August 26.

<sup>7</sup> Ellis told him then that he was being discharged for not following hospital procedures and for endangering the lives of patients and hospital employees.

<sup>4</sup> One of the persons had been treated, minutes before, in the Employer's emergency room.

It is not known how long his case will be in Arbitration.

In mid-October 1980, Pinkney received a phone call from L. Joseph Overton who identified himself as "president of the union."<sup>8</sup> Overton asked him to relate the August 18 incident and Pinkney did so in part, but was interrupted when Overton asked whether he hit Bryant because he was not following his order. Pinkney denied striking Bryant for that reason. Overton then asked for Pinkney's opinion of steward Signer. Pinkney replied that he could not trust Signer. Overton promised to call Pinkney with any news about the case and gave his phone number to him.

On October 6, Victor Creightney, president of USP, sent a letter to the Employer requesting that negotiations begin for a renewal contract to replace the agreement which was to expire on December 31.

Sometime in October, Employer Personnel Director Patricia Melis was meeting with employer attorney Lamberti in Melis' office at the hospital. Overton appeared at the office and said that he was representing USP and was authorized by USP to "facilitate" a merger between USP and Respondent Brotherhood and to negotiate a contract between the Employer and Respondent Brotherhood. Lamberti replied that he did not know who Overton was or who he represented and further stated that the Employer could not negotiate a contract with Respondent Brotherhood because it already had an agreement with USP. Overton then produced a letter signed by Creightney, which stated:

This is to inform you that Mr. L. Joseph Overton has been authorized by me to do whatever possible to implement the merge [sic] between the Union of Security Personnel and the International Brotherhood of Security Personnel, Officers and Guards; and during the interim he is also authorized to handle, on behalf of U.S.P., whatever grievance [sic] may arise between management and our members. He is also authorized to notify all employers of our intent to negotiate new contracts, prior to the expiration of those contract, [sic] now in existence.<sup>9</sup>

Lamberti refused to negotiate with Overton.

On December 27, Pinkney phoned Signer and asked for the status of his case. Signer replied that he did not know anything about its status. Pinkney then called the Union at the phone numbers previously given to him by Signer and Overton and left messages for Gourdine and Overton to call him. He received no calls from either man.

On December 30, a meeting was held in Personnel Director Melis' office. Present were Melis, employer attorney Gerard Fishberg, shop steward Signer, USP President Creightney, USP Treasurer Gourdine, Overton, and Ivan Ford, organizer. The purpose of the meeting was to

negotiate a renewal agreement with USP and to discuss a grievance relating to Signer's suspension the day before.

Overton announced at the meeting that he was present: (a) as an organizer and consultant for USP and (b) to negotiate a contract on behalf of Respondent Brotherhood. Overton added that his "other union," Respondent Brotherhood, was "taking over" the USP contracts, and that five hospitals had agreed to permit Respondent Brotherhood to negotiate a renewal agreement with it. Overton requested that the Employer negotiate renewal agreement with Respondent Brotherhood. Attorney Fishberg replied that the Employer could not negotiate with Respondent Brotherhood inasmuch as it is a different union than USP, with which the Employer had a contract. Overton replied that USP and Respondent Brotherhood are merging, "they are one and the same" and it was therefore permissible to negotiate with him. Fishberg stated that the USP and Respondent Brotherhood are two separate unions and he refused to negotiate with Overton or Respondent Brotherhood until a Board election was held in which the employees selected Respondent Brotherhood as their representative. Overton agreed to file a petition for an election with the Board. Signer's grievance hearing was postponed to January 21. There was no mention on December 30 of Pinkney's grievance.

On January 2, 1981, Respondent Brotherhood filed a petition to represent the security guards at the Employer.<sup>10</sup> Overton signed the petition as president of Respondent Brotherhood and stated thereon that Respondent Brotherhood requested recognition in November 1980 and such request was declined on December 30, 1980.

On January 12, Pinkney called Overton and asked for the status of his case. Overton replied that there was no news yet, and asked Pinkney to meet him that day at Brookdale Hospital to discuss his case. Overton mentioned that he would be at the Employer on January 14 and Pinkney asked if they could meet there on that day. Overton agreed.

On January 14, Overton met Pinkney briefly, told him that he was late for another meeting and could not talk to him then and asked Pinkney to call him later.

Pinkney called Overton the following day, January 15. Overton told him that a grievance hearing was to be held for steward Signer on January 21 and that he (Overton) "would see if he could get [Pinkney's] arbitration case heard" at that time. Overton asked Pinkney to meet him at the Employer's premises on January 21. Also on January 15, Pinkney prepared and mailed to Treasurer Gourdine at USP a written statement of the August 18 incident and his later conversations with Signer and Security Director Ellis.

On January 19, a conference was held at the Board regarding the petition filed by Respondent Brotherhood. The Board agent insisted that because USP was the incumbent union its name must appear on the ballot with Respondent Brotherhood. A Stipulation for Certification Upon Consent Election was then executed by Gourdine,

<sup>8</sup> Overton did not say whether he was president of USP or Respondent Brotherhood.

<sup>9</sup> An identical letter was sent to Melis on November 24, 1980.

<sup>10</sup> Case 29-RC-5251.

the treasurer of USP, and Overton, president of Respondent Brotherhood.

The following day, January 20, Pinkney called Overton to confirm their meeting the next day. Overton advised him that the Signer hearing was postponed to January 27. They agreed to meet at the Employer then.

On January 26, Pinkney phoned Personnel Director Melis and asked whether his arbitration case would be heard the following day. Melis replied that no grievance was filed by him or the Union protesting the discharge. Pinkney said that he did not know that he was required to do so. Melis stated that the Employer could not hear his case because it was untimely and asked who told him that he was to have a hearing on January 27. Pinkney answered that Overton told him that. Melis then said that Gourdine would call him. Pinkney then immediately called Overton and left Melis' name and phone number. Later that day Overton called Pinkney. Pinkney asked him if their meeting was still set for the next day. Overton said that it was, adding that "we will see if we can get this arbitration case heard," and if the Employer refused to hear the case, "we" would have to take the Employer and Union to court.

The following day, January 27, Signer's grievance was heard by the Employer. Overton, who was present at the meeting, announced that he wanted to grieve Pinkney's discharge. Personnel Director Melis replied that the grievance was untimely because Pinkney was dismissed 5 months earlier. Overton asked Melis to write him a letter concerning that and to include a copy of the counseling report form. Overton met with Pinkney outside the hospital that day and reported that the Employer refused to schedule an arbitration hearing. Overton advised Pinkney to sue the Employer and Union.

Two days later, on January 29, Melis sent the counseling report form for Pinkney to Creightney, president of USP. A covering letter stated that "no grievance has been filed and our position is that any further action will be untimely."

On February 2, Pinkney filed the charge in this proceeding. On February 17 an election was held. Of the 14 votes cast, Respondent Brotherhood received 8 votes, USP received no votes and "neither" labor organization received 6 votes. Signer served as the observer for Respondent Brotherhood, and James Aulissio signed the tally of ballots for that Union, which was certified by the Board on March 12, 1981. Present for Respondent Brotherhood at negotiations for a contract included Overton, Gourdine, Signer, and Aulissio. A contract was executed on May 27, 1981, between the Employer and Respondent Brotherhood, effective from July 1, 1980, to June 30, 1983.<sup>11</sup>

On January 18, 1982, Pinkney phoned Melis and inquired about the possibility of reinstatement to a position other than security guard.

On January 25, Pinkney sent a letter to Melis confirming their conversation, and also sent a letter to Overton asking him to support Pinkney's request for reinstatement to a different department. Pinkney offered to withdraw

<sup>11</sup> At the execution session, Overton accused Signer of agreeing to the final terms of the contract without his approval. Overton authorized Signer to sign the agreement which he did.

his charge against the Union if he received Overton's help in being reinstated, and if Overton negotiated for backpay for him. In response to these letters, Pinkney received a letter from Melis in which she stated that he was terminated for cause and would not be reinstated to any position at the Employer's premises. Overton replied that Respondent Brotherhood has "no jurisdiction or involvement in your problem at all," but he had no objection if the Employer reinstated him.

## 2. The status of the Unions

There was some evidence relating to the status of USP, Respondent Brotherhood, and another union, also called the International Brotherhood of Security Personnel, Officers & Guards (herein called Brotherhood 2).

Victor Creightney and John Gourdine were elected president and treasurer, respectively, of USP in 1977 for 3-year terms.

In March 1980, an election was held in which Lancelot Webb ran for the presidency.<sup>12</sup> Upon a complaint, the U.S. Department of Labor investigated the election, found certain irregularities, and directed that a new election be held.

On June 24, 1980, Webb filed charges with the Board against the League of Voluntary Hospitals and Respondent Brotherhood, alleging that the League unlawfully recognized Respondent Brotherhood as the successor to USP at a time when Respondent Brotherhood did not represent an uncoerced majority of its "membership."<sup>13</sup> Webb alleged that USP and Respondent Brotherhood improperly merged the two Unions in order to deprive him of his election victory and that Overton represented to certain employers under contract with USP that he was the president of the merged Union and was negotiating with those employers on behalf of the merged Union.<sup>14</sup> The charges were dismissed by the Acting Regional Director for Region 2.

Gourdine testified that the executive board of USP voted for a resolution to merge USP and Respondent Brotherhood, but there has never been any election by members regarding such a merger and the two Unions have never actually merged.

Gourdine further testified that sometime before he left USP's membership in April 1982 the members of USP voted to merge that Union with Brotherhood 2, and those two Unions merged. That merger is currently under investigation by the U.S. Labor Department. The office, files, records, and equipment of USP were moved to the office of Brotherhood 2,<sup>15</sup> and USP and Brotherhood 2 jointly represent the employees of five employers who had formerly been represented by USP alone.<sup>16</sup>

<sup>12</sup> Creightney and Gourdine did not run for reelection.

<sup>13</sup> Cases 2-CA-17343 and 2-CB-8398.

<sup>14</sup> Indeed, in the instant case Overton sought to bargain with the Employer and represented that a merger of USP and Respondent Brotherhood had taken place or was about to occur.

<sup>15</sup> If one were to telephone the original phone number of USP, he would be connected to the offices of Brotherhood 2, to which USP moved.

<sup>16</sup> Those five employers are not the same as the five employers which Overton claimed on December 30 permitted him to negotiate a renewal contract.

The officers or agents of Brotherhood 2 or the merged Union are Ivan Ford and Caswell Bennett. Gourdine stated that Bennett previously held office in USP but Ford was never an agent or representative of that Union.<sup>17</sup> Gourdine did not believe that Overton was connected with Brotherhood 2. Overton and Signer did not testify.

#### B. Discussion and Analysis

The General Counsel asserts that USP failed to properly represent Pinkney as to his discharge by the Employer. She argues that USP clearly violated Section 8(b)(1)(A) of the Act in that regard, and moreover asserts that Respondent Brotherhood also violated the Act as the successor or *alter ego* of USP. The General Counsel argues that Respondent Brotherhood is a successor or *alter ego* of USP because Gourdine, Overton, and Signer represented themselves to the Employer and Pinkney as agents and representatives of USP prior to March 12, 1981, the date of Respondent Brotherhood's certification by the Board, and in addition later held themselves out subsequent to March 12, 1981, as agents and representatives of Respondent Brotherhood. The General Counsel specifically alleges that "since on or about a date presently unknown in 1980, Respondent [Brotherhood] and USP have had common officers and agents and common goals and purposes in their operations and administration as labor organizations, and Respondent [Brotherhood] has operated as the successor and *alter ego* of USP."

Respondent Brotherhood denies that it is the successor or *alter ego* of USP and further asserts that its obligation to represent the employees of the Employer did not arise until March 12, 1981, when it was certified by the Board—7 months after Pinkney's discharge. It therefore argues that it had no duty to represent Pinkney.

##### 1. The status of Respondent Brotherhood as successor or *alter ego* of USP

The Board stated in *Teamsters Local 294 (Gene Graham Ford)*:

In deciding whether a union is a successor to another union in any particular unit, the Board looks to a number of factors, including whether democratic procedures have been followed in any vote on affiliation or merger, whether the new organization has succeeded to the assets and liabilities of the predecessor, whether the employees in the bargaining unit have had an opportunity to register their desires, and whether there is a continuity in the leadership and representation of the employees in the bargaining unit.<sup>18</sup>

The Board has found that one union is a successor and *alter ego* of another union where earnest efforts were made "to maintain the continuity of the constituent unions"; "[P]rovision was made for transferring all assets and liabilities, and for preserving representative status

and contractual obligations," the successor union, Oil Chemical and Atomic Workers (OCAW), "assumed the contractual and other responsibilities of the constituent unions"; OCAW was "responsible for all the debts, liabilities, obligations, and duties of the constituent unions"; and "after the consolidation, all the assets and liabilities of the constituent unions were merged into single accounts in the name of OCAW, and the deeds of all property owned by the constituent unions and their locals were changed to the new name." In these circumstances, the Board found "that OCAW is acting as the *alter ego* of the constituent unions not only in acquiring their assets and bargaining rights, but also in assuming their liabilities and the responsibility for carrying out their contractual obligations"; "that the consolidated organization was a continuance of the certified unions"; and that OCAW "has succeeded to the status of that organization [the Gas Workers] as the duly designated bargaining representative of the Respondent's employees."<sup>19</sup>

The evidence is insufficient to find that Respondent Brotherhood is a successor or *alter ego* of USP.

There is no evidence that USP and Respondent Brotherhood actually merged. USP treasurer Gourdine testified that no merger actually took place between those Unions.

Notwithstanding the undenied, credited testimony of employer witnesses Fishberg and Melis that Overton told them that he was authorized to facilitate a merger between the two Unions, that Respondent Brotherhood was "taking over" the USP contracts, and that the two Unions were "one and the same," there is no evidence that a merger of the two Unions took place. Although it is true that Overton acted in behalf of USP regarding grievances and contract negotiations during the term of the USP contract, he functioned in the capacity of consultant to USP, was paid his expenses, and was not an officer or even a salaried employee of USP.<sup>20</sup> The reports filed by USP with the U.S. Department of Labor covering the period from April 1, 1976, to March 31, 1981, do not list Overton as being an officer of USP at any time.<sup>21</sup> Moreover, those documents establish that USP existed as a viable, separate organization during that period of time with its own assets, liabilities, officers, and office.

I find no evidence that Respondent Brotherhood is a successor or *alter ego* of USP upon the facts that employees Signer and Aulissio, who were formerly the shop steward and alternate steward, respectively of USP, represented Respondent Brotherhood at the February 17, 1981, election or that Signer later signed the contract in behalf of Respondent Brotherhood. The status of Signer

<sup>18</sup> *National Carbon Co.*, 116 NLRB 488, 500-502 (1956). See also *American Enka Co.*, 231 NLRB 1335, 1336 (1977).

<sup>20</sup> When Overton asked Personnel Director Melis, in January 1981, to send him a letter regarding Pinkney, she sent the letter to the attention of USP President Creightney at the USP office.

<sup>21</sup> I do not credit Pinkney's testimony that he saw Overton's name on a ballot for an office in USP. Pinkney could not recall which office Overton was a candidate for and was vague about the date of the election. The overwhelming evidence, as testified by Gourdine who was an officer of USP, was that Overton was never a candidate for office in USP.

<sup>17</sup> As set forth above, Ford appeared at the negotiating session on December 30, 1980, and identified himself as an "organizer."

<sup>18</sup> *Teamsters Local 294 (Gene Graham Ford, Inc.)*, See *Lord Jim's*, 259 NLRB (1982), and cases cited therein.

and Aulissio as stewards were apparently carried over, at least temporarily, by the new certified representatives of the Employer's employees. There is no reason that because they acted in the capacity of stewards for the employees under the USP contract, they cannot do so for the employees under the contract with Respondent Brotherhood. Nor do I find any such evidence of successorship or *alter ego* status in the fact that Gourdine, the treasurer of USP, was present in April and May 1981 at several negotiating sessions for a contract between the Employer and Respondent Brotherhood and was also present at the contract execution. No evidence was adduced as to what, if anything, Gourdine said at any of these meetings or as to his reason for being there. Moreover, there is no evidence that Gourdine was an officer, agent, or representative of Respondent Brotherhood.<sup>22</sup>

The evidence indicates that USP continued in existence after Respondent Brotherhood was certified on March 12, 1981, and executed a contract with the Employer on May 27, 1981. Thus, the report filed by USP with the Department of Labor on January 19, 1982, for the period up to March 31, 1981, indicates that USP was extant as of that time. Gourdine's un rebutted testimony establishes that USP merged with Brotherhood 2 sometime before April 1982, that the office, files, records, and equipment of USP were moved from 317 West 45 Street to the office of Brotherhood 2, at 163 Street and St. Nicholas Avenue, and that those two unions jointly represent the employees of five employers who had formerly been represented by USP alone. One officer of Brotherhood 2, Caswell Bennett, had previously held office in USP, and according to employer attorney Fishberg, Ivan Ford, the other officer of Brotherhood 2, represented himself as an "organizer"<sup>23</sup> at the December 30, 1980, meeting.<sup>24</sup>

I therefore find and conclude that Respondent Brotherhood is not and has not been the successor or *alter ego* of USP. Respondent Brotherhood accordingly had no duty to represent Pinkney inasmuch as Pinkney was discharged 7 months before its representative status arose. I therefore recommend dismissal of the complaint in its entirety against Respondent Brotherhood.

I further find and conclude that USP is either still in existence or that it has been succeeded by Brotherhood 2, located at 163 Street and St. Nicholas Avenue, New York City.

## 2. The alleged failure to represent Pinkney

A union's duty of fair representation requires it to serve the interests of all the employees it represents

<sup>22</sup> Gourdine resigned his membership in USP in April 1982 because the hospital at which he was employed was not under contract with USP. He has not held office thereafter and was not an officer or member of any other union at the time of the hearing.

<sup>23</sup> Although Ford did not state whether he was an "organizer" for USP or Respondent Brotherhood, it is clear that he was present in behalf of USP since all those in attendance for the Union, including Overton, identified themselves as representing USP.

<sup>24</sup> Gourdine testified that Ford had never been an officer or representative of USP. I credit Fishberg's testimony in this regard. He took notes at the time of the meeting as to the participants at the session and therefore testified precisely as to the expressed status of Ford as an "organizer."

fairly and in good faith and without hostile discrimination based on unfair, arbitrary, irrelevant, or invidious distinctions.<sup>25</sup> In the performance of this duty, however, the effective administration of a contract requires that a union be afforded broad discretion in deciding what grievances to pursue and the manner in which they should be handled.<sup>26</sup> Mere negligence or poor judgment is insufficient to establish a breach of the duty of fair representation.<sup>27</sup>

A union breaches its statutory duty of fair representation when its conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith.<sup>28</sup> There is no evidence or contention that USP's actions regarding Pinkney's grievance were the result of bad faith or hostility toward Pinkney.

Pursuant to the parties' contract, the Employer properly and timely notified the Union by letter of its discharge of Pinkney. That letter was received by the Union on August 29. The contract provided that "if the Union desires to contest the discharge . . . it shall give written notice thereof to the Employer . . . no later than ten working days<sup>29</sup> from the date of receipt of notice of discharge . . . ." Thus, the Union, if it desired to protest Pinkney's discharge must have given written notice by September 15, 1980. It failed to do so. The negligent failure to timely file a grievance is not by itself a breach of a union's duty of fair representation in violation of Section 8(b)(1)(A) of the Act.<sup>30</sup>

The evidence is clear that Pinkney indicated a desire, although not expressly stated, to contest his discharge of August 21. Thus, he immediately told steward Signer that he had been fired and Signer stated that he had placed calls to USP.<sup>31</sup> On September 4, at a time when USP could have timely filed a grievance, USP Treasurer Gourdine told Pinkney that he "will get this thing into arbitration and see how far we can go with it."<sup>32</sup> Thereafter, on October 1, Gourdine admittedly sent a letter to Pinkney to help him obtain welfare benefits which stated that, "It is not known how long his case will be in arbitration." Furthermore, thereafter, in mid-October, Overton, acting as agent of USP, spoke to Pinkney about the incident relating to his discharge, and on January 15, 1981, Overton told Pinkney that he "would see if he could get [his] arbitration case heard" on January 21. On January 27, Overton told the Employer that he wanted to grieve Pinkney's discharge.

<sup>25</sup> *Vaca v. Sipes*, 386 U.S. 171 (1967); *Glass Bottle Blowers Local 106 (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979).

<sup>26</sup> *Vaca v. Sipes*, *supra* at 191-192; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292 (1974).

<sup>27</sup> *Plumbers Local 195 (Stone & Webster Engineering Corp.)*, 240 NLRB 504, 508 (1979).

<sup>28</sup> *Teamsters Local 335 (Monarch Institutional Foods)*, 229 NLRB 1319 (1977), *aff'd*, 597 F.2d 388 (4th Cir. 1979).

<sup>29</sup> Such time limit is expressly exclusive of Saturdays, Sundays, and holidays.

<sup>30</sup> *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974).

<sup>31</sup> Signer did not testify.

<sup>32</sup> Gourdine, who testified at the hearing, gave no testimony concerning this conversation and did not controvert it.

Upon the above facts, it is clear that on September 4 USP "specifically committed itself" by agreeing to file a grievance to arbitration protesting the discharge of Pinkney and that at the time it made such agreement it could have timely filed such a grievance with the Employer.<sup>33</sup>

Having thus undertaken to process Pinkney's grievance, USP was thereafter obligated to dispose of the grievance in accordance with the standards imposed by USP's duty of fair representation.<sup>34</sup>

Where, as here, a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations.<sup>35</sup>

In the absence, as in this case, of any evidence of hostile motivation or animus toward Pinkney, the issue is whether USP's actions constituted perfunctory treatment of Pinkney's grievance. Of course USP failed to process the grievance at all. There is no evidence of any reasons for USP's decision to abandon the grievance after having agreed to process it to arbitration. Gourdine did not testify as to his reason for not timely filing a grievance with the Employer or for abandoning it. In the absence of such evidence, it cannot be said that USP conducted an investigation or acted properly in deciding to abandon the grievance.<sup>36</sup> Moreover, the only investigation that was apparently undertaken before the cutoff date of September 15 was Gourdine's conversation with Pinkney on September 4 when after hearing part of the facts of the incident Gourdine agreed to take the matter to arbitration. Under these circumstances, USP's action toward Pinkney constituted more than mere negligence. Rather, USP's continued nonaction amounted to a willful failure to pursue the grievance, and was therefore perfunctory.<sup>37</sup>

Further, USP's duty of fair representation imposed on it the duty not to "purposely keep Pinkney uninformed or misinformed concerning" his grievance.<sup>38</sup> By informing Pinkney on September 4 that USP would take his grievance to arbitration and then by later telling him that there was no news concerning his case and that it would attempt to have his grievance heard, USP purposely kept Pinkney misinformed concerning his grievance because USP knew that it had not timely filed a grievance in Pinkney's behalf and knew that the Employer might properly refuse to hear such an untimely grievance.<sup>39</sup>

<sup>33</sup> *Food & Commercial Workers Local 324 (Fed Mart Stores)*, 261 NLRB 1086, fn. 2 (1982).

<sup>34</sup> *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979).

<sup>35</sup> *Owens-Illinois, supra*.

<sup>36</sup> *Graphic Communications Union No. 4 (San Francisco Newspaper Agency)*, 249 NLRB 88, 89 (1980).

<sup>37</sup> *Automobile Workers Local 417 (Falcon Industries)*, 245 NLRB 527, 535 (1980).

<sup>38</sup> *Groves-Granite*, 229 NLRB 56, 63 (1977); see also *Electrical Workers Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962), cert. denied 371 U.S. 936 (1962).

<sup>39</sup> *Falcon Industries, supra*.

For the foregoing reasons, I conclude that USP violated Section 8(b)(1)(A) of the Act by failing to fairly represent Jeffrey Pinkney regarding his grievance against the Employer, and by willfully misinforming him about the status of his grievance.

#### CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. USP has violated Section 8(b)(1)(A) of the Act by failing to fairly represent Jeffrey Pinkney regarding his grievance against the Employer, and by willfully misinforming him about the status of his grievance.

4. The foregoing unfair labor practices affect commerce within the meaning of the Act.

5. Respondent Brotherhood is not and has not been the successor or *alter ego* of USP.

6. Respondent Brotherhood has not violated the Act in any manner as alleged in the complaint.

#### REMEDY

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

Inasmuch as it appears that USP may have been succeeded by another labor organization, the Order herein shall apply to USP and its successors and assigns.

It is uncertain whether the processing of Pinkney's grievance would have resulted in a milder form of discipline or any discipline at all. This uncertainty results from USP's unlawful action. Where, as here, such an uncertainty requires resolution, at least for the purposes of determining monetary responsibility, it is deemed only proper to resolve the question in favor of the discriminatee and against the wrongdoer. Since USP did not prove that had it processed Pinkney's grievance Pinkney still would have been terminated, I shall resolve the uncertainty in favor of Pinkney and find that Pinkney is entitled to at least some backpay. In the circumstances of this case, where the Employer has consistently taken the position, in January 1981 and at the hearing, that it would not consider a grievance as to Pinkney's discharge because it is time-barred and where USP is no longer the certified bargaining agent of the employees of the Employer, I regard it as futile to issue the usual backpay remedy and Order requiring the Union to request the Employer to reinstate Pinkney, and if it refuses, to ask it to consider a grievance concerning his discharge and thereafter pursue the grievance in good faith with all due diligence.<sup>40</sup> I will accordingly order that Pinkney be made whole by the payment of backpay to him from the date of his discharge until he obtains substantially equivalent employment. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>41</sup>

<sup>40</sup> *Kaiser Co.*, 259 NLRB 1 (1981).

<sup>41</sup> See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

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

**ORDER<sup>42</sup>**

The Respondent, Union of Security Personnel of Hospitals and Health Related Facilities, Far Rockaway, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing or refusing to process the grievance of Jeffrey Pinkney, or any other employee, or processing such grievance in a perfunctory manner without reason or for arbitrary or invidious reasons.

(b) Willfully misinforming Jeffrey Pinkney or any other employee, concerning the manner in which it intends to process his grievance.

(c) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Make Jeffrey Pinkney whole for any loss of earnings he may have suffered as a result of his discharge by the Employer, The Church Charity Foundation of Long Island, Inc., St. John's Episcopal Hospital-South Shore Division, from August 21, 1980, until such time as he obtains other substantially equivalent employment, together with interest, to be computed in the manner set forth in the part of this Decision entitled "Remedy."

(b) Post at its business offices, and at all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."<sup>43</sup> Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by it, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by

Respondent to ensure that the said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be dismissed against Respondent International Brotherhood of Security Personnel Officers and Guards, referred to throughout this Decision as Respondent Brotherhood.

**APPENDIX**

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

WE WILL NOT fail or refuse to fairly represent any employee we represent in the processing and filing of grievances.

WE WILL NOT willfully misinform any employees we represent concerning the manner in which we intend to process his grievance.

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

WE WILL make Jeffrey Pinkney whole for any loss of earnings he may have suffered as a result of his discharge by the Employer, The Church Charity Foundation of Long Island, Inc., St. John's Episcopal Hospital-South Shore Division, from August 21, 1980, until such time as he obtains other substantially equivalent employment, together with interest.

**UNION OF SECURITY PERSONNEL OF HOSPITALS AND HEALTH RELATED FACILITIES**

<sup>42</sup> 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.

<sup>43</sup> 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."