

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALTERCARE OF WADSWORTH CENTER
FOR REHABILITATION AND NURSING CARE, INC.

and

Case 8-CA-37436

SERVICE EMPLOYEES INTERNATIONAL UNION,
DISTRICT 1199

Rudra Choudhury, Esq., for the General Counsel.
Scott Salsbury, Esq. (Salsbury & Salsbury), of
Hudson, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Cleveland, Ohio, on May 28-29, 2008. The charge was filed October 3, 2007, an amended charge was filed December 21, 2007, a second charge was filed February 26, 2008,¹ and the complaint issued February 29, 2008. The complaint, as amended, alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act): (1) on or about June 4 by promulgating a rule prohibiting employees from wearing prounion buttons while working; on or about June 4 and July 9² 10, and 11 by enforcing the rule through verbal warnings to employees against wearing prounion buttons; on or about June 26, by promulgating a rule prohibiting employees from engaging in union-related discussion during worktime and then issuing verbal warnings to two employees for violating such a rule; in or around early June by unlawfully polling and interrogating its employees about their union membership, activities, and sympathies through weekly "contest-quizzes" distributed to employees; and in or around July by posting answers to the "contest-quizzes" in the employee breakroom suggesting it would be futile for employees to continue to support the Union as their bargaining representative. The amended complaint further alleges that the aforementioned warnings to employees violated Section 8(a)(3). Finally, the amended complaint further alleges that the Respondent's promulgation of rules prohibiting employees from wearing union insignia and discussing the Union during worktime, and granting benefits to employees in July through the contest-quizzes, all without prior notice to the Union and affording it an opportunity to bargain, violated Section 8(a)(5). In its answer, filed March 14, 2008, denied the material allegations in the complaint.

¹ All dates are in 2007, unless otherwise indicated.

² Upon motion of the General Counsel and over the objection of the Respondent, the complaint was amended at trial to add a paragraph 8(g), charging a verbal warning by Unit Manager Loretta Heath on July 9. (Tr. 16-24.)

Upon the conclusion of the trial, I directed that posthearing briefs be filed by July 3, 2008. The General Counsel transmitted its posthearing brief by overnight mail on July 2 and it was received by the Judges Division on July 3. The Respondent transmitted its posthearing brief to the Judges Division by facsimile transmission on July 3 and sent another copy by
 5 regular mail on that date. The Respondent was notified by the Judges Division on July 7 that facsimile transmission is not an accepted method of filing posthearing briefs. On that date, the Respondent re-filed, submitting its brief through the Board's electronic filing system. Subsequent to receipt of posthearing briefs, the General Counsel moved pursuant to Section 102.24 of the Board's Rules and Regulations to strike the Respondent's posthearing brief on the
 10 ground that it was not timely filed because it was sent improperly by facsimile transmission on July 3. The Respondent opposes the motion, acknowledges its procedural error, and requests that the resubmitted version of its brief be accepted in substitution of the earlier-filed brief.

Section 102.11(b) requires that briefs be received "before the official closing time of the receiving office on the last day of the time limit." Therefore, filing by regular mail on the due date renders the filing untimely. In addition, Section 102.114(g) prohibits the filing of posthearing briefs by facsimile. Finally, Section 102.111(c) authorizes acceptance of late-filed briefs upon good cause shown based on a showing of excusable neglect and when no undue prejudice would result. The Respondent improperly filed its posthearing brief by the due date, thus
 20 rendering it late. This was due to an inadvertent error, as counsel failed to take note of the applicable Board Rules as noted in my closing instructions. Nevertheless, counsel electronically filed the brief the next business day upon learning of his mistake. Furthermore, there is no prejudice to the General Counsel, as the electronically filed brief is identical to the one transmitted by facsimile on the due date. Recent Board decisions indicate a reluctance to
 25 impose the harsh penalty of forfeiture under such circumstances. See *Barstow Community Hospital*, 352 NLRB No. 125, slip op. at 4, fn. 4 (2008) (judge accepted brief improperly filed by due date with Regional Office instead of Judges Division due to "inadvertent errors, their diligent attention to them, and the fact that no undue prejudice has resulted to any party"); *WGE Federal Credit Union*, 346 NLRB 183 (2005) (Board accepted brief electronically with the Board on the due date, but after office closing time, as "no one was prejudiced by the delay"). Accordingly, I
 30 deny the General Counsel's motion to strike the Respondent's posthearing brief, and have accepted the Respondent's posthearing brief for consideration.

On the entire record, including my observation of the demeanor of the witnesses, and
 35 after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, an Ohio corporation, engaged in the operation of a long-term care facility in Wadsworth, Ohio, where it annually derives gross revenues in excess of \$100,000 and purchases and receives products valued in excess of \$50,000 directly from points outside the
 45 State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Parties*

5 The Schroer Group, Inc. (Schroer Group) owns numerous long-term nursing care
facilities in Ohio and Michigan, including the Altercare of Wadsworth Center for Rehabilitation
and Nursing Care, Inc. (the Respondent or Altercare of Wadsworth). Another subsidiary,
Altercare of Ohio, Inc. (Altercare of Ohio), serves as the management company and issues the
10 rules, regulations, policies, and procedures for all of the Schroer Group's long-term care
facilities.³

15 The Respondent employs approximately 115 employees at its facility in Wadsworth,
Ohio. Aaron Hetrick is the Respondent's administrator and in charge of the facility's daily
operations. Dale Fryer is the facility's human resource director. Diane Geis is the Schroer
Group's executive vice president for human resources. The facility has several departments,
including a nursing department. The nursing department consists of four nurses' stations or
units. Each nurse unit is managed by a care coordinator. Loretta Heath is a care coordinator
20 and unit manager who is responsible to supervise, evaluate, and discipline the State-tested
nursing assistants (nursing assistants) on her unit.⁴ Diane Sams, Cathy Peterson, Sonya
Manley, Dianna Morris, Diana Martin, and Jacque Smith are nursing assistants. Nursing
assistants assist the facility's residents with all activities of daily living, including bathing,
dressing, and toileting.

25 The Respondent and the Union are parties to a collective-bargaining agreement with a
term of August 31, 2007 to August 31, 2009.⁵ The bargaining unit is defined to include "all full-
time and regular laundry aides, dietary aides, cooks, nurses aides,⁶ porters, restorative aides,
housekeeping aides, and students working more than 16 hours a week, but excluding all office
clerical employees, guards and supervisors as defined in the Act." Manley and Sams currently
serve as union delegates. Smith served as a union steward until January 2008.⁷ This
30 controversy relates to the period between May 30, 2007, when a decertification petition was
filed in Case 8-RD-2083, and August 10, 2007, the date of the decertification election
(decertification campaign period).

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40 ³ Diane Geis, the Schroer Group's principal human resource official, with authority explained
that Altercare of Ohio is the "management entity" and not the parent company for Altercare of
Wadsworth, leading me to conclude that the Schroer Group is the parent company, while
Altercare of Ohio and Altercare of Wadsworth are its subsidiaries. (Tr. 396-397.)

⁴ It is not disputed that care coordinators, including Heath, discipline, evaluate and supervise
nursing assistants. (Tr. 61, 63-65, 71-73, 168-170, GC Exhs. 16-17.)

45 ⁵ The parties stipulated to amend par. 7(b) of the complaint, which stated the term of the
most recent agreement as January 1, 2006, to August 31, 2007, to reflect the newer period. (Tr.
10-11, 361-362; GC Exh. 28.)

⁶ Nurses aides, as referred to in the bargaining unit's description, is the functional equivalent
of the State-licensed position of nursing assistant. I adopted the latter, as it is the term generally
referred to by the parties.

50 ⁷ Smith left the bargaining unit and her position as a union steward in January 2008 when
she transferred to the nonbargaining unit position of activity aide. (Tr. 341-342.)

B. The Respondent's Policies and Practices

Upon being hired, every employee is given a copy of the Respondent's handbook (handbook). In addition, any time any policy in the handbook changes, the entire handbook is reprinted and employees are given a copy of the new one. The Respondent's handbook was developed by Diane Geis, the Schroer Group's executive vice president of human resources. The handbook includes several policies relevant to this controversy. It has one provision relating to the uniform policy and another policy addressing personal appearance. The handbook also lists 44 specific instances of prohibited conduct by employees. It further states, in pertinent part, that commission of any of the listed prohibited actions "will be grounds for disciplinary action in the form of a written warning, suspension or discharge."⁸ Discipline is also addressed in the collective-bargaining agreement, which states in pertinent part, that "[v]erbal counseling and coaching shall not count for purposes of progressive discipline."⁹

The personal appearance policy requires direct care workers to wear name badges, but forbids them from wearing jewelry while working. The badges are fastened to employees' uniforms by pulleys. Pulleys are not, however, mentioned in the handbook.¹⁰ Nevertheless, nursing assistants, based upon instruction at employee orientation and during periodic in-services, have always been mindful to avoid wearing anything that "might get tangled up with" the frail residents that they serve. Hetrick, the facility administrator, has on occasion asked employees to remove buttons, whether union-related or not. With the exception of offensive or political campaign buttons, employees have always been permitted to wear buttons, including union buttons, in nonpatient care areas such as the breakroom.¹¹

As a general practice, however, neither Hetrick nor other any supervisors have enforced a policy of prohibiting employees from wearing buttons, pins, or pulleys displaying insignia other than their names, in resident care areas. Prior to May 2007, when the decertification election petition was filed, several employees wore nonunion buttons and pulleys in resident care areas without any objection or comment by supervisors with whom they frequently interacted and encountered, including Fryer, Heath, and nursing director Marge Carrey. Sams wore numerous buttons, pins, pulleys, and lanyards. The objects displayed insignias such as national and religious holidays, and others paying homage to her son's service in the Iraq War.¹² Manley wore a large button, attached by a pin, displaying her daughter's high school basketball picture. In fact, upon seeing the pin, Heath and Nursing Director Carrey remarked about how much Manley's daughter had grown. Peterson wore, and continues to wear, a pulley bearing a

⁸ R. Exh. 1, pp. 60-61, 64-67.

⁹ GC Exh. 28, p. 18.

¹⁰ There was no dispute that name badges were affixed to employee uniforms by a pulley. (GC Exhs. 23, 25-27.)

¹¹ Hetrick conceded that the Respondent did not have a written policy against the use of buttons. (Tr. 123-132.) On the other hand, Sams confirmed his assertion that direct care providers need to be concerned about anything, including a name badge, which could cause a skin tear. (Tr. 196-197.) She also confirmed that employees have been permitted to wear pronoun buttons in the breakroom. (Tr. 162.)

¹² I found Sams quite credible and reject the Respondent's contention that she attempted to exaggerate the items that she claimed to attach to the lanyard. It was quite obvious that she was not claiming that all of the pins and buttons attached to the lanyard were on it at one time at work. Upon more specific questioning, she clarified that she attached them all to the lanyard for demonstrative purposes at the hearing. (Tr. 154-157, 159, 163-165, 190-194, 215-219, 222-227; GC Exhs. 22-23.)

"Purrell" logo. Morris has worn and continues to wear a pulley with a pink breast cancer ribbon logo. She has also worn a pin with a Cleveland Indians logo on her name badge.¹³

5 The 44 listed rules include prohibitions against neglect of residents, intimidation of other employees, and disruptive or distracting behavior while working. The list does not, however, include a rule prohibiting employees from speaking about nonwork matters while working. In fact, the Respondent does not have such a rule in writing. The Respondent has, however, instructed nursing assistants that they are to limit discussion with other employees about nonwork-related matters while working with residents or are in resident care areas. The "dividing line" is when the conversation distracts nursing assistants from taking care of the resident. This policy is communicated to employees at orientation and reinforced during periodic in-service training. Employees are permitted to discuss nonpatient care issues, including those concerning the Union, in noncare areas.¹⁴

15 Prior to May 2007, employees, including discriminatees Smith and Martin, regularly engaged in conversations with other employees about nonwork matters during worktime. As such, they would speak with other employees about personal matters in work areas such as the hallway and resident dining room. Prior to the decertification campaign, Smith, as a union steward, also spoke to employees about the Union and potential grievances.¹⁵

20 In addition to issuing a handbook governing employee conduct at its managed facilities, Altercare of Ohio, Inc. also conducts an employee recognition and motivation program, commonly referred to by the acronym "RAMP." At the Respondent's facility, the RAMP has resulted in "fun" events for employees, including drawings, ice cream socials, gifts, and prizes. Occasionally, RAMP events are tied to facility initiatives, such as getting employees to respond to call lights in a timelier manner. The Respondent's prizes have included small cash prizes and turkeys. Since 2000, the Respondent has also conducted anonymous employee satisfaction

30 ¹³ Testimony by Manley, Morris and Peterson that they wore buttons or pins prior to the period leading up to the decertification election, without any objection by management, was credible and unrefuted by the Respondent. (Tr. 242-245, 264-265, 284-286, 294-296, 298, 310-315; GC Exhs. 24, 24(a), 26, 27.) In addition, Morris provided detailed, credible testimony concerning permission she received a year earlier from Deb Lougheed, the previous facility administrator, as to union or political buttons. (Tr. 290-291.)

35 ¹⁴ Hetrick's testimony regarding the Respondent's policy on employees' talking while working was ambiguous and less than credible. It was also glaring that the Respondent's handbook, upon which the Respondent relied as a foundation for its rules, failed to mention talking amongst employees while they work. There can be no doubt that the Respondent's primary mission, as a regulated long-term nursing care facility is to ensure that the needs of its residents are taken care of. (Tr. 136-138.) However, it was also clear from Hetrick's testimony that it was not a rule prohibiting absolutely all nonwork conversations while employees were in resident care areas—"I mean, we just want to limit all discussion, you know, and that's not centered around the resident . . . If it's a brief reference [to the Union or some union activity] and it's not, you know, intended, you know, for residents to hear, be disruptive, and those type of things. . . ." (Tr. 138-139.)

45 ¹⁵ I found the spontaneous and detailed testimony of Smith and Martin to be credible and indicative of a work environment in which supervisors, with whom employees came in contact frequently, were aware of the nonwork-related discussion that would take place. (Tr. 327, 329-332, 334, 343-344.) Significantly, there was no testimony offered by the Respondent suggesting they were unaware that employees engaged in nonwork-related conversation while

50 in resident care areas.

surveys every 6 months. Employees completed the surveys and the results are tabulated and analyzed. The Respondent has never provided notice of RAMP to, or bargained with respect any of its activities with, the Union.¹⁶

5 *C. Employee Use of Buttons and Pulleys During the Campaign*

At various times during the decertification campaign period, issues arose over pronoun buttons worn by several employees on their uniforms. The standard button promoting the Union displayed the words "District 1199" and "SEIU Stronger Together" (SEIU button).¹⁷

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On June 4, Sams had just completed caring for a resident when Fryer directed her to remove an SEIU button that she was wearing. Fryer explained that the only place that she could wear the button was in the employee breakroom. On July 9, Heath directed Sams to remove an SEIU pulley that attached her name badge to her uniform. At the time Heath issued this
15 directive, Sams was not performing direct care to residents. Sams responded by covering the SEIU logo with tape and wrote the word "yes" and placed a black checkmark across the pulley. Sams continued to wear the pulley, as modified, and received no further directives about it. Upon comparison, the SEIU pulley worn by Sams was similar to or smaller in size than nonunion buttons and pulleys previously worn by Sams, Manley, Martin, and Peterson. In any
20 event, the incident was not documented in Sams' personnel file.¹⁸

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On July 10, Peterson wore a name badge attached to her uniform by an SEIU pulley as she worked in a resident care area. As she prepared to go to lunch, Fryer approached her and asked her to remove the pulley and to refrain from wearing it in resident care areas. This
25 encounter was not documented in Peterson's personnel file.¹⁹

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During late June 2007, Manley and Sams were greeting a new resident at the facility when Carrey ordered Manley to remove the SEIU button from her uniform and not wear it in resident care areas.²⁰ On July 11, as Manley prepared to leave for lunch, Fryer ordered her to
30 remove an SEIU pulley she was wearing. This incident, like the others, was not documented in Manley's personnel file. Like Sams, Manley responded by covering the union logo with tape bearing the word, "Yes." She wore that pulley until the decertification election was held. After the election, she replaced the tape on the pulley with one bearing the word, "Alright." The SEIU button was significantly smaller than the basketball pin worn by Manley prior to the
35 decertification campaign.²¹

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¹⁶ Geis' testimony regarding the development of the RAMP program and its continued implementation at the Respondent's facility, was not disputed. The photographs of winners of such contests are frequently posted in the facility. (Tr. 372-375, 395-396; GC Exhs. 3-4.) Sams
40 also corroborated that the Respondent conducted such activities, including drawings, and awarded prizes in the past. (Tr. 419-420)

¹⁷ GC Exhs. 20-21.

¹⁸ Sams did not refute Fryer's testimony regarding the June 4 incident. On the other hand, Fryer did not refute Sams' assertion as to the circumstances of the July 9 directive. (Tr. 135,
45 160-162, 164-166, 171, 176-177, 200-204; GC Exhs. 20-21.) Heath did not testify.

¹⁹ Peterson's testimony on this issue also went unchallenged. (Tr. 315-319.)

²⁰ This incident was not included in the charges, but was considered as background evidence. (Tr. 246-247.)

²¹ This finding is based on Manley's credible and unrefuted testimony. (Tr. 247-254, 265-
50 267; GC Exhs. 20, 21, 24, 24(a), 25.) However, in the absence of testimony indicating otherwise, I also find that the incident was not documented in Manley's personnel file.

D. Employees Prohibited from Discussing the Union While Working

5 During the decertification campaign, issues arose concerning conversations between employees while they worked. Sometime in late June, Smith engaged in discussion about the decertification election with other employees while working. On June 25, Fryer called Smith at home and told her to come in immediately and meet with Hetrick regarding a disciplinary matter. Smith was, however, caring for her disabled husband, and could not report to work until the next day. On June 26, Smith, accompanied by Carol Wolf, a union representative, met with 10 Fryer and Hetrick in Hetrick's office. During the meeting, Hetrick issued Smith a verbal warning for talking about the Union while working. She responded that she was simply responding to questions by other employees about the Union and the decertification petition. At that point, Hetrick cautioned her to make sure that, in the future, she only spoke about the Union during her break or outside the facility. Smith then inquired as to why she was being admonished if 15 other people were talking about the Union while working. Hetrick concluded with a remark that others were also being issued verbal warnings for the same conduct. The warning was not, however, documented in Smith's personnel file.²²

20 During the morning of June 26, Martin was approached by several coworkers while working in a resident area and asked her if she had signed a letter calling for decertification of the Union. Martin told the employees that, "if it ain't broke don't fix it." Later that day, Martin was summoned to meet with Hetrick and Fryer. At the meeting, Hetrick issued Martin a verbal warning for discussing the union during company time. Hetrick did not explain to Martin or offer testimony explaining the underlying circumstances for the warning to Martin. In any event, there 25 was no written warning placed in Martin's personnel file as a result of this encounter.²³

E. The Respondent's Contest-Quiz

30 During the decertification campaign period, and without giving notice to the Union,²⁴ Hetrick implemented a RAMP contest focusing on the issues relevant to the impending

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40 ²² Again, I found Smith's version of the meeting to be more credible than Hetrick's contention that there was no meeting or warning issued. (Tr. 345-352.) Hetrick denied counseling Smith and insists he merely had a discussion with her about intimidating and being "gruff" with a housekeeping employee, Barbara Tachitie, about how to vote in the upcoming election. (Tr. 139-142, 146-148.) However, Hetrick did not witness the incident, Trachitie did not testify and, even though intimidation would have violated rule 5 in the employee section of 45 the Respondent's handbook, the alleged incident was not even documented. (R. Exh. 1, p. 61.) Moreover, Fryer testified as a 611(c) witness during the General Counsel's case, but was not called on rebuttal to refute Smith's testimony that he contacted her on June 25 and was present at the June 26 meeting. As such, Smith's contention stands essentially unchallenged.

50 ²³ This finding is based on Martin's credible and unrefuted testimony. (Tr. 328-336.)

²⁴ It is not disputed that Respondent did not give the Union notice of this contest and an opportunity to bargain over its implementation. (Tr. 357-358.)

election.²⁵ The contest consisted of “contest-quiz” forms containing questions,²⁶ which were placed in the employee breakroom on Mondays, along with a box for the voluntary submission of contest entries.²⁷

5 The questionnaires, prepared by Altercare of Ohio, were actually statements by the Respondent regarding its views of the Union. The first contest-quiz asked whether the Respondent provided health insurance a few years earlier and gave employees turkeys at Thanksgiving time because the Union required it. The second contest-quiz asked whether the Union uses its members’ dues to pay for political contributions and whether union members
10 have control over how the Union spends members’ dues. The third contest-quiz asked whether members’ dues directly improve their wages and benefits or are used for extravagant expenses, and whether the Union “buys American” and has enough funds to pay members’ bills during a strike. The fourth contest-quiz asked whether a member’s vote at the decertification election could be discovered, the Union could make the Respondent change its values, and whether the
15 Union would be more responsive to workers’ concerns if it won the election.²⁸

 Each contest-quiz form stated at the bottom that providing one’s names was “optional” and “no participant is required to sign his or her name.” However, in order to be eligible to win the weekly drawing and get a gift cards, employees had to identify themselves on the
20 questionnaire.²⁹ Bargaining unit employees submitted entries for all four contest-quizzes. The Respondent retained eight entries for contest-quiz 4, which was held during the week of the decertification election, and discarded entries for the other contest-quizzes.³⁰ Each of these

25 ²⁵ Hetrick’s lack of credibility regarding the circumstances leading to his placing the contest-quizzes in the employee breakroom strongly suggests that it was not disseminated in the regular course of the Respondent’s past practice of holding contests for “fun.” His vague and evasive explanation as to how he got the form from an employee at the Respondent’s parent company concluded with the admission that the Respondent’s labor counsel, in addition to the
30 parent company’s president and in-house counsel, told him what to do with the flyer. (Tr. 77–85, 110-112.)

²⁶ Given the objective standard applied in determining whether the quiz tended to be coercive, the Respondent’s assertions as to its intentions in not eliciting information from participants, its intentions to “provide information in a fun atmosphere like past contests, and its
35 assertion that it did not review who responded and their responses are irrelevant. (Tr. 142, 377, 394.) Similarly, in the absence of evidence that the Respondent actually told employees that it did not care what their responses were, Sams’ testimony that management “didn’t care what our answers were” is purely subjective. (Tr. 210.)

²⁷ As the forms, as well as the box for submitting the entries, were placed in the employee
40 breakroom, it is reasonable to assume that the contest was effectively limited to the employees who used that room. Furthermore, although the contest-quiz forms did not refer to an actual gift prize, consistent with past practice, employees reasonably expected that a winner would receive a gift of some type. (Tr. 76, 87–88, 95, 105–107, 116, 181–189, 211–213, 259–264, 269–276, 376-378, 393-394, 405-408.)

45 ²⁸ Geis and Hetrick conceded that the “answers” were intended to convey the Respondent’s views about the Union. (Tr. 99, 377; GC Exhs. 3, 6, 9, 12.)

²⁹ Geis’ testimony that employees could submit valid contest-quiz entries with their names on them, but without completing the answers, is not supported by the evidence. (Tr. 378, 411-412.)

50 ³⁰ The General Counsel noted that he served a subpoena duces tecum on the Respondent requesting production of all entries to its weekly contest-quizzes. (GC Exh. 2, Request 9.) The

Continued

entries identified the participant by name and their responses to the questions.³¹

Hetrick collected the questionnaires each Friday and conducted a random drawing of the winning entry. In addition to awarding employees gift cards for the contest-quiz, Hetrick posted an announcement of the name and photograph of the winning employee, with whom he posed, in the elevator and next to the timeclock in the breakroom. Of particular note, Manley won the contest drawing for the week of July 27. Each announcement remained posted for a week until the next contest-quiz winner was announced. Along with each announcement of a winner, Hetrick would also post its “quiz answers” in the employee breakroom.³²

The answer checked off by the Respondent to every question was “no” and was followed by narrative responses that included direct statements about the Union such as: the Respondent “was there to help when the union let these employees down;” the Union “absolutely uses dues money to pay lobbyists and make contributions to political campaigns and candidates;” the Union spends dues money on whatever its leadership in Columbus wants;” members’ dues are spent in “a variety of places far from Ohio for purposes unrelated to your wages and benefits;” the Union spend members’ dues on extravagant expenses such as Merrill Lynch (\$51,102), Embassy Suites (\$256,716), the Radisson Hotel (\$23,569), Columbus Convention Center (\$30,624), Busca Di Beppo (\$6,407), a “Promotion Products” company (\$46,617) and the Sunburst Travel Agency (\$22,634); the Union has less than \$4 available for each member in the case of a strike; in 2006, the Union’s largest investment of \$225,000 was in an Asian currency company; and “the union has no incentive to change its ways. The revolving door of union representatives will continue.” One answer went as far as strongly suggesting that the Respondent would not negotiate with the Union regarding wages, benefits, and working conditions because they were “consistent throughout its facilities.” As to those terms and conditions of employment, the Respondent proclaimed: “We’re not changing because our residents and employees depend on us.”³³

Legal Analysis

A. *The 8(a)(1) Charges*

1. The Respondent’s prohibition against the use of prounion buttons during worktime

Prior to the decertification election campaign period, the Respondent occasionally ordered employees to remove buttons that could cause injury to its elderly clients. However, it did not generally enforce a policy prohibiting employees from wearing nonwork-related buttons or pulleys. It took a decidedly different tack, however, on June 4, when Hetrick directed an employee to remove a prounion button attached to her uniform. The Respondent then enforced this newly-enforced rule on at least three other occasions during the decertification election campaign period—July 9, 10, and 11—when its supervisors directed employees to remove prounion buttons or pulleys. The buttons and pulleys at issue were mostly smaller in size, but

Respondent produced only the entries for contest quiz 4 and Hetrick testified, in less than credible fashion, that he may have discarded the responses to the other contests: “I don’t recall. I think I threw them away.” (Tr. 121.) In any event, it is not disputed that the employees submitted completed questionnaires for contests 1 through 3 as well.

³¹ GC Exh. 15.

³² GC Exhs. 5, 8, 11, 14.

³³ GC Exhs. 4, 7, 10, 13.

certainly no larger than the pulleys used to attach name tags to uniforms or other personal buttons worn previously by employees as they worked.

Union members' Section 7 rights generally entitle them to wear union insignia in the workplace. *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577 (9th Cir. 2008); *Mt. Clemens General Hospital v. NLRB*, 328 F.3d 837 (6th Cir. 2003); and *London Memorial Hospital*, 238 NLRB 704, 708 (1978). As applied to health care facilities, however, employers' restrictions on the wearing of union insignia in "immediate patient care" areas are presumptively valid. On the other hand, restrictions on union insignia in nonworking areas of such a facility are presumptively invalid. *Casa San Miguel*, 320 NLRB 534, 540 (1995). A complete restriction on the use of union insignia may be validated, however, where the employer demonstrates the existence of "special circumstances" that are "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978); and *NLRB v. Los Angeles New Hospital*, 640 F.2d 1017, 1020 (9th Cir. 1981). In such an instance, the employer bears the burden of proving an adverse impact on patient care. *Washington State Nurses Assn.*, 526 F.3d at 581; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979); *Mesa Vista Hospital*, 280 NLRB 298, 299 (1986).

The Respondent's policy as to what employees could attach to their uniforms while working in patient care areas was so vague and, for the most part, unenforced that it could hardly be considered a rule at all. Moreover, the Respondent's acquiescence to the use of other buttons and pulleys by employees that were larger than those at issue here negates its special circumstances allegation—that the prounion buttons and pulleys posed a danger to the facility's residents. As such, the Respondent's refinement and enforcement of its vague policy so as to prohibit employees from wearing prounion buttons in the midst of a decertification election campaign period was clearly discriminatory and calculated to restrain union activity. Under the circumstances, the implementation and enforcement of such a prohibition violated Section 8(a)(1). *Mt. Clemens General Hospital v. NLRB*, 335 NLRB 48 (2001).

2. The Respondent's prohibition against employees discussing the Union during worktime

Prior to the decertification election, the Respondent instructed nursing assistants to limit discussion with other employees about nonwork-related matters that may distract them from caring for the facility's residents. It did not have a rule prohibiting employees from speaking about nonwork matters while working. As a result, nursing assistants regularly engaged in such conversation and were not disciplined or otherwise prohibited from doing so. Such a rule, however, was enacted and enforced against two employees—Martin and Smith—during the midst of the decertification election campaign on June 26. There was no credible evidence that they were distracted from performing their responsibilities at the time.

An employer violates Section 8(a)(1) when it permits employees to discuss nonwork-related subjects during worktime, but prohibits employees from discussing union-related matters. *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978), *enfd.* 608 F.2d 762 (9th Cir. 1979); *Williamette Industries*, 306 NLRB 1010, 1017 (1992); and *Larid Printing, Inc.*, 264 NLRB 369, 374, 376 (1982). This is especially the case when the prohibition is announced during a union organizing campaign. *In re Teledyne Advanced Materials*, 332 NLRB 539 (2000); and *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978) *enfd.* 608 F.2d 762 (9th Cir. 1979). Under the circumstances, by promulgating and enforcing a policy allowing employees to discuss nonwork-related subjects, but forbidding Martin and Smith from discussing union matters during the decertification election campaign period, the Respondent violated Section 8(a)(1).

3. The Respondent's implementation of a contest-quiz

The Respondent's implementation of a contest in June and July was not a new concept. It had held such events before. However, the contest-quizzes at issue consisted of questions relating to the upcoming union decertification election and sought to elicit the views of bargaining unit members regarding the Union. In order to be eligible to win the weekly drawing, employees had to identify themselves on their entries. The Respondent also posted its answers to the contest-quiz questions in the employee breakroom. Each answer was "no," followed by a narrative as to the merits and ramifications of union representation, and clearly reflected an antiunion bias.

Just as in the "Union Truth Quiz" used in the controlling case of *Sea Breeze Health Care Center, Inc.*, 331 NLRB 1131, 1132-1133 (2000), the Respondent's contest-quizzes here were placed by supervisors in the sanctuary of the employee breakroom, reflected an antiunion bias and required entrants to identify themselves in order to be eligible for a cash prize. Citing earlier decisions finding such contests objectionable under the Act, the Board in *Sea Breeze* found such a contest or quiz "tantamount to effectively polling employees about their union sentiments" and violated Section 8(a)(1). See *Melampy Mfg. Co.*, 303 NLRB 845 (1991); *Houston Chronicle Publishing Co.*, 293 NLRB 332 (1989); and *National Gypsum Co.*, 280 NLRB 1003 (1986).

Similarly, the contest-quizzes at issue here were unlawful mechanisms for the polling and interrogation of employees about their union membership, activities and sympathies. Such a strategy was calculated to apprise the Respondent as to which employees were familiar with its campaign material. It also enabled the Respondent to ascertain where to focus its additional campaign tactics. *Sea Breeze Health Care Center, Inc.*, 331 NLRB at 1132-1133. In addition, one of the Respondent's answers published to employees in the breakroom suggested it would be futile for them to continue to support the Union as their bargaining representative. Such communication to employees violated Section 8(a)(1). *Goya Foods*, 347 NLRB 1118, 1135 (2006); and *Wellstream Corp.*, 313 NLRB 698, 706 (1994).

B. The 8(a)(3) Charges

The amended complaint further alleges that the Respondent's aforementioned directives to employees constituted warnings in violation of Section 8(a)(3). The evidence revealed four instances in which the Respondent unlawfully directed employees to remove pronoun buttons from their uniforms while working—on June 4 and July 9, 10, and 11. In addition, on June 26, the Respondent warned two employees to refrain from discussing matters involving the Union during worktime.

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), it is irrefutable that employees engaged in protected concerted activity by wearing pronoun buttons and discussing union matters while working. It is also clear the Respondent was aware of that activity. Its antiunion animus is established through the warnings, directives, and questions and answers provided in the four contest-quizzes. Whether the warnings constitute the requisite adverse action under the analysis, however, leads to a different result.

The Respondent's handbook defines disciplinary action to include written warning, suspension, or discharge. Furthermore, the collective-bargaining agreement states that "[v]erbal counseling and coaching shall not count for purposes of progressive discipline." As previously stated, the directives and/or warnings were coercive in nature and constituted violations of

Section 8(a)(1). Nevertheless, there is no indication that any of the employees received adverse action as a result. No documentation was placed in any employee's file. Nor was there any indication of a change to the terms and conditions of any of the warned or counseled employees. Under the circumstances, the Section 8(a)(3) charges are dismissed.

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C. The 8(a)(5) Charges

The amended complaint further alleges that the Respondent's promulgation of rules prohibiting employees from wearing union insignia and discussing the Union during worktime, and granting benefits to employees in July through the contest-quizzes, all without prior notice to the Union and affording it an opportunity to bargain, constituted unilateral changes in violation of Section 8(a)(5). The Respondent denies that such events constituted changes and contends that such contests and rules were long in place and never objected to by the Union.

Section 8(a)(5) requires employers to provide the Union with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *Pepsi-Cola Bottling Co.*, 330 NLRB 900 (2000); *NLRB v. Katz*, 369 U.S. 736 (1962). A mandatory bargaining matter is one that is "material, substantial, and significant" and an employer's failure to provide notice of such a change to the appropriate bargaining agent is a violation of Section 8(a)(5). *Crittenton Hospital*, 342 NLRB 686 (2004).

Contests at the Respondent's facility were not new. The Respondent periodically, and since 2000, conducted a voluntary employee recognition and motivation program known as RAMP. RAMP included a wide variety of events, ranging from ice cream socials to contests in which gifts and small cash prizes were awarded to the facility's employees. The Respondent has also periodically conducted anonymous employee satisfaction surveys. However, it has never provided notice of RAMP to the Union or bargained about any of the activities involved. As noted above, RAMP was utilized during the decertification election campaign for the commission of 8(a)(1) violations discussed above. That development does not change the fact, however, that such contests and social events were voluntary. As such, they were not a term or condition of bargaining unit members' employment. Under the circumstances, the Section 8(a)(5) allegation regarding the contest-quizzes is dismissed.

The Respondent's rule changes regarding the use of buttons and pulleys, and nonwork discussions between employees during worktime, however, are a different story. Before the decertification election campaign period, employees were generally permitted to engage in personal conversation and wear personal buttons while working in resident care areas. Such restrictions, which clearly affected how they were to behave and what they could wear in those instances, thus constituted material, substantial, and significant changes to bargaining unit members' terms and condition of employment. See *United Rentals, Inc.*, 350 NLRB No. 56, slip op. at 2 (2007) (uniform rule change); and *San Luis Trucking, Inc.*, 352 NLRB No. 34, slip op. at 18-19 (2008) (rule prohibiting employees from talking to one another). Accordingly, the Respondent's unilateral changes violated Section 8(a)(5) and (1).

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Conclusions of Law

1. The Respondent, Altercare of Wadsworth Center for Rehabilitation and Nursing Care, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. Service Employees International Union, District 1199 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative of the following employees of the Respondent, which constitutes a unit appropriate for the purposes of collective bargaining: All full-time and regular laundry aides, dietary aides, cooks, nurses aides,³⁴ porters, restorative aides, housekeeping aides, and students working more than 16 hours a week, but excluding all office clerical employees, guards and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) of the Act by promulgating and enforcing a rule prohibiting employees from wearing pronoun buttons and pulleys in the midst of a decertification election campaign.

5. The Respondent violated Section 8(a)(1) of the Act by promulgating and enforcing a rule allowing employees to discuss nonwork-related subjects, but prohibiting them from discussing union matters during a decertification election campaign.

6. The Respondent violated Section 8(a)(1) of the Act by polling and interrogating bargaining unit members as to their union membership, activities, and sympathies through the use of four contest-quizzes, one of which included a statement indicated that it would be futile to retain the Union as their bargaining representative.

7. The Respondent violated Section 8(a)(5) and (1) of the Act by instituting work rule changes regarding the use of buttons and pulleys, and nonwork-related discussions between employees during worktime, without giving notice to and bargaining with the Union.

8. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. All other charges not specifically referred to above are dismissed.

Remedy

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁵

ORDER

The Respondent, Altercare of Wadsworth Center for Rehabilitation and Nursing Care, Inc., Wadsworth, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

³⁴ See fn. 6, supra.

³⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Instituting work rules prohibiting employees from wearing prounion buttons and pulleys.

5 (b) Instituting work rules prohibiting employees from speaking with each other about union-related matters, while permitting employees to speak with others about other nonwork-related matters.

10 (c) Conducting polls or contests and interrogating employees concerning their position or support for the Union.

(d) Telling employees that it would be futile to support the Union as its bargaining representative.

15 (e) Unilaterally instituting work rule changes regarding the use of buttons and pulleys, and nonwork-related discussions between employees during worktime, without giving notice to and bargaining with the Union.

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

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

25 (a) Rescind the work rule prohibiting employees from talking to each other about union-related matters, while also permitting employees to talk with each other about other nonwork matters.

(b) Rescind the work rule prohibiting employees wearing buttons and pulleys displaying support for the Union.

30 (c) Within 14 days after service by the Region, post at its facility Wadsworth, Ohio, copies of the attached notice marked "Appendix."³⁶ Copies of the notice, on forms provided by the Regional Director for Region 8, 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 all places where notices to employees and members are
35 customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, 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
40 copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 2007.

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50 ³⁶ 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."

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

5 Dated, Washington, D.C. September 12, 2008

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Michael A. Rosas
Administrative Law Judge

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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 Federal 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 coercively question or poll you about your union membership, support, or activities.

WE WILL NOT tell you that it would be futile to support the Union as your bargaining unit representative.

WE WILL NOT institute rules prohibiting employees from talking to each other about union-related matters, while also permitting employees to talk with each other about other nonwork matters.

WE WILL NOT institute rules prohibiting employees wearing buttons and pulleys displaying support for the Union.

WE WILL NOT institute new work rules or modify existing rules without giving notice to and affording the Union an opportunity to bargain over such changes.

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 the work rule prohibiting employees from talking to each other about union-related matters, while also permitting employees to talk with each other about other nonwork-related matters.

WE WILL rescind the work rule prohibiting employees wearing buttons and pulleys displaying support for the Union.

ALTERCARE OF WADSWORTH CENTER FOR
REHABILITATION AND NURSING CARE, INC.

(Employer)

Dated _____

By

(Representative)

(Title)

JD-51-08
Cleveland, OH

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1240 East 9th Street, Federal Building, Room 1695
Cleveland, Ohio 44199-2086
Hours: 8:15 a.m. to 4:45 p.m.
216-522-3716.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 216-522-3723.