

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

NORTON HEALTHCARE, INC., D/B/A
NORTON AUDUBON HOSPITAL

and

Cases 9-CA-44236
9-CA-44323

NURSES PROFESSIONAL ORGANIZATION,
CALIFORNIA NURSES ASSOCIATION/NATIONAL
NURSES ORGANIZING COMMITTEE, AFL-CIO

Eric J. Gill, Esq.,

for the General Counsel.

Mark D. Nelson and Simona F. Cole, Esqs.,
(Drinker Biddle & Reath, LLP), of Chicago,
Illinois, for the Respondent.

Linda M. Shipley, Esq.,
for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. The consolidated complaint, issued on July 15, 2008, stems from unfair labor practice (ULP) charges that Nurses Professional Organization, California Nurses Association/National Nurses Organizing Committee, AFL-CIO (the Union) filed against Norton Healthcare, Inc., d/b/a Norton Audubon Hospital (Respondent or the hospital). The complaint alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) from November 2007 — March 2008, when an election among the hospital's registered nurses (RN's) (or staff nurses) was pending.¹ More specifically, the General Counsel alleges that Respondent made oral statements coercive of employees' rights, distributed two documents containing unlawful statements, and disciplined Jennifer Smithers because of her union activities.

Pursuant to notice, I conducted a trial in Louisville, Kentucky, on September 23 – 25, 2008, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and the General Counsel filed helpful posthearing briefs that I have duly considered.

Issues

Did Respondent threaten employees by telling them that the following would occur if they voted in the Union?

¹ Hereinafter, November and December dates occurred in 2007, and January – March dates occurred in 2008, unless otherwise indicated.

1. Nurse Manager (NM) Kimberly Justice, during the weeks of November 12 and 26, stated that she would no longer be able to help them with their patients.
- 5 2. Assistant Nurse Manager (ANM) Jonetta (Jonni) Palmer, in mid-January, stated that she would not be able to help them with their patients
3. NM Beverly Spindler, in mid-January, stated that they would not receive a cost-of-living raise (market adjustment).
- 10 4. President Thomas Kmetz, on about February 17, stated that they would lose their flexibility in scheduling and that their raises would be frozen during bargaining.

Did the following statements unlawfully limit employees' rights to solicit or distribute union literature?

- 15 1. ANM Michelle D'Amato, on about January 20, told Martha Ann (Ann) Hurst that she was not allowed to distribute union literature or be at the hospital during her nonwork hours.
- 20 2. NM Sherri Head, on about February 9, told Hurst that she was not to distribute union literature or be at the hospital during her nonwork hours.
- 25 3. ANM Stacy Pipes, on about February 23, instructed employees that Hurst was not allowed on the floor when she was not working, to let Pipes know if she came into their unit, and that she would be reported to the house supervisor and escorted off the property as she was previously.
- 30 4. NM Allyson Skaggs, on about March 12, told Hurst that she was not allowed to distribute union literature or be at the hospital during her nonwork hours.
5. Intensive Care Unit (ICU) Manager Charlene Woodard, on February 1, told Smithers that when she was off the clock, she had no reason to be on the unit and should be off the premises.

35 Were the passages contained in two documents that Respondent distributed to employees coercive because of what they said about employees' wages remaining frozen during bargaining?

40 Finally, did Respondent's issuance of a "communication record" (CR) to Smithers on February 8 constitute a disciplinary action against her because of her union activities on January 27, to wit, her conversations with coworkers about meeting with a union representative in the break room?

Witnesses

45 Both the General Counsel and Respondent called numerous witnesses. In addition to Smithers and Hurst, the former called RN's Teresa Allen, Donna Comstock, Janice Goodman, Holly Redmon, Rebecca Smith, Barbara Utley, and Carolyn Wallace.

50 Respondent called all of the management agents named in the complaint (specified in the previous section), and other representatives of management/supervisors, including Jane Carmody, Vice President of Patient Care Services; ANM LeeAnn Coleman French; Jacinta

Nelson, Division Director, Human Resources (HR) Operations; NM Gailann Reynolds; and Stephanie Swincher, ANM at times pertinent. Additional witnesses for the hospital were RN's John Hall, Linda Reece, and Sonya Vaught; and Adrienne Klusch, an LPN or floor nurse.

5 I will address credibility in the Facts section. I cite here the well-established precept that witnesses may be found partially credible: “[N]othing is more common in all kinds of judicial decisions than to believe some and not all’ of a witness’ testimony.” *Jerry Ryce Builders, Inc.*, 352 NLRB No. 143, slip op. at 1 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds, 340 U.S. 474 (1951). Rather, in evaluating its
10 plausibility, a witness’ testimony is appropriately weighed with the evidence as a whole. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 798 – 799 (1970).

Facts

15 Based on the entire record, including prior Board decisions, witness testimony and demeanor, documents, and the parties’ stipulations, I find the following facts.

Union efforts to represent the hospital’s nurses go back many years, predating Norton’s assumption of control of the facility on September 1, 1998. See *Norton Audubon Hospital*, 341 NLRB 143, 144 (2004), enfd. 156 Fed. Appx. 745 (6th Cir. 2005).
20

Norton Healthcare, Inc., a corporation with an office and place of business in Louisville, Kentucky, operates four hospitals in the Louisville area, including the hospital, which provides a full range of inpatient and outpatient medical care. Jurisdiction has been admitted, and I so find.
25

The hospital, licensed for just over 400 beds, has a typical daily census range of 200 – 240 patients. Classified as a full-service hospital, it has the capability of performing complex cardiac procedures, oncology services, and other specialized functions. The hospital has a total of about 1250 – 1300 full-time-equivalent (FTE) employees. It employs approximately 672 non-supervisory RN’s, about 650 of whom work under Patient Care Services, with the remainder under Care Management.² All of the pertinent nursing units are under Patient Care Services.
30

Sometime in late 2007, Respondent and the Union reached an agreement resolving certain prior ULP’s and providing for an election to be held among the hospital’s nurses.³ The Region later scheduled the election for March 14 – 15. To assist in its preelection campaign, Respondent engaged the services of Modern Management, a labor relations consulting service, and sought outside counsel. The hospital created a governing council to coach management on a regular basis as to what they could and could not say to employees.
35

40 On about Mach 12, the Region cancelled the election because of new ULP charges filed by the Union.⁴

Statements in the Hospital’s Campaign Literature

45 In the time frame from late October 2007 – March 2008, Respondent circulated to RN’s numerous preelection materials, most entitled “decisions.”⁵

² See R. Exh. 9, an organizational chart.

³ See R. Exh. 5 at 8.

⁴ R. Exh. 5 at 65.

⁵ See R. Exh. 5, which includes documents after March.

50

The “decisions” dated December 19 contains, in relevant part, the following:⁶

Myth #2: *We were told by union supporters that there are legal requirements placed on the hospital that can force agreement. Is that true?*

Response: Absolutely not! The only obligation on the parties (union and hospital is to bargain in good faith

There is no timetable or obligation to agree to any demand. . . .

The CNA has a track record of taking more than **one year** to obtain a first contract. In the interim, what you have in terms of wages, benefits and working conditions may well **remain frozen**. They may eventually be changed as a result of the give-and-take of collective bargaining.

The other document at issue is an undated notice entitled “An Old Union Adage” that was distributed in about early January and states in relevant part:⁷

Rumor: Union supporters claim that once they win, they will have a contract in less than 60 days because the hospital needs one to keep up with wage competition and also maintain its provider agreements with local businesses.

Fact: The CNA actual record of obtaining a first year contract is not even close to 60 days. In the last 10 years CNA averaged 367 days with longest lasting 713 days and shortest 180 days. Remember that all of your current benefits, wages and conditions of work remain **frozen** pending what may be eventually agreed to. . . .

Oral Statements to Employees

Witness testimony as to what management /supervisors said often varied and, on some topics, differed on specific wording even among witnesses called by the same party. Wording may be critical in deciding whether an employer engaged in legitimate campaign propaganda or in unlawful coercion. Accordingly, determining what in fact was said is of paramount importance. In so doing, I have evaluated the reliability of witnesses and the plausibility of their testimony.

Aside from solicitation/distribution, the alleged unlawful statements concerned two subjects: salary increases and managers’ assistance to RN’s. As to the former, Respondent has given two types of raises over at least the past few years. The first is periodic “market adjustment” pay (or cost of living) increases to RN’s, the last in October 2006.⁸ They are not provided at any fixed intervals. The second, pay-for-performance (PFP) or merit increases, are based on performance evaluations and effective annually with the first pay period in August.⁹ Regarding the latter, the existing practice is that managers, at times, help RN’s perform such functions as taking vital signs, starting IV’s, or wheeling patients outside after discharge.

⁶ Jt. Exh. 2 at 2; see also R. Exh. 5 at 33 (bold-face and italics in original).

⁷ Jt. Exh. 1 (bold-face in original).

⁸ R. Exh. 7.

⁹ See R. Exh. 6.

Kmetz' Meetings with Employees

5 During the preelection period, Kmetz, with Carmody present, spoke with employees on the subject of unionization at three kinds of meetings: regularly-scheduled (usually quarterly) "employee communication forums," generally with many employees and held in large rooms; smaller and informal "rounding" meetings that usually took place in staff work areas; and special meetings, held at various work locations, specifically for the purpose of talking about the upcoming election and management's perspective. At the special meetings, Kmetz both made standard remarks and also answered questions from employees. If the questions involved the clinical agenda or quality of care, he had Carmody respond.

10 General Counsel's witnesses on this allegation were all RN's. Thus, Smithers and Smith testified about one of the special meetings that Kmetz conducted, in the Open Heart Unit (OHU) break room on about February 17, and Goodman testified about an open forum meeting he held for med/surg employees in the community room in late January, as well as a special meeting he conducted a week or two later.

15 On Respondent's behalf, Kmetz and Carmody testified on the various meetings; RN Reece as to two open forum meetings, one of which was in the community room (apparently the same meeting that Goodman described); and RN Hall on what was apparently a special meeting in the Progressive Cardiac Unit (PCU) break room.

20 Kmetz served as the hospital's chief spokesperson in Respondent's preelection campaign, and he spoke numerous times, either sua sponte or in response to questions, on what would happen if the nurses voted for union representation. He carefully adhered to the instructions that the hospital's labor consultants and labor lawyers gave to management. In this respect, his testimony about what he said mirrored the campaign literature that Respondent distributed to nurses.

25 Kmetz demonstrated good recall, answered questions readily and without equivocation, and did not make any apparent efforts to hedge his testimony with qualifiers or otherwise. I note that RN's Reece and Hall corroborated his testimony regarding how he phrased what would happen to raises and benefits if the nurses voted for representation.

30 For all of the above reasons, I conclude that his testimony regarding what he said at meetings was reliable, and I credit it.

35 Kmetz had no script but communicated management's perspective by covering certain points. One was how divisive union organizing had been in other organizations and the negative impact it had had on employees, hospitals, and the community. He said that he did not know if that would happen at the hospital, although it had occurred with some frequency elsewhere. He further stated that the hospital did not know how long a contract would take to negotiate, but it typically took 12 – 13 months. He also asked nurses to find the time to vote.

40 Nurses asked questions at various meetings. A frequent one was the impact of union representation on flexibility. He replied that he could not tell them whether the NM's and ANM's would have more or less flexibility in assisting RN's with their duties until such time as there was a contract. Another was the impact that choosing representation would have on wages. Kmetz answered that during the collective-bargaining process, some organizations were very limited in the way of being able to honor pay adjustments, but others had been able to gain some flexibility, so he could not say what would happen until the collective-bargaining process began. He spoke in similar terms about benefits.

Reece and Hall corroborated Kmetz in this respect. Reece testified that he stated raises and benefits might be frozen depending on what was going on in negotiations but never said it was definite but only possible. Similarly, Hall testified that Kmetz stated he did not know what would happen to salaries and benefits if the Union was voted in, because they would have to be negotiated.¹⁰

I now turn to the special meeting that Kmetz held with OHU nurses in the break room on about February 17. Kmetz testified that he specifically recalled that meeting because Smithers accused him of not being honest about Norton's decision to close Southwest Hospital and about the reduction in OHU staffing levels. He was asked what would happen to salaries if the Union was voted in and gave "the same answer that I gave every time to that question of, it will depend on the process. It could happen, it's happened at other organizations where salaries were frozen. I'm not saying it would happen. It would depend on the kind of raise we want to give, what the Union negotiators' reaction is to that, what the National Labor Board reaction is to that" ¹¹

Smithers testified that Kmetz started by stating that if there was a union, management would not have flexibility to let nurses off if they needed flexibility in schedule. During the following question-and-answer period, a nurse asked if nurses would receive their annual raises and evaluations if the Union was voted in. According to Smithers, he replied, no, that their "raises and evaluations would be frozen until we came to an agreement on a contract."¹² However, in one of her affidavits, she stated, "Kmetz did not answer the question directly, my impression from what Kmetz said was that if the Union won, we would not get our raises in July."¹³ This sheds some doubt on the precision of her recall. Smith testified that Kmetz stated that if the Union came in, management could not longer change nurses' schedules and that a contract could take a couple of years, during which time wages would be frozen. However, she had limited recollection of the meeting.

For reasons stated earlier about Kmetz's credibility in general, as well as the above considerations, I credit his testimony about what he said at this particular meeting where it diverged from that of Smithers and Smith.

Other Managers/Supervisors' Statements Concerning Benefits

The relevant conversations generally arose in the context of more informal discussions at nurses' work areas. They follow in chronological order.

As to Justice's alleged statements during the weeks of November 12 and 26, the witnesses were Smithers on behalf of the General Counsel, and Justice on behalf of management.

¹⁰ Goodman testified that at the meetings she attended, Kmetz stated that if collective-bargaining were to take place, "everything would start at zero." Tr. 310. However, no other witnesses testified that he said this, and the General Counsel does not allege a violation based thereon. Accordingly, I do not find as a fact that he stated such.

¹¹ Tr. 367.

¹² Tr. 168.

¹³ Tr. 230.

Smithers testified about two such conversations, placing one in mid-November, in the back of OHU, and the other about 2 weeks later, at the OHU nurses' station. Justice, on the other hand, recalled only one such conversation in November, at the nurses' station. Smithers seemed to have a good recall of two meetings and provided differentiating details, including different names of other nurses who were there. Accordingly, I find that two meetings were held. Since Smithers testified that Justice said basically the same thing about helping nurses at both, whether there was one meeting or two is not significant.

Smithers and Justice consistently testified that the latter more or less "piped in" when RN's were already engaged in discussing the Union. The primary difference in their testimony relates to whether Justice stated she *would not* be able to help RN's with patients if the Union came because the Union would not allow interaction between supervisors and RN's (Smithers), or that *depending on what was negotiated*, she would not be able to directly assist in patient care (Justice).

In weighing the reliability of testimony in favor of Justice, I again note the extensive training that Respondent provided to managers/supervisors and the fact that the General Counsel did not call any other RN's to corroborate Smithers' version of what was said. I therefore find that Justice stated in mid- and late-November that she might no longer be able to assist in patient care, depending on the outcome of bargaining.

ANM Palmer's statement in mid-January took place in the second-stage recovery area. The witnesses who testified to this—RN Comstock on behalf of the General Counsel, and Palmer and NM Reynolds for the hospital—were not inconsistent in their versions of what Palmer said about patient care. I find the following.

Palmer came around to a small group of nurses, including Comstock, and told them to make sure they voted, but it did not matter to her which way. Palmer was asked whether she could continue to help them with patient care needs if the Union came in. She replied that she was not sure because that would have to be negotiated.

The incident involving NM Spindler took place at around the same time in an area near the 4W nurses' station. On this allegation, RN Allen testified for the General Counsel, and Spindler for the Hospital. Again, their versions of what Spindler said were generally consistent, with one important exception, discussed below.

I find the following. Spindler asked Allen and RN Joann Graff to go with her to a small room off the nurses' station. They did so. She first thanked them for increasing patient satisfaction and then stated she wanted to give them some information about the Union. After talking about union dues, Spindler stated that benefits would be frozen during the bargaining period, and that might include PFP and market adjustments. Allen responded that this was not fair. About a week later, Spindler reiterated to Allen her statement about benefits being frozen during the bargaining period.

As with the Justice – Smithers incident above, the one important difference in their testimony was whether Spindler said that nurses *would not* (Allen) or *might or might not* get raises during bargaining (Spindler). In resolving this difference, I first note Spindler's testimony that she had a number of conversations with employees about the Union, both one-on-one and in groups and that she made similar statements on the subject of what would happen to benefits during the bargaining process. She testified more specifically about her exact words than did Allen. I also take into account the hospital's concern with giving management/supervisors instructions on what they could tell employees. Finally, the General Counsel did not call RN

occasions were on about January 20, February 9, and March 12.

January 20

5 Hurst and Assistant Clinical Manager D'Amato testified about their relevant conversations that day. Two other direct participants did not: Sue Yost, an RN from Norton's downtown hospital, who accompanied Hurst in distributing literature; and House Supervisor Marsha Sharpe.

10 Both Hurst and D'Amato appeared sincere as they testified. In this regard, as described below, I note that their differing accounts of what Sharpe told Hurst favor the opposing party. Other than on this point, their testimony was not necessarily contradictory.

15 On January 30, Hurst and Yost went to the hospital, wearing shirts with union insignia. They started distributing leaflets in the 6 East break room and then went to the 6W nurses' station and asked the RN's for the combination to their break room. D'Amato, who did not recognize them, asked what they were doing and said they did not belong there. Hurst replied that they did and needed to leaflet in the break room. One of the nurses said she would let them into the break room. They accompanied her there and left leaflets on the table. They also
20 posted one on a bulletin board. After that, they left leaflets in the 5E and 5W break rooms before going down to the fourth floor. In the meantime, D'Amato called Sharpe and reported their presence.

25 On the fourth floor, right off the staff elevators and stairway, Hurst and Yost encountered D'Amato and Sharpe. According to Hurst, Sharpe asked what she was doing. Hurst showed her the leaflets and stated that she was passing them out. Sharpe responded that Hurst had done this before, she (Hurst) knew what she was doing, and as long as she abided by the rules, she could go ahead and do what she was doing. Hurst testified that she proceeded to leave leaflets in break rooms on lower floors; on the other hand, D'Amato testified that Sharpe told
30 Hurst and Yost that they could not engage in distribution without getting a vendors' pass from HR. Because Hurst and Yost engaged in further distribution without interference and without taking any steps to obtain hospital approval, I find Hurst's version more probable, and I credit it. I note that the General Counsel has not alleged that Sharpe committed any violations of the Act.

35 February 9

This incident involved NM Head (who did not testify), D'Amato, and Hurst. After passing out leaflets in the 6W break room, Hurst went to 6E, where she encountered D'Amato and asked for the combination for the 6E break room. They were either outside Head's office
40 (D'Amato) or went there together (Hurst).

45 Again, Hurst's and D'Amato's versions of what Head said were not inconsistent on key points. Head told Hurst that she could not belong there and needed to go home, to which Hurst responded emphatically that she had the right to pass out union literature. Head nodded at D'Amato, who then accompanied Hurst to the break room and let her in. Hurst put leaflets on the table and one on a bulletin board.

50 Once more, their differing accounts of what next happened bolster the finding that they were candid and not making efforts to slant their testimony. Hurst testified that she proceeded to distribute leaflets in other break rooms; D'Amato, on the other, testified that she followed Hurst down the elevator to the first floor and, presumably, her exit from the building. Thus, their respective versions favor the opposing party. I believe that Hurst, as a long-time union

supporter, would have been sensitive to any perceived management interference in her union activities, and I therefore find her account more likely. I also note that D'Amato is not alleged to have committed any violations of the Act by her conduct on the day in question.

5 March 12

Hurst had a conversation with NM Skaggs on the fifth floor on this date. As was the case with Hurst and D'Amato, Hurst and Skaggs did not testify contradictorily on key matters.

10 After clocking out on March 12, Hurst got union leaflets from her car and went back inside the hospital. She first left literature in the 6E and 6W break rooms and then went down to the fifth floor. Skaggs saw her and followed her as she entered the 5E break room. There, Skaggs told her that she did not belong there, that the break room was for 5E staff, and that Hurst should use her own break room if she wanted to pass out leaflets. Skaggs asked if she
15 was off the clock, and Hurst replied no. Skaggs then stated she should go home. Hurst responded that Skaggs did not know the rules. After leaving the union literature, Hurst left, and Skaggs remained. Thereafter, Hurst went on to distribute the flyers in other break rooms.

20 Statements Made to Other Nurses about Hurst's Distribution of Literature

These relate to statements that ANM Pipes allegedly made at the CVU nurses station on about February 23. The General Counsel's witnesses on this were RN's Kusch and Wallace; Respondent called Pipes.

25 Finding facts here is difficult. Kusch and Wallace were not consistent on the place of the meeting, and Pipes had no recollection about the specific conversation, testifying that she never had discussions about employees (as opposed to non-employees) distributing literature.

30 Wallace testified that the conversation took place at the CVU nurses station on about February 23, with several nurses present; however, Kusch testified about a conversation in the CVU break room on a date that she could not recall, with only her and Wallace. Wallace recalled no such conversation. Assuming it was the same meeting, they were not consistent on what Pipes said.

35 Kusch's testimony was that Pipes did not specify Hurst in her remarks, but Wallace testified that Pipes named Hurst at the outset. However, in Wallace's affidavit, she first said that Pipes mentioned Hurst by name but then stated, "I believe that all the nurses knew that Pipes was referring to another staff nurse [Hurst],"¹⁷ a seeming contradiction. I also note that Wallace on cross-examination added conversations about which she did not testify on direct
40 examination. In view of these problems with her credibility, and the lack of corroboration, I cannot find her testimony reliable.

45 On the other hand, Kusch appeared candid, and there was nothing in her testimony shedding doubt on its reliability. Assuming they were testifying about the same incident, I credit Kusch over Wallace where their testimony differed. Although Pipes testified that she could not recall any such conversation, I do not believe that Kusch manufactured it. I note NM Skagg's testimony that her issue with Hurst on March 12 was the latter's being in the break room when she was off-duty. Therefore, I credit Kusch's account, as follows.

50

¹⁷ Tr. 115.

Kusch and Wallace were in the break room when Pipes walked in and said that there were some people spotted off the clock distributing literature; if they were on the clock fine, but since they were off the clock, management needed to know about their presence. Wallace asked if she should call Hurst. Pipes responded that Wallace should do whatever she had, but she (Pipes) was telling them what she had been told by her supervisors.

Off-Duty Nurses Coming to the Hospital

I heard testimony from numerous witnesses from different departments on this subject. Crediting the testimony of RN's Comstock and Hurst and ANM Justice, I find that, at least in some departments, off-duty nurses on occasion come in to their units for purposes not directly related to their employment, to wit, bringing personal items to colleagues (Comstock), bringing in their children to "show off" (Hurst), and attending baby or bridal showers in the break room (Justice).¹⁸

Nothing on the record, either testimonial or documentary, reflects that the hospital has a policy specifically addressing the matter of nurses going into break rooms outside of their normal work stations.

Communication Record (CR) Issued to Smithers

Respondent contends, contrary to the General Counsel, that the CR issued to Smithers was not, in fact, disciplinary in nature. To put this issue in proper context, an overview of Respondent's formal disciplinary system is necessary. The hospital's progressive discipline policy provides for four levels of offenses—level 1 – 6 points; level 2 – 3 points; level 3 – 2 points; and level 4 – 1.5 points.¹⁹ Points are accumulated in a rolling 12-month period, and an employee accumulating 6 points in such a period is subject to possible termination. The terminology of "oral warnings" and "written warnings" is not used.

CR's are nowhere mentioned in any of HR's written policies, but Respondent Exhibit 8, a compilation of CR's issued since January 1, 2007, demonstrates that they are a document that employees, including nurses, may receive from management regarding their conduct. They are maintained in the employee's file in his or her department, but not in the employee's HR personnel file.

Smithers' CR

Smithers, previously a charge nurse, returned from medical leave in March as a staff nurse.²⁰ She became actively involved in the union campaign in approximately November, as reflected in General Counsel's Exhibit 3, an undated union flyer with her picture and statement supporting unionization.

¹⁸ Hurst's off-duty activities at the hospital cannot be equated with those of off-duty RN's coming in for job-related reasons, such as checking their upcoming schedules or for training on equipment.

¹⁹ See R. Exh. 1.

²⁰ Respondent contends that this demotion colored the veracity of her testimony because she had an "ax to grind." (R. Br. 61). In assessing her credibility, I have considered this as one factor among many, including the consistency of her testimony with that of other witnesses.

The CR, issued on February 9, stemmed solely from events on the night shift (7 p.m – 7 a.m.) on January 27, concerning Smithers' conversations with other RN's about meeting with a union representative in the break room that evening. Direct witnesses to the pertinent events were RN's Redmon, Smith, and Utley, the nurses on duty that night. All of them testified. On salient points, their versions of what took place were similar and consistent with Smithers', and I find the following.

At one point, apparently on January 27, Smithers talked with Smith about bringing in a union representative. Smith responded that it was a good idea, and Smithers arranged for Elvia Arrero of the Union to come to the hospital.

Later that evening, Smithers told Redmon, Smith, and Utley that a union representative was going to be in the break room with pizza, to meet with them. All of them said no, that they would not be comfortable with that. Smithers said "okay" and left. She did not get emotional or raise her voice during that conversation.

Smithers met Arrero at the back door to the Hospital, took pizza and union literature from her, and returned to the unit with them. Arrero did not enter the building. Once back, Smithers put the pizza and union information in the break room and informed other RN's of this.

As Smithers was on her way out, she passed Smith, who was in a patient's room. Smith told her that they were all afraid of getting fired, and Smithers responded that Smith did not have anything else to complain about anymore. Smith observed nothing out of the ordinary in Smithers' behavior and did not see her cry, stomp her feet, or raise her voice.

Management's Response

Swincher testified as follows. Camilla (Cami) Karl, the night-shift ANM, reported to her that Smithers had arranged for a union representative to bring pizza into the break room and would be available to talk to RN's, and that they were concerned about talking to a union representative while they were working. Swincher thereafter interviewed Smith, but not Utley. Smith stated that she felt it inappropriate for nurses to talk to a union representative during their worktime. Swincher reported the incident to Woodard. .

In contrast, Justice testified that Swincher reported to her that Karl, Smith, and Utley had all come to her and complained that Smithers had disrupted patient care; Coleman French that Smith called her and related what had occurred, including, inter alia, that Smithers "got upset and cried;"²¹ and Woodard that Justice and Coleman French were the ones who notified her.

Because of these inconsistencies, and the fact that the hospital produced no written documentation showing which RN's reported what to whom, I am unable to make any findings of fact thereon.

Management's internal deliberation process concerning issuance of the CR against Smithers was similarly contradictory in many respects.

Thus, Coleman French testified unequivocally that Woodard made the decision to issue it, Justice that she recommended the decision and Woodard said "okay," and Woodard that it was a mutual decision between Coleman French, Justice, HR, and herself. I note here that

²¹ Tr. 545.

Woodard was markedly evasive and never gave a direct answer when I repeatedly asked her whether the decision to issue Smithers a CR was made prior to management's first meeting with her, on February 1. Further, Justice testified that she had never before issued a CR and that she considered Woodard a mentor. Based on these factors, I believe that Coleman French and Justice were more reliable witnesses and credit them over Woodard. Accordingly, I find that Woodard made the ultimate decision, despite what appeared to be her attempt to minimize her involvement.

February 1 Meeting

Justice called Smithers in to a meeting in the education room on February 1. Initially, they and Coleman French were present; Woodard arrived when the meeting was already in progress.

Justice began by saying that they wanted to hear Smithers' side of the story. Coleman French stated that Smith had reported that Smithers had upset everybody, been red-faced, cried, and stomped her feet. Smithers denied this. She stated that she did not bring anybody in but had brought union literature. Woodard came in at that point. Either she or Justice stated that Smithers would receive a CR for disruption of patient care, explaining that it would go into her file in the OHU and be maintained for a year but would not go into her HR file. Woodard also said something about Smithers being within earshot of a patient's room. Smithers denied this. Woodard asked Smithers if she was off the clock at the time. Smithers answered "yes." Woodard responded that she should not be there when she was not working, citing the "20-minute-rule" that she should be there not over 20 minutes before and after her scheduled shift.²² Smithers stated that she believed the 2007 handbook allowed her to pass out information in the break room. Woodard replied that she really did not have a reason to be there when she was not working. The meeting ended with Justice or Woodard saying they would get back to her with the CR.

I note that Smithers' testimony indicated that she displayed more emotion at the meeting (and the subsequent meeting she had with Justice and Coleman French) than her demeanor as described by Coleman French, Justice, and Woodard. I have no doubt that Smithers was upset at both meetings, but perceptions and descriptions of emotions are subjective and can vary greatly. In any event, in the absence of expert psychological testimony, I am unable to draw inferences either for or against Smithers based on the degree of emotion she exhibited.

On a date between February 1 – 9, Smithers went to the HR office and met with HR representatives, including Neal Augustus, to file a grievance over the CR. Augustus told her that she could not do so because a CR would not go into her HR file and was not a write-up or disciplinary action. He suggested she write a letter for inclusion with the CR.

Receipt of the CR

Shortly after Smithers reported to work on February 9, Justice asked her to come and sign the CR. Smithers accompanied Justice to the ANM's office, where Coleman French was present. Justice gave Smithers the CR. She read it over, made comments denying the

²² Justice testified that the sole basis for the CR was disruption of patient care. She further testified that whether Smithers was on or off the clock had no bearing and that she did not know why Woodard raised the 20-minute rule at the meeting.

allegations, and refused to sign it.²³

In relevant part, the CR states: (bold-face in original)

5 **Circumstances:** While completing her documentation on January 27, 2008, Jennifer approached staff regarding a non-employee wishing to visit our employees. This occurred in a patient care area and staff members reported they were uncomfortable with the discussion within the hearing of a patient's room.

10 **Discussion:** I [Justice] obtained [Smithers'] viewpoint. I informed her that activity not relating to patient care, must be restricted to areas outside of patient's hearing and that no non-employee can come on the unit unless to visit a patient.

. . . .

15 Progressive disciplinary action may result if reoccurrence.

20 After receiving the CR, Smithers wrote a letter to management dated February 11, setting out her position on what had occurred and asking that the CR be removed from her record.²⁴ By letter to her dated February 19, Randa Bryan, Director of Patient Care Services, reiterated that the CR was not a formal discipline and thus not grievable.²⁵

CR's and Discipline

25 Woodward's and HR Director Nelson both testified that a CR is issued to employees to improve *unsatisfactory* performance or behavior. As Woodard put it, a CR essentially states that "this was the situation, this can't continue" ²⁶ Tr. 585.

30 Nelson and Woodard both further testified that a recurrence of the same behavior *might* result in discipline. Justice testified, however, that a recurrence within the year period *would* result in discipline. Nelson had limited familiarity with the practices regarding CR's, since HR is not directly involved in them. Woodard hedged on the subject of CR's vis-à-vis formal procedure and on how long CR's are maintained, as she did on the matter of the timing of the decision to issue Smithers a CR. For these reasons, I conclude that Justice's testimony on this point was more reliable than theirs, and I credit her and so find.

35

Analysis and Conclusions

Statements about Raises

40 Respondent here had a practice of giving nurses PFP raises each August, as well as periodic (but irregular) market adjustments in their salaries. At issue in Respondent's campaign literature is the language in the December 19 decisions that wages, benefits, and working conditions "may well remain" frozen during negotiations, and the language in "An Old Union Adage" that "all of your current benefits, wages and conditions of work remain **frozen** pending what may be eventually agreed to" in collective bargaining.

45

²³ See GC Exh. 4. Smithers inadvertently left out "not" before "believe" in her comments.

²⁴ R. Exh. 3.

²⁵ R. Exh. 4.

²⁶ Tr. 586.

50

When employees are represented by a labor organization, an employer may not make unilateral changes in their terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962); *Wal-Mart Stores, Inc.*, 352 NLRB No. 103 (2008).

5 An employer with a past practice of granting periodic wage increases violates Section 8(a)(1) by stating to employees that their wages will be frozen until a collective-bargaining agreement is signed, because this suggests that the employer intends to unilaterally take away the conferral of future benefits and require the union to negotiate to get them back. *Walmart-Stores, Inc.*, supra; *W. E. Carlson Corp.*, 346 NLRB 431 (2006); *Jensen Enterprises, Inc.*, 339 NLRB 877, 877 (2003).

Respondent relies on *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992), in which the literature stated that benefits were “typically” frozen during negotiations. The Board held that, in all the circumstances, the statement was not an 8(a)(1) threat.

15 The Board considered numerous factors. One was the fact that it was the only statement alleged to be unlawful in all of the employer’s campaign literature. It is true that among the numerous pre-election literature Respondent distributed to employees, only two statements have been alleged as violations of the Act. However, I find *Mantrose-Haeuser* distinguishable in other and critical respects, all emphasized by the Board. First, the employer had assured employees that they would be receiving their regular December wage increases. Second, the reference was in a third-party context, directly referring to employers in general. Third, the qualifier “typically” was used. Fourth, there were no other alleged ULP’s.

25 Here, Respondent never communicated an intention to give nurses future salary increases as per past practice, the freeze was in the context of the Hospital itself, and there were no similar qualifiers. Thus, The Adage essentially stated that wages **would** remain frozen until a contract was negotiated, and the Decision’s “may well” suggested the probability or likelihood of a freeze, rather than just its possibility.

30 In light of all these considerations, I conclude that employees reading either document reasonably would have formed the conclusion that they would lose future PFP’s or market adjustments unless and until the Union negotiated their restoration. Ergo, these statements violated Section 8(a)(1).

35 Kmetz and Spindler made statements to the effect that nurse might or might not get market adjustment and PFP raises during the bargaining process. I have already found that Respondent violated Section 8(a)(1) by statements in writing on the subject. In view of this, I find it unnecessary to decide whether these oral statements, phrased in terms of possibility, not certainty or probability, carried the reasonable implication that Respondent would not provide such benefits pursuant to existing practice but that the onus would be on the Union to negotiate them back.

Other Statements Concerning Benefits

- 45
1. Kmetz stated that whether NM’s and ANM’s would have more or less flexibility in assisting RN’s with their duties depended on what was negotiated.
- 50
2. Palmer stated that she was not sure if she could continue to help nurses with their patient care needs if the Union came in because that would have to be negotiated.

3. Justice stated that she might no longer be able to assist in patient care, depending on the outcome of bargaining.

None of these statements suggested any cut in current benefits unless they were restored through negotiation by the Union. Rather, they all related to the potential effect of a negotiated agreement on management-staff nurse interaction, and presented an adverse change as only a possibility, not a certainty. Thus, I conclude that the statements contained no expressions constituting “threat of reprisal or force or loss of benefits” and were protected under Section 8(c) of the Act as legitimate campaign propaganda that employees were capable of evaluating. See *Wild Oats Markets, Inc.*, 344 NLRB 717, 717 – 718 (1995); *Medplex of Milford*, 319 NLRB 281, 281 (1995); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enf. 679 F.2d 900 (9th Cir. 1982). Accordingly, I recommend dismissal of these allegations.

Statements Concerning Hurst’s Distribution of Union Literature

A hospital prohibition against employee distribution of literature in immediate patient-care areas is presumptively lawful, even during employee’s nonwork time; on the other hand, restrictions on distribution of literature during nonwork time and in nonwork areas are presumptively unlawful, even as to areas that may be accessible to patients. *Hospital Pavia Perea*, 352 NLRB No. 60 (2008); *Brockton Hospital*, 333 NLRB 1367 (2001). See also *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978).

The only locations where Hurst sought to distribute were employee break rooms. There can be no question that they were not patient-care areas or even routinely accessible to patients, as reflected by their being locked and accessible only by code given to employees in the department. Indeed, Respondent’s own written policy specifies “employee lounges” as nonwork areas where distribution may occur during nonwork time, provided it does not disrupt patient care or disturb patients. Nothing on the record shows, or even suggests, that Hurst’s activities disturbed patients. Moreover, any impact of such activities (i.e., having an RN on duty open a break room door for her) had a de minimis impact, if any, on patient care. I note that during this time period, management and supervisors held numerous formal and informal meetings with RN’s, obviously concluding that this did not interfere with their providing quality nursing care.

I now turn to the issue of the impact of Hurst’s status as an off-duty employee when she sought to distribute union literature. To be valid, any non-access rule for off-duty employees must apply across-the-board, not just to those who engage in union activity. See *Santa Fe Hotels, Inc.*, 331 NLRB 723, 723 (2000); *Tri-County Medical Center*, 222 NLRB 1089, 1089 - 1090 (1976). Here, off-duty nurses go into their departments not only for job-related matters but for non-hospital-related activities, such as bridal and baby showers. Therefore, Respondent cannot rely on Hurst’s status as an off-duty employee to justify restrictions that it could not have lawfully placed on her had she been at the hospital on nonwork time. I further note that Respondent provided no evidence that nurses are prohibited from going into break rooms other than the one in the department in which they are working.

From the above, I conclude that Hurst had a right to engage in distributing union literature in break rooms on her days off. It follows that any statements made to the contrary violated Section 8(a)(1) of the Act.

On about January 9, D’Amato did not recognize Hurst or the woman with her (who, in fact, did not work at the hospital), and she asked who they are and what they were doing. They did not identify themselves but merely answered that they had a right to be there. D’Amato did

not stop them but instead got in contact with Sharpe, who later identified Hurst and told Hurst that she could go ahead and distribute literature.

5 Even though Hurst and Yost wore union shirts, implying their purpose, they could have been non-employees, governed by different rules as far as distribution of union literature is concerned. Therefore, I do not conclude that D'Amato's questions expressed any kind of limitation on employees' lawful distribution rights.

10 On about February 9, Head told Hurst on February that she did not belong in 6E and needed to go home. When Hurst protested, Head signaled to Justice, who then escorted Hurst to the break room. Were this the only allegation of interference, I might hold that anything Head said in violation of the Act was immediately cured by what was in essence a retraction. However, there was another incident about a month later.

15 Thus, on about March 12, Hurst was in the break room when Skaggs told her that she did not belong on 5E, that the break room was for 5E staff, and that Hurst should use her own break room if she wanted to pass out leaflets. Skaggs asked if she was off the clock, and Hurst replied no. Skaggs then stated she should go home.

20 I conclude that Head's and Skaggs' statements contained unlawful restrictions on Hurst's right to distribute union literature, as described above, and therefore violated Section 8(a)(1). The fact that Hurst was not intimidated and then went ahead with her distribution does not change this determination, because the test is not whether the conduct succeeded but whether it reasonably tended to interfere with employee rights. See *Golub Corp.*, 338 NLRB 25 515, 517 fn. 15 (2002).

30 Finally, on about February 23, Pipes told Kusch and Wallace that there were some people spotted off the clock distributing literature; if they were on the clock fine, but since they were off the clock, management needed to know about their presence. Respondent has not shown that this was a standard practice prior to the Union's organizing campaign, and in such circumstance, I conclude that Pipes' statements also reasonably tended to interfere with employee rights and violated Section 8(a)(1).

The CR Issued to Smithers

35 The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*. Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee 40 engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

45 First, I will deal with the issue of whether the CR was disciplinary or, more specifically, an adverse action. If not, then a necessary predicate for a finding of a violation of Section 8(a)(3) is lacking. See *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993), cited by Respondent, which held that a counseling was not an adverse action when it was not part of the formal disciplinary process "or even a preliminary step in the progressive disciplinary system." That case was distinguished in *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1352 (2004), *affd.* in relevant part, 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied, 127 S. Ct. 50 2033 (2007), wherein the Board found a coaching or counseling to be part of the disciplinary process, because:

5 [I]f an employee has received a coaching or counseling for a particular infraction, that coaching or counseling is taken into consideration in determining whether further discipline is warranted, and the nature of that discipline, for future infractions. The Board has found that warnings and reprimands are part of a disciplinary process in that they lay
 5 “a foundation for future disciplinary action against the [employee].” (citing *Trover Clinic*, 280 NLRB 6, 16 (1986)).

See also *Oak Park Nursing Care Center*, 351 NLRB No. 9 slip op. at 4, 5 fn. 4 (2007).

10 Smithers clearly faced imposition of points under Respondent’s progressive disciplinary system if management found that she engaged in similar misconduct within a 1-year period. I have credited Justice’s testimony that discipline would result, but even crediting Woodard and Nelson, management would at least take into account the CR in determining whether to issue
 15 discipline for a repeat of the misconduct. Indeed, the CR expressly states, “Progressive disciplinary action may result if reoccurrence.” I note that most of the CR’s contained in Respondent’s Exhibit 8 contain language that recurrence will or may result in disciplinary action. Accordingly, I conclude that the principle set forth in *Promedica* applies and that the CR was disciplinary in nature. Thus, the adverse action element under *Wright Line* is satisfied.

20 Since the CR was based on Smithers’ union activity on January 27, the conduct and knowledge elements are also met. To the extent that Respondent contends her activity was unprotected, I will address this further when evaluating Respondent’s position on the reasons it issued the CR.

25 Animus is the final element necessary for a prima facie case. Evidence of animus need not be direct but can be inferred from the totality of circumstances. *Flour Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Birch Run Welding*, 269 NLR 756, 764 – 765 (1984), enfd. 761 F.2d 1175 (6th Cir. 1985). Preliminarily, I decline to adopt the General Counsel’s contention that
 30 Respondent is a “recidivist employer,” because of ULP’s it committed years ago and any ULP’s committed by its predecessors.

35 However, I have found several violations of Section 8(a)(1). Of particular relevance here, three different supervisors, during a period extending for over a month, made unlawful statements to three different employees regarding employee rights to distribute literature. This suggests a pattern of coordinated management conduct, rather than ad hoc reactions by individuals. Smithers’ union activity on January 27 also related to solicitation/distribution, and I find that animus can be inferred from those separate ULP’s for purposes of establishing a prima facie case regarding her CR.

40 Accordingly, I conclude that the General Counsel has satisfied all of the elements for making out a prima facie case. Under *Wright Line*, the burden of persuasion next shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. See *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v.*
 45 *NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *SPO Good-Nite Inn, LLC*, 352 NLRB No. 42 slip op. at 2 (2008); *Serrano Painting*, 332 NLRB 1363, 1366 (2000).

50 If the employer’s proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not in fact relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. *SPO Good-Nite Inn, LLC*, supra. On the other hand, further analysis is required if the defense is one of “dual motivation,” i.e., the employer defends

that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 323, 223 (D.C. Cir. 2006).

5 Although other considerations were cited in the CR, Respondent's sole defense is that Smithers engaged in disruption of patient care.²⁷ For the following reasons, I conclude that this defense is pretextual.

10 Consistent with Respondent's position, Justice stated unequivocally that the CR was issued because Smithers' conduct disrupted patient care. However, the CR does not specifically mention disruption of patient care, and none of the nurses who were direct witnesses to the events testified about such disruption, either at the nurses' station or when Smithers conversed with Smith, who was in a patient's room. On the contrary, all of them testified that Smithers exhibited no behavior that was out of the ordinary, such as speaking
15 loudly and getting agitated. Indeed, Smith, consistent with Smithers, testified that she initiated their conversation and that Smithers responded in a normal fashion. Respondent provided nothing from its records that would provide a basis for impeaching any of their testimony. Even crediting all of management's witnesses, the record is devoid of evidence as to who reported that Smithers had cried, stomped her feet, or raised her voice. The failure of direct
20 eyewitnesses to support Respondent's claim of disruption, or that they reported such, seriously undermines the conclusion that Respondent's motives were bona fide. In this regard, Respondent cannot seriously argue that either Smithers' brief conversation with coworkers at the nurses' station or her merely responding when Smith made a remark from a patient's room per se "disrupted patient care." I need not discuss testimony that RN's at the nurses' stations at
25 times may talk about personal and other non-hospital-related matters when they are not performing work duties: recognition of workplace reality dictates such a conclusion in the absence of any evidence to believe the contrary.

30 Also damaging to Respondent is that it provided Smithers with shifting bases for the CR. Again, Justice testified that the sole reason was disruption of patient care. Yet, the CR twice mentions Smithers efforts to bring in a non-employee. Moreover, Woodard at the February 1 meeting raised the matter of whether Smithers had been on or off the clock and said she should have left the property. Justice testified that she did not know why Woodard brought up the subject. An employer's proffer of inconsistent or shifting reasons for its imposition of discipline
35 raises the reasonable inference that they are pretextual and mask an unlawful motive. *River Ranch Fresh Foods, LLC*, 351 NLRB No. 15 slip op. at 4 fn 9 (2007); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), enfd. mem 165 F.3d 326 (7th Cir. 1998).

40 Respondent's witnesses testified rather inconsistently that the decision to issue the CR was made prior to the February 1 meeting but also that the meeting was held to allow Smithers to present her side of the story. If the decision was already a fait accompli, then the meeting was a sham as far as fact-finding. I also note that Respondent did not document in any way either the nurses' alleged complaints against Smithers or the later statements they made to management about the events in questions. Failure to conduct a thorough and fair inquiry into
45 an employee's alleged misconduct is strong inferential evidence of unlawful motivation. *A/Style Apparel*, 351 NLRB No. 92 slip op. at 2 (1997); *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004), enfd. 198 Fed. Appx .752 (10th Cir. 2006).

50

²⁷ See R. Br. at 59.

Respondent's witnesses also gave inconsistent testimony about who made the final decision to issue the CR, and Woodard, the highest-level manager involved, attempted to minimize her role in management's deliberations. This suggests lack of candor on the real motivation behind Respondent's action against Smithers.

5

Since Respondent has failed to rebut the General Counsel's prima facie case, I conclude that its issuance of the CR to Smithers on February 9 violated Section 8(a)(3) and (1) of the Act.

10

Finally, I address Woodard's February 1 statement to Smithers that she should not be at the hospital on nonwork time. It was made apropos of Woodard's comment about Smithers being within earshot of a patient's room when she engaged in alleged disruption, in the context of asking to meet with a non-employee union representative. Any link of the statement to Smithers' lawful solicitation/distribution rights as an employee was therefore attenuated. Moreover, my conclusion that the issuance of the CR was a violation effectively encompasses anything that management said during its discussion, making a separate finding of an 8(a)(1) violation unnecessary. In these circumstances, I recommend that this allegation be dismissed.

15

Remedy

20

Because I have found that 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.

25

The General Counsel requests as part of the remedy that Respondent e-mail to employees copies of the notice, because the December 17 decisions was so communicated to them.

30

The General Counsel cites two cases. The first is *Valley Hospital Medical Center, Inc.*, 351 No. 88 (2007). However, in that case the Board denied such a request from the charging party because the evidence did not establish that the employer *customarily* communicated with employees electronically. *Ibid* at fn. 1. Other recent decisions reflect this policy. See, e.g., *Valerie Manor, Inc.*, 351 NLRB No. 91 (2007); *Nordstrom, Inc.*, 347 NLRB 294, 294 (2006). The evidence in this case does not establish how often and what percentage of the time Respondent communicates with employees by e-mail. Thus, I am unable to make a finding that Respondent customarily uses e-mail to communicate with employees.

35

40

The General Counsel also cites *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 491 (2001). Therein, an employer found to have committed a number of 8(a)(5) violations was ordered to disseminate by e-mail a copy of the notice to employees to whom it had e-mailed an unlawful solicitation to withdraw from the union. That decision appears to be an exception to the general rule. In any event, the situation there was materially different from this case, in that the document itself was an illegal intrusion into employees' Section 7 rights. Here, only one sentence out of many in the e-mailed document was unlawful.

45

Accordingly, I decline to order that the Respondent distribute the notice to employees via e-mail.

ORDER

50

The Respondent, Norton Healthcare, Inc., d/b/a Norton Audubon Hospital, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

5 (a) Issuing communication records or formally disciplining employees because they engage in activities on behalf of Nurses Professional Organization, California Nurses Association/National Nurses Organizing Committee, AFL-CIO, or any other labor organization.

(b) Implying to employees that if they select union representation, salary increases will be frozen during collective-bargaining, even though such increases were given in the past.

10 (c) Making statements that unlawfully restrict the right of off-duty employees to engage in distribution of union literature on nonwork time in nonwork areas, excluding immediate patient-care areas.

(d) 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.

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

(a) Within 14 days from the date of the Board’s Order, remove from its files any references to the February 9, 2008 communication record issued to Jennifer Smithers, and within 3 days thereafter, notify her in writing that this has been done and that the communication record will not be used in any way against her.

25 (b) Within 14 days after service by the Region, post at its facility at Louisville, Kentucky, copies of the attached notice marked “Appendix A.”²⁸ Copies of the notice, on forms provided by the Regional Director for Region 9 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 are 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 copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2007.

35 (c) Within 21 days after service by the Region, file with the Regional Director for Region 9 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.

40 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 12, 2008

45

Ira Sandron
Administrative Law Judge

50 ²⁸ 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.”

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 issue you communication records or formally discipline you because you engage in activities on behalf of Nurses Professional Organization, California Nurses Association/National Nurses Organizing Committee, AFL-CIO, or any other labor organization.

WE WILL NOT imply that if you select union representation, your salary increases will be frozen during collective-bargaining, even though we gave you such increases in the past.

WE WILL NOT make statements that unlawfully restrict your rights when you are off-duty to engage in distribution of union literature on nonwork time in nonwork areas, excluding direct patient-care areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL remove from our files any reference to the communication record unlawfully issued to Jennifer Smithers, and within 3 days thereafter notify her in writing that this has been done and that the communication record will not be used against her in any way.

NORTON HEALTHCARE, INC.,
D/B/A NORTON AUDUBON HOSPITAL

(Employer)

Dated _____ By _____
(Representative) (Title)

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.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003

Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m.
513-684-3686.

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

5

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, 513-684-3750.

10

15

20

25

30

35

40

45

50