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

**VERITAS HEALTH SERVICES, INC. d/b/a
CHINO VALLEY MEDICAL CENTER
Employer**

and **Case No. 31-RC-8689**

**UNITED NURSES ASSOCIATIONS OF
CALIFORNIA/UNION OF HEALTH CARE
PROFESSIONS, NUHHCE, AFSCME, AFL-CIO
Petitioner**

Mark Robbins and Christina Hanna, Attys. (Littler Mendelson), Los Angeles, CA,
and Radha Savitala, Atty., of Prime Healthcare Management,
for the Employer.

Ryan Spillers and Omar Shehabi, Attys. (Gilbert & Sackman)
Los Angeles, CA for the Petitioner

ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS

LANA PARKE, Administrative Law Judge. On April 15, 2008,[1] the Petitioner filed a petition for election (the Petition) among the registered nurses employed by Veritas Health Services, Inc. d/b/a Chino Valley Medical Center (the Employer or the Hospital)[2] with the Regional Director of Region 31 of the National Labor Relations Board (the Board or NLRB). Thereafter, pursuant to a Stipulated Election Agreement, an election was conducted under the direction and supervision of the Regional Director on May 22 and May 23, 2008 in the following unit:

> All full-time, regular part-time and regular per diem registered nurses employed by the Employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

[1] All dates are in 2008 unless otherwise indicated.

[2] The Employer is a property of Prime Healthcare Management, which has nine healthcare facilities including the Hospital.

The Region served a tally of ballots upon the parties following the election, which showed that of approximately 133 eligible voters, 120 cast ballots, of which 48 were cast for the Petitioner and 65 were cast against the Petitioner. There were 7 challenged ballots, a number insufficient to affect the results of the election.

On May 30, the Petitioner filed timely objections to conduct affecting the results of the election. On August 20, the Regional Director issued a Report on Objections, Order Directing Hearing, and Notice of Hearing setting the Petitioner's objections 1 through 16 for hearing. Thereafter, the Petitioner withdrew objections 1, 8, 10, 14, and 16. I conducted a hearing in Los Angeles, California, October 27 through 30 and November 24 on the remaining objections 2 through 7, 9, 11 through 13, and 15.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following

Findings of Fact and Discussion

I. Legal Principles

The critical period during which the Board generally considers objectionable representation-election conduct (the critical period) "commences at the filing of the representation petition and extends through the election." *E.C. Electric, Inc.,* 344 NLRB 1200, FN 6 (2005). In representation proceedings where, as here, there has been no unfair labor practice allegation or finding, a party seeking to have a Board-supervised election set aside because of misconduct during the critical period carries a heavy burden of proof. The objecting party must show the conduct in question had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. *Quest International,* 338 NLRB 856, 857 (2003). In determining whether the conduct has "the tendency to interfere with the employees' freedom of choice," the Board considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See *Cedars-Sinai Medical Center,* 342 NLRB 596, 597 (2004), citing *Taylor Wharton Division Hrasco Corporation,* 336 NLRB 157, 158 (2001), et al.; *Avis Rent-a-Car,* 280 NLRB 580, 581 (1986).[3]

[3] The Union couches a number of its objections in terms of violations of the Act. While conduct unlawful under the Act is "a fortiori, conduct which interferes with the results of an election" *Airstream, Inc.,* 304 NLRB 151, 152 (1991), no unfair labor practice issue is before me in this case, and I make no finding as to the unlawfulness of any alleged employer conduct. Rather, where appropriate, I apply the *Taylor Wharton* analysis.

II. Objections

A. The Petitioner's Objection No 2

During the critical period, the Employer repeatedly engaged in surveillance of employees while they spoke with Union organizers. These included, but were not limited to, occasions on which the Employer stationed security guards near an entrance known by the Employer to be used by nurses going to meet with Union organizer Kuusela Hilo, just outside the Employer's facility; and other occasions on which the Employer's chief financial officer monitored Ms. Hilo and pro-union unit nurses as they distributed information in the cafeteria.

The Employer operates a 126-bed acute care facility in Chino, California at the corner of Walnut Avenue and 10th Street. The Hospital provides emergency and acute medical care. The Union conducted a representation campaign there during April and May. The critical period herein ranges from the date the Union filed the Petition (April 15) through the last day of the election (May 23).

During the critical period, various union organizers, including Kyle Surrette (Mr. Surrette), Kuusela Hilo (Ms. Hilo), Vanessa Caballero (Ms. Caballero), and Olivia Guevara (Ms. Guevara; collectively, the union organizers) regularly distributed union campaign materials and spoke to registered nurse employees (RNs) immediately outside the Hospital. The union organizers frequently stationed themselves in front of the main hospital entrance as well as at the East employee entrance.

At all relevant times, the Hospital's Security Supervisor, Darryl Lee (Officer Lee), oversaw a nine-officer security team at the Hospital.[4] Officer Lee testified that prior to the critical period the security team worked essentially the same schedule as during the critical period, i.e., three two-officer shifts a day. The security team patrolled the Hospital's interior, including entrance areas and stairwells, and its exterior, the latter both on foot and in security vehicles. Two of the Hospital's RNs, Magda Gonzalez (Ms. Gonzalez) and Cassandra Reynolds (Ms. Reynolds) testified the Hospital employed more security guards than normal during the union campaign.

As to the guards' conduct during the critical period, Ms. Gonzalez testified the guards, contrary to pre-critical-period practice, stood close to the employee entrance during periods when union organizers handed out campaign material or tried to talk to entering/exiting employees. Ms. Reynolds, who worked the night shift during the relevant period, also testified that during the union campaign she noticed an increased number of security guards at the hospital stationed in front of, inside, and at the entrances of the hospital.[5] Officer Lee testified that the only change he made to normal security routines during the critical period was to order extra security rounds throughout the hospital interior and to assign an officer to report four hours earlier than usual on the graveyard shift, which ran 11:30 p.m. to 7:30 a.m.

While leafleting at the Hospital during the union campaign, both Ms. Guevara and Ms. Hilo saw security guards observing them from several vantage points inside or outside the

[4] One officer worked part-time, two days a week.

[5] Ms. Reynolds testified the guards told her they were working overtime. In the absence of reliable corroborative evidence, I do not accept as evidence the matter asserted in this hearsay testimony.

Hospital. On one occasion, as related by Ms. Guevara, a security guard later identified as Francisco Mojarro (Mr. Mojarro) positioned himself near Ms. Guevara for almost two hours as she leafleted at the Hospital's front entrance, trying to engage her in personal conversation and offering her coffee. It is unknown whether other leafleters were present during this incident; in any event, only Ms. Guevara testified of it. About two days before the election while leafleting at the employee entrance, Ms. Guevara noticed a security guard later identified as Mark Esquivel (Mr. Esquivel) standing about 30 feet away, writing in a small notebook and speaking on a cell phone as he watched the leafleting for over an hour. According to Ms. Guevara, in the time Mr. Esquivel observed the leafleting, approximately 15-20 nurses passed by. Although other leafleters, including Ms. Hilo, were in eyesight of Mr. Esquivel, only Ms. Guevara testified of his conduct.

Mr. Surrette visited the hospital cafeteria a "couple of times" when union organizers were present. Each time, he saw a security guard seated at a nearby table. Shortly after April 15, Ms. Reynolds saw a security guard seated at a cafeteria table during the lunch period when union representatives were present. Ms. Gonzalez also saw security guards in the cafeteria, one of whom on April 21 sat facing the union table without eating for at least 30 minutes. Ms. Guevara testified that during occasions when she campaigned in the hospital cafeteria, 75% of the time the security personnel who escorted the union representatives there remained at a nearby table the entire time. Security personnel were permitted to eat and take breaks in the cafeteria.[6]

Ms. Gonzalez, on two respective occasions while union organizers were present in the cafeteria, saw James L. Lally M.D. (Dr. Lally), president and chief medical officer of the Employer, sitting with a couple of physicians and saw other hospital administrators eating lunch. Ms. Hilo testified that on two occasions she saw an individual who was identified by employees as the Hospital's chief financial officer in the cafeteria during times union representatives were tabling there. Hospital management personnel are provided free lunches at the cafeteria

Sometime between April 15 to April 25, at about 6:15 to 7:30 p.m., hospital management personnel, Dr. Lally, Gregory Brentano (Mr. Brentano), the hospital's Emergency room administrator and Chief Financial Officer, Linda Ruggio, Chief of Nursing, and Ann Marie Robinson, Director of Nursing, exited the Hospital and gathered near Dr. Lally's car in the hospital parking lot. Before leaving the parking lot in their respective vehicles, the four spoke together for 20 to 30 minutes and greeted nurses arriving at or leaving the Hospital during the shift change.

On May 20, the Union hosted a three-hour party at the Hospital between the parking lot and the sidewalk, dispensing food and information to the Hospital's nurses. During the course of the party, security guards drove security vehicles through the parking lot, passing within about two car lengths of the party four to five times. Although Ms. Hilo had seen security guards patrol the parking lot in security vehicles before, she had never seen them as frequently as on that occasion.

[6] Although Ms. Hilo also testified that hospital security guards were present in the cafeteria during union "tabling" (the term for occupying a table in the cafeteria while displaying union handouts and information), she did not corroborate Ms. Guevara's testimony of security pervasiveness, and I do not give weight to Ms. Guevara's estimate.

It is well settled that where employees are conducting union activities openly at or near company premises, an employer's open observation of such activities is not unlawful unless effected in a manner that is out of the ordinary. See *Wal-Mart Stores, Inc.,* 350 NLRB No. 71, slip op. 6 (2007); *Town & Country Supermarkets,* 340 NLRB 1410, (2004); *Aladdin Gaming, LLC,* 345 NLRB 585, 586-587, (2005); *Fred'k Wallace & Son,* 331 NLRB 914 (2000). *Roadway Package System, Inc.*, 302 NLRB 961 (1991), *Southwire Co.*, 277 NLRB 377, 378 (1985). The Board employs an objective test in determining whether an employer's conduct in observing open union activity would, under the circumstances, tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Wal-Mart Stores, Inc.,* 352 NLRB No. 103 (2008).

Here, security guards and supervisory personnel unquestionably observed the open activity of union representatives and adherents conducted in the hospital cafeteria and on the hospital's exterior. The question is whether their observations were made in extraordinary circumstances. Ms. Gonzalez and Ms. Reynolds testified that during the critical period the Hospital employed a greater number of security officers than usual who were abnormally stationed at hospital entrances. The two RNs provided no specific or quantitative information to support their informal observations. Further, although Ms. Reynolds said she observed a greater overall security presence during the critical period, she did not corroborate Ms. Gonzalez' testimony of guard concentration near the employee entrance. Officer Lee's testimony was supported by hospital time records, which failed to reveal any significant security staffing increases. Accordingly, I give weight to the testimony of Officer Lee and find that security staffing was neither increased nor unusually deployed during the critical period.

As to Ms. Guevara's testimony of incidents involving security officers, Mr. Mojarro and Mr. Esquivel, I cannot find the officers engaged in activity that would have a reasonable tendency to interfere with employees' free choice in the election. As Ms. Guevara described the episodes, the two guards engaged in extraordinary behavior for protracted periods of time in open view, yet no witness but Ms. Guevara described either occurrence. That might mean the Union could find no other witness willing to testify of the events, or it might mean no other observer found the incidents significant. Since the evidence suggests Ms. Hilo likely perceived Mr. Esquivel's behavior but did not testify of it, the latter explanation is more persuasive than the former. There is also insufficient evidence from which to infer that employees who observed Mr. Mojarro chatting with Ms. Guevara would interpret his attentions as interference with their access to union organizers rather than a clumsy attempt to interact with an attractive young woman. Since the union organizers were daily at the Hospital and very accessible, it is likely that employees would not ascribe coercive motives to Mr. Mojarro's isolated conduct. Under all circumstances associated with the conduct of Mr. Mojarro and Mr. Esquivel, I find their behavior was not coercive and had no reasonable tendency to interfere with employees' free choice.

Concerning the Union's assertion that one managerial parking-lot-gathering and repeated managerial cafeteria visits constituted objectionable surveillance, the Union adduced no persuasive evidence that supervisory or management personnel conversed in the hospital parking lot or visited the hospital cafeteria during the union campaign in any frequency or manner notably different from customary and routine activity. Further, the Union presented no

evidence that security guards utilized the cafeteria in any manner that would have led employees reasonably to receive the impression that their union activity was being surveilled. See *Wal-Mart Stores, Inc*., 352 NLRB No. 103 (2008); *Quest International,* supra at 857.[7]

Regarding the Union's contention that security guards patrolled the Hospital parking lot in unusual frequency during a three-hour union-sponsored party on May 20, the Union has failed to show that the guards' activity tended to interfere with, restrain, or coerce employees in the exercise of their guaranteed rights. Assuming employees, as well as Ms. Hilo, believed security patrols during the party were more frequent than usual, it is reasonable to expect that employees would have viewed increased security oversight during the party as a predictable response to an unusual and lengthy gathering on hospital property rather than as an effort to survey their union activity, particularly in circumstances where the guards engaged in no "coercive or even questionable conduct towards the employees." *Quest International*, at 857. Accordingly, I recommend the Union's Objection No 2 be overruled.

B. The Petitioner's Objections Nos 3 and 4

3. During the critical period, the Employer improperly barred non-employee union organizers from areas of the Employer's premises to which the public has free and unfettered access.

4. During the critical period, the Employer instituted a new policy prohibiting nonemployees from accessing the cafeteria and the hospital lobby, which it implemented in order to interfere with union access and which it discriminatorily enforced against the Union. Specifically, after the adoption of this policy, the Employer allowed the University of Phoenix, a for-profit online university, to install a banner in the lobby and other areas and to distribute information inside the lobby and the cafeteria, but refused the union's request for a similar installation and removed a union banner of similar dimensions.

A public sidewalk surrounds the perimeter of the Hospital. All property within the perimeter is the Hospital's private property. The Hospital's front entrance and lobby is open to the public from 8:00 a.m. to 8:00 p.m., but entry to the Hospital is otherwise limited. The hospital has had secured access to patient areas and the cafeteria since 1998. Currently, visitors to patient or administrative areas or the cafeteria may only enter through locked, receptionist-monitored double doors.

During the critical period, various union organizers regularly distributed union campaign materials and spoke to RNs outside the Hospital. In the early evening of April 15 at the main entrance to the hospital, the union organizers, including Mr. Surrette passed out newsletters announcing the petition filing. Officer Lee and ER/ICU director Carlos Gonzalez (ER/ICU

[7] *Partylite Worldwide, Inc.,* 344 NLRB 1342 (2005) and *Sands Hotel & Casino*, *San Juan*, 306 NLRB 172 (1992) cited by the Union are distinguishable. In *Partylite*, on three separate occasions shortly before the election, no fewer than eight high-ranking managers and supervisors stood at entrances to the employee parking lot watching the Petitioner distribute literature. In *Sands,* the employer posted guards near the employee entrance and another guard with binoculars in an upstairs hotel room in order to observe employees and union agents soliciting authorization card signatures across the street from the hotel. Unlike the instant matter, the *Partylite* and *Sands* security guard activity was blatantly extraordinary and, inferentially, motivated by employees' union activities.

director Gonzalez) told the organizers they had to remove to the curb of Walnut Avenue, paralleling the front of the Hospital about 30-40 ft away from the main entrance. Mr. Surrette refused saying he had a right to be where the public could be. During the lengthy exchange that ensued, as many as a dozen RNs walked past, to some of whom Mr. Surrette gave newsletters. There is no evidence hospital security or management thereafter challenged union organizers' right to station themselves at Hospital entrances.

The Union argues that Officer Lee and ER/ICU director Gonzalez' April 15 "harassment" of the union organizers "sent a message to unit employees that management was hostile to the Union's presence at the hospital," which chilled employees' exercise of their Section 7 rights and requires setting aside the election. Assuming, arguendo, the Hospital did not have a sufficient property right to deny the union organizers access to the Hospital's main entrance,[8] Officer Lee and ER/ICU director Gonzalez' unenforced directive to the organizers to remove to the public sidewalk does not, of itself, require setting aside the election. The Union must show the managers' conduct had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. *Quest International,* supra. The Union has not done so. While unit employees who observed the exchange between the managers and the union organizers must have inferred the Hospital did not want the organizers to solicit there, it does not follow the employees' free choice was thereby restrained or coerced. Since the union organizers thereafter unrestrictedly solicited at hospital entrances, it is reasonable to conclude employees would have inferred that both the Union and they could freely assert their organizational rights in the upcoming election.

The Hospital's cafeteria is open from 6:30 a.m. to 6:30 p.m. with three meal services: breakfast 6:30 a.m. – 9:00 a.m., lunch 11:00 a.m. – 2:00 p.m., and dinner 4:30 p.m. – 6:30 p.m. The cafeteria is a small room containing about ten patron tables. Under hospital policy, hospital employees and patient visitors may use the cafeteria, but it is not generally available to the public or to soliciting groups except through special permission from the Hospital, which, after assessing usefulness to employees of proposed presentations, limits promotional activity to two presenters during the lunch period. The hospital also bars easels, large posters, or material disparaging to the hospital from outside-organization presentations.[9] The hospital has extended permission to such institutions as the University of Phoenix, Washington Mutual Savings, and 24-Hour Fitness to set up presentation tables in the cafeteria during the lunch shift and permitted its Women's Auxiliary organization to sponsor fund-raising book sales in the lobby and the Red Cross to conduct blood drives.[10]

On April 16 at 11:45 a.m., Mr. Surrette, Ms. Caballero, and Ms. Guevara entered the hospital, intending to go to the cafeteria. After the three organizers signed in at the reception desk, the receptionist electronically unlocked the double doors from her reception desk, and

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[8] See *Albertsons, Inc.,* 351 NLRB No. 21, slip op. 5-6 (2007).

[9] Although the Hospital's written policies do not prohibit easels, large posters, or disparaging material in nonemployee presentations, Dr. Lally credibly testified of the Hospital's long-standing policies in this regard. Other than a receptionist's reference to a "new policy" regarding outside organizations, as detailed later, no contradictory evidence was presented.

[10] The Hospital permitted Washington Mutual to set up a presentation table after the election. University of Phoenix representative, Paul Holguin, testified that in 2008 the university twice sought and was granted permission to exhibit in the cafeteria during the lunch period. He did not display a floor easel or posters and draped the cafeteria table at which he sat with a cloth bearing only the university's name.

they entered the cafeteria. In addition to several cafeteria patrons seated at tables, the organizers observed a man seated at a table with informational materials spread before him along with a table-draped banner bearing the name of the University of Phoenix.

Utilizing one of the cafeteria tables, the organizers displayed union pamphlets and tried to engage the interest of nurses visiting the cafeteria. About 15-20 min later, Dr. Lally and Mr. Brentano appeared in the cafeteria and asked the organizers to leave. Mr. Surrette argued he had the right to be in the cafeteria because he had the right to be where the public could be. Dr. Lally said the hospital policy was that groups who wished to use the cafeteria were to make appointments. Since the organizers had not followed that policy, they should leave. After additional discussion between Dr. Lally and Mr. Surrette, some of which took place outside the cafeteria, the organizers left. Later that afternoon, Dr. Lally telephoned Mr. Surrette, telling him the Union would only be permitted into the cafeteria during the lunch period.[11]

On the evening of April 16, the organizers returned to the Hospital at about 5 p.m., encountering Dr. Lally as he was leaving the Hospital. Dr. Lally asked Mr. Surrette not to attempt access to the cafeteria. Despite Dr. Lally's request, the organizers told the receptionist they wanted to go to the cafeteria. According to Mr. Surrette, the receptionist asked if they were with an organization. When Mr. Surrette told the receptionist they were with the Union, the receptionist declined to unlatch the double doors, saying the hospital had a new policy and the group could not go into the cafeteria.[12] A short time later, when the receptionist buzzed a visitor into the restricted area, the organizers followed the visitor through the opened double doors and gained access to the cafeteria. Hospital security eventually contacted the local police department whose officers directed the organizers to go to the lobby. Thereafter, the Hospital permitted the Union to access the cafeteria during lunchtime and the front lobby during the evening until 8 p.m. In early May, the Union displayed large posters on easels in the front lobby and the cafeteria. The posters listed threats and benefit "take-aways" the Hospital had allegedly communicated to employees. Although the evidence is not clear, it appears that after the Union complied with the Hospital's request to take down the posters, the Union displayed the same information on a cloth draped over a cafeteria table during "tabling" sessions.

The Union argues the Hospital "discriminatorily enacted and enforced a policy to limit union access" when it restricted the Union's access to the cafeteria to the lunch period and to the front lobby in the evening. The Union further argues the Hospital "threatened to revoke the Union's 'privilege' to solicit inside the hospital for displaying posters and banners substantially similar to those used by the commercial solicitors." The Union contends the Hospital limited access and disparately applied its solicitation policy in order to impede the union's ability to solicit employees and, by "denying the union the same level of access to its premises as it gave to other non-employee entities," engaged in objectionable conduct. The evidence does not support the Union's position.

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[11] I find it unnecessary to resolve the question of whether Dr. Lally at any time told Mr. Surrette the union organizers could access the cafeteria during the dinner period. The Union has presented no evidence or authority that rescinding such permission would have any tendency to interfere with employees' free and uncoerced choice in the election.

[12] Contrary to the Union's position, I cannot base any factual finding on the receptionist's unexplained reference to a new policy. Not only is the statement hearsay as to the matter the Union wishes to prove, it is inherently unreliable as it is susceptible to more than one meaning, sets no time frame for institution of the policy, and is without attribution to a Hospital agent.

Regarding nonemployee access to an employer's premises, the Supreme Court held "[A]n employer may validly post his property against nonemployee distribution of union literature…if the employer's notice or order does not discriminate against the union by allowing other distribution." *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112 (1956).[13] An employer engages in discrimination by denying access to its premises while allowing similar distribution or solicitation by nonemployee entities other than the union. See *Wal-Mart Stores, Inc.,* 349 NLRB 1095 (2007).

Here the evidence shows the Hospital consistently enforced policies that limited nonemployee distributor/solicitor presentations: (1) to the lobby and/or cafeteria areas of the Hospital and in the cafeteria area only during the lunch service period, (2) from utilizing large easels or displays, (3) from presenting material disparaging to the Hospital.[14] There is no evidence the Hospital applied its policies discriminatorily to the Union. The Union has failed to present evidence that the Hospital's policies on nonemployee presentations are inherently discriminatory or that the Hospital disparately applied those policies to Union presentations. Indeed, by permitting the Union to present every evening in the lobby and at every lunch service period in the cafeteria, the Hospital accorded greater accommodation to the Union than to other nonemployee groups. Since the Union presented no evidence of disparate treatment, I recommend the Union's Objection Nos 3 and 4 be overruled.

C. The Petitioner's Objection No 5

> During the critical period, the Employer, through its counsel, labor consultants, managers and supervisors, told employees in individual and group meetings and other communications that negotiations for a collective bargaining agreement could take up to three years, and that there would be no wage increases during contract negotiations. Such statements constitute improper threats to withhold benefits and threats to make unilateral changes to terms and conditions of employment in violation of Sections 8(a)(5) and 8(a)(1) of the Act.

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[13] In reaffirming this test in *Lechmere Inc. v. NLRB,* 502 U.S. 527, 533 (1992), the Court noted its basis for finding a "critical distinction" between employees and nonemployees: the organizing activities of employees are guaranteed by Section 7 while Section 7 applies only derivatively to nonemployees.

[14] Evidence was adduced as to the nature of the nonemployee presentations the Hospital permitted, presumably to show the presentations were an integral part of the Hospital's function, since nonemployee solicitation or distribution that is so limited does not evidence disparate treatment. *Rochester General Hospital,* 234 NLRB 253 (1978) (Red Cross postering and blood collection in hospital for blood bank, postering of sales by a volunteer hospital group, displaying of pharmaceutical products, and display of medical books are work-related activities to assist hospital in carrying out community health care functions and responsibilities and not such disparate application that would require the employer to waive its rule and permit access by nonemployee union organizers); *George Washington University Hospital,* 227 NLRB 1362, 1373-1374, and fn. 39 (1977) (sales of a volunteer auxiliary excluded from analysis of disparate activities as they are virtually an integral part of the hospital's necessary functions). In the circumstances of this case, it is unnecessary to consider the nature of other permitted presentations.

At all relevant times prior to the filing of the Petition and during the critical period, the Hospital maintained a merit pay-increase program wherein employees' performances were annually evaluated on employment anniversary dates and merit increases accordingly granted.

During the union campaign, the Employer utilized the services of Cruz & Associates, labor consultants, to present management's election views. During the critical period, the Employer arranged four rounds of employee meetings with seven to nine meetings in each round. Each round occurred about one week apart, and each meeting within each round was attended by about 15 RNs. The first, second, and fourth rounds were conducted by William Leopardi (Mr. Leopardi) and/or Gary Crowley (Mr. Crowley), respectively president and senior consultant of Cruz & Associates. On May 8, Suzanne Richards (Ms. Richards), Vice President of Nursing and Clinical Operations, Prime Healthcare Management, conducted the third round of meetings with Mr. Leopardi or Mr. Crowley attending. Each of the first, second, and fourth rounds of meetings, respectively, included a power point presentation featuring various aspects of a union representation process, the fourth of which focused on collective-bargaining. The third round, conducted by Ms. Richards, featured a power point presentation centered on employee benefits. During their respective presentations, the consultants and Ms. Richards fielded employee questions.

During each of the fourth round of meetings, the consultants presented a slide (slide 9) that read in pertinent part:

> What You Should Know BEFORE You
> Vote In The Election!
>
> The bargaining process can be completed in a few weeks—
> or it can take years. No one knows.
>
> Pay and benefits typically <u>remain as they are</u> until we go
> through the negotiation process.
>
> …

In discussing slide 9, Mr. Leopardi said he explained what a unilateral change was, telling the nurses:

> Now, the big question then becomes, what becomes a change, and if the Employer has, as a formula-driven thing, you know, so that if—it is a grid and it is based on the number of years, and you go into the next year, obviously you get that. That doesn't change, because that would—to not give that, would constitute a change. On the other hand, if the Employer moves the whole—moved the whole structure on a random and arbitrary or discretionary basis, that is typically going to be looked at as a change, but as we sit here today, we can't say what would be a change and what wouldn't be a change, because it is very, very specific to the situation that you have.
> …
> [W]e [cannot] make the unilateral changes…what constitutes a change[?] If it is something that is an ongoing process, an ongoing program, it is automatic, then you have to continue with that. That would be a change if you discontinued that. On the other hand, if it is discretionary, if it is random, that typically is going to be considered a change.

Mr. Crowley said he offered employees the following explanation of slide 9:

> [I]f the union's voted in, it's like you take a snapshot of the pay and benefits and practices and policies that are in effect at the time and they stay in effect until you go through the negotiations process…if you have a merit pay program where you get an annual pay increase based upon your evaluation, that policy stays in effect and continues until you go through the negotiations process.[15]

Ms. Gonzalez attended three employee meetings in which Mr. Leopardi and Mr. Crowley jointly participated and one employee meeting conducted by Ms. Richards. Although she did not specify at which meeting or by which consultant the statements were made, Ms. Gonzalez testified employees were told all raises would be at a standstill during negotiations, which would take years. She also recalled the consultants saying there would be no changes to pay and benefits during negotiations and there had to be a bargaining process before the Hospital could make changes. According to Ms. Gonzalez, in the employee meeting conducted by Ms. Richards, Ms. Richards responded to an employee question about customary annual raises by stating that in the process of bargaining, which may last almost three years, no raises would be given.[16]

Ms. Reynolds attended three consultant-conducted employee meetings, the first of which both Mr. Leopardi and Mr. Crowley conducted. Ms. Reynolds testified that at the first meeting the consultants told employees negotiations could take from one to three years, during which time everything would be frozen in the Hospital, that all wages and benefits would be at a standstill—nothing up or down, nothing gained or lost until the contract was negotiated. Ms. Reynolds took notes at this first employee meeting. The only reference to raises in her notes are the words "'annual' raises? No??" Ms. Reynolds could not recall what the words referred to.[17] As to all other consultant-conducted meetings Ms. Reynolds attended, she could not remember "one way or the other" if anyone made statements to the effect that wages and benefits would be frozen during contract negotiations.

Mr. Leopardi recalled Ms. Reynolds asking questions during the first power point presentation, but he denied ever telling any employee at any of the meetings anything to the following effect:

> Negotiations for a labor contract could take up to three years

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[15] I cannot fully credit any of Mr. Crowley's testimony; he demonstrated a pronounced recollection deficit during cross examination, which significantly detracts from his reliability. Moreover, neither Mr. Leopardi nor Ms. Richards, whose testimonies I do credit, corroborated his explanation of slide 9, specifically his asserted assurance that a merit pay program would remain in effect during bargaining. Ms. Richards recalled Mr. Crowley saying that during contract negotiations, everything remains the same, but everything is on the table to be negotiated and that whatever employees had in place stayed in place until negotiated and the contract ratified, which is appreciably different than Mr. Crowley's account. Therefore, I give no weight to Mr. Crowley's testimony that he informed employees their merit pay program would continue.

[16] Ms. Gonzalez was vague about what Ms. Richards said at the meeting, often answering that she could not recall when asked specific questions, e.g. :

Q. Other than stop and answer questions did [Ms. Richards] say anything else other than what's on the PowerPoint presentation?

A. I don't recall. I don't recall.

[17] No reasonable evidentiary basis permits me to draw the inference urged by the Union that Ms. Reynolds' notes reflected "her incredulity at being told that 'everything would be frozen,' and that 'no one would get any raises [during negotiations].'"

Once negotiations began everything would be frozen
Once negotiations began all wages and benefits would be at a standstill
Once negotiations began there would be nothing up or nothing down, nothing gained, nothing lost until the contract was negotiated
During negotiations there would be no increase in wages and/or no raises
During negotiations there would be no changes in wages and benefits.

Mr. Leopardi further denied that Mr. Crowley made any such statements in meetings in which the two presented together. Ms. Richards also denied that during her presentations to employees she ever said that no raises would be given during bargaining.

The Union accurately asserts that "threats to eliminate regular annual wage increases in the event of a union election victory can be grounds for setting aside an election result." No party disputes that the Hospital's annual merit pay-increases constituted an established practice regularly expected by employees.[18] If, during the critical period, the Hospital threatened to eliminate or abrogate the merit pay increases, its conduct would be objectionable. [19] The question is whether the Hospital made any such threats. In contending the Hospital did so, the Union makes a two-fold argument: (1) while answering questions during the meetings, the consultants and/or Ms. Richards directly threatened normal raises would cease during negotiations; (2) slide 9 implicitly threatened that raises would cease during negotiations, and the accompanying explanations did not "clearly signal[ ] to nurses…what would happen to annual wage increases" if they selected the Union.

As to the Union's first argument, I credit Mr. Leopardi and Ms. Richards' accounts of what they or Mr. Crowley said in the employee meetings.[20] In contrast, both Ms. Gonzalez and Ms. Reynolds' testimony as described above was imprecise, sometimes vague, and even equivocal. Therefore, I find neither the consultants nor Ms. Richards directly threatened to withhold benefits or make unilateral changes to terms and conditions of employment.

The Union's second argument focuses on the objective impact of slide 9 on employees. Slide 9 states the bargaining process could take years and declares, with underscored emphasis, that during the bargaining period—short or long—"[p]ay and benefits typically <u>remain as they are</u>." As the Union contends, a reasonable reading of slide 9 could inform employees that if the Union won the election their current pay and benefits (as opposed to current pay *programs*) would remain unchanged for the duration of the bargaining, which could take years.[21] Board law is clear that an employer with an established pay increase practice, such as the Employer's annual merit-pay increase program, violates Section 8(a)(1) by telling employees their wages will be "frozen" (e.g. remain the same) during collective bargaining.[22]

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[18] See *United Rentals, Inc.,* 349 NLRB 853, 854 (2007).

[19] The Board has explained, "an employer faced with a union organizing drive is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene." *Sam's Club*, 349 NLRB No. 94, slip op. 6 (2007).

[20] Although I have not credited Mr. Crowley's testimony, since Mr. Leopardi was present at all employee meetings about which Ms. Gonzalez and Ms. Reynolds testified, Mr. Crowley's unreliability does not impact ultimate credibility determinations of what was said at the meetings.

[21] See *American Red Cross Missouri-Illinois Blood Services,* 347 NLRB 347, FN 5 (2006) (Board distinguished between statement that "'wages' typically remain frozen during bargaining" as opposed to unobjectionable statement that 'wage…programs' remain frozen).

[22] See *Wal-Mart Stores, Inc.,* 352 NLRB No. 103, supra, citing *Jensen Enterprises,* 339 NLRB 877 (2003).

The Employer argues that Mr. Leopardi satisfactorily explained the thrust of slide 9 in the fourth round meetings he conducted by telling assembled nurses the Employer could not unilaterally change pay or benefits if employees selected the Union. The unilateral-change doctrine is a complicated concept generating reams of legal analysis; Mr. Leopardi's explanation of it was at best ambiguous. It cannot be supposed that after hearing Mr. Leopardi's explication, employees would reasonably conclude their annual merit pay increases would continue as usual. Rather, employees must have been left with the unresolved question of whether slide 9 forecast the freezing of their current salaries if the Union won the election or whether the merit pay program would continue unchanged. Applying the *Taylor Wharton* factors to slide 9, it is clear the consultants' statements, for which the Employer is directly responsible, had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election: most unit employees attended the employee meetings, the fourth round of which was held shortly before the election, and a threat to prospective wage increases was likely to cause fear among unit employees and to persist in their minds through the election. Since the information disseminated to nearly all unit employees through slide 9 (and its accompanying explanations) remained susceptible to coercive interpretation during the latter part of the critical period, I recommend the Union's Objection No 5 be sustained.

D. The Petitioner's Objection No 6

During the critical period, Dr. James Lally, the Employer's president and chief medical officer, and the principal of the Employer's parent company, distributed letters to bargaining unit nurses, in which he invited them to explain "where things went wrong" so as to invite unionization. The letters constitute a solicitation of employee grievances in violation of Section 8(a)(1) of the Act.

On April 16, the Hospital distributed a letter signed by Dr. Lally by email to unit employees (the cheating wife letter), which in pertinent part read:

> Yesterday, the Hospital was served with notice that [the Union] filed a petition with the [Board] to unionize the Registered Nurses at our facility.
> Because of everything we have been through together over the years, I wanted to share my personal reaction with you…hearing about the petition was like finding out that my wife had been cheating on me. I spent the entire day asking myself what I might have done to cause this and what I could have done to have prevented this.

On September 12, the Employer requested Special Permission of the Board to appeal the Regional Director's August 20 Report on Objections, Order Directing Hearing, and Notice of Hearing. In its request, the Employer argued that the Union had submitted no evidence in support of its Objection No 6. In its September 26 Opposition to the Employer's Request for Special Permission filed with the Board, the Petitioner raised, for the first time, the contention that Dr. Lally's April 16 letter equated the Union's organizing campaign with "disloyalty or betrayal," thereby impliedly threatening reprisals. In its October 3 reply to the Petitioner's Statement of Opposition, the Employer argued that in defending Objection No 6 the Petitioner had raised a new allegation of misconduct that should be rejected as untimely. On October 4, the Board issued the following Order, stating in pertinent part:

> Specifically, the Employer contends that the Petitioner failed to produce sufficient evidence to warrant a hearing on its [Objection 6]…. The Employer's request is denied, as there are factual and legal issues warranting a hearing on those objections.

At the hearing, the Petitioner presented evidence of Dr. Lally's April 16 letter, and Dr. Lally testified as to his intent in making his "cheating wife" comment:

> Well, two things are pretty dear to me. One is my wife and the other is this hospital. And the issue of cheating…is taken out of context because cheating occurs when two people can't communicate, when there's something that's gone between them that causes the other to seek solace somewhere else and certainly the feeling I had when this petition was laid upon me…was that somewhere I had failed and could I have prevented this much like a person would do if they found out that their spouse had left them.

Dr. Lally's communication to unit employees that notification of the union petition was akin to finding out his wife had been unfaithful was a patent accusation of employee disloyalty, but the accusation is not encompassed by the wording of Objection No 6. The threshold question to this objection, then, is whether I have the authority to consider "issues that are not reasonably encompassed within the scope of the objections that the Regional Director set for hearing." See *Precision Products*, 319 NLRB 640, 641 (1995). A party affected by objections to an election is denied procedural due process if the fundamental requirements of "meaningful notice … and … full and fair opportunity to litigate" are not provided. *Factor Sales, Inc,* 347 NLRB 747 (2006). To be "meaningful, the notice must provide a party with a "clear statement" of the accusation against it, as a party "cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion International Corp.*, 339 NLRB 672, 673 (2003).

In the various documents filed with the Board pursuant to the Employer's Request for Special Permission to Appeal, the Union explicated its legal and factual theory underlying Objection No 6. Although the Employer specifically objected to the Union's raising a new allegation of misconduct in Objection No 6, the Board directed that "factual and legal issues warrant[ed] a hearing" on the Petitioner's objections including Objection No 6. Thereafter, both parties presented testimony relevant to the Petitioner's theory of Objection No 6 and addressed the theory in their briefs. In these circumstances, due process has been provided to the Employer. I will, therefore, consider the question of whether Dr. Lally's "cheating wife" constituted objectionable conduct.

Addressing similar issues in unfair labor practice cases, The Board has held that an employer's suggestion that union support is disloyal may violate Section 8(a)(1) if the circumstances are sufficiently coercive. *Sawgrass Auto Mall and Ed Morse Chevrolet,* 353 NLRB No. 40, slip op. 2 (2008); *North Star Steel Company,* 347 NLRB 1364 (2006). The Board employs a totality of circumstances standard "to distinguish between employer statements that violate Section 8(a)(1) by…implicitly threatening employees with…negative consequences because of their union activity, and employer statements protected by Section 8(c)."[23] *Sawgrass Auto Mall,* supra, citing *Sprain Brook Manor Nursing Home,* 351 NLRB No. 75, slip op. at 15 (2007). Generally, the existence of other unfair labor practices renders a "disloyalty" statement sufficiently coercive to violate Section 8(a)(1).[24] However, it is unnecessary to conduct an unfair

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[23] Sec. 8(c) states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[24] See cases cited at *Sawgrass Auto Mall,* supra, FN 14 and at *North Star Steel Company,* supra, FN11.

labor practice analysis here, as conduct may be found to be objectionable interference with an election even if it does not rise to the level of an unfair labor practice. *Dana Corporation,* 351 NLRB No. 28, FN 19 (2007); *General Shoe Corp.,* 77 NLRB 124, 127 (1948). In the absence of unfair labor practice allegations, a *Taylor Wharton* analysis is appropriate.

Applying the *Taylor Wharton* factors to Dr. Lally's cheating-wife letter, I find the letter had a reasonable tendency to interfere with unit employees' free and uncoerced choice in the election: the letter was disseminated to most unit employees during the critical period; the letter pointed out the close relationship Dr. Lally had had with employees "over the years" and impliedly accused them of infidelity in supporting the Union. Employees could reasonably understand a reproach couched in terms of marital betrayal to mean there would be changes in Dr. Lally's formerly "close" relationship with them and potential repercussion and difficulties if they selected the Union as their bargaining representative;[25] this implied threat of different, unfavorable treatment was likely to cause fear among unit employees and to persist in their minds throughout the critical period. Accordingly, I recommend the Union's Objection No 6 be sustained.

E. The Petitioner's Objection No 7

> During the critical period, Dr. Lally personally ask[ed] bargaining unit nurses how they would vote in the election and whether they knew who had initiated the union's organizing campaign.

The Union presented no evidence Dr. Lally asked bargaining unit nurses how they would vote in the election and whether they knew who had initiated the union's organizing campaign, as alleged in Objection No 7. The Union contends, however, that the facts underlying the allegations of Objection No 9, set forth below, constitute objectionable interrogation. I find no evidence in those facts or any other evidence that Dr. Lally interrogated employees about their union activities. Accordingly, I recommend Objection No 7 be overruled.

F. The Petitioner's Objection No 9

> At the end of the first day of voting, and before the second day, Dr. Lally sent an e-mail memorandum to bargaining unit nurses, which reminded them to say "NO…to drugs." This was properly understood throughout the hospital as a signal to say "no" to the Union in the representation election. Earlier during the critical period, Dr. Lally had distributed a memo to bargaining unit nurses stating that his only birthday wish was for the nurses to say "no to drugs and no to the union."
>
> On May 19, Dr. Lally issued an email to the staff that stated, in pertinent part:
>
> > Today is my birthday and anyone wanting to "grant me a wish" I would ask that you just say "NO"…to drugs and this Thursday and Friday, mark the box "NO" with a nice big "X"…Please mark "NO" and let's get on with the business of having a great hospital.
>
> During the union campaign, Dr. Lally occasionally wore a shirt that bore the following wording: in front—"Just Say No," in back—"Good Choice."

[25] See *North Star Steel Company,* supra.

At 9:40 p.m. on May 22, the first day of the election, Dr. Lally sent an email to unit employees, thanking employees who had voted that day and encouraging employees who had not yet voted to do so the next day.[26] Dr. Lally concluded the email with the following:

> Thank you for your continued support and patience involving this process. I can assure you that no one is looking for this to be done more than me. Remember just say "NO"……to drugs.

Dr. Lally's May 22 email was a transparent message to unit employees who had not yet voted to vote against the Union. The Union contends Dr. Lally's message violated *Peerless Plywood,* 107 NLRB 427, 429 (1953), which prohibits employers and unions "from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." The Board has clarified that its rule prohibiting captive audience speeches in *Peerless*, does not prohibit circulating campaign literature or "any other legitimate campaign propaganda or media." *Peerless* at 430. The Board has further found that a brief electronic "Vote No" message, sent within 24 hours before the election is more analogous to campaign literature than to a campaign speech. *Virginia Concrete Corp., Inc.,* 338 NLRB 1182 (2003). Since Dr. Lally's May 22 email was not audible and could have been unopened or deleted if employees so chose, it did not violate the *Peerless* rule. Accordingly, I recommend that Objection No 9 be overruled.

G. The Petitioner's Objection No 11

> The Employer's election observer, Imelda Bachar, was a supervisor at the time of the election. As a weekend in-house supervisor, she dedicates a regular and substantial percentage of her work time to supervisory functions. She is certainly also an agent of the Employer in committing objectionable conduct and unfair labor practices: Ms. Bachar was responsible for summoning bargaining unit nurses for their mandatory individual meetings with Dr. Lally and/or the Employer's counsel and labor consultants, as set out above [in Objection No 10, which the Union withdrew]. The Employer's selection of a statutory supervisor agent as election monitor is *per se* objectionable conduct and grounds for vacating the election.

Imelda Bachar (Ms. Bachar), a telemetry unit RN, was the Employer's observer at one session of the election. The parties agree that the Hospital's four house supervisors are supervisors within the meaning of Section 2(11) of the Act. Prior to and during the relevant period, the Hospital designated four relief house supervisors from among its RNs to fill in for temporarily absent house supervisors on an ad hoc basis. As needed, Ms. Bachar served as a relief house supervisor for which she received $1.50 hourly differential pay. During the nearly one-year period preceding the election, Ms. Bechar worked as a relief house supervisor 84.75 hours. The question of Ms. Bechar's supervisory status focuses on her work as a relief house supervisor.

[26] The Union proffered into evidence a copy of Dr. Lally's May 22 email to Ms. Reynolds only. No party contends the email was isolated rather than addressed to all unit employees. No evidence was adduced as to how many employees received or opened the email, and it appears employees could have ignored it if desired.

As relief house supervisor, Ms. Bechar oversaw the operation of the Hospital's nursing units, determined whether the number of scheduled nurses was sufficient to cover the shift, called in off-duty nurses to meet any nursing deficit, coordinated hospital beds for admitted patients, oversaw and documented the circumstances of medical emergencies, checked to see if help was needed on a unit, provided nurses with medical equipment and supplies from locked storage areas, and handled patient/nurse problems. Ms. Bechar had no authority to discipline or evaluate employees or to approve time off or overtime. When Ms. Bechar served as relief house supervisor, both the head of house supervisors and unit managers were available by telephone, as needed. Ms. Bechar contacted the appropriate unit manager in the following, reportedly rare, situations: when RNs needed to be transferred from one area to another, when a registry RN cancelled, when RNs called in sick, when an RN was tardy, when an RN failed to report to work, and when RNs or registries had to be cancelled because the patient census dropped.[27] Although no such situation has arisen when Ms. Bechar served as relief house supervisor, she testified that if an RN had to leave work or if a dispute occurred between two RNs or a problem between a charge nurse and an RN, she would contact the RN manager for direction.

With regard to RN staffing, the Hospital followed a state-established patient/nurse ratio, making adjustments for patient acuity, as assessed by charge nurses and unit managers. To meet assessed RN staffing levels, unscheduled nurses sometimes had to be called into work, a responsibility of the house supervisor or relief house supervisor. The Hospital maintained a nurse call-in list that a house supervisor or relief house supervisor utilized in asking off-duty nurses if they wanted to work. While a relief house supervisor could request an RN to work, acquiescence was voluntary.[28] When RNs needed to be "floated" to meet the staffing needs of another area, a relief house supervisor consulted the float rotation list established by the Hospital.

During the union campaign period, Larry Wong, a labor consultant retained by the Hospital, met with certain RNs in the hospital conference room. Nursing Director Ann Marie Robinson told Ms. Bechar to report to Mr. Wong, who provided Ms. Bechar with the names of RNs he wanted to see. Ms. Bechar then notified and covered for the RNs during their absences from their duty stations.

The Union bears the burden of proving Ms. Bachar was a supervisor within the meaning of Section 2(11) of the Act,[29] which defines a supervisor as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to

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[27] Although Ms. Bechar testified that in many situations she made recommendations to the unit manager that were followed, it is not clear from her testimony whether her recommendations were controlling or whether Ms. Bechar and the manager simply reached a meeting of minds after Ms. Bechar reported the facts of each situation.

[28] On one occasion, while working as relief House Supervisor, Ms. Bechar telephoned Ms. Reynolds and left the message, "Can you come to work tonight because we're short." Ms. Reynolds declined.

[29] *Barstow Community Hospital,* 352 NLRB No. 125, slip op. 1 (2008), and cases cited therein.

recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Oakwood Healthcare, Inc., 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NRLB 717 (2006); and *Golden Crest Healthcare Center,* 348 NLRB 727 (2006), address the meaning of the terms "assign," "responsibly to direct," and "independent judgment," as used in Section 2(11) of the Act, under the framework of the Supreme Court's decision in *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001). In *Oakwood Healthcare, Inc.,* supra, the Board addressed the status of individuals engaged part time in supervisory roles and held to its established legal standard that determination of supervisory status in such situations depends on whether the individual spends a regular and substantial portion of work time performing supervisory functions. The evidence fails to show Ms. Bechar had a regular, established assignment as a relief house supervisor rather than serving on an ad hoc basis.

Even assuming Ms. Bechar spent a regular and substantial portion of her work time as relief house supervisor, the Union presented no evidence the Employer required "actual accountability" from Ms. Bechar in the performance of her relief duties, a requisite showing to establish the authority responsibly to direct. *Golden Crest Healthcare,* supra at 731. Further, the evidence is insufficient to sustain the Union's burden of proving Ms. Bechar exercised independent judgment in assigning nurses when she served as relief house supervisor. The Board has stated that "in the healthcare setting, if an individual weighs the individualized condition and needs of a patient against the skills or special training of the available nursing staff, the resulting assignment involves the exercise of independent judgment." *Barstow Community Hospital*, supra at slip op.2. When calling an unscheduled nurse into work or floating a nurse from one hospital area to another, Ms. Bechar followed hospital-established call-in or float rotation lists without regard to skills or special training of the available nursing staff. The record contains no "examples or details of circumstances showing that [Ms. Bechar] actually 'weigh[ed] the individualized condition and needs of a patient against the skills or special training of available nursing personnel.'" *Id,* citing *Oakwood Healthcare,* supra at 693.

Accordingly, I find the evidence does not establish that Ms. Bechar was a supervisor within the meaning of Section 2(11) when she served as the Employer's election observer, and I recommend the Union's Objection No 11 be overruled.

H. The Petitioner's Objection No 12

During the critical period, the Employer eliminated a premium wage for shifts worked in excess of a full-time schedule, known as "in-house registry pay" or crisis pay." The Employer informed employees that it was eliminating in-house registry pay on a trial basis only. However, the Employer also refused to commit to reinstating in-house registry pay. The timing, presentation, and substance of these statements clearly conveyed the message that in-house registry pay would be reinstated should the Employer prevail in the election. Accordingly, these statements amount to improper acts to withhold and threats to withhold benefits and threats to make unilateral changes to terms and conditions of employment in violation of Sections 8(a)(5) and 8(a)(1) of the Act.

Prior to January, the Hospital had a pay practice known as in-house registry pay or extra-shift bonus pursuant to which the Hospital paid RNs a set fee for any extra shift worked in addition to increased hourly pay. In January, the Employer replaced in-house registry pay/extra-shift bonus with a system called "crisis pay bonus," in which RNs who worked extra shifts in a crisis period, as determined by the Hospital, received additional hourly pay.

In conducting the third round of employee meetings, Ms. Richards reviewed hospital benefits and pay changes that had already occurred. According to Ms. Gonzales, in her PowerPoint presentation, Ms. Richards showed a slide entitled "Upcoming Changes," which stated "there will be pay raises for all the Nurses and Nurses will get increase in pay based on years of experience," and noted a change in new nurse pay and extra money for working extra shifts.

The Employer presented printed evidence of the third-round PowerPoint slide content, which contained no slide entitled "Upcoming Changes." Ms. Richards denied ever telling employees that discontinuance of in-house registry pay/extra-shift bonus was temporary or that it would be reinstated if the union lost the election.

I cannot give weight to Ms. Gonzalez' uncorroborated testimony that conflicts with probative documentary evidence. Further, Ms. Gonzalez' testimony does not correlate with the grounds of the Union's objection. The Union having presented no probative evidence in support of its objection, I recommend the Union's Objection No 11 be overruled.

I. The Petitioner's Objection No 13

> During the critical period, the Employer, through its counsel, offered wage increases to bargaining unit employee Ryan Terrio and other employees who, like Mr. Terrio, had publicly challenged claims made by the Employer in its preelection forums. These offers constitute promises of benefits to stifle the union's organizing campaign in violation of Section 8(a)(1) of the Act.

During a second-round consultant-conducted employee meeting on May 2, Ryan Terrio (Mr. Terrio), per diem RN and formerly a fulltime RN, spoke up. According to Mr. Terrio, he contested the consultants' statements that employees at certain unionized hospitals did not want the union to represent them and then left the meeting. According to Ms. Reynolds, Mr. Terrio said it was about time someone could be a voice for him because it was apparent nobody was going to listen to his voice. He said he had accepted fulltime employment with another employer because the Hospital's revised medical plan could not accommodate his family circumstances. To Ms. Reynolds' recollection, the presenting consultant, Mr. Leopardi, responded that management was willing to listen.

Shortly after the meeting, Mr. Leopardi reported to Mr. Brentano that Mr. Terrio had been aggressively upset in the employee meeting and had voiced displeasure with hospital management. Mr. Brentano asked Mr. Terrio to meet with him in an administration office. During their meeting, Mr. Brentano told Mr. Terrio he knew he was upset. Referring to the consultant meeting, Mr. Terrio said employees had better use for their time than to have people lie to them and think they were not intelligent. He suggested the Hospital be honest and upfront with employees. According to Mr. Terrio, Mr. Brentano told Mr. Terrio he had always been a good employee, and the Hospital wanted to keep him on staff. Mr. Brentano asked Mr. Terrio what the hospital could do to bring Mr. Terrio back into fulltime employment. Mr. Terrio said that since the Hospital had changed health insurance plans, he could not afford the Hospital's medical benefits given his particular family situation. Mr. Terrio further testified that

Mr. Brentano asked, "What if we brought you back over here and then we would just give you a check for the difference [in medical insurance costs]." When Mr. Terrio declined, Mr. Brentano said, "If there's anything that we can do…to bring you back and make you happy here at Chino, we want to keep you." The substance of Mr. Terrio's version of the conversation was thereafter disseminated to two other RNs.

Mr. Brentano's version of his and Mr. Terrio's interaction differed from Mr. Terrio's. Mr. Brentano testified that Mr. Terrio complained that although he loved working at the Hospital, he had had to find employment in another hospital where the medical benefits would cover the treatment his son needed. After discussing comparative salary and medical insurance costs with Mr. Terrio, Mr. Brentano pointed out the financial difference between Mr. Terrio's former and present employment was not significant and suggested Mr. Terrio return to full time employment with the Hospital. Mr. Terrio said he liked his present medical benefits and did not want to leave his current employment, but he would like more per diem shifts on Fridays. Mr. Brentano said he would check into that, and the Hospital could probably give him Friday shifts. Mr. Brentano had no further conversation with Mr. Terrio.[30]

I have carefully considered the testimony of Mr. Terrio and Mr. Brentano regarding their May 2 exchange. In crediting the testimony of Mr. Brentano over that of Mr. Terrio, I am influenced by the inherent improbability of Mr. Brentano's alleged offer that the Hospital make up the difference in Mr. Terrio's medical costs. There is no evidence to suggest the Hospital conducted the kind of financial operation that would lend itself to capricious employee payouts, and it is implausible that Mr. Brentano would so commit the hospital without management discussion. While the discussion of comparative health care costs and salaries may have led to a misunderstanding by Mr. Terrio of what Mr. Brentano had suggested, I find Mr. Brentano did not offer to supplement Mr. Terrio's income if he returned to fulltime employment with the Hospital, and I find Mr. Brentano's account of his conversation with Mr. Terrio credible.

Accepting Mr. Brentano's account does not, however, end the discussion of Objection No 13. Although the objection alleges the Employer offered "wage increases" to Mr. Terrio, which I have found it did not, the objection is broad enough to include promises of other benefits. An employer violates Section 8(a)(1)—and by extension, engages in objectionable conduct—when it solicits, and promises to remedy, employee grievances as part of an effort to discourage union activity. *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1173 FN 5 (2004); *Hospital Shared Services*, 330 NLRB 317 (1999); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972). The promise to remedy grievances need not be explicit to constitute a violation. "There is a compelling inference that [an employer] is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), enf. denied on other grounds 32 F.3d 588 (D.C. Cir. 1994), quoting *Reliance Electric*, 191 NLRB at 46.; see also *Evergreen America Corp.*, 348 NLRB 178, 210 (2006), enfd. 531 F.3d 321 (4th Cir. 2008).

Mr. Brentano's discussion with Mr. Terrio, coming as it did in direct response to the discontent Mr. Terrio's expressed at the employee meeting, was more than a general managerial inquiry about job satisfaction. Mr. Brentano explored Mr. Terrio's specific concerns, and when Mr. Terrio said he would like more per diem shifts on Fridays, Mr. Brentano said the

[30] When a later check with Mr. Terrio's supervisor revealed that Mr. Terrio had declined some Friday shifts, Mr. Brentano did not pursue the matter any further.

Hospital could probably accommodate him. By so doing, Mr. Brentano clearly implied the Hospital would redress one of Mr. Terrio's grievances. The reasonable inference to be drawn was that Mr. Brentano offered redress in order to influence Mr. Terrio's attitude toward the Hospital and, concomitantly, the Union.

The remaining question is whether Mr. Brentano's implied promise to Mr. Terrio of increased Friday shifts had a reasonable tendency to interfere with employees' free and uncoerced choice in the election. See *Quest International,* supra. I conclude it did not. Mr. Terrio proved to be ineligible to vote, and the employees to whom he related his conversation with Mr. Brentano did not hear of the promise to increase Friday shifts. Mr. Terrio testified he told coworkers of his conversation with Mr. Brentano, but since, by Mr. Terrio's account, the conversation involved only the promise of a wage supplement, there is no evidence his coworkers learned of the Friday shift-increase promise. Rather, Mr. Terrio's coworkers heard an inaccurate version of the Mr. Brentano/Mr. Terrio exchange to the effect that Mr. Brentano had promised wage supplements to Mr. Terrio. Since the Employer cannot be held accountable for a wage-increase promise falsely attributed to it, Mr. Terrio's communication to coworkers must be evaluated under the third-party standard (whether Mr. Terrio's conduct in communicating a spurious account was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible". *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002), and cases cited therein). No evidence suggests that Mr. Terrio's dissemination of an inaccurate account of his exchange with Mr. Brentano created a general atmosphere of fear and reprisal. Accordingly, I recommend the Union's Objection No 13 be overruled.

J. The Petitioner's Objection No 15

> During the critical period, the Employer informed an employee that her request to take vacation in December 2008 would be denied if the union won the representation election and contract negotiations were pending at that time. This statement constitutes a threat to withhold benefits and a threat to make unilateral changes to terms and conditions of employment in violation of Sections 8(a)(5) and 8(a)(1) of the Act.

Since at least 2006, the Hospital's policy and practice has been to disallow RN vacations between November 15 and January 10 without special permission.[31]

According to Ms. Gonzalez: sometime in late April, in the presence of Ms. Gonzalez, RN Sandra Moreno (Ms. Moreno) asked ICU Charge Nurse, Edna Borbon (Ms. Borbon), an admitted supervisor, whether nurses would still be able to schedule vacations during the months of November and December under union representation. Ms. Borbon said that if the Union came in, like the RNs in Kaiser Hospitals, the Employer's RNs would be unable to schedule vacations in those months. Ms. Gonzalez told Ms. Borbon that ER/ICU director Gonzalez had guaranteed her a vacation in November. Ms. Borbon said that would change with the advent of the Union and that she would not be able to have a vacation.

Ms. Borbon denied having any such conversation with Ms. Moreno or Ms. Gonzalez. I find it implausible that Ms. Borbon would tell employees they could no longer schedule vacations during the November-January vacation embargo, when no such privilege existed

[31] In corroboration of the policy, Ms. Reynolds, who testified for the Union, acknowledged that for the last two years, the Hospital has issued emails to RNs that vacations between November 15 and January 10 of each year are not normally allowed.

according to hospital policy, and I cannot accept Ms. Gonzalez' testimony that she did so. Inasmuch as I have not found Ms. Gonzalez to demonstrate a good recall of statements in other instances, I decline to accept either her testimony in this regard or her testimony to the effect that Ms. Borbon said Ms. Gonzalez would not be able to take a promised November vacation if employees selected the Union. Accordingly, I recommend the Union's Objection No 15 be overruled.

RECOMMENDATION

Based on the above, I recommend that Objection Nos 5 and 6 be sustained and that Objection Nos 2, 3, 4, 7, 9, 11, 12, 13, and 15 be overruled. In view of the fact that numerous unit employees were exposed to the objectionable conduct set forth in Objection Nos 5 and 6, I conclude the Employer's conduct affected the results of the Board election in Case 31-RC-8689. Accordingly, I recommend that the Board election in Case 31-RC-8689 be set aside and a new election be held.[32]

Further, and in accordance with *Lufkin Rule Co.*, 147 NLRB 341 (1964) and *Fieldcrest Cannon, Inc.,* 327 NLRB 109 FN 3 (1998), I recommend that the following notice be issued in the Notice of Second Election:

NOTICE TO ALL VOTERS

The election conducted on May 22 and May 23, 2008 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice among employees in the following unit:

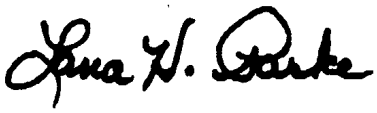
> Included: All full-time, regular part-time and regular per diem registered nurses employed by the Employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.
>
> Excluded: All other employees, all registered nurses employed or working as Case Managers, Clinical Documentation Improvement Coordinators, Clinical Documentation Specialists, Clinical System Analysts, IT Analysts, Infection Control Practitioners and Employee Health Nurses, all registry registered nurses, all traveler registered nurses, all clerical employees, all nonprofessional employees, all other professional employees, all guards within the meaning of the National Labor Relations Act, as amended; and all supervisors as defined in the National Labor Relations Act, as amended, including but not limited to all Charge Nurses, House Supervisors, Nurse Managers, the Performance

[32] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Recommended Decision. Exceptions must be received by the Board in Washington by January 30, 2009. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

Improvement Manager, the Director of Nursing Services, the Director of Medical/Surgical and Telemetry/DOU units, the Director of Surgical Services, the Director of Emergency and Critical Case Services, and the Director of Case Management.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

Dated, at Washington, D.C. January 16, 2009



Lana H. Parke
Administrative Law Judge