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Naples Community Hospital, Inc. and Service Employees International Union Healthcare Florida.
Cases 12–CA–25689

August 27, 2010

DECISION AND ORDER

BY MEMBERS SCHAUMBER, PEARCE, AND HAYES

On February 4, 2009, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, the Respondent filed reply briefs, the General Counsel and the Charging Party filed cross-exceptions, and the Respondent filed an answer to the Charging Party's cross-exceptions.

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

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

The complaint allegations in this case arise from an organizational campaign which commenced in June 2007. We agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(1) of the Act

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

² We grant the Respondent's request to delete language from the recommended Order and notice requiring that the Respondent personally notify employees that they do not have to request permission to engage in solicitation and distribution of union-related materials on employees' own time in nonwork areas.

We grant the General Counsel's request for electronic notice posting. The requirements for imposing this remedy, as set forth in *Nordstrom, Inc.*, 347 NLRB 294 fn. 5 (2006), have been established here. Accordingly, we shall order the Respondent to post the attached notice on its intranet and transmit the notice to its employees via email. Member Schaumber relies on *Nordstrom* as extant law. Member Hayes would not require electronic posting in this case.

We deny the Charging Party's request for extraordinary remedies.

by creating the impression that employees' union and other protected, concerted activities were under surveillance, by prohibiting employees from posting union literature in the employee break/kitchen area,³ and by telling employees that they were not permitted to engage in union and other protected, concerted activities in non-work, nonpatient care areas.⁴ However, we reverse the judge and dismiss the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to assign to Registered Nurse Mary Villani charge nurse duties as it had done previously because she assisted the Union and engaged in protected concerted activities.⁵

At all pertinent times, Villani worked as a day-shift registered nurse in the surgical intensive care unit (SICU) of the Respondent's hospital. She typically worked three 12-hour shifts per week. For each shift, one of the 4 to 6 SICU nurses served as the charge nurse and received an additional \$1.50 an hour in wages for the additional duties involved. Villani was an open and active supporter of the Union, and known as such by the Respondent's officials. The complaint alleges that from late November 2007 to mid-January 2008, the Respondent reduced the number of charge nurse assignments for Villani because of her protected union activities. The judge found that the General Counsel met his *Wright Line*⁶ burden of proving that the Respondent reduced Villani's charge nurse hours, and that it did so because of her protected activities. He found that the Respondent failed to meet its rebuttal burden of showing that it would have made the same number of charge nurse assignments to Villani even in the absence of her union activities. In excepting,

³ The judge found that the Respondent unlawfully prohibited employees from posting or having union literature in the employee break/kitchen area. The credited testimony in support of this finding is that Director of Human Resources Brian Settle told employee Terese Panebianco that employees were "not allowed to have Union pamphlets in the break room on the refrigerator." We shall modify the Order and notice to conform to the violation proved.

⁴ The Respondent excepted to this last finding by the judge in its enumerated exceptions document but failed to present any supporting argument. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we disregard those exceptions. *Holsum de Puerto Rico, Inc.*, 344 NLRB 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

The Respondent excepts to the judge's drawing of an adverse inference from its noncompliance with a subpoena. However, the judge specifically noted that: "[t]his adverse inference is not relied on in any way by me in deciding any of the issues in this case." We therefore find no need to pass on the exception.

⁵ There are no exceptions to the judge's resolution of all other unfair labor practice issues.

⁶ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

the Respondent contends, among other things, that the General Counsel failed to establish that Villani actually suffered the alleged adverse employment action—specifically, that the Respondent did not reduce her charge nurse assignments for the period in question. We find merit in this exception.⁷

The Respondent has an informal, nonprioritized system for assigning the charge nurse shift position. For day-shift assignments, the clinical coordinator on the preceding night shift, after consultation with the charge nurse for that shift, selects the next day-shift charge nurse and communicates this assignment by placing a post-it note on the timeclock. The assigned nurse, however, does not necessarily perform the charge nurse duty. Instead, shift nurses frequently give charge nurse assignments to one another. If a nurse other than the originally assigned nurse works the charge nurse shift, that nurse simply makes a correction entry in the timeclock system. Villani, herself, testified that she often switched with the assigned charge nurse, that this was a common practice for the nurses to do among themselves, and that there was thus a significant difference between the number of times a nurse was assigned charge nurse duties and the number of times the nurse actually worked those duties.

The Respondent did not retain the original post-it assignment notes, so there is no documentary evidence directly showing how many charge nurse assignments were made to Villani, as opposed to how many charge nurse shifts she actually worked. Villani testified that in the period before late November 2007, she was assigned charge nurse duties 65–75 percent of the time. As a result, she worked as charge nurse for approximately two out of three shifts each week. Villani further testified that in late November 2007, she noticed her paychecks were smaller and that she was not receiving charge nurse assignments. On direct examination, she said that she only worked three shifts as a charge nurse from late November 2007 to mid-January 2008, but on cross-examination she conceded that the Respondent's records showed she worked as charge nurse on eight shifts.

Nurse Jacquelyn Rasmussen testified that she preferred not to serve as a charge nurse, but during the late November 2007 to mid-January 2008 period at issue she was assigned charge nurse duties once or twice per week—more than her usual assignments of once or twice per month. Rasmussen speculated that she was getting charge nurse assignments that had previously gone to Villani.

In concluding that the Respondent unlawfully curtailed Villani's charge nurse assignments, the judge did not rely on the testimony of Villani and Rasmussen. Rather, he relied on certain documents in the record—the “NCH Healthcare System Posted Schedule Detail” from June 24 to July 19, 2008, and the Respondent's compilation of “charge distribution and utilization from the period of January 1, 07 through February 2, 08.” Ultimately, the judge found that the documents showed that, during the 2-month period in question, “the number of times [Villani] worked as a charge was reduced resulting in a reduction of her pay.”

The Respondent disagrees with the judge's interpretation of the record documents. It submits that Villani essentially worked her usual number of charge nurse shifts, or more, during the 2-month period in question. Although we have doubts about the judge's interpretation, we need not resolve the matter. Even assuming that Villani did work fewer charge nurse shifts than usual, the documentary evidence does not establish that the Respondent reduced her charge assignments. The documents do not purport to show—and do not show—the number of charge nurse shifts the Respondent assigned to Villani or to any other nurse. They show only the charge nurse shifts that Villani and the other nurses actually worked. There is no way of knowing what percentage of the charge nurse shifts worked by Villani before, during, or after the period in dispute resulted from the Respondent's original assignments, rather than assignments traded with other nurses.

We are left then with the testimony of Villani and Rasmussen. The judge did not rely on this testimony, but neither did he discredit it. We find that this testimony, even if credited, is insufficient to prove the alleged adverse employment action. Villani's testimony was concededly inconsistent as to the number of charge nurse shifts she actually worked from late November 2007 to mid-January 2008. Further, although she testified that she participated in the widespread and regular practice of trading charge nurse assignments, her testimony provides no specific insight as to how many of the charge nurse shifts that she worked resulted from this informal trading. As for Rasmussen, her testimony provided no objective basis supporting her speculation that she received assignments that would ordinarily have been given to Villani, as opposed to any other nurse working that shift. In sum, the General Counsel failed to satisfy his initial burden of proving that the Respondent actually reduced Villani's work assignments from late November 2007 to mid-January 2008. Accordingly, we shall dismiss the

⁷ Accordingly, we do not pass on whether the General Counsel met his initial *Wright Line* burden in other respects.

complaint allegation that the Respondent unlawfully reduced Villani's charge nurse hours.⁸

ORDER

The National Labor Relations Board orders that the Respondent, Naples Community Hospital, Inc., Naples, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that employees' union and other protected, concerted activities are under surveillance.

(b) Prohibiting employees from posting union literature in the employee break/kitchen area.

(c) Telling employees that they are not permitted to engage in union and other protected, concerted activities in nonwork, nonpatient care areas.

(d) Prohibiting employees, in the parking garage at Respondent's facilities, from distributing union literature in nonwork, nonpatient care areas.

⁸ Contrary to his colleagues, Member Pearce would adopt the judge's finding that the Respondent violated Sec. 8(a)(3) by reducing Mary Villani's charge nurse assignments from late November 2007 to mid-January 2008. As found by the judge, Villani was a prominent union supporter, member of the union organizing committee, and—as acknowledged by the Respondent—a union activist. She was also the victim of or witness to several of the Respondent's unfair labor practices. As to each of those unfair labor practices, the judge credited Villani's testimony over the Respondent's witnesses in finding the violations.

In November, 2007, Villani was the sole pictured employee on a campaign leaflet distributed at the hospital, criticizing the Respondent. Villani testified that beginning that same month, her charge nurse assignments declined, and remained down until she publicly protested her reduction in assignments at a mid-January press conference. Employee Jacquelyn Rasmussen corroborated Villani's uncontradicted testimony and testified, similarly without contradiction, that Villani's assignments declined during this period while Rasmussen's charge nurse assignments increased. Rather than dispute this consistent testimony, the Respondent's witnesses merely disclaimed responsibility for the charge nurse assignments and asserted ignorance as to how frequently Villani was assigned the higher-paying charge nurse work. By expressly discrediting this respondent testimony, the judge implicitly credited the corroborative and uncontradicted testimony of Villani and Rasmussen that Villani's charge nurse assignments had, in fact, decreased, as alleged in the complaint. Further, as found by the judge, the Respondent's exhibit reflecting charge nurse work that Villani performed during this period, supports, rather than undermines Villani's and Rasmussen's credible testimony. That the more reliable record of actual charge nurses assignments was not retained by the Respondent does not, in Member Pearce's view, undercut their testimony, but demonstrates that that the Respondent failed to meet its *Wright Line* rebuttal burden.

In sum, Member Pearce agrees with the judge that the General Counsel met his initial *Wright Line* burden of proving unlawful motivation for the reduction in assignments, and that the Respondent failed to meet its rebuttal burden of showing that it would have taken the same action in the absence of Villani's prominent union activity. Accordingly, Member Pearce would adopt the judge's finding of a violation.

(e) Prohibiting employees from posting union literature in nonwork, nonpatient care areas where other non-union literature and materials are posted.

(f) Soliciting employee complaints and grievances and impliedly promising to remedy them if employees refrain from engaging in union organizing activity.

(g) Telling employees that they are not permitted to engage in union and other protected, concerted activities unless they receive prior permission and approval from Respondent.

(h) Maintaining and enforcing overbroad restrictions on employees' rights to engage in solicitation and the distribution and posting of written or printed materials.

(i) Issuing verbal or written disciplines because employees assist the Union and engage in concerted activities, and to discourage employees from engaging in these activities.

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

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

(a) Rescind in its employee handbook and on its website the following policies and rules regarding solicitation, distribution, and posting of written or printed materials, and notify employees that this action has been taken.

D . . . Employees that wish to solicit for community charitable organizations must request permission on the "Solicitation Approval Form." The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or designee. Requests to solicit for personal profit, political causes or organizations representing any protected or non-protected groups will routinely be denied.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful verbal and written discipline given to Sandi McGoun and the unlawful verbal disciplines given to Janice Cothran and Nike Saltzer, and within 3 days thereafter notify Sandi McGoun, Janice Cothran, and Nike Saltzer in writing that this has been done and that the verbal and written disciplines to Sandi McGoun and the verbal disciplines to Janice Cothran and Nike Saltzer will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facility in Naples, Florida, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms

⁹ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the

provided by the Regional Director for Region 12, 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 that facility at any time since August 6, 2007.

(d) Within 14 days after service by the Region, post the attached notice marked "Appendix" electronically on the Respondent's intranet with a link sent by electronic mail to its employees.

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

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) 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.

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."

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 create the impression that your union and other protected, concerted activities are under surveillance.

WE WILL NOT prohibit you from posting union literature in the employee break/kitchen area.

WE WILL NOT tell you that you are not permitted to engage in union and other protected, concerted activities in nonwork, nonpatient care areas.

WE WILL NOT prohibit you, in the parking garage at our facilities, from distributing union literature in nonwork, nonpatient care areas.

WE WILL NOT prohibit you from posting union literature in nonwork, nonpatient care area where other nonunion literature and materials are posted.

WE WILL NOT solicit your complaints and grievances and impliedly promise to remedy them if you refrain from engaging in union organizing activity.

WE WILL NOT tell you that you are not permitted to engage in union and other protected, concerted activities unless you receive prior approval and permission from us.

WE WILL NOT maintain and enforce overbroad restrictions on employees' rights to engage in solicitation and the distribution and posting of written or printed materials.

WE WILL NOT issue verbal or written disciplines because you assist the Union and engage in concerted activities, and to discourage you from engaging in these activities.

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

WE WILL rescind in our employee handbook and on our website the following policies and rules regarding solicitation, distribution, and posting of written or printed materials, and WE WILL notify you that this action has been taken:

D . . . Employees who wish to solicit for community charitable organizations must request permission on the "Solicitation Approval Form." The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or des-

ignee. Requests to solicit for personal profit, political causes or organizations representing any protected or non-protected groups will routinely be denied.”

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful verbal and written disciplines given to Sandi McGoun and the unlawful verbal disciplines given to Janice Cothran and Nike Saltzer, and WE WILL, within 3 days thereafter notify Sandi McGoun, Janice Cothran, and Nike Saltzer in writing that this has been done and that the verbal and written disciplines to Sandi McGoun and the verbal disciplines to Janice Cothran and Nike Saltzer will not be used against them in any way.

NAPLES COMMUNITY HOSPITAL, INC.

Karen M. Thornton, Esq., for the General Counsel.
James G. Brown, Esq. (Ford & Harrison LLP), of Orlando, Florida, and *Donald R. Lee, Esq. (Ford & Harrison LLP)*, of Atlanta, Georgia, for the Respondent.
Gene Mechanic, Esq. and *Katie Roberson-Young, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Naples, Florida, on August 4–8, 2008. The original charge was filed by Service Employees International Union Healthcare Florida (the Charging Party, the Union, or SEIU), on January 10, 2008, the amended charge was filed on February 20, 2008, and the complaint was issued April 28, 2008. As amended, it alleges that Naples Community Hospital, Inc. (Respondent) (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (a) creating the impression that employees’ union and other protected, concerted activities were under surveillance; (b) prohibiting employees from posting or having union literature in the employee break/kitchen area; (c) telling employees that they were not permitted to engage in union and other protected, concerted activities in nonwork, nonpatient care areas; (d) prohibiting employees from distributing union literature in a nonwork, nonpatient care area, namely, the parking garage; (e) prohibiting employees from posting union literature in nonwork, nonpatient care areas where other nonunion literature and materials were posted; (f) soliciting employee complaints and grievances and impliedly promised to remedy them if employees refrained from engaging in union organizing activity; (g) telling employees that they were not permitted to engage in union and other protected, concerted activities unless they received prior permission and approval from the Employer; and (h) maintaining in its employee handbook and enforcing a policy which contains the following: “Requests to solicit for . . . organizations representing any protected or nonprotected groups will routinely be denied,” and (2) violated Section 8(a)(1) and (3) of the Act by (a) issuing a verbal and then a written discipline to its employee Sandi McGoun because she assisted the Union and engaged in concerted activi-

ties and to discourage employees from engaging in these activities; and (b) changing the working conditions of its employee Mary Villani by failing to assign her charge nurse duties as it had done previously because she assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Respondent denies violating the Act as alleged in the above-described complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel, the Charging Party, and Respondent on October 14, 2008, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides acute health care and outpatient services at two hospital buildings and at various other locations in Naples, Florida, and throughout Collier County, Florida, where during the 12 months before the above-described complaint was issued (a) it derived gross revenues in excess of \$250,000, and received revenues in excess of \$50,000 from the United States Government through Medicare and Medicaid program payments, and (b) in conducting its business operations it purchased and received at its Naples facility, goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent has a total of approximately 3200 employees, with roughly 1000 registered nurses (RNs) at facilities described above.

Caleb Jennings, who is an organizing coordinator for the Union, testified that the Union was contacted by nurses at Respondent’s Hospital in June 2007; and that he met with about 70 of Respondent’s nurses during June 2007 to discuss the issues, to determine whether the nurses wanted to organize a union at Respondent, and to form an organizing committee.

John Brown, who is Respondent’s director of public safety, testified that there are 32 security guards; that John Griffith is the supervisor for Respondent’s downtown facility and Valerie Barbaccia is the supervisor for Respondent’s North Naples hospital; that on June 12, 2007, he sent an e-mail (R. Exh. 4), to all members of uniformed security department of the hospitals, with a cc going to Brian Settle, who is Respondent’s chief human resources’ officer, and Renee Thigpen, who is Respondent’s human resources director, indicating that he did not authorize them to disband employees who were found in groups discussing union activities¹; that in June 2007 he attended training in a leadership retreat in the Telford Building (located on Respondent’s downtown campus) that was provided to all executives, directors, and managers; that part of the class was

¹ The email indicates “[u]nder no circumstances will any officer approach any other employee unless there conduct is in violation of policy or law.”

training with respect to what employers can and cannot do; and that his security guards were not there but Supervisors Griffith and Barbaccia were and he told these two supervisors to discuss their training with the officers.

On cross-examination, Brown testified that he put “[s]upervisors will immediately insure that each officer assigned has read and fully understands this message and prior to 0700, Wed. June 13 certify completion in writing to me” because he had already given his expectations and they had this misunderstanding so he wanted to make sure that everyone understood what the rules were; that he believed that Respondent’s no-solicitation/no-distribution policy and the posting of materials on bulletin boards and elevators and elsewhere was discussed at the training session at the leadership retreat “in August 2007” (Tr. 666); that the bulletin board policy is in the employee handbook; that when he was hired he received an employee handbook (he believed); and that he sign a confidentiality agreement and he was not sure he could say how often he signs that.

When called by Respondent, Thigpen sponsored Respondent’s Exhibit 12, which she testified is a document that (a) Respondent has all new employees sign when they hired, and (b) indicates that the new employee has received

our CD that describes the policies, the employee handbook, our standards of behavior, corporate compliance, confidentially, no-disclosure act, et cetera, shows them where to go to get things. It tells them that if they don’t have a computer and would like a hard copy, they can come to Human Resources and receive a hard copy of policies and handbook. [Tr. 905.]

Thigpen further testified that this particular form has been in effect since May 2007 but Respondent had a document similar to this since Respondent went electronic (computerized) with its policies; that the purpose of the document is to ensure that Respondent has covered this information with the employees and they know where to find the policies or handbook or answer any questions; that paragraph 6 of the document tells employees that they can access the handbook and the personnel policies via the NCH intranet; and that paragraph 2 of the document refers to the employee handbook and indicates that by signing the document the employee agrees to read the handbook and refer to it and also to refer to the human resources policy and procedure manual on the intranet.

Thigpen testified that probably in late June into July 2007 she became aware that unknown persons were using the hospital’s fax machines and tube system to distribute union literature and posters. On cross-examination, Thigpen testified that “it may have been, yes” (Tr. 921), that Nunso’s organization also used Respondent’s fax and tube system to distribute their literature²; that department directors were instructed to meet with their employees and let them know that the fax and tube should not be used for nonwork related matters; that she did not recall if Respondent had any document reflecting that communication with management; and that she did not know if in fact Respondent caught anyone who misused the fax or tube.

² As noted herein, this organization opposes SEIU.

McGoun, who has been a registered nurse (RN) for Respondent in its downtown medical intensive care department and who works from 6:45 a.m. to 7:15 p.m., testified that in July 2007 Doctor Alan Weiss came up to the intensive care unit to speak to the nurses; that Weiss said that there were some financial difficulties and that they were going to have to tighten their belts; that a lot of the nurses who were good team players used a lot of their paid time off; that at the end of July 2007 the nurses heard that upper management had given themselves close to a 20-percent raise and a bonus; that the nurses met with Weiss looking for an explanation but they did not get the answers they would have liked; that she went to a union meeting and became a member of the organizing committee; that she made phone calls on behalf of the Union, she gave out union leaflets, she tried to inform some of the nurses, she tried to get people to sign cards, and she was interviewed and quoted by the local newspaper after one of the first union meetings; and that she wore purple laces on her shoes and starting in July 2007 she wore a little organizing committee badge so nurses would know that they could come to her if they had any questions.

Thigpen testified that in late June or early July 2007 Respondent formally became aware of an effort of the nurses to unionize; that in response to this information Respondent’s executive group met; that this group consists of Allen Weiss, who is the chief executive officer; Brian Settle, who is Respondent’s chief human resources officer; Phil Dutcher, who is the chief operations officer for the downtown campus; Carrie Skifton, who is Respondent’s chief nursing officer; Gail Dolan, who is the chief operations officer for the North Naples campus; Kevin Cooper, who is the general counsel; and Linda Roebach, who is the general counsel working under Cooper; that she did not recall when they discussed the no solicitation policy but she believed it was after they learned about the union campaign; that there were no changes in the solicitation and distribution policy between May 2001 and when the union campaign began; and that, as described below, the change of this policy was approved August 30, 2007, or about 2 months after Respondent became aware of the union campaign.

On July 19, 2007, the nurses held a union meeting and committed to moving forward with the union campaign.

On July 26, 2007, the union campaign was publicly launched with two meetings (at 5 and 8 p.m.) at the Bellasera, which is a hotel near Respondent’s downtown campus, where union authorizing cards were distributed and signed. Jennings testified that a total of approximately 300 nurses came to these meetings; that a letter titled “We’re Uniting for Quality Care and Quality Careers” to “Dear RN colleague” was distributed and mailed on July 26, 2007, following this meeting (GC Exh. 17(a)); that the letter contains the names and signatures of the nurses on the organizing committee³; General Counsel’s Exhibit 17(b) is another union flyer signed by a number of nurses in the surgical intensive care unit (SICU) at Respondent’s downtown campus, including Villani and McGoun; that General Counsel’s Exhibit 17(h) is the flyer which was handed out

³ The name of Villani appears in the first column and the name of McGoun appears in the third column.

with small packets of candy on Halloween in 2007; that General Counsel's Exhibit 17(j) on one side has a picture of just RN Terese Panabianco with an article entitled "Don't Fall for Management's Raises—They've Tried This Tactic Before"; that General Counsel's Exhibit 17(l) is two letters to "Dear Fellow RNs" on a letterhead which gives the names of those on the organizing committee so that their coworkers knew who to go to when they had questions about the Union⁴; that these letterheads include the names of McGoun, Panabianco, and Villani; and that members of the organizing committee wore a special pin and they also wore purple "Crocs," which are shoes.

On Friday, July 27, 2007, the following article (GC Exh. 19), appeared in the Naples Daily News:

NCH nurses put union to a vote
Results of vote on unionizing efforts to be released today

More than 300 nurses, some sporting scrubs and others wearing street clothes, trickled into the lobby of the Bel-lasera Hotel in Naples on Thursday with the issue of unionization on their minds.

The nurses, all part of the NCH Healthcare System, attended two meetings at the hotel aimed at reaching a decision on the nursing staff's unionizing efforts. Nurses put the issue to a vote and the results will be released today.

"We are hoping to achieve having a voice, being able to speak with administration and be heard," said Caryl P. Godwin, a nurse for 22 years. "There are many issues, but the bottom line is that we wouldn't be here if we didn't have concerns."

The nursing staff at NCH began talking of organizing in recent months after mounting discontent over job cut-backs that led to higher patient ratios and disagreements over how work hours are accrued.

But it wasn't until the NCH board of trustees awarded 19 percent bonuses to Dr. Allen S. Weiss, the hospital's president and CEO, and seven senior managers in late May that morale hit rock bottom.

"This is the biggest disconnect I've ever felt between us and management," said Sandie McGoun, a nurse for 30 years.

That rift led to Thursday's two meetings, the first of which hosted 200 nurses.

But hours before the gatherings Weiss released a letter laying out the board of trustees' plans on how to rectify the divide between the NCH's administration and the nursing staff. The board met Wednesday to discuss the issues.

Some of the moves included an 8 percent to 10 percent raise for the nursing staff (6 percent to 8 percent for all other employees), appointing an NCH nurse to the board of trustees, creating a fund for employee year-end bonuses and establishing a chief medical officer position to improve interactions between physicians, nurses and other caregivers.

"All of these positive actions by the Board of Trustees reflect a clear intent and effort on the part of the hospital leadership to listen to your concerns and respond to your recommendations," Weiss said in the letter. "Our desire to do the right thing for all of you may not always be apparent. And I personally apologize for any unintended consequences."

. . . .

Counsel for the General Counsel indicated that this article was not being offered for the truth of the matter asserted therein.

McGoun, who had not received a discipline in perhaps the last 15 or 20 years, received a "COACHING FORM" dated "7/31/07" (GC Exh. 3), from Respondent which indicates "I have received complaints on 2 separate occasions, 7/25/07 and 7/30, from the Nursing Director of 3N regarding Ms. McGoun visiting her unit and interrupting her staff with nonrelated patient care activities while that staff was trying to work." McGoun testified that she received a verbal counseling in August 2007 from her assistant nurse manager and Clinical Coordinator Jen Ringle about speaking; that at the meeting she had with Ringle about this discipline, Ringle told her that she was observed talking about the Union on 3 North nurses' station, which is next to progressive care, which is intensive care; that she was at the nurses' station and at the elevator on 3 North; that she did not remember Ringle mentioning a hospital rule or a policy during this meeting; that she had been told by the union people that if they were allowed to talk about their children or sports events, they could talk about the Union; that she could not remember if she told Ringle this; that Ringle told her that she, Ringle, did not want to discipline her but someone from 3 North called her about McGoun and she, Ringle, felt she had to do it; that she did not consider the nurses' station and elevator patient care areas; that she has no recollection of talking about the Union at the elevator; that with respect to the conversation at the nurses' station on 3 North, Carl Westman, Respondent's chairman of the board, came up to the progressive care nurses' station in the afternoon from the direction of 3 North and he summoned the nurses to talk to them; that she had been floated (assigned to a unit other than her normal unit to meet the hospital's need) to progressive care so she was in the area; that for 10 minutes Westman explained to the nurses that he really did not get a 20-percent raise or a bonus; that after Westman left progressive care she received a telephone call from one of the nurses on 3 North who usually works in progressive care, Mary DeBellis, who asked her to come to 3 North because she wanted to talk about Westman; that before she left progressive care she asked someone to cover her patients while she was gone; that she walked about 20 feet to the nurses' station on 3 North and spoke with DeBellis for about 3 minutes; that there was just the two of them at the nurses' station on 3 North at the time; that they discussed Westman and Weiss in that the latter had never denied taking the raise; and that she did not recall any rule that the Employer may have about what you can and cannot talk about while at work.

On cross-examination, McGoun testified that she dated her signature on the coaching form (GC Exh. 3), "7/31/07"; that on the day in question she had been floated from her usual unit, intensive care, to progressive care; that the nurses' station is a

⁴ One is dated September 25 and the other is dated September 26, 2007.

working area for the nurses in that they do charting there and there are telephones there; that when she had the conversation with DeBellis she and DeBellis were both on working time; that being outside her assigned unit talking to a fellow nurse happens frequently; that she did not remember what she said to Ringle when Ringle gave her the coaching form; that she thought that there were just the two of them in the office at the time; and that she believed that she told the union people about this verbal or coaching form and submitted an incident report to the Union when she was given this discipline but she could not remember.

Thigpen testified that neither she nor Settle get involved in coaching forms; that she was not involved in McGoun's coaching form; that she did not recall if she got involved in dealing with the subject of that coaching form; that Charging Party's Exhibit 7 from Ringle to her dated July 31, 2007, which reads "[a]ttached is coaching I did with Sandi. It went much better than anticipated" demonstrates that as of the time of this e-mail she, Thigpen, had knowledge of McGoun's coaching form; and that McGoun received this coaching for being out of her work area and not for a violation of the solicitation policy.

Villani testified that Charging Party's Exhibit 11 is a union incident report she filled out for McGoun since McGoun was very shaken up about what happened. The report is dated "7/27/07." It indicates that the date of the occurrence was "07/27/07," the department is 3N downtown, and the name of the supervisor involved is Stacey who has the title of "CC." The following appears in the "[d]escription of Incident" portion of the form: "[a]t 3N nurses station Mary DeBellis RN and Sandy McGoun discussing the board and Mr. Westman trying to convince staff nurses that board did not receive 19 percent raise at nurses station—Jen Ringle warns Sandy McGoun."

On cross-examination, Villani testified that the board described in the incident report is the hospital board and Westman was trying to convince staff nurses at the nurses' station that the board did not receive a 19-percent raise; that she spoke with McGoun and DeBellis and McGoun was at the nurses' station on 3 North discussing what Westman told the nurses at 5:40 p.m.; that the coaching form that McGoun received (GC Exh. 3), is dated 7/31 and has Director Ringle's signature; that she does the variances (incident reports) at home at night and she was not sure that she did not write it out afterwards; and that she spoke with McGoun at work and DeBellis on the telephone.

Stacy Gutierrez, who is the day-shift clinical coordinator and charge nurse on 3 North (telemetry unit) and who supervises the RNs in the unit, testified that she knows RN McGoun who works in PCU and wears pink⁵; that in late July 2007 she saw McGoun at the nurses' station in telemetry but she could not recall the time of day; that she was about 30-feet away from McGoun, who was talking to DeBellis, who is a float nurse who was working on the telemetry unit that day; that she observed DeBellis and McGoun for a couple of minutes but she could not hear what they were talking about; that at the nurses' station doctors retrieve information from patient charts, it is were the computers are located, the secretary answers the tele-

⁵ Gutierrez testified that she did not remember seeing McGoun wearing purple.

phone, and it is a very busy area; that since she had to leave the nurses' station she did not know how long McGoun was there and she did not see McGoun leave the area; that when she started in this position about 3 years ago she was instructed by her director, Lori Preece, to report any change in a typical day to her; and that since she did not receive a transfer form from PCU, McGoun and DeBellis were not discussing a patient transfer.

On cross-examination, Gutierrez testified that another thing which was not typical that day was that the administrative coordinator brought around one of the board members, Westman, to the telemetry unit; that the administrative coordinator asked her if she wanted to gather the nurses to the nurses' station to hear what Westman had to say; that Westman was in the unit for maybe a couple of minutes; that she reported this to Preece; that before this she had never reported to Preece any other nurse for similar conduct; that this was the first time she experienced something like this; that she told Preece who McGoun was talking with; that she could not recall if anyone ever asked her about her report to Preece that McGoun was at the nurses' station in telemetry talking to DeBellis; that a visiting nurse did attend a staff meeting; that she did not see the visiting nurse in any area where she was working; that she never saw the visiting nurse talking to RNs on the floor of the telemetry unit; that she has signed acknowledgments of receipt of, as here pertinent, the hospital's policies with respect to (a) confidentiality regarding patients, doctors, and medical information, and (b) no-solicitation/no-distribution; that nurses could have a birthday party or a shower in the employee lounge on the telemetry unit, occasionally nurses do come back who are off duty to attend such a party and she would not report this to Preece; that before McGoun came into telemetry that day DeBellis was listening to Westman and asking him questions; that she considers the nurses' station to be an immediate patient care area because patients come to the desk to ask questions, they receive patients from the emergency room at the main nurses' station, that is where charts are dropped off, patients are on a stretcher next to the nurses' station while the transporter is receiving their chart, and sometimes a patient will receive medication with a drink of water at the nurses' station; that she could not recall if there was a patient at the nurses' station on the day she saw McGoun and DeBellis talking; that when Westman left telemetry he went next door to PCU and she saw McGoun, through the glass on the doors to PCU, standing at the nurses' station in PCU when Westman was speaking there; and that she reported McGoun to Preece because the situation was atypical and not because McGoun violated any hospital rule.

Ringle, who is the clinical coordinator of critical care, testified that she reports to Jonathon Kling; that McGoun works in a critical care unit, namely intensive care; that she signed McGoun's "7/31/07" coaching form along with Kling, who was her interim director at the time; that she gave McGoun the coaching form because she had received complaints from Nursing Director Preece on 3 North that McGoun had been visiting the unit and disrupting, or talking to her staff who were trying to do work; that she telephoned Thigpen and she, Ringle, brought up the coaching; that there were no points involved with this coaching and its purpose was an informal; that she

typed the coaching form which indicates, among other things, “[n]ot visiting other units and interrupting staff that are on work time with nonpatient care-related concerns, issues, or activities”; that she did not know where McGoun was in the unit she just knew that McGoun was on 3 North; that she spoke with McGoun about the coaching in Kling’s office; that McGoun did not write anything on the coaching form; and that during her discussion of the coaching, McGoun was upset initially, saying that she was being singled out and picked on.

On cross-examination, Ringle testified that she did not do any investigation into Preece’s complaints regarding; that Preece told her that on two separate occasions McGoun was in Preece’s unit talking with her staff who were on their (plural) work time, and McGoun was not allowing their staff to do their work; that she did not discuss the matter with McGoun before drafting the coaching; that she did not talk with anybody on 3 North other than Preece about this matter; that with respect to the alleged incident when McGoun was allegedly on 3 North speaking with someone other than DeBellis, she, Ringle, did not have any details about what allegedly happened on July 25, 2007, she did not know how long McGoun was allegedly there, and she did not know who the other person was; that she telephoned Thigpen “because of the fact that there was Union activity going on. I wanted to make sure I was doing things correctly” (Tr. 767 and 768); that Thigpen reviewed McGoun’s coaching form before she, Ringle, issued it to McGoun; that after she issued the coaching form to McGoun, she, Ringle, communicated back to Thigpen (GC Exh. 3); that she does not do this with all coaching forms but she felt that she needed to do it with respect to McGoun’s because “there was union activity potential involvement” (Id. at 768); that she thought that there was union activity potentially involved in that she “was concerned there would be a misperception as far as an employee leaving a unit, and I was concerned over misperceptions as far as . . . [McGoun] leaving and talking to people and coming back that was not related to patient care activities” (Id. at 768 and 769); that Preece did not mention union activity to her; that the only investigation needed in this situation was the conversation with Preece; that she had no firsthand knowledge of whether McGoun’s presence on 3 North on the two dates specified had any impact on patient care and in issuing the coaching she was relying on what Preece told her; that two nurses at the nurses’ station could have a conversation about their children’s soccer game or something like that since that is allowed; that she contacted Thigpen because she, Ringle, was worried about misperceptions in that she did not want the McGoun situation to be viewed as related to antiunion activity that even though she did not know what McGoun was speaking about, she was concerned because “that was the whole climate of the organization at that point in time. Everything was being focused on, related to the Union” (Id. at 773); that the employee is always allowed to tell their side of the story at the coaching meeting but not before she decides to give them a coaching; that before giving McGoun the coaching form she was concerned about McGoun’s response; that as a matter of course she generally does not send coaching forms to human resources; and that with respect to McGoun responding in writing to the coaching, she did not give McGoun any more details than are

on the coaching form, namely “I have received complaints on 2 separate occasions, 7/25/07 and 7/30, from the Nursing Director of 3 North regarding Ms. McGoun visiting her unit and interrupting her staff with non-related patient care activities while that staff was trying to work.” (GC Exh. 3).

On redirect, Ringle testified that there is a difference in (a) a nurse talking to another nurse on the same unit, and (b) a nurse talking to another nurse outside of her unit because when they are both from the same unit they know what activity is going on and whether they are disrupting that activity; that when they are not from the same unit there is no way for the outsider to know whether she is disrupting activity with her conversation since that nurse is not working in that unit.⁶

Ringle gave the following testimony on recross:

Q. If an employee in one unit calls an employee in another unit and requests that they come to the nurses’ station, is there something improper about the second employee going to the nurses’ station to see what the first employee wants?

A. That’s extremely vague. I cannot answer that.

Subsequently, Ringle testified that she did not know if the same employee in Preece’s unit was involved in both the July 25 and 30, 2007 incidents; that more than one employee in Preece’s unit might have been involved; that she did not know whether the employee or employees that McGoun talked to while she was in Preece’s unit also received coachings; that she did not ask; and that when she gave McGoun her coaching she did not tell McGoun that she was observed talking about the Union on 3 North.

Kling, who is the director of critical care at Respondent’s downtown campus, testified that he was present at McGoun’s July 31, 2007 coaching as a witness in that he was clinical coordinator at the time; that he signed the coaching form (GC Exh. 3); and that he was not involved in the investigation of that matter. Kling did not corroborate Ringle with respect to her testimony that when she gave McGoun her coaching she did not tell McGoun that she was observed talking about the Union on 3 North.

When called by Respondent, Thigpen testified that General Counsel’s Exhibit 2, which is Respondent’s “Corrective Action Policy for Performance Improvement—Policy” and which has a “Reviewed/Approved” date of “2/08,” was the policy which was in effect at the time of the trial herein; that section F of the policy contains some types of unsatisfactory behavior that could result in some level of corrective action up to and including termination; that it is discretionary; that section F.7., which reads “[d]isruptive behavior and other actions which disturb a patient or disrupt a fellow employee in the performance of their duties to include use of obscene or inappropriate language,” and F.21., which reads “[u]nsatisfactory work performance,” have been in the policy since the beginning of the policy (The

⁶ This is strained if not faulty logic in that the nurse who is working in the unit, here DeBellis, would know and simply could say so. Here, DeBellis called McGoun and had her come over to the unit DeBellis was working in that day. There was no showing that DeBellis was disciplined.

top of the first page of the exhibit indicates, "Original 7/90."); and that Respondent's Exhibit 11 are a series of corrective actions for infractions similar (allegedly) to McGoun's for being out of the work area or disrupting other employees.⁷

On cross-examination, Thigpen testified that the employees included in Respondent's Exhibit 11 are a cleaning aide, a security employee, an Ed Tech in the emergency room, and employees who work in environmental services, transportation, radiology, food services, and outpatient rehab; and that there are no registered nurses in Respondent's Exhibit 11 and Respondent did not have any examples of registered nurses who have been disciplined since January 2007 for leaving their working stations other than McGoun.

Brown testified that on or about August 2, 2007, one of the three downtown parking garage elevators was vandalized in that someone spray painted the face of a man on the elevator wall⁸; that a review of the video of the camera in the elevator showed that the vandal was an unidentified female; that the videos are reviewed in the event of a complaint or if there is a need to review them; that the matter was reported to the Naples police department; and that the woman and her companion were not recognized as employees of NCH.

On Friday August 3, 2007, an article (GC Exh. 20), involving the Union appeared in the Naples Daily News. The article is titled "*NCH ignores union campaign proposals*" and it indicates, in part, that "[t]he nurses' union organizing committee submitted to the chairman of NCH's board of trustees last week a list of seven campaign guidelines that both parties would have been required to follow. The nurses asked for a response no later than the end of the business day Wednesday. NCH officials did not respond." The article also indicates "'[w]e just wanted to set some ground rules on both sides,' said Mary Villani, a 25-year nurse at NCH who works in the surgical intensive care unit at Downtown Naples Hospital." With respect to the raises described in the earlier newspaper article, this article indicates as follows:

Last week, before nurses met to sign union pledge cards, administrators announced that the board of trustees plans to give raises of 8 percent to 10 percent this fall to nurses, and raises of 6 percent to 8 percent to general employees. The raises would be pending the sale of DSI Laboratories, an NCH affiliate, to the national company, LabCorp.

DSI's sale was finalized Wednesday, Westman said. He said Thursday that the board's vote last week was unanimous in its intent to give raises in line with what's happening in the market. The pay increases would happen

in October with the start of the new fiscal year and not before, he said.

"We don't want to do anything we don't do normally," Westman said.

...

This article, which reiterated some of what appeared in the earlier article described above, was not received for the truth of the matters asserted therein.

Villani, who is a registered nurse (RN) who worked for Respondent in the downtown SICU and has worked for Respondent for 27 years, testified that she began passing out union literature around August 2007; that she was a member of the organizing committee, she made telephone calls, talked to other nurses, had at least three press conferences, and got union cards signed; that she passed out union literature around three times a month, usually in the hallway on the third-floor walkway going from the garage to the main hospital, with other nurses in the mornings before shift and occasionally after work; that to show her support for the Union, she wore a lot of purple, including purple "Croc's"; that she wrote letters to the editor which were published in the Naples Daily News; and that her name was mentioned in other peoples' letters to the editor which were published in the Naples Daily News.

Elaine Phillips, who is a RN in the progressive care unit in the critical care division at the downtown facility and who has worked for Respondent for 27 years, testified that she was one of the original members of the organizing committee for SEIU; that she showed her support for the Union by going to meetings, wearing purple, being very verbal, and appearing on television; that in 2006 she and a friend, Jean Werner, went to see Westman to tell him about some concerns they had; and that Westman, accompanied by a Mr. Morrison⁹, came to see her after it became known that SEIU was organizing, and they wanted to discuss why she felt the employees needed a union.

On cross-examination, Phillips testified that while off duty she handbilled four or five times outside the elevators on the bridge between the garage and the downtown hospital; that no one stopped her; and that she placed union literature in the nurses lounges in other units (2 and 3 North) about three times while she was off duty and no one stopped her.

Panebianco, who was hired by Respondent in 1991 and works the day shift, weekdays as the full-time charge nurse in the preadmission testing unit in Respondent's downtown facility, testified that her unit is directly across the hall from the blood donation center and is down the hall from occupational health (OH); that she became a member of the RN union organizing committee; that she attended union meetings, handed out information, answered questions, wore a purple bracelet and an SEIU sticker, and posted union literature in the breakroom on the refrigerator; that her department's breakroom, which is also used by the blood donation center and OH, does not have a bulletin board so the refrigerator is used for posting; that she began posting union material on the breakroom refrigerator at the end of July or the beginning of August 2007; that the refrigerator is used to post uniform sales, bake sales, baby showers,

⁷ The exhibit consists of a total of 17 disciplines issued to 11 employees, none of whom are nurses, between October 1998 and February 13, 2008. Thigpen testified that she believed that the timeframe that Respondent looked at was 1 year but some of the disciplines outside the 1-year period involved the same employee. Two of these disciplines refer to failure to clock out.

⁸ R. Exh. 5. Brown sponsored this exhibit. This picture of the graffiti clearly shows that the image was painted under a large cork bulletin board which is framed by a wood border.

⁹ There is a John Morrison on Respondent's board of trustees.

Christmas parties, and just general information the people who use this breakroom want to communicate with other departments; that on August 6, 2007, before she clocked in that morning she posted an 8-by-7 inch union flyer on the refrigerator in her department's breakroom; that the refrigerator was crowded with other leaflets but she did not remove anything; that about 8 a.m. she went back to the breakroom to get her breakfast out of the refrigerator and her flyer was down and there flyers up in its place, antiunion flyers, namely Here's are the Facts¹⁰; that she went back to her office and telephoned OH and asked to speak to Mark Pitts because his OH office is directly across the hall from the breakroom and she thought that someone might have seen someone in the breakroom removing her flyers; that there is a receptionist to the left of the door into OH; that she asked Pitts who was taking down her flyers for the Union; that Pitts said, "I'm not going to speak to you about that, I've reported you to Human Resources" (Tr. 383); that she asked Pitts if he was watching her; that Pitts said, "[Y]es, I'm watching you and I'm monitoring your activities" (Tr. 83 and 384); that she then telephoned Settle, who is the director of human resources for the hospital and left a message; that about 4 p.m. Settle came to her office and spoke with her for about 15 minutes; that she told Settle that (a) she had spoken to Pitts in the morning and he told her that he was watching and monitoring her activities, and (b) she felt harassed and intimidated by this because Pitts was not her director or her supervisor; that Settle told her that managers were told to keep their eyes open but he did not explain why; that she asked Settle why the union pamphlets were taken down and Settle "said that we are not allowed to have Union pamphlets in the breakroom on the refrigerator" (Tr. 383); that she told Settle that in future dealings with OH she wanted someone else other than Pitts to attend to her; that Settle said she had a right to have a different practitioner; that she told Settle that she would put what happened in writing but that it would have to wait until the following day because the computers were shut down; that she never posted anything on the refrigerator after Settle told her she could not; that The Wave is more of a small magazine than a newsletter and she might have

seen it at some time posted on the refrigerator but she does not read it and she really does not pay much attention to it; that General Counsel's Exhibit 12 is the e-mail she sent to Settle and Dolan the next day, August 7, 2007, about this incident; and that she told Jennings what happened on August 6, 2007, and she gave him a writeup of what transpired (CP Exh. 2),¹¹ and a copy of the letter she e-mailed to Settle.

On cross-examination, Panebianco testified that she has five full-time and two part-time nurses in her department; that she is the only charge nurse in preadmission testing when she is on duty; that the other nurses serve as relief charge nurses when she is not on duty; that as charge nurse she does not assign the other nurses to particular patients per se; that the nurses pretty much self-schedule but she is in charge of the schedule; that if someone needs time off they come to her and, in a manner of speaking, she has the power to grant that time off; that she has the same extent of patient care responsibilities that her nurses do; that her day-to-day duties are no different than the other nurses in the unit but they are not totally like the other seven nurses; that she is paid \$1.50 more an hour than the other nurses; that she does not discipline nurses; that she does not direct other nurses to perform other tasks; that her direct supervisor is Deborah Ellis, who is the perioperative coordinator for the downtown OR (operating room), and before that it was Dolan, who is the COO of the hospital; that her director is Bill Diamond and Ellis is below Diamond; that in August and October 2007 Dolan was her direct supervisor; that she has her own office and the other nurses in the unit have their own office; that as a member of the nurses' organizing committee she actively organized on behalf of the Union; that she signed a letter as a member of the organizing committee which was handed out in the end of July 2007 to nurses to let them know that the signers were supportive of the Union (GC Exh. 17(a)); that on August 6, 2007, she saw a Here's the Facts on the refrigerator in the breakroom and she did not take it down; that she has never taken down any of the Here's the Facts from the refrigerator at any point during the campaign; that she posted union materials on the refrigerator and they were taken down; that on August 6, 2007, Pitts did not say to her that she took the Here's the Facts down from the refrigerator; that she initiated the conversation with Pitts on August 6, 2007, to see if he knew who was taking the union material down and after Pitts told her

¹⁰ GC Exh. 24 is a "Here's the Facts . . ." that she has seen posted on the refrigerator. As here pertinent the document reads as follows:

Recently agents of the SEIU Healthcare Union have been violating NCH policy by placing flyers in improper locations on NCH property. If you have seen one of these flyers, we believe you should know the FACTS before deciding if you want to support the union.

SEIU statement: "SEIU Healthcare (is) a national organization of healthcare workers with more than 1 million members."

FACT:

SEIU statement: "(We are a) democratic, member-run organization. Members vote to elect leaders and on key issues."

FACT:

SEIU statement: "Dues (are) 1.5 percent of monthly total pay."

FACT:

GET THE FACTS . . . the FACTS the SEIU will complain about us helping you find . . . then decide.

NCH
Healthcare
System

¹¹ The document reads as follows:

August 6th @ 0730 am

Mark Pitts of Occupational Health complained that we shouldn't be hanging union pamphlets in our break rooms.

August 6th @ app. 4pm

Visit by Brian Settle, VP of HR, @ my request. I complained that Mark Pitts stated that he is "watching" me, and monitoring my activities. I told Brian that I felt harassed by Mark. Brian responded that the managers were told to "keep their eyes open." Brian said that he would speak to Mark about the incident . . . [t]. Brian also stated that we were NOT allowed to hang union pamphlets in our break room. I do have a copy of a memo dated July 27, 2007 from Brian Settle that states "As for break rooms, if you typically allow your employees to post personal materials in the break room, you do not need to remove the union materials unless they are unnecessarily littering the room"

that he was watching her she began to think that Pitts was the one who was removing the union flyers; that in her affidavit she indicated, "I asked Pitts are you watching me? Pitts said, yes, I am, and I am monitoring your activities" (Tr. 418); that Pitts' office is in the back of occupational health and the office does not have glass walls so Pitts cannot see from his office to the breakroom; that she made more than 25 phone calls to nurses on behalf of the Union; and that Settle told her that managers were told to keep their eyes open and this was said after she told Settle that Pitts was not even her supervisor.

On redirect, Panebianco testified that she called Pitts and asked him if he knew who was taking down her flyers in the breakroom; and that Pitts then said that he was not going to answer that and he already reported her to human resources for putting the union pamphlets up.

Jennifer Todd, who is a customer service representative in Respondent's downtown OH department, which is located on the first floor of the Medical Plaza building, testified that OH shares the first floor with the blood bank, preadmission, Naples Diagnostic Imaging Center, and DSI; that when the front door to OH from the hallway is open she can see out into the hallway while sitting at her desk; that while normally the door from the hallway to OH is closed, on August 6, 2007, the air-conditioning was broken and this door was open all day because it is cooler in the hallway; that there is a kitchen/breakroom on the hallway which OH shares; that there is a refrigerator and a microwave in the breakroom; that people, other than those who work in OH, use the refrigerator in the breakroom; that while she was sitting at her desk on the morning of August 6, 2007, she heard a ripping sound coming from the breakroom; that about 10 seconds later, while seated at her desk, she saw the back of an individual walking down the hallway away from the breakroom; that she had seen the individual before, the individual had shoulder length, brownish blonde hair, and she saw what the individual was wearing; that she walked to the door, did not see anyone in the hallway and she "walked into the break room and that's when I noticed one of our signs in the trash can torn" (Tr. 785); that the signs are postings that OH keeps on the refrigerator; that the sign was in the trash can ripped and crumpled; that she did not recall what was on that particular document; that she believed that the posting was one of the "In the Know's" (Id. at 786), but she did not know what it stated; that she did not recall if there was anything posted on the refrigerator in its place; that she took the material which was torn down "out of the trash can and brought it into our office" (Id. at 787); that she brought the torn and crumpled material which she retrieved from the trash can to Mark Pitts, who is OH supervisor in the office; that she "showed him what I had found there and what I had heard" (Ibid); that later on August 6, 2007, she saw the individual who she had seen in the hallway just after she heard the ripping sound; that she saw this individual when she, Todd, was walking to the cafeteria for lunch with she believed Pitts and nurse Elaine Hennels; that she was not sure if they passed on the way to the cafeteria or if the individual was walking in front of her, Pitts, and Hennels; that she pointed the individual out as the person she saw in the hallway just after she heard the ripping sound; that Pitts and Hennels both said it was Panebianco; that before the union

organizing there were NCH flyers posted on the refrigerator for NCH activities and there was a flyer about cleaning out the food in the refrigerator; and that she is in this breakroom a few times a day and she had never seen any personal notices posted on the refrigerator prior to the union organizing.

On cross-examination, Todd testified that she does not usually bring her lunch, she goes to the cafeteria to eat but she does use the refrigerator in the involved breakroom; that on average she is in the breakroom a couple of times a day; that she felt the need to tell Pitts because "[t]here had been occasions where some of the NCH postings had been removed, and so when I found it *I took it to him*" (Tr. 794 with emphasis added); that the refrigerator is used by other departments on the floor; that she did not think Pitts was in charge of the refrigerator "[i]t was just where we have had—put our postings and I saw it torn down. That's why I took it to him" (Ibid); that when she gave it to him Pitts asked her what had happened, she told him what she heard and saw, and Pitts said okay; that other NCH things had been torn off the refrigerator, torn and placed in the trash can; that this had been going on for a while; that she had posted "stuff" (Id. at 795) that her supervisor, Diana Adreau, has printed out, and this was "In the Know" which was a letter stating what was going on with the Union and with NCH; that she was "not . . . sure of all the contents of them" (Ibid); that from her desk she could not see the involved refrigerator and she did not see anyone tear anything down from the refrigerator; that she has never posted any personal postings on the refrigerator and she has never seen personal postings on the refrigerator; that she could not recall anyone ever telling her that she was not allowed to post things on the refrigerator; and that it took maybe 2 weeks to get the air-conditioner in her office fixed.

Subsequently, Todd testified that she could not explain why Pitts would have indicated in an August 6, 2007 e-mail (GC Exh. 12), to Respondent's chief human resource officer, Settle, the following:

We have the door open to our office today and have seen Teresa Panebianco from Pre admission testing come by our office to the break room several times. The last time, our secretary saw her walk by, *then* she heard a sheet of paper rip and our secretary went in the break room and noted the *Here are the Facts* sheet was missing off the refrigerator. [Emphasis added.]

Todd further testified that she did not see the individual walk by and then hear the rip; that she heard the rip and then she saw the individual walk by; that items are taped to the refrigerator; that it would not have been necessary for an individual removing an item from the refrigerator to tear the item in that the item could be removed by removing the tape from the refrigerator; and that usually all four corners of the posting would be taped to the refrigerator.

Pitts, who is Respondent's occupational health (OH) coordinator at its downtown facility, testified that the breakroom that OH uses is across the hallway from OH; that preadmission testing, the blood bank, TSI laboratories, Naples Diagnostic Imaging Center, and the Eye Center are other units on same floor as OH; that the employees in preadmission testing store

their lunch in the refrigerator in the breakroom across from OH; that the refrigerator and freezer door are used as a bulletin board in this breakroom; that at the time of the trial herein Respondent's weekly newsletter, "Straight Talk" was posted on the refrigerator but in August 2007 the posting was called something else; that "we would never put up anything personal" on the refrigerator (Tr. 955); that in July and August 2007 OH posted *Here are the Facts*, which dealt with the union campaign, on the refrigerator in the breakroom; that the *Here are the Facts*, which OH posted on the refrigerator were taken down; that he did not take them down; that he put them back up many times; that when they were taken down the latest union information would be posted in their place; that on August 6 Todd told him that she heard a ripping sound in the breakroom and she saw a person walk by the room; and that

Jennifer [Todd] sits up there [up in front right by the door]. We had the door open because prior to that we were having problems with our air conditioning. So we had the—*she had come back to my office and said she just heard the ripping of the papers and I went out and sure enough, they were ripped up and I put up the new fliers, NCH fliers.* [Tr. 958 with emphasis added.]

Pitts further testified that Todd described the individual to him since Todd did not know the individual's name; that from the description he thought it might have been Terese Panebianco based on the "size, the frame build, the color hair, and the fact that Terese wears purple all the time" (Id. at 958); that Panebianco was a union supporter; that when Todd described the individual he said it sounds like Terese; that he had this conversation with Todd sometime in the morning and later they went to get lunch together with a third person who he believed might have been LPN Hennels; that on the way to get lunch they passed the individual in the hallway, Todd said that's the person, and the other person they were going to the cafeteria with said that is Terese; that they pick up lunch and return to the office to eat it; that later on August 6, 2007, he received a telephone call from Panebianco; that Panebianco asked him why he was removing her union information; that he told Panebianco that "it's NCH policy that we don't put up Union information on bulletin boards or public areas, or not public areas but in our break room" (Id. at 960); that Panebianco asked him why not and he told her "[b]ecause we have gone to meetings stating that Union information is only being posted in areas that you allow other pieces of information such as personal cookie sales or whatever, and if you allow that, then you can allow the Union. We never allowed that before" (Id. at 961); that Panebianco said that she wanted to see the policy; that he told Panebianco that she "should not be taking down the NCH information or rip it off the wall" (Ibid); that Panebianco questioned this conclusion and he ended the conversation; that during this conversation with Panebianco he did not say, "Terese, I am monitoring you" (Ibid.); and that he did not say anything that could have been construed to imply that he was surveilling her activities.

On cross-examination, Pitt testified that since he is the coordinator of his office, he put himself in charge of the refrigerator in the breakroom across the hall from OH; that he has been the

OH manager for 15 years; that OH moved into the involved building when it was completed 3 or 4 years ago; that during the morning of August 6, 2007, his director, Cindi Lukas, came into OH, he told her what was going on, and later that morning Settle either e-mailed him or he e-mailed Settle; that the e-mail occurred after Panebianco talked to him; that he was responsible for posting management literature on the refrigerator which he prints from online; that he did not give Panebianco the policy she asked him about; that Todd told him the individual had a medium build, short cropped light brown hair and wore purple; that he is not Panebianco's supervisor; that as indicated in General Counsel's Exhibit 12, his August 6, 2007 e-mail to Settle, Lukacs, and Thigpen, "[a]t 11:30, it was reported to me, . . . [Terese] was coming out of the Blood Bank."

Subsequently, Pitts testified that Todd came to him and said that she heard in the breakroom fliers coming down and ripping; that Todd had checked it out first; and that Todd

said that she saw a person, and she described the person to me, walk by the office and I told her that it sounded like it was Terese, and then I got up and we went back into the kitchen together and I looked in the wastepaper can and *found my fliers I had put up earlier in the wastepaper can.* [Tr. 975 with emphasis added.]

Pitts further testified that when Todd first approached him about this matter she did not bring him what was ripped, she did not bring anything in her hands.

Settle testified that General Counsel's Exhibit 10 is authentic¹²; that he recognized the documents included in General Counsel's Exhibit 12¹³; that on August 6, 2007, Panebianco

¹² It reads as follows:

From: Settle, Brian Sent: Fri 7/27/2007 12:27 PM
To: Department Heads, Supervisors & Mid-
Managers
Cc:
Subject: Union Paraphernalia

Today (Friday) union paraphernalia began appearing around the hospital. Specifically, we have seen at least 3 different 8.5 x 11 SEIU fliers, along with a large poster in the north Naples parking deck.

Please be vigilant in enforcing our rules regarding such the [sic] posting on non-Hospital related materials, such as the union materials that have appeared. As a reminder, we do not allow unauthorized postings in our elevators, restrooms, public areas, work areas (such as charting stations) and the like. If you see unauthorized materials in these areas, please remove them immediately and send them to HR via inter-office mail, along with a notation as to where you found them, as well as the time and date.

As for break rooms, if you typically allow our employees to post personal materials in the break room, you do not need remove the union materials unless they are unnecessarily littering the room (for example, completely covering a table so that employees can't use the table to eat) or are inappropriately posted information. (for example, on a dry erase board we need for hospital use or covering hospital)

¹³ The documents which are e-mails which refer to an incident which occurred on August 6, 2007, read as follows:

From: Pitts, Mark

Sent: Monday, August 06, 2007 11:39 AM
 To: Dolan, Gail
 Cc: Settle, Brian; Lukacs, Cindi; Thigpen, Renee
 Subject: Union pamphlets

In our break room on our refrigerator, for years we have been taping NCH memos so our staff can read, i.e. Straight talk, parking memos, The WAVE, NCH picnics, and most recently the NCH *Here are the Facts* sheet (that was handed out at last weeks meeting.). Last Friday, I noted 3 sheets taped regarding SEIU and what to expect when forming a union. I call Renee [Thigpen] and ask her what should be done with the information. She asked if this is an area where we have personal items hanging and I explained it is not, only NCH memos. Renee instructed me to take it down and send it to her. Today when I came to work, the forms were back up, I removed again, then half hour later the forms appeared again. I removed. We have the door open to our office today and have seen Terese Panebianco from Pre admission testing come by our office to the break room several times. The last time, our secretary saw her walk by, then she heard a sheet of paper rip and our secretary went in the break room and noted the *Here are the Facts* sheet was missing off the refrigerator. Cindi Lukacs was walking into the department about the same time, I reported this to her and she called Brian Settle. A few minutes later, I received a T/C from Terese, in an aggressive tone, asking why I was removing her Union information; she has a right to post this material. I tried to explain to her hospital policy and she interrupted and demanded to see the policy. I did state to her that she should not be destroying NCH material. Again, in a very aggressive tone she stated 'How do you know I did it' 'Did you see me rip it up?' Because of her anger, I told her that I did not choose to have his conversation with her any longer. That I would be passing this information to my VP (Brian Settle). Terese said "FINE, I'LL CALL BRIAN MYSELF." At 11:30, it was reported to me, Terese was coming out of the Blood bank. To me it seems, Terese has too much free time on her hands. Please nip this in the bud ASAP. Thank you Mark Pitts

From: Settle, Brian
 Sent: Monday, August 06, 2007 4:33 PM
 To: Pitts, Mark; Dolan, Gail
 Cc: Lukacs, Cindi; Thigpen, Renee
 Subject: RE: Union pamphlets

Mark, thank you for fulfilling your management responsibilities. While this union activity is causing dissension, it is important that staff understand the facts surrounding unions and collective bargaining and that we continue to uphold NCH policies and regulations.

I did talk with Terese and she clearly understands that she cannot post personal postings in the break room unless we change practice and permit other personal postings such as garage sales

.....
 She did mention that you said you would be watching her; I told her all management is responsible for assuring that all employees follow our policies and procedures and that you would not be "watching her" any more than we oversee other areas on a day-to-day basis.

From: Pitts, Mark
 Sent: Tuesday, August 07, 2007 7:58 AM
 To: Settle, Brian; Dolan, Gail
 Cc: Lukas, Cindi; Thigpen, Renee
 Subject: RE: Union pamphlets

Just wanted to say . . . I'm sure Terese felt we were watching. I have mentioned to the staff here if they see forms hanging

telephone him to tell him that Pitts had accused her of tearing down a hospital posting from the refrigerator in the breakroom which is shared by her department, preadmission, and Pitts' department, OH, and replacing it with union material; that the refrigerator was used because there was no employee posting board in that area; that to his knowledge Respondent had not ever allowed a non-NCH notice to be posted on the refrigerator; that Panabianco told him that she felt that Pitts was watching her; that he did not tell Panebianco that management was going to be watching her more closely; and that he told Panabianco that Pitts, as well as all managers, had the responsibility to make sure employees were upholding the policies and procedures.

Thigpen testified that there are things called official bulletin boards at the hospital; that one official bulletin board was located on the downtown campus in the main building cafeteria; that in 2002 Respondent went electronic and had an electronic bulletin board on its website "My NCH" which became Respondent's formal public bulletin board; that social events are not posted on the electronic bulletin board; that while physically there is still a bulletin board in the cafeteria, no one posts on that anymore; that Respondent also has official bulletin boards¹⁴ in its parking garage elevators where it posts hospital materials; that departments have their own bulletin boards; that other than the bulletin board policy in the employee handbook in effect in May 2007, which was in effect in September 2007, there is nothing else in writing which gives a description of what official bulletin boards were at the hospital from May 2, 2007, on; that there is a notice on the bulletin board in the cafeteria indicating that one needs HR approval in order to post anything there; that there is nothing in writing which (a) describes the bulletin boards that might be in departments or lounges throughout Respondent's campuses; (b) sets forth standards for managers on whether or not to have bulletin boards in their departments or lounges; or (c) sets forth standards as to whether or not managers should allow for certain kinds of

to let me know, and the staff did. I would never say to her I'm "watching her." I do monitor all employees' behavior, i.e. tongue piercing, receiving a TB test in a bathing suit (bikini), inappropriate language, etc . . . and report as needed. Thank you for handling this. Mark

From: Panebianco, Terese
 Sent: Tuesday, August 07, 2007 9:26 AM
 To: Settle, Brian
 Cc: Dolan, Gail

Hi Brian—as per our conversation yesterday, August 6th 2007, I'm sending this e-mail in order to have my complaint about Mark Pitts in writing. I feel that by his actually admitting to me that he is watching me and monitoring my activities that he is harassing me, and trying to intimidate me. Also, in the future, if I need to go to occupational health, [I want] . . . a party other than Mr. Pitts [to] treat me. Thank you.

¹⁴ CP Exh. 4, which is Respondent's employee handbook "[u]pdated 05/02/07" contains the following on p. 76 "[f]or the convenience of employees, official bulletin boards are located throughout NCH. Information posted on these official bulletin boards, such as system news and notices required by law, must be approved by the Human Resources [HR] Department or Administration prior to posting."

things to be posted or not posted on any bulletin boards they may have in their departments or lounges; that to her knowledge, the only written reference in any personnel policy, handbook, or any other official NCH document on bulletin boards is the already noted reference on 76 of Charging Party's Exhibit 4, namely—as already noted—“[f]or the convenience of employees, official bulletin boards are located throughout NCH. Information posted on these official bulletin boards, such as system news and notices required by law, must be approved by the Human Resources [HR] Department or Administration prior to posting”; that she could not cite anything in writing that shows that it has been communicated to nurses at any time that bulletin boards in their departments or lounges are considered to be official bulletin boards that are referred to in the employee handbook; that Charging Party's Exhibit 5, which is the employee handbook which was “[u]pdated 09/04/07” contains the same bulletin board language as the prior employee handbook, Charging Party's Exhibit 4; and that to her knowledge there is nothing in writing in which Respondent provides department Directors individual discretion with respect to bulletin boards in their breakrooms but they have such discretion and on July 27, 2007, they were advised by HR that if they typically allow their employees to post personal materials in the breakroom, they did not need to remove union materials (GC Exh. 10).

On August 17, 2007, Villani picked up pizza from the Union in the parking lot and then went to different breakrooms and distributed literature and pizzas. Villani testified that this occurred around 12:05 p.m.; that two of her coworkers, Phillips and Godwin, were with her; that when they entered the hospital they ran into Weiss and Westman who said hello to them; that they took an elevator to the lounge on 5 North where they spoke to a couple of nurses aides, left some pizza, and put some literature on the bulletin board; that they then proceeded to the 5 Southwest lounge, which is the rehab department, where they spoke to a couple of nurses and nurses aides in the lounge and posted some union literature; that they were in the 5 Southwest lounge for about 20 minutes when Stella Mason, who was their director at the time, came into the lounge and said, “[T]hat she had made some phone calls and that we would find that we wouldn't be welcome here and we wouldn't be welcome anywhere” (Tr. 165); that they told Mason that they appreciated her allowing them to stay and then they left 5 Southwest; that they had one or two pizzas left and they went to the 3 North lounge; that there Phillips ran into one of her nurse friends, Mertice Linton, who was working in the hallway; that she and Godwin went into the lounge on 3 North and posted some literature on the bulletin board while Phillips was in the hallway speaking with Linton; that as she and Godwin were leaving the 3 North lounge (breakroom), she saw Phillips walking toward them with Preece who is a director on 3 North; that Preece asked them what they were doing there; that she told Preece that they posted some union literature on the bulletin board in the 3 North breakroom, it was their right to do so, and she would appreciate it if Preece did not remove the union literature; that Preece told them it was time for them to leave, they thanked her, and Preece said, “[B]ye-bye ladies” (Tr. 166); that when she has frequently gone to Respondent's facility when she was not working to attend baby showers, birthday parties, or lunch

with coworkers she was never asked to leave; that she has never had a problem with being off duty and on Respondent's premises; that a lot of times the nurses talk at the nurses station and distribute fundraising information like Girl Scout cookies sales; that when she came into the hospital on August 17, 2007, she, Phillips, and Godwin were in street clothes; that she was wearing a purple T-shirt and her name badge; and that on August 17, 2007, she wrote out a “variance” (SEIU union incident report) (CP Exh. 1), regarding what occurred on that date.¹⁵

On cross-examination, Villani testified that on August 17, 2007, she, Godwin, and Phillips took a total of six boxes of pizza into the hospital; that they first went to the lounge on 5 North, which is the orthopedic unit; that they stayed in that lounge for a few minutes, posting union literature on a bulletin board and dropping some pizza off; that they did not ask permission to post the union literature because public information, namely birthdays and things of that nature, was posted on that bulletin board; that she usually (at least 20 times) goes through lounges after work on her way out of the hospital and posts union literature¹⁶; that no one ever stopped her posting of union literature, except one time with Preece; that she did not seek permission to post union notices because there was public information¹⁷ on the bulletin boards; that she was not aware of the hospital's bulletin board policy because “we've always posted things on bulletin boards . . . [w]e posted everything on our bulletin boards” (Tr. 210); that she worked in SCIU and years ago on 2 North; that most of the bulletin boards have public information unless they are locked or are fiberglass; that she saw this when she did her union postings on various bulletin boards; that there were a few departments which she did not post in; that on August 17, 2007, she, Godwin, and Phillips went from 5 North to the rehab unit on 5 Southwest; that they were in the rehab unit for around 20 minutes and she knew this because she looked at the clock in the rehab unit lounge when

¹⁵ The exhibit consists of two pages or two “Incident Report Form[s].” In the “Description of Incident” portion of the first form, which refers to “Dept 5 SW, Rehab,” Villani, as here pertinent, wrote she, Godwin, and Phillips “delivered pizza nurses lounge 1215 at lunch posting union literature for—speaking to nurses at lunch Stella [Mason] states ‘I've made a phone call you're not allowed to be here, you'll find out that you're not allowed in other areas too.’” The second page refers to “Dept 3N” and Director Preece, and Villani wrote the following in the “Description of Incident portion of the form:

Elaine Phillips what are you doing here “Lori Preece in Elaine Phillips” face—Elaine you need to leave—we are walking our walk Lori “you girls need to leave Mary Villani and Caryl Godwin hanging up literature in 3N lounge on bulletin board. Mary Villani ‘Lori please don't remove our union material it is our legal right. If you remove the literature you are breaking the law.’ Thank you Lori we will see you soon. Have a good day. One and half hr later Anna Coors checked 3N lounge all the union literature had been removed.

¹⁶ Villani testified that she posted union literature in the lounges on 2 through 6 North, except 4 North which was locked, and 4 and 6 South. Subsequently, Villani testified that she also posted union literature in the surgical lounge.

¹⁷ This was later defined as birthday parties, baby showers, fundraisers, pharmaceutical dinners, social events, houses for rent, and things like that.

Mason came in; that she was sitting down at a table when Mason came into the lounge; that Mason opened the door to the lounge and said, "I've made a few phone calls, You will find that you ladies . . . would not be welcome here or anywhere" (Tr. 215); that from rehab they went to 3 North, which is Preece's unit; that they posted union literature in every lounge they went into on August 17, 2007; that as she and Godwin were exiting the lounge on 3 North, Preece came along; that they said hello to Preece and she told Preece that they had posted some material and Preece should not take it down; and that she told Preece this because she had posted literature in that lounge quite a few times before and it had been removed.

With respect to August 17, 2007, Phillips testified that she, Villani, and Godwin brought pizzas into the downtown hospital on their day off in an attempt to connect with nurses who were not attending union meetings and just invite them to come and be informed; that they went to the nurses lounge in the rehab unit and stayed there for about 20 minutes; that they talked to several nurses in the lounge, some of whom were for the Union and some of whom were against the Union; that they left a couple of pizzas, handed out leaflets, and invited the nurses to come to a meeting so that they could hear why we felt the Union was necessary; that they did not leave on their own accord in that the director of the unit, Mason, came in after they were there for about 20 minutes and she told them that they needed to leave; that they were standing talking about what they were going to do next when Mason told them that she felt they would not be welcome anywhere else in the hospital; that she thought that they went to 5 North next, dropped off a couple of pizzas and some leaflets in the lounge since there were no nurses there; that they then went to 3 North where she saw a nurse she had known for a long time, Linton; that Linton asked her what she was doing there, and she told Linton that they were handing out union leaflets and they wanted to invite her to a union meeting; that while she was talking to Linton, Preece, who is the manager of the unit, approached her and asked her what she was doing there; that Preece told her, "[Y]ou're done here, Elaine, you're finished" (Tr. 243); that Villani had put leaflets in the lounge and Preece started to pick them up; and that Villani told Preece that they had a right to leave the union leaflets there and Preece should not touch them.

On cross-examination, Phillips testified that when she, Villani, and Godwin went into the hospital around noontime to give out pizzas and distribute union literature she was wearing street clothes; that she believed that the people they spoke with in the rehab lounge on the fifth floor (5 Southwest) were on break in that one was eating her lunch and the others were in the lounge eating pizza; that Mason came into the lounge and asked them to leave; that after leaving rehab she believed that they went to 5 North where they left some pizzas and leaflets in the lounge next to the nurses station, and Villani may have posted a poster on the bulletin board; that she spoke with Linton in the hallway on 3 North while Linton was on duty, inviting her to a meeting; that they only distributed leaflets in the lounges; that they went to rehab, 5 North, 3 North, and ICU; and that they were in the hospital that day for a total of about 1 hour and 15 to 20 minutes, and they all left together.

On redirect, Phillips testified that she has gone to a hospital lounge while she was off duty for a going away party, or a birthday party, or for some event, and she would come in, have a piece of cake, or have lunch with someone; that she was never asked to leave; that when Mason came into the lounge she said that they really needed to leave, it was time for them to leave; and that when they were discussing what unit they would go to next Mason told them that she did not think they would be welcome anywhere in the building.

Preece, who is the unit director of 3 North which is the telemetry unit where cardiac patients or patients with other diseases are monitored, testified that there is an employee lounge, which is right across from patients' rooms on the unit; that there is a door to the employee lounge and it is closed; that there is an RN in her unit by the name of Linton; that on August 17, 2007, she was standing at the west end nurses' station in her unit and she saw three people come out of the employee lounge dressed in street clothes; that she was walking behind them and she recognized the voice of Villani who said, "[D]on't take anything down" (Tr. 696); that she did not say to these three individuals that they had to leave the floor; that there was no conversation whatsoever; and that she was walking about 15 to 20 feet behind the three, she never caught up with them, and they went into the progressive care unit which is right beside her unit.

On cross-examination, Preece testified that she did not recognize either of the other two nurses with Villani; that she did not notice anyone talking to Linton; that nurses do float in and out of departments so nurses in other departments get to know each other; that there have been cakes in the lounge in her unit for someone leaving and a birthday; that she had never seen anyone from another department attend these events; that the only time she has seen off-duty nurses on her floor was when she saw the three on August 17, 2007; that she has never gone to a lounge in another department; that she signs a confidentiality agreement with the hospital periodically; that she signed one when she was hired but she could not recall if she signed one after that; that she did not know if she ever had to sign an acknowledgement or a receipt of the no-solicitation/no-distribution policy; that when Villani said don't take anything down she did not know who Villani was talking to since Villani was not facing her; that she did not know what Villani was talking about; that she knows Phillips; and that she did not know if Phillips was one of the other two because she did not see their faces. Subsequently, Preece testified that when she saw the three people exiting her employee lounge she did not say, "[I]t's time for you to leave, bye-bye, ladies." (Tr. 703.)

Gutierrez, who as noted above is the day-shift clinical coordinator and charge nurse on 3 North (telemetry unit) and who supervises the RNs in the unit, testified that nurses could have a birthday party or a shower in the employee lounge on the telemetry unit, and occasionally nurses do come back who are off duty to attend such a party.

Ann Norman, who works for Respondent as a staff nurse on comprehensive rehab, testified that on a day in August 2007, around noontime, she saw three women in street clothes bringing two or three boxes of pizza; that she knew Phillips, she was later introduced to Villani, and she could not remember the

name of the third woman; that she followed the pizza into the lounge and ate the pizza with the three; that her unit's secretary also sat down in the lounge and had some pizza; that the three women were in the breakroom for 20 to 30 minutes and then they picked up the remaining boxes of pizza and they were leaving the breakroom; that her then unit director, Mason, was right outside the breakroom¹⁸; that as she was walking away, she heard Mason say, "[H]ello, my name is Stella Mason and thanked them for the pizza" (Tr. 990); that it was her recollection that the three nurses were outside in the hallway when Mason spoke with them; that since she was in the process of walking away she did not know, she did not hear what, if anything, Mason said after thanking the three nurses; that she was coming out the door when she heard Mason thank the three; and that she did not know where the three went after that.

On cross-examination, Norman testified that when Mason entered the room on August 6 she, Norman, was finished eating and she was getting ready to leave; that she overheard the beginning of the exchange between Mason and the three women delivering pizza; that the exchange took place in the hallway right by the door as they were exiting; and that she did not believe that she was there for the whole conversation.

Ringle testified that there is a bulletin board in the employee lounge in SICU and there are union postings on that bulletin board; that there is a section of the bulletin board where staff can put whatever they want to; that as clinical coordinator she allows staff to put up union posters; that those who use the SICU lounge include SICU staff, secretaries, anyone who might come into the unit, physicians occasionally, and staff from other units might visit to say hello during their break; that from July 2007 up to the time of the trial herein she has seen union literature in the SCIU lounge, including on the table; that she has never told any nurse that worked for her that they cannot distribute union literature in the lounge; and that she has never told a nurse who works for her in SCIU that they cannot solicit when they are on their break or lunchtime.

McGoun testified that she has come to work when she was off duty for somebody's birthday party or someone was leaving or to have lunch in the lounge or to pick up her schedule; that the birthday parties are held in the lounges in SICU and progressive care; and that she has seen everything posted in the nurses' lounge, including business cards, notices on classes, union stuff, and hospital antiunion stuff.

Terri Holliday, who is an RN hired by Respondent in 2003 and who wore purple bracelets, purple uniforms, an organizing pin, an SEIU name tag, had her picture on union flyers, and works the 7 p.m. to 7 a.m. shift in med/surg. at Respondent's North Collier facility, testified that she has had occasion to go back to the hospital when she was not working to do some education on the computers, to attend a baby shower and drop off a gift, or cookies or food for birthday parties, or to check her schedule or to make copies of her schedule; that she has never been asked to leave because she was not working; and that she did not remember ever being around anyone else who was asked to leave because they were not working.

¹⁸ Norman testified that Mason moved away and the unit had a new director, Michael Dusic.

Niki Saltzer, who has worked for Respondent for 20 years and is a staff nurse (RN) on the 3 to 11 p.m. shift in the psychiatric unit in the Respondent's downtown facility, testified that items are placed on the walls at the nurses station and they include memos, mandatory classes, education classes, copies of the letter that is on the website about the Union (*Here are the Facts*), and employees' children's photographs; and that items for sale are posted in the nurses' lounge on the walls or on the bulletin board, namely Girl Scout cookies and Christmas items such as wrapping paper and fudge.

On cross-examination, Saltzer testified that during the union organizing there was often union literature posted in the break area; and that she did not know if the union literature was ever taken down.

Panebianco testified that RNs do have occasion to be present at the Respondent's facility when not working, other than visiting patients, namely to attend a baby shower, a birthday party, a Christmas party, spring fling, pick up paycheck, or pick up their schedule, or to attend a get together for someone's last day in the unit; and that she has seen an employee come back to the downtown hospital to sell Avon or hand out catalogs, which occurred in admitting office.

Thigpen testified that an off-duty nurse can come back to the hospital for a birthday party or shower in their department, or to pick up their paycheck or schedule without getting permission from her or someone in authority; that she thought that the off-duty policy relates more to just roaming; that she could not produce any document regarding limiting off-duty nurses to social events in their home department but the practice has been in effect as long as she recalls; that off-duty nurses or other employees are not allowed to sell Girl Scout cookies at any of Respondent's facilities; that off-duty employees should not be able to go up to their departments and sell Girl Scout cookies; that she is not aware of this happening at least that she recalls; that she is not aware of off-duty employees selling raffle tickets in their departments, not that she recalls; that she thought that there are some Girl Scout cookies sold in breakrooms of the department when employees are on break; and that it is not impermissible for nurses to talk about personal matters such as their child's soccer game or the church picnic while at the workstations.

Ann Andersen, who has worked for Respondent for about 10 years, is a RN in the emergency department on the north campus, and works the 7 a.m. to 7 p.m. shift, testified that she publicly supports the Union and is on the organizing committee; that off-duty nurses regularly come into nonpublic areas of the hospital, such as nurses' lounges on days when they're not scheduled for work to attend birthday parties or showers for other nurses; and that sometimes when the nurses are off duty they come into the hospital to drop things off like Avon products, and things they might be selling for fundraisers for their children like cards, paper, or Girl Scout cookies.

Cynthia Roper, who has worked for Respondent for 15 years and is an RN in the emergency department on the 7 a.m. to 7 p.m. shift, testified that she is a member of the organizing committee; that she has been prohibited from distributing union literature in nonwork areas on nonworktime; that this occurred in August 2007 (on August 17, 2007) when they started to pass

our materials; that the incident occurred in the passageway or walkover to the hospital on the North Collier campus parking garage; that during the shift change she was passing out information (union flyers) to the nurses; that after she had been passing out the information for about 10 minutes a security guard approached her and asked her what she was doing; that she told him that she was passing out information for nurses; that the guard asked her if it was union material; that when she responded in the affirmative the guard said that he would have to confiscate it; that when she asked the guard why, he said because that was the law or rule or policy; that the guard made a telephone call, and then he told her that she had to stop handing out the flyers and either he would take the material or she could put it in her car; that she told the guard that she did not think he was right, the guard said that he just talked with his supervisor, Val (Barbucci), and that is what he was told, she said he was wrong but she would do as instructed, and she put the materials in her car; that since the guard told her that she could stay there but not pass out materials, she stayed and talked to nurses who were coming and going; that she distributed union literature in or near the parking garage 15–20 times after this incident, and while there were security guards often (80 percent of the time) in her presence (standing about 15 feet away), they did not speak to her about what she was doing; that when she distributes flyers during a shift change she normally stays for about 1 hour so she can catch people one-half hour before shift change going in and people one-half hour after shift change coming out; and that Charging Party's Exhibit 3 is an incident report she submitted to the Union.¹⁹ When Respondent objected to this testimony pointing out that there was no allegation in the complaint about this matter, the Charging Party indicated that it went to Respondent's claim that it did not enforce its solicitation policy in an overly broad fashion.

On cross-examination, Roper testified that her director is Rosemary Lebailly; that there is a lot of public support for the Union in the North Naples ED; that she posted union materials in the breakroom; that initially an administrative coordinator, Melody something, tried to stop her and several charge nurses took the union material down; that with respect to the incident in the parking garage, she was on the third floor just inside the walkway; and that the guard told her that he was going to have to confiscate the union material because she was not allowed to hand out union material on hospital property; and that eventually she put the material in her car.

Holliday testified that on August 19, 2007, she went with another nurse, Pat Cross, to the downtown campus to handout union flyers to some of the nurses during shift change, just outside the parking garage about 6 p.m.; that for about 10 min-

¹⁹ The incident report is dated August 17, 2007. As here pertinent it reads as follows:

I was in hallway between parking lot & hospital (sky bridge) handing out union info. Was approached by Security Officer Don Patterson = employee #16820. I was told 'If that is union material, I have to confiscate it. You may not distribute any union information.' I said I would put the literature in my car. He said that would be ok. I asked him why—he stated—my boss, Valerie told us—He made a call to his supervisor—at the time we were speaking. I stayed & only spoke to nurses.

utes they were on the third-floor landing of the parking garage just inside the doors from the garage; that two groups of nurses came off the elevator and they gave some of the nurses who wanted it information about the Union; that the third group exiting from the elevator consisted of two nurses and a male in scrubs; that they asked the group if they would like to have some information about the Union and the male told them that they were not allowed to do that there; that she told the male that she believed that they had the right to be there in that they were in a nonpatient area just trying to get information to their coworkers; that while the group walked away she saw the male take out a cell phone and start to dial; that within a minute or so two security guards showed up and one of them asked what they were doing there; that when they told him that they were handing out information about the Union the guard told them that they were not allowed to be there; that she told the guard that she believed that they were allowed to be there, they were not in a patient care area, and they were just trying to get information to their coworkers; that the guard told them he was calling his boss; that the guard went outside into the garage and about a minute later he came back in and told them that they had to leave; that they agreed to leave but they told the guard that they believed that they had the right to be there; that General Counsel's Exhibit 22 is the union flyer they were handing out on August 19, 2007; and that she has seen someone for Nurses Against the Union (NUNSO) on two occasions (in December 2007 and January 2008) handing out candy and flyers in Respondent's North Collier garage.

On cross-examination, Holliday testified that she and Cross were handbilling at 6 p.m. because that was the time of a change in shift of some of the nurses like those in the operating room (OR) and those areas and other nurses come in early for their 7 p.m. shift; that she did not recognize the male in scrubs who told her and Cross that they were not allowed to be there doing that; that she did not know the names of either of the security guards; that nurses got off the elevator while she and Cross had the exchange with the security guard and the nurses looked at them as they passed; that she told the guard that she believed that they had the right to be there but she would respectfully leave; that, as indicated in her affidavit, she passed out union flyers in the North Collier and Naples Community Hospital once or twice a month for the past 3 months, for a total of about five times since August 19, 2007, without incident; and that after August 19, 2007, she never passed out union flyers downtown again.

On redirect, Holliday testified that the first time she passed out flyers at North Collier a security guard drove up and asked her if she was handing out flyers; that when she told him that she was he said, "[T]hey saw you on the video and I was told to come over here and write an incident report, but I'm not going to put your name down . . . have a good night." (Tr. 333.)

Thigpen testified that Charging Party's Exhibit 8 is an e-mail that was sent from Brown, who—as indicated above—is Respondent's director of security, to herself and Settle in regards to an incident of distribution of union literature. The underlying e-mail from Lt. Colon Francisco to Brown indicates in part as follow:

On 08/19/07 . . . Administrative Coordinator . . . notified me . . . that two employees reported union activity in the sky bridge, on the third floor of the parking garage.

. . . .
 I advised the two W/F [white females] they should not be in hospital premises distributing what appeared to be union literature. One of them was wearing a NCH ID badge with the name Terry [Terri Holliday], RN and the other one had no ID on her.

The W/F with the ID on she replied that they had the right to be there. . . . The two W/F left together at approximately 1844 hrs. . . .

Brown testified that he was aware of an incident involving his officers where there may have been distribution going on in the parking garage by prounion nurses since he receives daily reports from Supervisors Griffith and Barbaccia on the activities of the officers throughout their shifts every day each morning; that there was one incident where two officers were called to the downtown parking garage by Jeanie McCree, the administrative coordinator, who complained that there were two hospital employee organizers in the garage handing out material; that this could have been around August 2007; that after this incident he issued instructions to his officers about how to respond to employees distributing in the garage, namely that they were to no longer respond to complaints that purely involved union organizers distributing material unless there was some other overriding reason to do so such as a fight or some other crime; that he gave this instruction verbally in November 2007 and in January 2008 he sent out an e-mail which reiterated this information.

On cross-examination, Brown testified that Charging Party's Exhibit 13 is an e-mail he sent to Brian Settle, the chief human resources officer, Tammy Rattray of Ford and Harrison, and Mr. Dutcher.²⁰ The e-mail reads as follows:

From: Brown, John
 Sent: Monday, September 24, 2007 7:50 AM
 To: Settle, Brian; . . . ; Dutcher, Phil
 Subject: FW: Union Activity

Have we changed the policy yet again? As of 8/27/07 this was the last written direction I received:

According to our legal advisors, off duty employees can solicit/talk with other off duty employees in our parking garages As far as the sky bridges, we are taking the position that solicitation cannot take place in the bridges . . . we will keep you posted as to any updates and thanks for all of your efforts. . . .

Thank you.

Brian Settle

. . . .

Mobile e-mail: NCH. . . .

From: Griffith, John
 Sent: Monday, September 24, 2007 6:54 AM
 To: Brown, John
 Subject: Union Activity

No activity reported over the weekend.

About 5:30 on Friday, Phil Dutcher called Maya to his office in reference to an email from Marie Coomey regarding the union information that was being passed out on the 1st floor of the garage on Friday morning. He now says that no union activity will be permitted on the 1st or 2nd floors of the garage and they can distribute their literature and ribbons in the elevator lobby on the 3rd level entrance to the sky bridge. My understanding, from our conversation with Phil in the cafeteria, was that it must be done outside the double doors on the 3rd level, actually inside the garage, not in the entrance to the sky bridge.

John Griffith
 Public Safety Supervisor

. . . .
 When asked on cross-examination what was the hospital's policy on employee solicitation and distribution in the sky bridge next to the parking lot (downtown), Brown responded, "[i]n July, I believe—and I would rather not guess because I don't know." (Tr. 682.) When he testified at the trial herein he testified that at the time of the trial, with respect to employee solicitation and distribution in the sky bridge, it would be considered a public area so the employees would be permitted to do that. Further, Brown testified, when asked if there was a different policy in place in July 2007, that "[t]here was some confusion, I guess, about the policy" (Ibid); that the confusion seemed to exist around exterior areas (the garage) as opposed to being actually inside the building (the enclosed walkway to the hospital); that the garage and the sky bridge (walkway) are public areas; and that the confusion was cleared up when he decided that security officers were no longer going to respond to these incidents.

On redirect, Brown testified that he did not recall if he received the clarification he sought from Settle in his September 24, 2007 e-mail to Settle; that at some point subsequent to September 24, 2007, employees were allowed to handbill in the sky bridge; that he did not know approximately when that was; and that at some point there was clarity, at least in his mind, with respect to the policy about handbilling in the sky bridge.

On August 30, 2007, the Union filed a petition with the National Labor Relations Board (the Board), for Certification of Representative (GC Exh. 18).

Thigpen testified that Respondent's new solicitation and distribution policy, which was approved August 30, 2007, as here pertinent, contains additional language not found in the prior 2001 policy, namely "[w]orking areas are all areas of the Hospital, except cafeterias (unless he employee is working in the cafeteria, employee lounges and break areas, lobbies and park-

²⁰ Respondent did not object to the introduction of the e-mail.

ing areas.” (GC Exh. 9, p. 1)²¹; that with respect to whether there was any discussion that she recalled with Respondent’s executive team relating to the need to further define working areas, she believed that the decision to review this came from the employees to their directors, back to human resources because they were confused with the policy and they needed clarification; that with respect to off-duty employees, the changes approved on August 30, 2007, did not change in this regard, namely “F. [o]ff duty employees . . . are not permitted access to NCH except to the extent that other members of the public have such access; for example, when visiting patients or receiving medical care” (Id. at p. 2); that Respondent no longer maintains hard copies of personnel policies—even in the human resources department—and they are maintained through Respondent’s intranet; that with respect to the changes which were approved on August 30, 2007, there was a meeting with the department directors who in turn assured human resources that the policy was reviewed with their employees; and that new employees are not given a hard copy of the employee handbook but rather they receive it on a CD rom.

When called by Respondent, Thigpen further testified that the solicitation policy was changed on August 30, 2007 (GC Exh. 6), to clarify the May 2001 policy (GC Exh. 7), with respect to work areas, working time, and the nominal donations that an employee can or cannot receive; and that the policy was clarified because “[t]here was confusion amongst staff and Department Directors in regards to who and where and when employees could distribute information, post information” (Tr. 855.)

Brown testified that there was a revision of Respondent’s solicitation and distribution policy in August 2007; and that when he received the revision he provided it to his two supervisors, Griffith and Barbaccia, told them to read it and discuss it with their security officers during roll call training.

Villani testified that in August 2007 she received a new edition of Respondent’s solicitation policy (GC Exh. 9), in her mailbox; that the effective date of the document is August 30, 2007; that she did not recall Respondent distributing anything else that explained its solicitation policies; and that the hospital did not distribute anything else to employees that explained its posting policies. Subsequently, Villani testified that in her 27 years working for Respondent she was never given anything, any kind of document which spoke to Respondent’s policy regarding posting; that she was never told by anyone in management anything about the posting policy Respondent had; and that the employees used to have all the policies in books but about 1 year ago Respondent switched to the Intranet. On recross Villani testified that she did not know that she could look at the handbook on the website until October or November 2007.

Regarding Respondent’s posting policy, Phillips, who has worked for Respondent for 27 years, testified that she did not recall ever being given anything in writing which indicated what Respondent’s policy was with respect to posting on bulletin

boards; that she could not remember before the posting incident with McGoun (covered below) ever being told what the Respondent’s policy is with respect to posting on bulletin boards by anyone in management or a supervisor; and that she was never told by anyone in management or a supervisor that she could access the Respondent’s posting policy by going on the Intranet website.

With respect to Respondent’s posting policy, Jacquelyn Rasmussen, who has worked in Respondent’s downtown SICU for 18 years testified that she did not know that she has seen a policy on what can be posted and what cannot, but she understood that you had to have approval before posting on a common bulletin board that is by the cafeteria; that, with respect to whether any manager or supervisor ever told her what Respondent’s policy was regarding posting on bulletin boards, she supposed that there has been a verbalization maybe by the directors or by the clinical coordinators that you use the nurses’ lounge for more private things but Respondent has not always stuck to that policy because she has seen a little poster on the nurses station about a party or someone had a baby; and that she did not think that she had been told by someone in management or a supervisor that she could access Respondent’s posting policy on bulletin boards by going on the Intranet website of the Respondent. On redirect, Rasmussen testified that when she testified that a manager or a supervisor may have told her about posting in the lounges, that occurred years ago and was not recent.

On September 25, 2007, Jennings, Villani, Panebianco, and several other nurses were in the cafeteria in Respondent’s downtown facility at lunchtime distributing union literature and giving out cake. Jennings testified that they were at a table sitting down, not disrupting anyone in the cafeteria; that after about 20 minutes a security individual approached them and told them that they had to stop everything they were doing and go; that he told the security person that this was not true and they had a right to be there and it was his understanding that the cafeteria was a public space because this is what Respondent’s human resources director, Thigpen, testified at a prior Board (the Board) hearing, and nurses had the right to distribute union literature; that after he told the security person what Thigpen had testified, the security person got a little nervous, said okay hold on, he left and returned a few minutes later, telling them that they could continue to distribute the union literature but they could not give out cake for health reasons; that the security person was not sure about the reason; and that he was not actively passing out literature.

Brown testified that he spoke with Union Organizer Jennings in the downtown cafeteria (on September 25, 2007); that Jennings was at a table in the cafeteria with two or three off-duty nurses and a couple of other nurses; that they had a purple sheet cake on the table which they were serving to other people at the table, and they offered him a piece; that there were flyers on the table that they were handing out or appeared to be handing out to people; that there were two table together and people also had meals on the tables; that the tables were inside the cafeteria, about 25 feet from the entrance in an area where tables are normally located; that he asked Jennings to come out in the hallway so he could speak with him; that Jennings complied

²¹ It is noted that this language appears on p. 81 of Respondent’s employee handbook received in evidence as CP Exh. 4. It is indicated on the cover “[u]pdated 05/02/07.”

and he told Jennings that Respondent's "policy was that they were able to have lunch in the cafeteria, and they could talk to the other employees, but the cake, that they couldn't have the cake there anymore" (Tr. 647); that they could not have the cake there "[b]ecause that was a violation of our policy to have—bring food into the cafeteria and hand it out to folks" (Id. at 648); that Jennings said he believed that "I was wrong . . . [and] he was going to contact the SEIU's attorney" (Ibid); that he told Jennings that he wanted the cake removed; that they removed the cake and finished their lunch; that he did not at any point tell Jennings or the nurses that they had to leave; that this exchange took no more than 10 minutes; and that he and Jennings had their verbal exchange at a normal conversational tone.

On cross-examination, Brown testified that on September 25, 2007, he went to the cafeteria because he received a call from Cooper in administration, who asked him to come to the cafeteria; that Cooper directed him to ask Jennings and the nurses with him to put the cake away; that he believed that the involved food policy was a written rule but he did not know where it could be found; that the first time he became aware of the rule was when Cooper spoke to him about going to the cafeteria and asking Jennings and the nurses to put the cake away; and that when he asked Jennings to step into the hallway Jennings may have said that he wanted to stay inside the cafeteria with the nurses and everyone and have the conversation together. And on redirect, Brown testified that he recalled having a conversation with Jennings in the hallway.

Brown testified that in September 2007 officer Griffith reported to him that John Baldia, who is an RN in the downtown emergency department and who represents the antiunion organization NUNSO, was placing NUNSO flyers on the windshields of cars that were parked in Respondent's downtown garage; that a security guard, pursuant to Respondent's procedure, asked Baldia to stop and remove the material from the car windshields; that about 30 minutes later Baldia came to his office and asked him why he could not place material on the cars in the garage; and that he explained to Baldia that it was against Respondent's policy because people throw the material on the ground and someone has to pick it up.

On cross-examination, Brown testified that the policy prohibiting placing flyers on car windshields in Respondent's garage is found in Respondent's security policies and it would be accessible on the internet.

Villani testified that in July, August, and September 2007 she saw houses for rent, roommates needed, things for sale, and furniture for sale posted with thumbtacks on the garage elevator cork bulletin board.

Thigpen testified that General Counsel's Exhibit 25 is the NCH organizational chart which would have been in effect in September and October 2007. The following appears in the lower right-hand corner of the chart: "NCH Org Chart March 2007."

Villani testified that she attended the Board hearing on the Union's petition in October 2007 in Miami, Florida, and Renee Thigpen and Carrie Skifton were present the day she attended. Holliday testified that she attended the Board hearing in October 2007 in Miami on the Union's petition and she was there

for 3 days. Counsel for the General Counsel and Respondent stipulated that the hearing in the R case, Case 12-RC-9275, began in Miami on September 17, 2007, and continued for 11 days, closing on October 3, 2007.

Brown testified that the wood in the elevators inside the hospital had to be replaced in October 2007 because someone has carved into the wood paneling; that the carving started in July 2007; that originally Respondent paid \$53,000 per elevator to put the cherry or mahogany wood on the walls; that the wood was replaced with a material that can not be scratched; and that there are no cameras in the elevators in the hospital.

Janice Cothran, who has worked for Respondent since 1990 and is an RN in the psychiatry department at Respondent's downtown hospital, testified that she showed her support for the Union by wearing the colors, attending meetings, and posting posters and flyers; that she posted some union posters and flyers in the employee elevator in the parking garage and in their lounge in 4 Southwest; that in early October 2007 she posted flyers in the downtown elevator in the garage; that there are two elevator, namely one in the front and one on the side and she posted the flyers on the side elevator; that she posted during a weekend when she was leaving work at approximately 11:30 p.m., and she was with two other of Respondent's employees, RN Saltzer and LPN (licensed practical nurse) Milton Branham; that her next day at work was Tuesday; that on that Tuesday her director, Susan Theroux, came to the nurses station at the beginning of the shift, at about 3:30 p.m.; that she, Saltzer, and Branham were at the nurses station at the time and she and Saltzer were doing specified tasks; and that

She (Theroux) sat down and she was very relaxed. And she said we know that you guys are really interested in the Union. And she asked us what we could do to keep the Union out. What could we do to keep the Union out? [Tr. 338.]

Cothran further testified that she told Theroux that she did not think Theroux could do anything, it was just a little too little, too late; that Theroux asked her to come to her office and when they arrived at the office Theroux told her that she was caught on camera putting up literature in the elevator; that she said "so" because she did not realize it was a patient care area; that Theroux told her not to do that any more; that she asked Theroux why since it wasn't a patient care area and Theroux told her it was a public area and she could not post in a public area either; that it was her understanding when she posted in the elevator that Respondent's policy was very relaxed, they had corkboards up in the elevators and people put things up like rentals; that there was a bulletin board in the cafeteria but you had to have any posting on that bulletin board approved by human resources; that she did not know if there was a sign on the bulletin board in the cafeteria indicating that approval of human resources was required because Respondent moved that bulletin board from where it was located when you walk into the cafeteria to around the corner behind some computers where you cannot see it unless you know what you are looking for; that when she posted in the elevator there was no sign on the corkboards in the elevator that indicated that approval of human resources was required; and that at the time of the trial herein the corkboards were no longer there, the bulletin boards

are covered and they clearly indicate not to post without approval.

On cross-examination, Cothran testified that Theroux had been their director for about 9 months to 1 year; that when the above-described incidents took place in mid-October 2007 Theroux had been her director for maybe 6 months; that in or around October 2007 she and the other nurses told Theroux that they needed additional equipment and they were given an automatic blood pressure cuff, and the public phone was taken out of the department so patients could not choke themselves with the cord; that additionally the nurses asked for scrubs with elastic bands and not ties, and vinyl chairs which were easier to clean; that Respondent has some suggestion boxes like the one in the cafeteria which has been there for about 5 years; that this suggestion box has been moved into the hallway leading to the cafeteria; that quarterly meetings that the administration holds with staff, which are called round the clock, started before the union campaign did and they are forums where staff are invited to share their concerns; that Respondent conducts employee satisfaction surveys and Respondent has been doing this since before the union organizing got started; that the changes described above occurred as a result of Theroux asking the nurses in October 2007 at the nursing station what they needed the most; that in mid-October Theroux said to her, Saltzer, and Branham, “[W]e know you guys are really interested in the Union, and what can we do to keep the Union out”; that before Theroux asked this question she asked how it was going and Theroux conversationally warmed them up a bit before asking about the Union; that she told someone from the Union about this incident maybe within a couple of week but she was not sure who it was because several union people were in and out but it might have been Jennings; that she was not aware that she could have filled out an incident report; that when she told the Union about the incident the Union did not tell her to fill out an incident report but she was told that an attorney might be interested in talking with her; that she did speak with a union attorney about a year ago; that the Union had spoken to her several times about filling out an incident report but she did not know where to get one so she did not fill one out; that she did not fill out an incident report about the posting in the elevator incident because “the people behind . . . [Theroux] are intimidating people and I don’t want to lose my job” (Tr. 354); that she wore purple all of the time and she wore SEIU materials “because now I know I’m protected” (Id. at 355); that she did not file a grievance under the NCH procedure because it is her understanding that this procedure is only available if points are at issue; that she did not believe that she received any points over the elevator incident; that with respect to the notices of a personal nature that she has seen in the elevator, they stay up until all of the numbers are torn off and then they are no longer there; that she has no idea who removes the posters; that she has seen posters in the elevator for weeks at a time; and that she is estimating how long she has seen material posted.

On redirect, Cothran testified that when she met with Theroux regarding the posting in the elevator, Theroux did not ask her to sign any disciplinary form for her file.

Saltzer testified that Theroux is her supervisor; that more than once Theroux asked “us what she could do for us, what we

needed” (Tr. 361); that she asked Theroux for (1) a psychiatric health care provider to be on call, to call the unit back in a timely manner; (2) a review of the electronic medical administration record system the unit uses to dispense medications; and (3) 11 chairs for 11 patients in the living room; that she went to a union meeting and she showed support for the Union at work by wearing a purple bracelet; that the conversations with Theroux occurred mostly at the nurses’ station; that Cothran, Branham and Barbara Bell work on her shift, and sometimes Ginger McCamish when she worked evenings (Tr. 364); and that with respect to one conversation with Theroux,

We were talking about the Union and we had several conversations with Susan [Theroux] about the Union. And she asked what she could do for us to not have the Union come in, words to that effect, vote for the Union or not have the Union come in. What would change your mind?

. . . I don’t remember when it was, but Susan [Theroux] asked what can I do, or we do for you so that the Union won’t come, or you’ll change your mind about the Union, or you won’t vote for the Union. And I don’t remember the exact words, but that was the gist of it. [Tr. 364, 365.]

Saltzer also testified that this conversation about what Respondent could do to keep the Union out was separate from the conversations where Theroux, as the director, asked the nurses what they wanted done to improve how the unit worked.

On cross-examination, Saltzer testified that her unit holds 11 patients and it only has 7 chairs; that she wanted 11 chairs which could be washed off so each patient could have a chair during group therapy; that she is an open union supporter; that on the occasion in question Theroux “asked her usual question, what can I do for you, but she asked it with the Union attached to it” (Tr. 375); that Theroux said, “[w]hat can I do for you, or what can we do for you so that—I don’t know” (Ibid); that she could not remember the exact words that Theroux used and she was paraphrasing when she attributes these comments to Theroux; that they had several conversations with Theroux about the Union; and that she did not recall who was present for these conversations.

Theroux, who has been with Respondent for 4.5 years and is the nursing director of 2 North general surgery, 4 South oncology, 4 and 6 Southeast, and CEAP of behavioral health (BH), testified that when she takes over a new department she finds out what is needed for the nurses to run the unit; that typically she asks the staff; that before she went to BH, the chief nursing officer, who is responsible for every nursing department in the hospital, was overseeing the unit; that in August 2007 she took the interim role of the BH department and within a couple of months she took the permanent role; that in August 2007 she had conversations with the nurses in BH regarding what needed to be done to improve the department; that these conversations took place when she began rounding permanently in that department; that she is always seeking input from the nurses; that between August and October 2007 the nurses, with Saltzer being the most vocal, told her that they needed additional, individual, easily cleanable seating for the patients; that the nurses asked for and received (1) a cordless (to remove a choking

hazard) phone for the patients; (2) scrubs for the patients which have an elastic waistband and not a removable tie; and (3) an automatic blood pressure machine which did not have a cord; that there are a total of 16 nurses in BH, which includes the 4 Southwest voluntary unit and the 6 Southeast involuntary unit; that Saltzer and Cothran are both in 4 Southwest, they both work on the evening shift from 3 to 11 p.m. and that shift of their unit, from appearances (purple attire, Crocs, and SEIU paraphernalia), was strongly pro-union; that she did initiate conversations with her nurses about the Union in that she asked the nurses if they had any questions; that she provided the nurses with information about what NCH offered as an organization; that she never asked any of her nurses what she could do to keep the Union out; that she did speak to Cothran about posting literature in an elevator in the parking garage in October 2007; that the posting was brought to her attention when she received an e-mail from security asking her if she could identify staff members; that she has seen personal postings in the elevators but they are not allowed; that she rides the elevators 5 days a week (Tr. 611) and has seen a personal posting in an elevator one day and by the next day it is no longer there; that Cothran did not receive any points for posting in an elevator; and that she has a personal bulletin board in her breakroom and she allows union-related material to be posted on the bulletin board.

On cross-examination, Theroux testified that as of the time of the trial herein she continues to ask questions regarding what the employees need for patient care; that she asks the nurses how is your shift, what are the issues of the shift, and what is needed for patient care; that when she asked the nurses if they had questions about the Union, they asked her about the election; that she could not recall if she asked the nurses what they expected to get out of the Union; that she could not recall if she specifically asked the nurses what did they expect the Union to do for them; that the nurses would provide information like that²²; that she did not ask the nurses what can I do so that you won't vote for the Union; that before the union organizing campaign she was never asked to identify anyone for posting something in the elevator; that after she identified Cothran she met with Settle, Thigpen, and a lawyer and as a group they decided what she was comfortable with and that was a coaching and she was directed to speak with Cothran; that she does not meet with HR every time she gives a coaching; that HR asked for this meeting; that she sees approximately one personal posting a week in the elevators; that such postings include classifieds, apartment for rent, a vehicle for sale, things that could be on NCH's classified ads website; that she received guidance about Respondent's elevator policy sometime between August and October 2007; that the guidance took the form of department head meetings and that she could not be more specific; that guidance was given about what could and could not be

discussed with staff which would include what could and could not be posted in the elevators; that the guidance was given by HR and Respondent's lawyers; that, when asked if she was given anything written regarding a hospital policy about what could be posted in the elevator, "I think I've answered this, but there was a lot of documentation at the meetings. We were given some information. I don't have it currently" (Tr. 624); that at the department head meetings during August to October 2007 the elevator policy "may have come up during that time frame [a]t some point I was familiar with the policy" (Id. at 625); that she never communicated to her employees that they were not allowed to post in the elevators, not until the coaching of Cothran and Saltzer, who was also present in the elevator when Cothran posted the union material; and that they were verbal coachings and no form went with it.

Subsequently, Theroux testified that when she gave the coaching regarding posting in the elevator she asked the staff members if they were familiar with the solicitation/distribution policy, and were they familiar with where things could be posted; that both Cothran and Saltzer "denied that they were familiar" (Tr. 628); that she approached the incident in terms of the solicitation/distribution policy; that she did not approach the incident in terms of the bulletin board information in the employee handbook; that she told Cothran and Saltzer that they could continue to post union material on the bulletin board in the private nurses' lounge on the unit; that there is a designated bulletin board in the nurses' lounge but "[t]he [downtown] elevator did not have a bulletin board. Things were being just taped to the wall or hung on the wall" (Ibid); that she was not sure if before the Plexiglas bulletin board there was a cork bulletin board; that when she saw personal postings in the elevator before the Plexiglas bulleting board, the personal postings were taped up; and that she could not say that she ever saw a cork bulletin board in the elevator before the Plexiglas bulletin board was installed. When asked if she was "looking at a rule, or did she have a rule in mind" when she told Cothran and Saltzer that they could not post union literature in the elevators, Theroux gave the following testimony:

THE WITNESS: It was my interpretation of the solicitation and distribution policy.

....

THE WITNESS: That things could be handed out.

JUDGE WEST: So it wasn't your interpretation of any rule with respect to bulletin boards?

THE WITNESS: Right. I didn't consider—I owned the bulletin boards in the nurse lounge. I don't oversee the bulletin boards in the public elevators.

JUDGE WEST: But again, you weren't basing the coaching on any rule with respect to the use of bulletin boards. You were basing it on the solicitation and distribution rule or policy.

THE WITNESS: Correct. [Tr. 631.]

Earlier Theroux gave the following testimony:

THE WITNESS: My interpretation of the policy is that this is both a public and employee area in the elevator. The solicitation/distribution policy—I wasn't stopping them

²² More specifically, Theroux gave the following testimony:

Q. Did you ask them [the nurses] what did they expect to get out of the Union?

A. I can't recall.

Q. What do you expect the Union to do for you:

A. I can't recall if I specifically asked it. They would provide information like that. [Tr. 615.]

from soliciting or distributing, but that doesn't mean hanging something in the public area.

They were free to talk to staff. They were free to hand out flyers in non-work areas, non-patient care areas—[Tr. 630.]

Holliday testified that when she was first hired by Respondent she worked in the downtown hospital for about 2 years before she was transferred; that she has seen the bulletin boards on the elevators on the downtown campus; that she always saw a variety of things posted on the bulletin board on the elevator, namely cars for sale, people having parties, nursing education, and CPR classes; and that she saw a variety of things posted on the bulletin boards in the lounges in the downtown campus, namely things for sale, educational material, invitations to parties, letters of recognition from patients and thank yous for good care on all of the bulletin boards everywhere.

On cross-examination, Holliday testified that she worked in Respondent's downtown facility from May 2003 to approximately February 2005; that when she worked downtown she saw postings on the bulletin boards such as things for sale, educational material, and party invitations; that, with respect to whether she saw anything of a commercial nature or related to any business, she also saw postings about people trying to open businesses like baby sitting services, lawn mowing service, and car washing; and that she did not know if these were Respondent's employees' own businesses. It is not clear when the witness answered the questions about postings of a commercial nature she was referring to the bulletin boards in employee lounges or the bulletin board on the downtown garage elevators or both.

Panebianco testified that she has seen postings about the hospital's Spring Fling parties for employees posted in the garage elevators; that she has seen an advertisement for a lost pet; that before the union organizing campaign she did not see anything in the elevators prohibiting posting there but well into the campaign she did see a policy prohibiting posting there; that no manager, director, or supervisor other than Settle ever discuss what could or could not be posted anywhere in the facility; and that she never received written material from a manager or supervisor explaining this.

Thigpen testified that Respondent has two elevators at the downtown campus and one elevator at the North campus; that at the time of the trial herein there were unlocked sliding Plexiglas bulletin boards on the two downtown elevators; that before the Plexiglas bulletin boards were installed in early 2008 the two downtown elevators had cork bulletin boards; that the cork boards were no longer used predominantly because the cork was falling off; that the corkboards had been used for as long as the downtown parking garage had been there, which was at least 5 years; that she could not point to anything in writing that communicated to nurses that the cork bulletin boards in the downtown garage elevator were considered to be official bulletin boards subject to the employee handbook; that over the years she saw various things posted on the cork bulletin boards in the downtown garage, including things for sale, or a party notice but that was not permissible and it was taken down; and that she did not have a memorandum issued to hospital personnel indicating that these materials should not be posted because

she did not see it as a major problem, it would just be there from time-to-time, and it was not there every day she used the elevator.

Brown testified that his office is located in the downtown hospital, he parks in the garage, and he rides the parking garage elevators; that to his knowledge prior to the union campaign the hospital did not allow notices of a personal nature to be posted in the garage elevators; and that he did not recall ever seeing any notices of a personal nature posted in the elevator in the parking garage.

On cross-examination, Brown testified that he did not recall ever seeing anything personal ever posted on the garage elevators; that personal is anything that does not have the NCH logo on top of it and that "is something that would pique my interest right away" (Tr. 675); and that he did not recall ever taking anything down from the elevator.

When called by Respondent, Thigpen testified that Respondent has procedures in place to secure employee input or suggestions; that more specifically Respondent has what it calls round the clock (RC) which is like a town hall or employee forum; that there are RCs about every 8 weeks; that they involve a series of meetings between Weiss and Respondent's executive team, on the one hand, and, on the other, employees; that these meetings start with a discussion of what is going on in the hospital and then the employees are asked if they have any questions, "it's opened up to the staff to talk about anything that they may want, what's going well, what's not going well, [and] suggestions for improvement" (Tr. 902)²³; that Respondent has an employee advisory group website where employees can offer suggestions or ideas to help them, and that is answered; that department directors hold staff meetings usually on a monthly basis where information is given to the employees; that department directors also meet with their staff on a quarterly basis to review the employee opinion survey; and that RC has been in effect for about 10 years, and the employee advisory group has been in effect for about 5 years.

On October 31, 2007, Villani was in Respondent's downtown cafeteria at lunchtime. She testified that it was Halloween; that they were having a benefits fair where employees could upgrade their benefits; that she was with nurses Renee Fuller and Panebianco; that they were going to eat their lunch and hand out some treats which were in a mini bag attached to a trick or treat union flyer; that they were striking up conversations and giving people treats with the union material attached; that while they were doing this and eating their lunch, Director of Security Brown approached them, told them that they were no longer allowed to pass out treats, and they needed to leave; that she told Brown that he knew all of them and could they at least finish their lunch; that Brown said no, he wanted them to put the treats away and he wanted them to leave; that Panebianco told Brown that it was Halloween and everybody was passing out treats; that she told Brown that they had a legal

²³ Thigpen also described Respondent's GEM program which started within 4 months of her testimony at the trial herein. Consequently, this program, which is described as a greet, eat, and meet would have started after the pertinent events alleged in the complaint involved herein.

right to be there and there were treats at the fair; that they bagged the treats, put them under the table, assured Brown that they would take them back to their respective departments and they left shortly after that; that during her employment at NCH she has seen others in the cafeteria giving out treats or selling things, namely bake sales, Girl Scout cookies, and heart walk stuff; that Brown told them that they had to leave because they were not allowed to pass out their treats; that vendors at the fair kind of setup booths with tables and their computers; that employees could upgrade their insurance or sign for disability or other options the employees had in their benefit plan at NCH; that the vendors had bowls with candy, cookies or little treats; that General Counsel's Exhibit 17(h) is the union flyer to which they attached the small candy packet; that while Respondent has vending machines with candy, Respondent did not sell anything like the tiny candies that they were giving out; that she has observed NUNSO supporters, who are against the Union, distributing literature in the main cafeteria downtown; that she has ordered Girl Scout cookies and she picks them up in the lounge; that a lot of times she will pick them up in the lounge while she is on off time after she is in the gym or wellness center; and that the order forms for Girl Scout cookies or other items for school fund raisers are passed around through the nurses station or lounge.

Panebianco testified that on October 31, 2007, Halloween, she went to Respondent's downtown cafeteria about noon with nurses Villani, Fuller and one or two other nurses; that they had a flyer for Halloween about the Union and they had candy attached to it; that they were sitting down eating their lunch when people would come up to the table to talk to them and they would hand out the flyers with the candy; that Brown approached their table and told them they were not allowed to be there; that Villani told Brown that they had a right to be there; that Brown said that they could not hand out candy and pamphlets because they needed permission to be set up like a booth, and they would have to leave; that Villani told Brown again they had a right; that they left the cafeteria; that she did not see anyone else handing out candy or any type of goody that day; that the candy bag was about 2 or 3 inches across, it was wrapped up and tied to the flyer; that she did not know what Brown meant when he said they had set up like a booth in that they were sitting at a table just like any other table in the cafeteria and there was no background or anything else; that General Counsel's Exhibit 17(h) is the handbill they were giving out that day; and that there may have been a benefits fair going on in the cafeteria that day but she was not 100-percent sure.

On cross-examination, Panebianco testified that on Halloween she and the other nurses in her group did not have tables pushed together in the cafeteria; that the one box (described as a file box measuring approximately 17-by-13-inches by 9 inches) they used to transport the materials was on the floor; that they had some flyers with the candy attached on the table; that sometime in the fall she was also stopped by a security guard from distributing literature in the downtown cafeteria; that she did not think that she filed an incident report over that matter; and that she has distributed materials in the cafeteria more than once.

Brown testified that when he went to the downtown cafeteria about 12:30 p.m. on Halloween 2007 he saw two or three off-duty nurses at a table in the cafeteria about 25 feet from the entrance; that there were flyers and Halloween candy on the table; that half the table was covered with the candy and flyers; that he explained to the nurses at the table "that they could eat lunch in the cafeteria, that they could speak with the other employees, but that *the candy and material that was displayed on the table, that I would like for them to remove it*" (Tr. 649 with emphasis added); that they put it under the table, continued with whatever they were talking about, and he left; that he did not ask them to leave; that this whole exchange took 5 minutes; that he did not recall any other time when he asked somebody in the downtown cafeteria not to display union literature and candy, or not to distribute union literature and candy; and that he used a normal conversational tone during this verbal exchange.

On cross-examination, Brown testified that he did not recall anyone specifically using the words, namely "asking if they could finish eating their lunch first" (Tr. 670); that as far as he was concerned they could finish eating; that he did not remember anyone having to ask him that; that there is not written policy about having flyers displayed on a table "[n]o, ma'am, I think it was the candy and stuff that was at issue" (Tr. 681); and that he believed "that they were permitted to hand out the flyers and have lunch and discuss anything that they wanted to discuss." (Ibid.)

Charging Party's Exhibit 14 is an e-mail from Settle to department heads dated October 31, 2007. As here pertinent, it reads as follows:

From: Settle, Brian
 Sent: Wednesday, October 31, 2007 4:26 PM
 To: Department Heads
 Subject: FW: Solicitation and Distribution Policy "DO NOT POST OR DISTRIBUTE the below e-mail.

Good afternoon. Below is out policy addressing solicitation and distribution as updated on August 30, 2007 and previously distributed to you and to your staff. With the increased onsite solicitation and distribution by the union pushers, it is important that you become very familiar with this policy.

It can be difficult to determine what constitutes solicitation/distribution, and where these activities can take place. For example, an employee may discuss personal business and handout materials over lunch in the cafeteria; however, he /she cannot hand out food, candy, or drinks in the cafeteria, since that competes with our cafeteria business.

We do plan to meet with you and your first line managers next week to discuss your critical role in continuing to educate employees about the union and the upcoming election as well as to further clarify our guidelines on solicitation and distribution.

...

Holliday testified that she has seen a NUNSO nurse who had a table right in front of the cafeteria with antiunion literature on

it and she thought he also had candy; that this occurred during the day shift around lunchtime; that she remembered that he had some chocolates and also some candy corn; and that she did not remember when she saw this but she thought it might have been around Halloween and the other time she was certain was after the first of January 2008.

Andersen testified that at some point in September 2007 she went with another nurse, Jacki Chuck, and SEIU organizer Liz McNamara to the cafeteria; that they had big cake with them and they handed out pieces of the cake in the cafeteria; that after about 5 minutes Dolan, who is the COO of the North Naples hospital, and the head of security on the north campus, Val, approached them in the cafeteria and Dolan told her that she was not allowed to do this here; that she asked Dolan why and eventually Dolan went to the back of the room and used her cell phone; that Dolan came back to their table and told her that she was not allowed to give out cake in the cafeteria because Respondent sells cake in the cafeteria; that Dolan asked McNamara who she was and McNamara identified herself; that Dolan told McNamara that she had to leave immediately; that McNamara said that she would leave but she would be contacting an attorney because she did not believe that she should have to leave; that Dolan told her that the cake could be brought to the emergency department nurses' lounge; that she was off duty that day; that she has seen others giving out food in the cafeteria in that at the end of October there were a number of vendors in the cafeteria and one of them, Sam's Club, was giving out brownies; that in February there was an American Heart Association fundraiser in the cafeteria where they were selling funnel cake; and that after the September 2007 incident, she again distributed food in the cafeteria on Halloween, which is described below. When it was pointed out that this incident is not alleged as a violation of the Act in the complaint, the Charging Party indicated that it goes to Respondent's rules about distributing food in the cafeteria, which is at issue in paragraph 10 of the complaint.

On cross-examination, Andersen testified that the cake incident occurred in late September 2007; and that they only had cake and they were not handing out literature at the time.

Settle testified that that as demonstrated by a lack of any documentation with respect to General Counsel's Exhibit 11 (The documents turned over to counsel for the General Counsel pursuant to her subpoena for all the request and approval forms for soliciting from January 1, 2007, to the return date of the subpoena.), Sam's Club and NUNSO, which is a group of nurses who are against SEIU, did not submit a request for permission or approval pursuant to Respondent's distribution and solicitation policies; that Sam's Club, and others are invited one time a year to attend an employee benefits fair which is held in the Telford Auditorium on the downtown campus; that Sam's Club may have given out candy, cookies, key chains, squeeze balls, and all kinds of things; that he did not see anything explicit in Respondent's policy which indicates that it is improper for employees to distribute food in the cafeteria; and that at the North Naples Hospital the benefits fair was held in the cafeteria and Sam's did give away food.

At the end of October or in early November 2007 Jennings went to the cafeteria on Respondent's north campus with Roper

and Miles Granderson, who is one of the Union's attorneys. Jennings testified that they met with several nurses from the North Collier emergency room, namely Andersen, and Al Rodriguez, who were in their break and joined them in the cafeteria; that they had found out that the benefits fair was going on and Sam's Club was giving out brownies; that Bank of America was also there, and some of the other vendors were giving out he thought candy and other items (described as "chachkas"); that he and the others sat in the cafeteria and gave out union literature and cupcakes; that after about 20 minutes a woman who is the head of the North Collier campus security approached them and told them that they could not be distributing cupcakes in the cafeteria and they had to go; that they asked the security person why they could not give out cupcakes in view of the fact that Sam's Club was giving out brownies; that the security person said that was the policy, and they asked to speak with Settle, who is Respondent's chief resources officer, and the security person left; that subsequently Settle and Dolan approached them; that when they asked Settle why they could not give out cupcakes in view of the fact that Sam's Club was giving out brownies, Settle said it was because he had invited Sam's Club and not "you guys" (Tr. 136); that the nurses were allowed to take the cupcakes which had not yet been distributed up to their breakroom and he, Roper, and Granderson were escorted out by Settle and Dolan; and that a security guard followed him, Roper, and Granderson to Roper's car and made sure they left the campus.

Roper testified that she was off duty and she went to the (North campus) cafeteria with Jennings and one of the SEIU attorneys, Granderson; that they had a lot of information, packets, material, and Halloween cupcakes; that they gave out the material and cupcakes for about 10 minutes; that the chief security person at North Collier, Val, came up to her and said "Cindi, what are you doing, You know you can't be here" (Tr. 445); that she asked Val, "[W]hy is that" (Ibid.), and Val said, "[O]h, stop it. You know why. . . . [y]ou need to leave" (Id. at 445, 446); that she told Val that she did not think she was right and Jennings stood up and introduced himself; that Val left them and came back 5 minutes later with Settle who told them that they had to leave; that Jennings stood up and extended his hand but Settle did not shake Jennings' hand; that Settle told them that they had to leave and they could not give out cupcakes; that she asked Settle why they could not do this, and there were other people giving out cupcakes and so forth (candy bars and tootsie rolls); that the other people were local vendors, like Sam's, advising employees about the different benefits available to them; that Settle told them they had to leave, that everyone else there was invited, and they were not invited; that they packed up and left, giving the cupcakes to an employee to take to her unit; and that a security guard walked them out to their car. When Respondent objected to this testimony on the grounds that it is not alleged in the complaint, the Charging Party indicated that it goes to the enforcement of Respondent's solicitation and distribution policy and its justifi-

cation for the rule underlying the events in paragraph 10 of the complaint.²⁴

On cross-examination, Roper testified that they were at a table in the North Naples cafeteria and the cupcakes and flyers were placed on the table; and that they are not allowed to distribute union literature to other people in the cafeteria.

Andersen testified that on Halloween she distributed food in the cafeteria on Respondent's North campus; that it was noon-time and she was with another nurse from the emergency department, Judy Ardizone; that they had a box with little containers of candy attached to a union flyer (GC Exh. 17(h)), and they began to hand it out; that after about 5 minutes one of the managers from women's and children pointed her finger at them and started yelling, "[Y]ou can't be here, you can't do this, you need to get out of here" (Tr. 586); that they left and went to a nurses' lounge in the hospital; that after about 30 to 40 minutes they went back to the cafeteria with the candy and began giving it out again; that her emergency department supervisor, Lebailly, approached them, she asked Lebailly what was going on with the person that yelled at them, Labailly told her that it was okay and they told the other supervisor that it was okay, that they were allowed to be there; that they stayed in the cafeteria for 30 to 45 minutes giving out candy and then Settle approached them; that Settle told them they were not supposed to be there; that when she asked Settle why not, he did not reply; and that Settle then walked away.

On cross-examination, Andersen testified that a birth place manager who is an education director in women's and children's, Ms. Benson, told her to leave the cafeteria on Halloween 2007; and that a few days later she asked Labailly, who was sitting at another table when the incident occurred, who the woman was.

Thigpen testified that she is familiar with the benefits fair; that the following organizations are invited to the benefits fair: First Service Administrators (provides Respondent's health care), Express Scripts (Respondent's pharmacy company), Fidelity Investments (Respondent's current 401(k) administrator), a number of colleges in which Respondent provides tuition and scholarship assistance, Triple A South, Costco and Sam's Club (to offer memberships), Sun Schools Credit Union, a number of named banks (for mortgage assistance), Unam (provides Respondent's disability, short- and long-term care, and life insurance), Hyatt Legal Services (an benefit that employees can purchase), and others; that there are a variety of booths or tables; that the benefits fairs are held in the Telford Building, which is adjacent to Respondent's downtown hospital, and in the cafeteria on the North Naples campus; that the vendors at the benefits fairs do hand out food items; that separate and apart from the benefits fairs Respondent has had Hodges Mace in the downtown cafeteria and on the North Naples campus; that Hodges Mace was on both campuses for 2.5 to 3 weeks allowing employees to electronically sign up for benefits the hospital

offered such as health, dental, life, and short-term disability insurance, and a 401(k); and that she did not recall if they were handing out any food items.

When called by Respondent, Thigpen testified that once a year a benefits fair is held at both the downtown campus and at the North Naples campus; that the benefits fair is held to allow the employees the opportunity to review all the benefits that are offered so that they can make their determinations and selections prior to the beginning of the calendar year; that, among others, Sam's Club and Costco participate to afford employees the opportunity to provide payroll deduction to split the cost of those memberships up through four pay periods which is 8 weeks; that to participate, Sam's Club and Costco have to be invited and fill out a form; that the Union never asked for permission to pass out food in the cafeteria; and that auxiliary groups, which is an extension of Respondent's volunteer services, hold fundraisers three or four times a year, after getting permission from Respondent, to benefit the hospital in terms of scholarships or projects, and such fundraisers are held in a variety of areas, particularly in either the Telford or the cafeterias both at the downtown campus and at north Naples.

McGoun testified that in October and November 2007 she gave out union literature at various places, including three or four times in the parking garage near the skywalk that leads to the hospital. On cross-examination, McGoun testified that she handed out the union flyers in the evenings with others, she thought it was three times, and no one stopped her from passing out the flyers.

On November 2, 2007, McGoun was given a "1-Point Reminder for Unsatisfactory Work Performance" (GC Exh. 3). The discipline notes "Sandi, you were observed posting union flyers in the parking garage on Oct. 29th at 19:16, this action violates policy regarding solicitation approval." In the employee comments section of the form, McGoun wrote "This was a mistake that I posted this material but I did not know that I could not post this material." McGoun testified that on November 2, 2007, at about 5:30 p.m. she received a telephone call from Kling, who is her nursing director and who said that he wanted to see her in his office; that she told Kling that she was very busy and he told her that he needed to see her, that's all; that when she went to Kling's office he was there along with Claudia Garone, who is the nurse manager on 1 North; that Kling reviewed the above-described verbal she received in August 2007 and then they told her that she was observed posting union literature in the elevator in the parking garage and they felt that it was appropriate that she receive a point for that; that Garone said that she was receiving the discipline because Respondent has a solicitation policy and Garone asked her if she was aware of the policy for posting literature; that she told them that she was not aware of the policy for posting literature in the parking garage; that Garone told her that she was responsible for knowing every policy; that, as indicated at the bottom of the discipline, she recalled being given a copy of the solicitation policy at this disciplinary meeting; that she had never seen this solicitation policy before; that she signed the disciplinary form and then went back to work; that about 15 minutes later Kling approached her, gave her a hug, and told her, "I'm sorry you had to go through that" (Tr. 288); that on October 29, 2007,

²⁴ Par. 10 of the complaint alleges that on or about October 31, 2007, Respondent, by John Brown, at the Respondent's facility, told employees that they were not permitted to engage in union and other protected, concerted activities unless they received prior permission and approval from the Employer.

she was handbilling, she had two leftover handbills, she was parked on the first floor of the garage, and she posted union handbills in the two elevators in the parking garage; and that before October 29, 2007, she had seen various things on the garage bulletin board, namely houses or pets for sale and some business cards.

On cross-examination, McGoun testified that she parked on the first floor of the garage on October 29, 2007, because she was off duty, and that on duty employees are supposed to park higher up in the garage²⁵; that in her January 24, 2008 affidavit to the Board she indicated, regarding what she has seen posted on the bulletin boards in the parking areas, that in the past she has seen animals for sale, houses, dogs, rentals, etc.; that she did not include business cards in her affidavit because it did not come up; that while she knows that the hospital has a grievance procedure, she has never used it; that while she was very upset, she did not file a grievance because she found out she only had one week to make the filing and it was too late; that she contacted the Union about this discipline but she could not remember who she spoke with; that she believed that she filled out a union incident report regarding this matter; that in her affidavit to the Board she indicated, “I did not appeal the written warning to Human Resources because the whole affair is totally ridiculous”; that she thought it was ridiculous because she was “penalized for something that was not illegal—verbalizing about the Union isn’t illegal, but I got—they gave me a verbal warning for that. And the accumulation of the posting . . . in the elevator made the point, so it really to me wasn’t illegal in a sense” (Tr. 311); that it was her understanding that she received a point as a result of the two incidents; that subsequently she did not receive any disciplines; and that she wants the point removed and her record expunged.

Subsequently, McGoun testified that before receiving the November 2, 2007 one point reminder for “posting union flyers in the parking garage” to her knowledge she had never (a) been given anything in writing from the Respondent which described its policy with respect to posting on the bulletin boards or (b) been told by anyone in management or a supervisor what the Respondent’s policy was with respect to posting on the bulletin boards. McGoun further testified that she was aware that she could access Respondent’s policy by going to its Intranet website but if one tries to access policies on that site, it is very difficult in that it is not user friendly; that she was not aware that one could go to the policy guidelines on the Intranet and obtain information about posting on bulletin boards; and that she did not recall anyone telling her that she could do that with respect to posting.

Villani testified that she filled out a union incident report for McGoun about what happened since McGoun was very upset about what happened (CP Exh. 12). The report reads as follows:

²⁵ Thigpen testified that floors one through three in the downtown garage are devoted to the public.

SEIU variance

Friday Nov 2 400pm

John . . . [Kling] SW and Claudi Garone 4N pulled Sandi McGoun into tiny office and disciplined her 1 disciplinary point for hanging union literature in parking garage elevator and also grouped in another warning from talking at nurses’ station with Mary Debellis at 3N earlier this summer, and also talking by elevator. That Jen Ringle warned Sandi. Sandi responded by saying “if we can talk about our kids we can talk about the union at the nurses’ station.” “Am I being disciplined because this is about the union and I am part of the union.” They responded “Oh no.” This is my right . . . freedom of speech. John King and Claudis Garone pulled out policy. Actually Sandi was not on worktime. Day off.

Mary Villani

On cross-examination, Villani testified that believed that she did not use a Union incident report because she was out of the variance forms since she wrote a lot of variances; that what she wrote on Charging Party’s Exhibit 12 is what McGoun told her at 4 p.m. on November 2, 2007; that Kling, who is her Director, had just taken over and Garone was training him, and that is why she was there; and that the variance is based on what McGoun told her. And on redirect Villani testified that the variance reflects what McGoun told her regarding what they accused her of doing.

Kling testified that he gave the “1-Point Reminder for Unsatisfactory Work Performance” to McGoun for posting union flyers in the parking garage on October 29, 2007, in that “this action violates policy regarding solicitation approval” (GC Exh. 3); that he told McGoun (and the written discipline indicates) that she had 7 days to file a grievance; that McGoun admitted posting the material; that he received the photos of McGoun posting in an elevator in an e-mail from Director of Security Brown and he responded that it looked like McGoun; that before he met with McGoun to give her a written discipline he attended a meeting in HR with Thigpen, Cooper, Skifton, and Becky Van Hoecke present; that this is “what we always do if we do any kind of roundtable or any kind of disciplinary or coaching” (Tr. 828); that as a result of the meeting “[i]t was decided to go ahead and follow the corrective action policy we had and go with the one pointer based on what she did” (Ibid); that McGoun had already received a coaching so the next step in the disciplinary process was one point; that when he met with McGoun regarding this discipline, Garone, who is director of 4 North, was present because it is standard operating procedure when he does a counseling or talks to employees about issues to make sure that the employee’s rights are protected and nothing gets misinterpreted: that during his meeting with McGoun he showed her the pictures, she said she did it, and he gave McGoun a copy of the policy; that McGoun said that she did not know that policy, she was sorry, and she did not think it was a problem; that the policy can be found by going online to My NCH policies and procedure tab under HR; that while what McGoun did in the elevator was a posting, he gave her the no solicitation policy because “[i]t wasn’t from—you know, from

round tabling with HR and with the executive team, it was decided that there was no solicitation approval form filled out through HR and she did not get approval for it” (Id. at 830, 831); that he knew that McGoun supported the Union in that “[s]he told me, [s]he always wore purple, [s]he had purple Crocs, the purple lanyard, the buttons, and she’s very open with me, very honest” (Id. at 831); that McGoun wears pink a lot, it is her favorite color; that during the approximately 20-minute meeting McGoun was very pleasant, very professional but she was upset and she was a little shaken; that about 30 minutes after the meeting he went to her because he wanted to make sure she was okay; and that he gave her a hug when he saw her because “I respect her as a person. She’s my friend and I wanted to make sure that . . . she knew it wasn’t personal and I supported her.” (Id. at 832.)

On cross-examination, Kling testified that an employee could have two coachings; that McGoun received the one point “because it was related to the first coaching” (Tr. 834); that posting a union flyer did not negatively impact her department, it did not impact patient care; that HR did not tell him what to write on the form, he did that himself; that he had written people up before and whether he consults HR depends on what the discipline is for; that since this matter started with the e-mail of the picture and since he was a new director, he wanted to speak with someone with experience who could tell him what the best route was; that when he joined NCH he did not sign anything about the receipt of the no-solicitation/no-distribution policy; that under the solicitation policy, McGoun should have requested permission to post and this was determined after the discussion with HR; and that he uses the garage elevator every day and he has seen postings in the garage elevator including everything from couches and cars for sale and houses for rent to things for child day care.

When asked on redirect whether he knew the postings for cars for sale was authorized, Kling responded that he had no idea.

Subsequently, Kling testified that when he spoke with McGoun he was relying on NCH’s policy that “[r]equests to solicit for organizations representing any protected . . . groups will routinely be denied.”

When called by Respondent, Thigpen testified that she uses the downtown garage elevators; that she has seen unauthorized postings in these elevators for the sale of such things as puppies; that she takes such postings down; that even after Respondent started using the electronic billboard she has seen unauthorized postings in the garage elevators two or three times a month; that other people have taken the unauthorized postings down and brought them to HR; that this does not happen that much anymore, about once or twice a month; and that Respondent has had a “practice” (Tr. 890)²⁶ of no unauthorized posting

²⁶ During the last day of the trial herein, before I ruled on the objection, one of the attorneys for Respondent used the word “practice” in his question after one of the attorneys for the Charging Party objected to the use of the word “policy,” indicating that it was without foundation in that the Charging Party did not believe that there was any evidence relating to a policy.

in the hospital garage elevators for as long as the garage has been there, which is about 10 years.

On cross-examination, Thigpen testified that the garage elevators in the downtown parking garage have been there for about 10 years and they had corkboard bulletin boards (up until those boards were replaced with Plexiglas boards); that “for the past 10 years” (Tr. 936), she and others have been removing personal postings from the cork bulletin boards; that she determined that it was not necessary to specifically mention bulletin board posting standards of behavior in the corrective action policy (GC Exh. 2); that she believed that there have been surveillance cameras in the downtown parking garage elevators since the elevators were first used and they have been upgraded over the years; that she could not specifically recall any other instance where she actually got a picture of someone putting up a posting at any point in time before McGoun; that the original photographs of McGoun in General Counsel’s Exhibit 3 show that the bulletin board was a cork bulletin board; that the photographs were taken on October 29, 2007; and that the Plexiglas bulletin boards were not installed in the downtown garage elevators until January 2008.

Brown testified that he knew what General Counsel’s Exhibit 3 is; that in looking at the picture of the West elevator dated 10/29/07 he remembered that the triggering event for reviewing the video of the camera on this elevator was that someone found an SEIU flyer or a pronoun flyer on the bulletin board in that elevator²⁷; that he was asked by someone in HR to review the video tapes and he directed Griffith to do the review; that about three other times security reviewed the videos for employees allegedly posting union materials on the elevator bulletin boards; that he believed that the videos were reviewed two times before this incident for posting union materials; and that one occurred in August 2007 and involved an employee of the psychiatric unit on 4 Southwest.²⁸

On redirect, Brown gave the following testimony:

Q. Can you describe what kind of bulletin boards we have in the parking garage elevators now?

A. They are cork standard bulletin boards that you pin stuff on.

Q. They’re cork right now?

A. I believe so.

Q. They’re not enclosed with a sheet of plastic?

A. As near as I can recall, we haven’t yet been able to identify an enclosed bulletin board that will pass the Fire Marshall’s scrutiny. They have to be of a specific size and specific construction.

Q. And we have Plexiglas bulletin boards in the elevator now in the parking garage elevators?

A. Yes, we do have an eight and a half by 11 Plexiglas that meets the Fire Code that we’ve put in all the elevators.

Q. Including the parking garage elevators?

²⁷ The pictures in General Counsel’s Exhibit 3 show that the bulletin board in Respondent’s downtown garage elevator is cork with a wood frame.

²⁸ It appears that Brown is referring to Cothran posting union material in a garage elevator earlier in October 2007.

A. Yes.

Q. So it's not a corkboard at the moment?

A. I don't know. [Tr. 689, 690.]

Respondent's chief human resource officer, Settle, testified that Respondent has an employee handbook which applies to all of Respondent's facilities; that General Counsel's Exhibit 2 is Respondent's corrective action policy which is from its policy and procedural manual; that a corrective action would be filed in the employee's personnel file and a "coaching," which is not necessarily part of a formal corrective action, would not necessarily be in the employee's personnel file; that General Counsel's Exhibit 3 are snapshots (three all dated "10/29/2007") from a video camera in a parking garage elevator (of Sandi McGoun)²⁹; that as indicated in the photographs, there is a cork bulletin board in the involved elevator; that General Counsel's Exhibit 4 consists of a "3-Point Reminder for Employees Standards of Behavior" to Pete Karavas (for "placing another flyer in the elevator of the parking garage, which violates NCH policy") dated "08/03/2007,"³⁰ a "COACHING FORM" for Kelly Kinsland (for "... posting literature in a non approved area") dated "08/10/07,"³¹ and a "1-Point Reminder for Employee Standards of Behavior" to Rosann Graham (for "[d]istributing union literature in the endoscopy department which violates the hospital policy against solicitation") dated "11-2-07"³²; that he believed that General Counsel's subpoena requested documents for employees who were disciplined for reasons similar to those of McGoun and General Counsel's Exhibit 4 are the documents that Respondent provided in response to the subpoena; that he believed that the names of Karavas and Kinsland were on "a flyer that came through, so they were in favor of the Union" (Tr. 43); that it is not true that under Respondent's written policy all requests to solicit or distribute must be made in writing and submitted to HR; that General Counsel's Exhibit 5 is Respondent's solicitation and distribution policy found at pages 80-82 of Respondent's employee handbook but that is not the current policy in that the policy was revised in August 2007 to clarify, as here pertinent, im-

mediate patient care areas, working time, and working areas; that General Counsel's Exhibit 6 is the current policy which was approved (as indicated on third and the last page of the document) on "08/30/2007"³³; that new employees receive the no-solicitation/no-distribution policy during an employee orientation, the policies are available on the intranet, which is "My NCH," and when policy changes are made they are distributed to department directors to review with their staff; that the prior policy (GC Exh. 7) was approved in May 2001³⁴; that employees are not allowed to post things in the employees' lounge in that Respondent maintains bulletin boards throughout its campuses for official notices, legal postings, and other items approved by administration while some departments in their breakrooms have permitted employees to post personal notices for garage sales, chili suppers, whatever on a bulletin board in their breakroom, and Respondent continued to permit that to occur; that the bulletin board policy is found in the employee handbook and on "My Intranet" (Tr. 50); that he did not see that bulletin board policy in the employee handbook received in evidence herein as General Counsel's Exhibit 8 but it is on "My Intranet" (Tr. 52); that while the copy of the employee handbook provided to the General Counsel in response to her subpoena contains blank pages, to his knowledge Respondent did not leave these pages blank intentionally; that General Counsel's Exhibit 9 appears to be the no-solicitation/no-distribution policy that was approved on August 30, 2007" [The letterhead is "NCH Healthcare System" (emphasis in original)]; that as to whether this August 30, 2007 policy change was distributed to employees "we provided Department Directors with policy changes and they communicate those changes with their staff" (Tr. 53); that he believed that he mailed General Counsel's Exhibit 13, which is dated July 21, 2007, which is on "NCH Healthcare System" letterhead, and which advises employees what they should consider if they are approached and asked to sign a union authorization card, to all employees; that General Counsel's Exhibit 14 was distributed to volunteers who work at Respondent's facilities³⁵; that General Counsel's Exhibit 15, is

²⁹ The exhibit also contains a "COACHING FORM" dated "7/31/07" to McGoun and a "1-Point Reminder for Unsatisfactory Work Performance" dated "11-2-07" to McGoun. As noted above, the latter indicates "Sandi you were observed posting union flyers in the parking garage on Oct. 29th at 19:16 this action violates policy regarding solicitation approval" and "Copy of solicitation policy given to Sandi McGoun."

³⁰ The reminder does not specify which policy Karavas violated. Thigpen testified that Karavas did not get a three point reminder solely because he posted a union flyer but rather Karavas "had previous corrective actions which elevated it to the three points." (Tr. 568.)

³¹ Under the "Desired Performance" portion of the form the following is typed: "Abide by the Hospital's Solicitation and Distribution policy." Under the "Action to be Taken by the Director/Designee" "Review the Hospital's Solicitation and Distribution policy with Kelly" is typed in. And under the "Employees Plan for Improvement . . ." "Become familiar with and abide by the Hospital's Solicitation and Distribution policy" is typed in.

³² The following appears in the "Employee's Comments" section of the form: "I was in the endoscopy dept. on my lunch time, as well as some days after my shift. I only gave literature in the break room on those occasions, never in the treatment room."

³³ The policy contains the following:

It is the policy of the NCH Healthcare System (NCH) that solicitation by employees at NCH is prohibited during working time and in immediate patient care areas and distribution is prohibited during working time and in working areas. It is also NCH's policy that distribution and solicitation of employees by persons not employed by NCH, on NCH premises, is strictly prohibited unless prior authorization has been granted by the Chief Human Resources Officer or designee.

³⁴ P. 3 of the exhibit is a "*Solicitation Approval Form*," which indicates, inter alia: "Solicitation requests must be made 60-90 days in advance and in accordance with NCH policy. . . ."

Name of organization:
Purpose of solicitation?
How does this organization support the mission of NCH Healthcare System?
Dates, time and locations of proposed solicitation:
Type of Solicitation:

³⁵ The letter, which is dated August 15, 2007, on the letterhead of "NCH Healthcare System," and is signed by Respondent's president and CEO, Weiss, summarizes the perceived negative consequences of

distributed to employees, posted on Respondent's bulletin boards, and is available on the intranet³⁶; that General Coun-

having a union and indicates, inter alia, that Respondent "is committed to remaining union-free."

³⁶ The document, which is dated July 26, 2007, is titled "*Straight Talk NCH Healthcare System*, A weekly update from management on the issues that matter most," and which is signed by Weiss, reads in part as follows:

By now, of course, all of us are aware of the agitation by outside union organizers, eager to persuade NCH nurses and perhaps others to sign up with them immediately to form a union at our hospital.

....

So over the past several weeks, as you know, I, personally, and other members of management as well as several Trustees have been meeting with many of you to listen to your suggestions and concerns and, when feasible, to act on them.

These meetings with employees have already yielded positive results.

We've increased the adjusted nurse-patient ratios, increased the shift differential, reintroduced Ben Bucks, and implemented similar things to show that we're listening and that we care.

I'm delighted to say that yesterday, at its regular meeting, the NCH Board of Trustees decided to continue this approach of responding positively to staff concerns and recommendations. Among the Board's actions were the following:

In terms of our annual fall wage and salary adjustments, the Board reviewed the results of the market data survey compiled by Human Resources that I referenced in a previous Straight Talk, and agreed that in light of our changing market, it was appropriate to plan for an increase in wage and salary in the range of 8% - 10% for RNs and LPNs, and an increase in the range of 6% - 8% for all other employees. This would continue to make us highly competitive in the market.

In terms of an employee year end bonus - what has in the past been called 'Team Share' - the Board decided to set aside funds for a Board discretionary bonus in the fall, as has been its custom in recent years. I understand this is another subject that has sparked some misunderstanding and confusion, and I'm delighted that the Board's decision should help clarify this issue. Again, the Board's decisions regarding salary increases and discretionary bonuses are conditioned on the closing of the DSI sale, and would be effective, as always, in the fall.

The Board also decided yesterday to move on an idea it has contemplated for some time - appointing an NCH nurse to the Board of Trustees. The nominating committee of the Board will be asking for recommendations from the staff. Furthermore, because we think it is important, Senior Leadership is recommending that the Board of Trustees appoint an additional NCH general employee to the Board at the September meeting.

The Board also decided to add a Chief Medical Officer to enhance relations with the physicians, nurses, and other care givers, as well as to provide leadership for several priority projects, such as CPOE (computer physician order entry), quality initiatives, and EBM (evidence based medicine).

The Board also expressed a clear intent to expand employee input in future plans for the hospital system, in such key areas as strategic planning, renovation, redesign, and quality care.

All of these positive actions by the Board of Trustees reflect a clear intent and effort on the part of the hospital leadership to listen to your concerns and respond to your recommendations. Our

sel's Exhibit 16 is a compilation of a number of *Here are the Facts* and these documents are a communication vehicle that Respondent used to communicate with its employees the facts surrounding the union organizing attempt at Respondent; that these documents did not exist before the union organizing campaign; that some of those who supported the Union wore a lot of purple at work; that Respondent purchased and provided blue bracelets to employees to wear who did not support the Union; and that Respondent has a monthly newsletter called *The Wave*, which is distributed with paychecks.

In response to questions of the Union, Settle further testified that the policy described in General Counsel's Exhibit 6, as described above, addresses solicitation and distribution and it does not cover the posting of materials; that Respondent's bulletin board policy covers the posting of materials; that he believed that the bulletin board policy is the only policy that covers posting materials; that paragraph "C" of the policy described in General Counsel's Exhibit 6 has to be read in the context of the entire policy³⁷; that under paragraph "F" of the policy in General Counsel's Exhibit 6 off duty employees have the same access to the involved facilities as members of the public³⁸; that under the policy as it existed before it was amended on August 30, 2007, the only restrictions on employee distribution in public areas was that the employee could not be on working time or in a working area or off duty (GC Exh. 7) (approved "5/01"); and that the new policy (GC Exh. 6), clarifies the prior policy with respect to working time, working areas, and immediate patient care areas.

In response to questions of Respondent's counsel, Settle testified that he was not aware of the Hospital ever allowing unauthorized postings for commercial ventures in the hospital parking garage elevators; that while the employee handbook provides a synopsis of Respondent's policies and guidelines, the human resources policy manual provides greater in-depth information and he believed that Respondent's employees have access to the personnel policy manual in that he believed it is on "My NCH," which is an intranet; that in orientation employees are given a copy of the policies on a CD and they are shown how to navigate on "My NCH"; and that when the union organizing drive was going on in 2000 Respondent allowed employees to distribute literature in nonwork areas without disciplining them.

desire to do the right thing for all of you may not always be apparent. And I personally apologize for any unintended consequences.

The fact is we do care about doing right for you and for our great hospital. And we're confident that working together, without outside interference, we can build an even better NCH.

³⁷ Par. "C" reads as follows:

No distribution is allowed during working time. No distribution of any kind is allowed at any time in any working areas. Working areas are all areas of the Hospital, except cafeterias (unless the employee is working in the cafeteria), employee lounges and break areas, lobbies and parking areas.

³⁸ Par. "F" of the policy reads as follows:

Off duty employees are included in this policy and are not permitted access to NCH except to the extent that other members of the public have such access; for example, when visiting patients or receiving medical care.

General Counsel's Exhibit 17(e) is a union flyer (dated "11.13.07") which on one side of the flyer has a picture of just Villani, identifies her as an RN in SCIU, Downtown campus and quotes only her as saying the following:

Right now, nurses are left in the dark when it comes to NCH finances and how resources are used. By uniting in a union, we'll gain the right to request more information about financial data during negotiations. That kind of transparency, openness, and input will be good for everyone at NCH.

The other side of this flyer reads as follows:

Priorities at NCH:
The \$110 million Question
Imagine if Nurses Had a Voice About Prioritizing
How NCH Used Its Profits Since 2003

Nurses' hard work has helped make NCH a trusted and respected place for our community to get care.

Our work has also helped NCH do very well financially. Last spring, managers were telling us to "tighten our belts," while cutting staffing, overtime, and travelers' contracts, and implementing convenience of hospital—even after coming off a year where they made \$26 million in profits, according to their IRS filings.

In Fact, Since 2003, NCH:

Has made \$110 million in profit.

Has made a higher profit margin than the average hospital. In 2005, NCH's profit margin was double the national average for hospitals.

Stands to make up to \$89 million more from the sale of DSL Labs. Estimates for the value of the sale range from \$40 million to \$89 million. NCH hasn't disclosed the terms.

During this time, compensation for executives has been an NCH priority...

CEO compensation at NCH has been more than double the national average.

Former CEO Ed Morton's \$3.3 million total compensation for 2005 - 2006 was more than double the average hospital CEO's compensation.

. . . . [The flyer has a chart showing the increase in compensation of the CEO and the President from 2003 to 2006]

CHART: NCH CEO's compensation went up 248 percent from 2003 to 2006. NCH president's compensation went up 102 percent, up to \$831,882 in 2006.

Many of us believe that NCH could do more to staff units and recruit and retain RNs.

In fact, from 2005 to 2006, the share of NCH's budget devoted to staff pay and benefits actually went down.

Sources: Financial data from publicly available IRS disclosures, financial audits, and media coverage of DSI sale.

Imagine what we can achieve when we unite and gain more say on how the hospital allocates resources.

Florida
SEIU Healthcare
United for Quality Care

General Counsel's Exhibit 17(d) is a flyer which refers to what Villani said during a press conference after an unfair labor practice charge was filed with the Board in January 2008.³⁹

General Counsel's Exhibit 21 is a copy of a January 21, 2008 article which came off the Naples Daily News website. It is titled "*NCH nurses accuse hospital management of union tampering.*" The following appears on the last of three pages of the article:

Mary Villani, a registered nurse in the surgical intensive care unit at NCH Downtown Naples Hospital, said she has been followed by management and was suddenly relieved of some of her job responsibilities last month, which she attributes to her support of the union.

She has worked for NCH for 26 years.

"Nurses are being pulled from the hallways to be disciplined and some of those encounters can take up to an hour," Villani said.

The article was not received for the truth of the matters asserted therein.

Villani testified that usually five to six nurses work on each shift in her department, SICU; that the number can drop to four in the summer; that one RN is assigned to be charge nurse on her shift; that a charge nurse on SICU carries a full assignment, is part of the code team, helps her coworkers, frequently transports patients throughout the hospital, responds to emergencies in the hospital codes, and assists when necessary on SWAT calls⁴⁰; that the charge nurse is paid \$1.50 more an hour; that over the last couple of years the nighttime supervisor, who is called a clinical coordinator, determines who will be assigned to work as charge nurse on her 7 a.m. to 7 p.m. shift; that early in the period June 2007 to February 2008 only a few nurses on her shift wanted to do charge, and the charge nurse is notified by a little Post-it by the timeclock; that at that time there was no rotation⁴¹; that she was charge quite a bit in the past; that usu-

³⁹ The flyer quotes Villani as saying the following:

A majority of us support a patient care voice for nurses, and the community is with us. We urged management to act professionally and allow us our democratic right to decide on a union for ourselves, free from intimidation. They couldn't abide by that simple request.

The flyer goes on to indicate the following:

On Thursday, we filed charges with the National Labor Relations Board (NLRB) to stop NCH from breaking the law through fear and intimidation tactics in an effort to get in the way of us forming out union.

⁴⁰ Subsequently, Villani explained that SWAT calls are when a patient begins to deteriorate and the clinical coordinator who responds calls for more assistance and the charge nurse responds.

⁴¹ While it was still that way when Villani testified at the trial herein, she testified that sometime in January 2008, after the press conference,

ally the senior staff is selected because they are willing to take on the extra responsibility of being charge; that on the day shift Carole Miller and Jacqueline Branch will do charge; that Rasmussen does not care to do charge but she will do it if no one else will; that in the summer of 2007 there were not too many nurses that liked to do charge; that you do not know that you are assigned charge until you arrive at work in the morning and see the Post-it by the timeclock where it is indicated who is responsible for what that day; that after the press conference in January 2008 when she mentioned the reduction of her charge nurse assignments, the procedure with the Post-it by the timeclock was still followed; that her statements were published in the Naples Daily News (GC Exh. 21)⁴²; that ironically after the press conference, in mid January 2008 she was in charge the next 3 days she worked but after that it was very sporadic, with her being charge maybe once a week or sometimes she would go a whole week without being charge; that in the period before late November 2007 she was assigned charge nurse duties 65 to 75 percent of the time she worked or two out of three shifts that she worked depending on vacations and such; that during the time period from late November 2007 to mid-January 2008 she was not assigned to work as charge nurse as frequently; that she was assigned charge after November 2007 on a couple of holidays that she worked, namely Christmas and New Years; that when she noticed that her paycheck was a lot lower she asked Kim Kooyers, who is a fill-in daytime clinical coordinator, about it in the presence of Rasmussen; that when she asked Kooyers if she was not being assigned charge because of her union activity, Kooyers said there was nothing in the communication book about that; that she believed that this book is used between clinical coordinators; that a lot of times she comes to work, sees that someone else is assigned charge, that person does not want to take the responsibility of charge nurse and asks her if she would mind taking charge, and she takes the charge nurse functions; that this is a common practice and the nurses do not need approval but rather do it among themselves in SICU; that as a charge nurse is moving through the hospital there is an opportunity to converse with other hospital personnel; and that when she is not the charge nurse she does not have interaction with nurses in other departments as often as she does when she is the charge nurse.

On cross-examination, Villani testified that, in addition to herself, the nurses on the day shift in SICU who are eligible for charge nurse responsibilities includes Rasmussen, Miller, Branch, Vladi Miravotsolva, Jacqueline Crandall, Suzi Guy ["rarely" (Tr. 189)], Silvia Denny, and Barbara Garner ["rarely" (Ibid.)]; that the nurses who do not want to have charge nurse responsibilities are Rasmussen, Crandall, and Garner; that the clinical coordinator on the night shift determines who will be assigned charge nurse duty for the next day in SICU; that the charge nurse assignment is always posted on a Post-it by the timeclock but if the person assigned does not

want the assignment, then that nurse will ask someone else to take the assignment; that this happens pretty frequently (It happened to her once in her last six shifts before she testified at the trial herein.); that there is a certain code which is punched into the timeclock for charge nurse (ULT for unit team leader) which means that if after punching in she accepts the charge assignment from someone else, she has to then, within a certain amount of time, punch in the correct code or fill out a "KRONOS" (the timeclock system) exception sheet; that her union activity started in July 2007 and she signed the union poster received as General Counsel's Exhibit 17(a) in August or September 2007; that all of the nurses on the day shift in SICU support SEIU; that in the second or third week in November 2007 she began to notice that she was not getting assigned to the charge nurse duty; that she noticed that the amount on her paycheck was reduced and her name was not on the Post-its; that the charge nurse assignments to her increased immediately after she gave a statement to Mark Heaton on January 20, 2008; that the differential per 12-hour shift for being a charge is a total of \$18; that she should have been charge nurse at least two out of three shifts; that if she was on paid time off this would affect her assignment to charge nurse duty; that in late November 2007 she started discussing the situation regarding her not being assigned as frequently as in the past as charge nurse with some of her coworkers; and that on one occasion she complained to Rasmussen about not being assigned as charge nurse, Rasmussen told her that she could have the assignment but she declined the offer.

On redirect, Villani testified that while all of the nurses on the day shift in SICU who were eligible for charge nurse supported the Union, primarily she and, towards the end of the campaign, Rasmussen helped the Union out a lot; and that she was the main resource person for the Union in her department. On recross, Villani testified that Rasmussen is on the union literature; and that at least 80 percent of the nurses in her department wear something which indicates their support for SEIU.

Rasmussen testified that she has been an RN in Respondent's SICU for 18 years; that she is assigned charge nurse duties but she prefers not to be the charge nurse; that several of the RNs really like to be charge nurse, including Villani, but there are many who do not like to be the charge nurse; that the coordinators know which RNs like to be charge nurse and which RNs do not like to be charge nurse, "it is common knowledge" (Tr. 264); that prior to November 2007 she was assigned to work as a charge nurse one or two times a month; that from late November 2007 to mid-January 2008 she was assigned to work as a charge nurse one or two times a week; that she was getting charge nurse assignments which had previously gone to Villani and Villani did not like this because Villani likes to do charge; and that of the RNs who were involved in organizing for the Union, Villani was the most outspoken.

On cross-examination, Rasmussen testified that she works days in SICU and the RNs assigned charge nurse duties on that shift include herself, Villani, Miller, Denny, and Guy; that her shift is from 6:45 a.m. to 7:15 p.m.; that when she comes in in the morning there is a yellow Post-it near the timeclock with the charge nurse's name on it; that she believes that the night-

her clinical director told her that Respondent had come out with a new policy to rotate but that it was very inconsistent.

⁴² As noted above, the January 10, 2008 article indicates that Villani "was suddenly relieved of some of her job responsibilities last month, which she attributes to her support of the union."

shift clinical coordinator posts the name of the charge for the following day shift because she knows that the day-shift clinical coordinator makes the charge nurse assignment for the following night shift; that about once a week the named, day-shift charge nurse asks someone else to be charge nurse in her place; and that all of the nurses in SICU support SEIU.

On cross-examination, Holliday, who works at Respondent's North Collier facility, testified that she telephoned the SEIU organizer who flew in from Washington State; that she sort of got the union organizing ball rolling; that she was a very public supporter of the Union; that she has worked as a charge nurse (a matter not covered on direct); that she has had her hours cut as a charge nurse during this union organizing drive; and that she did not fill out a union incident report or complain to any member of management or file a grievance pursuant to hospital policy about the reduction in her charge nurse hours.

Ringle testified that as the day-shift clinical coordinator in SICU she designates who will be the charge nurse on the following evening shift; that Respondent's Exhibit 7 are schedules of SCIU; that Brett McCloskey is a night-shift clinical coordinator; that the night-shift clinical coordinator chooses the day-shift charge nurse for SICU; that the nurses on the day shift who are capable of being a charge nurse include Branch, Denny, Linda Falvo, Guy, Miller, Lori Plosky, Rasmussen, Villani, and Garner; that those who do not like to be assigned charge nurse duty include Garner, Sherry Reiser, Crandall, and Lottie Bjrektarevic; that the day-shift nurses who like to be assigned charge include Branch, Guy, Miller, Plosky, Rasmussen, and Villani; that the charge nurse makes \$1.50 more an hour; that the preceptor or training duties pays an additional 75 cents an hour; that Villani has worked as a preceptor; that it occurs that the charge nurse named on the Post-it near the timeclock does not take the assignment; that the clinical coordinator has nothing to do with the patient assignment which occurs in SCIU; that nurses decide patient assignment in SCIU and this could be considered in determining ultimately who is the charge nurse; and that when census is down in the summer and ICU and SCIU are combined, this could affect how many times someone could be designated as charge nurse because there are more names to draw from.

On cross-examination, Ringle testified that the SICU night clinical coordinator, which could be McCloskey, designates the charge nurse for Villani's day shift; that while she takes certain things into consideration in making the charge nurse assignment for the night shift, she does not make the charge nurse assignment for the day shift, and she cannot say what considerations the night-shift coordinator takes into account in deciding who will be charge nurse on the day shift; that a Post-it is placed by the timeclock indicating which nurses are assigned to do what that day; and that from Respondent's Exhibit 7 there is no way to tell who was assigned to work as charge nurse.

Kling testified that nurses Crandall, Falvo, Garner, and Reiser do not particularly care to be charge nurse; that Rasmussen will be a charge nurse if asked but she does not like it; that Villani, Miller, and Plosky, before she became the clinical Coordinator, really enjoy and want to be the charge nurse; that he has assigned Villani to work as a preceptor training interns; that Villani is excellent in terms of capability and skills; that conti-

nity is a consideration in deciding who will be the charge nurse; that during the off season, between about June and October, the staffs of ICU and SICU are combined and this affects assignments to be charge nurse because there is a bigger pool of charge capable nurses; that from July 2007 through February 2008 Villani did not come to him and complain about not being assigned as charge nurse; that since he has been director of critical care no one in Respondent's management has instructed him not to designate Villani as charge nurse; that he never decided on his own accord that he was not going to designate Villani as a charge nurse; and that to his knowledge only one nurse in SICU is not in favor of the Union.

When called by Respondent, Thigpen testified that Respondent's Exhibit 9 is the schedules printed from Respondent's "AcuStaf" scheduling system that shows when and where an SICU employee worked; that the period covered by this exhibit is from "6-24-2007" to "7-19-2008"⁴³; that this document comes from the KRONOS clock-ins; that, as here pertinent, this exhibit shows when and where Villani worked during the involved period, and it shows when Villani worked as a charge nurse by the charge code "UTL" for unit team leader⁴⁴; that Respondent was formally served with the Union's petition for an election in August 2007 but the union activity began in June and July 2007; that Villani was an outspoken union advocate; that Respondent's Exhibit 14 shows the UTL or charge distribution for the period of January 1, 2007, through February 2, 2008, by pay period⁴⁵; and that Respondent's Exhibit 15 is a chart of UTL utilization for the day staff SICU nurses showing charge from November 2007 through January 2008.

Respondent stipulated that it did not provide Respondent's Exhibits 9 and 7 or any documents during the investigation stage of the charges prior to the complaint being issued. On cross-examination, Thigpen testified that the pay stub the employee receives shows the number of hours that the employee worked as charge and charge would be indicated on the pay stub.

Edie Alteen, who at the time of the trial herein had been the night clinical coordinator of critical care for about 1-1/2 years, testified that critical care encompasses SICU; that she is involved in selecting the day-shift charge nurse in that she and the night charge nurse collaborate in making the decision who will be the SICU charge on the day shift; that she then places a yellow sticky Post-it by the timeclock indicating, as here pertinent, who is assigned to be the charge nurse on the following SICU day shift; that the factors taken into consideration include

⁴³ The exhibit shows that during the 3-month period from the beginning of September 2007 through the end of November 2007, Villani was charge on a total of 20 days; that for the 3-month period from the beginning of December 2007 to the end of February 2008 she was charge on a total of 12 days. This is a 40-percent reduction.

⁴⁴ R. Exh. 10 provides the definitions of the various codes used in R. Exh. 9.

⁴⁵ A comparison of the five pay periods ending during the time in question (late November 2007 and mid-January or, pursuant to the document, pay periods ending "11/24/07" through "1/19/08") with the immediately preceding the five pay periods shows over a 20-percent reduction in the number of hours Villani has as a charge nurse during the time in question.

who worked the prior day shift as charge, and who likes to be charge; that sometimes the night charge nurse makes a recommendation as to who should be charge on the day shift; that she never refused to assign Villani charge because of her union sympathies; and that she has never instructed her night charge nurses don't recommend Villani because of her union sympathies.

On cross-examination, Alteen testified that she does not on average assign Villani to be charge because Villani is generally on the other side of the week that she works and she thought that Night-Shift Clinical Coordinator McCloskey would probably see Villani more than she does. On redirect, Alteen testified that she works four nights 1 week and three nights the following week.

McCloskey testified that he has been the clinical coordinator in critical care since July 4, 2007; that critical care encompasses SICU; that he works three nights 1 week and four nights the following week; that he schedules day-shift nurses in SICU; that he takes the names off a print-out list of who is scheduled to work in SICU and he writes the names on a yellow Post-it Note; that he takes the note to SICU asks the night-shift charge nurse in SICU who should be charge on the day shift; that some of the night charge nurses who make this decision are Nass Kinsland, Michelle Behrendt, and Janie Largent; that these are some of the names that he worked with in the last couple of weeks before the trial herein that he could remember but it could be anyone that was working that night⁴⁶; that he writes "CHG" next to the name the night SICU charge chooses and he posts the note next to the timeclock so the SICU nurses can see it in the morning when they clock in; that he does not choose the day-shift charge in SICU because he does not come in until 8 p.m., he has no idea who was the day charge in SICU the day before, and that information would only be known by the people who are working 6:45 p.m. to 6:45 a.m.; that he does not overrule the night charge nurses' choice; and that he has never instructed the night charge nurse not to select Villani for day charge nurse because of her union sympathies.

On cross-examination, McCloskey testified that he had no idea how many times he assigned Villani to be charge nurse before November 2007; that as to whether there is an attempt to balance the charge nurse work assignment among those who want the assignment, he "could not speak to what the charge nurse uses to make her decision or his decision" (Tr. 985); that the night charge nurse designates who will be the charge on the following day shift and he puts "CHG" next to that name and posts the list next to the timeclock; that the only place where it is recorded who was originally chosen for charge nurse (before it is determined by the nurse chosen whether she wants to be the charge nurse that day) is on the Post-it and that it not retained; that, with respect to whether he takes into consideration the day-shift nurses' preference in assigning charge, he does not make the designation "[s]o I don't know what they use." (Id. at 986.)

On rebuttal, Villani testified that in mid-October 2007 there was a press conference and heightened stress because of the

⁴⁶ None of the night charge nurses who allegedly made the decisions testified at the trial herein.

appearance of The Burke Group; that the union organizing committee circulated a lot of fliers, mailers, and posted fliers with nurses photos on them; that at the end of November 2007 she started noticing that she was being assigned as charge nurse less often; that she is usually assigned to be charge nurse quite frequently; and that according to Respondent's Exhibit 14 (1) for the pay period ending November 10, 2007, she worked as a charge nurse for two shifts which is not consistent with the fact that she is assigned charge quite frequently; (2) she worked as charge several times in the next pay period but she did not think that she was actually assigned to work charge for those days but rather the charge assignments may have been passed to her by another nurse who declined doing charge; (3) for the pay period ending "12/22/07" she worked just one shift; (4) for the pay period ending "01/05/08" she worked two shifts which included Christmas Day when she was the charge assigned by the night-shift clinical coordinator; and (5) for the pay period ending "01/19/08" she worked one shift as charge nurse.

On cross-examination, Villani conceded that she testified earlier in the trial herein that she believed that from Thanksgiving 2007 until early January 2008 she pulled three shifts as a charge nurse, and that the Respondent's records show that she worked a lot more than three shifts.⁴⁷

On redirect, Villani testified that there is a difference between the number of times that she is assigned to work as charge nurse by the night-shift clinical coordinator and the number of times she actually worked as charge nurse in that in her department there is a number of nurses who prefer not to do charge so they will try to turn it over to a fellow coworker.

Brown testified that Respondent's Exhibit 6 is a January 9, 2008 picture of an automated robot delivery cart (tug) which delivers medical supplies from the central supply area to nursing units throughout the hospital; that it appears from the photograph that there was a purple Christmas decoration placed on the top frame of the tug, a purple flyer on the side, and a couple of purple Christmas ornaments on the rim; that purple is associated with SEIU; that at the time he testified at the trial herein employees had permission to decorate tugs but they did not have such permission on January 9, 2008; and that the tug goes into patient care areas.

On cross-examination, Brown testified that in January 2008 there was no written rule prohibiting employees from putting decorations on the tug.

⁴⁷ Respondent's records show that between November 24, 2007, and early January 2008 Villani worked as charge eight times. Since Respondent does not retain the yellow Post-its making the charge assignment, this method is not available to determine how many times Villani was actually assigned to be charge vis-à-vis the nurse assigned to be charge giving the assignment to Villani. Villani testified about the procedure if, after she punches in, she accepts the offer from the nurse assigned to be charge. Apparently, there is a certain amount of time during which she can punch in the correct code. So if she accepts the offer before she punches in or within the period during which she can change the code, it does not appear that one would, from Respondent's available records, be able to tell she was the charge because she accepted the offer. If, on the other hand, Villani filled out a KRONOS discrepancy report, it should be available as part of R. Exh. 7.

As noted above, according to the testimony of Thigpen, the Plexiglas bulletin boards were installed in the downtown garage elevators in January 2008 and at this point in time a notice was put up in these elevators that the bulletin boards were not to be used for personal postings. Thigpen testified that such a notice had never been put up before this; that it was indicated in the employee handbook that it was not allowed but before this the prohibition was not actually posted in the elevator; and that the notice was put up in the elevators because Respondent was getting continuous union information posted in the elevators and this was a public area. When asked if the handbook specifically referred to the three garage elevators Thigpen responded, “[a]ny of the public elevators or any of the public areas which would—the elevator would be considered a public area, public bulletin board” (Tr. 943); that the personal postings went on for years in the downtown garage elevators and she personally removed some of the personal postings; that the personal postings for items for sale gave a name and telephone number; and that she did not use the name or telephone number on the posting to contact the person who made the personal posting to advise them that this conduct was not proper because

this garage is used for both employees and the public. So we had public postings. We had Wellness Members posting. We did not carry it that far but it was not always employees and it wasn’t every single day. *So it wasn’t a major issue.* We just took them down as we saw them and discarded them. [Tr. 943, 944, with emphasis added.]

Settle testified that with regard to the union organizing campaign, Respondent hired a consultant, namely the Burke Group; that he believed that representatives of the Burke Group spoke to Respondent’s employees in the breakrooms and other off-duty areas; and that he did recall whether the Burke Group representatives were authorized to talk with Respondent’s nurses at the nurses’ station.

Villani testified that she was approached by a representative of the Burke Group in her unit while she was working; that at the time she was documenting at the nurses’ station in front of a computer and Plosky, who is a clinical coordinator, approached her with another female; that the other individual introduced herself and said that she was there to answer questions about the Union; that she asked the individual if she was employed by the Burke Group and the woman said yes; that she quit charting on her computer and talked with the woman for a little while; and that the woman then started a discussion with some of the other nurses.

Thigpen testified that Charging Party’s Exhibit 9 is an e-mail from Susan Connelly to her (dated January 25, 2008); that as indicated by the salutation, the e-mail should have gone to Garone, who is the department director for the nurses’ directory and staffing; that Connelly is an employee of the Burke Group; that Connelly was invited by Respondent to come into the hospital and speak to staff and answer any questions that they might have; that Connelly’s visits to the hospital varied; that Connelly was invited to staff department meetings and she worked with department directors on scheduling her visits to Respondent’s facilities; that there were two other Burke Group employees who participated in Respondent’s staff meetings

(Another was also there for a short period of time.); that the Burke Group covered all of Respondent’s departments (estimated to be between 80 and 100) during their period of participation in the campaign; that employees of the Burke Group were in the hospital night and day; that it was her understanding that employees of the Burke Group spoke to nurses either at a staff meeting or in a breakroom while the nurse was on break; that she never saw anything in writing which set forth any ground rules with respect to locations at which employees of the Burke Group could talk to nurses; that the Burke Group people started talking to Respondent’s employees at the end of October or the first of November 2007 through mid-April 2008 but they were not at Respondent’s facilities all of the time, it was sporadic; that Nora Boczarm is also an employee of the Burke Group who was “out and about on the floors a lot . . .” (CP Exh. 10) at Respondent’s facilities playing the same role that Connelly did, going to staff meetings and meeting with nurses in breakrooms; that she did not know if there were any instructions at all that the Burke Group consultants should not be talking to nurses while they were working at the nurses’ stations or in patient areas; and that Penne and Susan Harris were also employees of Burke similar to Connelly and they performed the same functions as Connelly.

When called by Respondent, Thigpen testified during cross-examination that when representatives of the Burke group were in the hospital she did not go with them to the different departments but rather they went alone; that it was her understanding that the representatives of the Burke Group were in the breakrooms of the nursing department; that she was not aware whether representatives of the Burke Group went to patient care areas; that if representatives of the Burke Group had gone into patient care areas, they were not wearing nurse’s attire; that representatives of the Burke Group were wearing street clothes when they were in Respondent’s facilities; that Charging Party’s Exhibit 15 is a copy of the schedule that she received from the Burke Group⁴⁸; and that the four consultants from the Burke Group who came to Respondent’s facilities were Connelly, Nora, Penny, and Harris.

Andersen, who—as noted above—is a RN in the emergency department on the north campus, testified that in February 2008 three nurses came in from a hospital in Missouri; that she was very busy at the time taking care of patients; that the clinical coordinator had her charge nurse page her to come to the nurses’ station; that she asked why she was paged and she was told that there were three nurses who she said she wanted to talk to; that she asked the three who were they and who were they from; that two other nurses from the emergency room were present, Julie Stoner and Judy Ardizzone; that the three nurses from Missouri told her that they were there to help her with communications, they knew the Respondent’s nurses were having an organizing effort and they had had some bad experiences with the Union and they were just at Respondent’s facilities to enhance communications; that the three nurses spoke for

⁴⁸ Inter alia, the document indicates that Nora “rounded” in Telemetry—3N, Telemetry—4NE, Cath Lab and Angioplasty, Golf View Sts—6N, and Surgical Serv—OR; and that Penne “rounded” in Med Surg 4 and 2.

about 5 minutes and said that they would come back when they were not so busy in the emergency room; that when she asked them why they were coming to her hospital and who they were affiliated with they told her that they were just nurses who Respondent's nurses interest at heart and they wanted Respondent's nurses to know and understand about the Union; that when they said that they were there to help she asked them if they could get her an IV pump; that the three nurses then said you are really busy we will be back tomorrow; and that she has seen drug representatives come into her department, bring food and talk to the doctors and sometimes the nurses.

As noted above, Gutierrez testified that a visiting nurse did attend a staff meeting; that she did not see the visiting nurse in any area where she was working; and that she never saw the visiting nurse talking to RNs on the floor of the telemetry unit.

Kling testified that he could not recall a situation where individuals who were nurses but not nurses employed by Respondent, came into his department to talk to NCH nurses; that the Burke Group did come to his department and talked to his RNs; that the Burke Group nurses were at staff meetings and they would do "rounds" or, in other words, they walked the entire hospital; that the Burke Group nurses went into the employee lounges to talk with the nurses; and that the Burke Group nurses did not go on rounds with NCH nurses but rather the Burke Group nurses "rounded on their own" (Tr. 839), and this included patient care areas and everything else.

On cross-examination, Andersen testified that she was prohibited from distributing literature in the cafeteria (north campus) on what might have been Valentine's Day 2008; that the security guards told her that she was not allowed to give out union literature; that she believed that she was passing out candy as well at the time; that even when she tried to distribute just union literature in the cafeteria she was told by a security guard that she was not allowed to do that; that she dropped union literature on multiple tables in the cafeteria and then went back to her department; and that she never saw a guard actually confiscate the literature.

Thigpen testified that General Counsel's Exhibit 26 is a list of NCH's officers and trustees which was printed "3/13/08."

Thigpen sponsored Respondent's Exhibit 13 which is a number of photographs taken in July 2008 of bulletin boards in Respondent's facilities to show that Respondent does allow union postings. Thigpen testified that 95 percent of the lounges have union postings; that union postings are allowed in some of the lounges because previously personal postings of bake sales, puppy for sale and other things were allowed; that to her knowledge, two of the downtown department lounges do not allow union postings, namely 3 North and OH; and that the photographs include the breakrooms in PCU (third floor) and SICU both of which are at the downtown facility, and the north Naples emergency room.

Panebianco testified that Respondent's Exhibit 3 is a letter from the organizing committee which was handed out 1 week before the trial here commenced. Her name, among others, is included in the letterhead (left margin of the first page) of the letter.

Analysis

Before getting to the merits, two matters must be resolved. The trial in this proceeding was continued on August 8, 2008, for counsel for the General Counsel to seek subpoena enforcement against Respondent to require it to turn over to me specified documents for an in camera inspection to determine if they are privileged, as claimed by Respondent.⁴⁹

On September 3, 2008, counsel for the General Counsel filed a Motion to Close Record, indicating that "[a]fter reviewing the state of the record and considering the issue of the delay likely to result from seeking enforcement in [F]ederal district court, General Counsel has decided not to seek enforcement of the subpoena." Counsel for the General Counsel requested that the record be closed and a briefing schedule be established. The motion of counsel for the General Counsel was granted and briefs were schedule to be filed on October 10, 2008. That date was extended to October 14, 2008.

On brief, counsel for the General Counsel contends that if a party fails to comply with a subpoena, the trier of facts may impose an adverse inference as a sanction for the noncompliance, *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004); that to the extent that Respondent's evidence conflicts the General Counsel's on the solicitation and distribution policy and its maintenance and application, including, but not limited to the verbal coaching and written discipline of Sandi McGoun, counsel for the General Counsel requests that an adverse inference be drawn from this failure; that drawing an adverse inference is especially warranted in this case, where the Respondent did not cooperate during the investigation and stipulated at trial that it did not provide any documents during the investigation stage of the charge prior to the complaint being issued; that on the last day of the trial Respondent indicated that it did not comply completely with the subpoena of counsel for the General Counsel in that Thigpen testified (Tr. 916, 917), that Respondent did not provide all of the subpoenaed documents and requests received for the purpose of gaining permission and/or approval pursuant to Respondent's distribution and no solicitation policy and all responses; and that an adverse inference should be drawn with respect to the failure to provide solicitation approval forms that are a part of its solicitation and distribution policy.

Respondent on brief argues that the approach being taken here raises real concerns the counsel for the General Counsel is denying Respondent procedural due process, the essential ingredients of which are notice and an opportunity to be heard; that Respondent did not object to an in camera inspection of the documents but requested that another administrative law judge—not the trier of fact herein—conduct the inspection; that

⁴⁹ At the outset of the trial herein, Respondent's attorney, James Brown, who had turned over a privilege log to opposing counsel, proposed, for the first time, submitting the documents to another administrative law judge for an in camera inspection. Brown refused to comply with my ruling to turn the documents over to me for the in camera inspection.

such an approach was proposed by the General Counsel in *CNN America*, 352 NLRB 448 (2008), after the respondent in that case argued that the trier of fact should not review the allegedly privileged documents; that the imposition of any sanctions in this case would be an abuse of discretion by the judge; that Respondent's refusal to produce certain documents for in camera inspection by the trier of fact was justified "by . . . [Respondent's] reasonable concern that the Judge's impartiality could potentially be affected if he conducted the in camera review" (R. Br. 59); that Respondent's refusal to produce the documents for an in camera inspection is "neither willful, conscious, nor intentional" (Id. at 60); that there is a legitimate question whether the Board possesses the authority to rule on whether Respondent's documents are protected by attorney-client privilege; that in *NLRB v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999), the court concluded that implicit in its subpoena enforcement power is the court's exclusive authority to determine "whether any privileges protect the documents from production" (Id. at 605–606); and that Respondent should be afforded the opportunity to make its case on the subpoena in an enforcement proceeding, and sanctions are not appropriate in the circumstances of this case.

In *CNN of America*, supra, CNN refused to comply with an order of the administrative law judge to produce to him for in camera inspection specified documents listed on a privilege and redaction log. CNN argued that the judge was the trier of the fact and, therefore, should not review the allegedly privileged documents; and that pursuant to *NLRB v. Detroit Newspapers*, supra, a Federal district court and not an administrative law judge, must determine privilege issues. The Board in *CNN of America*, supra, indicated at pages 448 and 449 as follows:

The party asserting a privilege bears the burden of proving that it is applicable.⁴

. . . . Thus the issue before us here is whether the judge appropriately exercised his discretion in ordering an in camera inspection of the documents on CNN's privilege and redaction logs. We find that he has. In camera inspections are well-established procedures in the Federal courts, *U.S. v. Smith*, 123 F.3d 140, 151–152 (3d Cir. 1997), and have been approved by the Board, *Brink's Inc.*, 281 NLRB 468 (1986).⁶ Without an in camera inspection of allegedly privileged documents, the party claiming privilege would be able to shield any document from disclosure by merely including it in a privilege log. In addition, some courts appear to require the exhaustion of administrative remedies before granting enforcement of a subpoena.⁷ Thus, we find that the in camera examination of documents to evaluate claim of privilege is a proper exercise of the administrative law judge's authority.

⁴ See, e.g., *Dole v. Milonas*, 889 F.2d 885, 889 (9th Cir. 1989).

⁶ See also *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829, 829 (2003) (to the extent that subpoenaed documents were claimed as privileged attorney work product, the Board authorized the judge "to review those documents in camera to determine whether they are also exempt from disclosure"). Therefore, contrary to the Respondent's argument, we do not view the Sixth Cir-

cuit's holding in *Detroit Newspapers*, supra, as supporting the general proposition that an administrative law judge, as the trier of fact, cannot resolve privilege issues.

⁷[Footnote left out.]

Obviously at this point it is unknown to me what is in the documents that Respondent refuses to provide for my in camera inspection. But exception must be taken to Respondent's argument that its refusal to produce certain documents for in camera inspection by the trier of fact was justified "by . . . [Respondent's] reasonable concern that the Judge's impartiality could potentially be affected if he conducted the in camera review" (R. Br. 59, with emphasis added). Quite the contrary, it is not a reasonable concern. Speculation about a judge's possible mind set should not be an exercise engaged in by an advocate, notwithstanding what may be in the involved documents. With respect to Respondent's argument that its refusal to produce the documents for an in camera inspection is "neither willful, conscious, nor intentional" (Id. at 60), it is noted that Respondent did not make its argument until the outset of the trial herein. As a practical matter, Respondent's approach would involve additional, unnecessary expense to the taxpayer, and an unnecessary delay. The law is clear. The Board has already decided that the trier of fact can conduct the in camera examination, and the Board has already addressed Respondent's argument regarding the Sixth Circuit's holding in *Detroit Newspapers*, supra. Nonetheless, Respondent wants to exercise control over the situation. The course of action it has chosen is willful, conscious, and intentional. As noted above, counsel for the General Counsel requests that to the extent that Respondent's evidence conflicts with the General Counsel's on the solicitation and distribution policy and its maintenance and application, including, but not limited to the verbal coaching and written discipline of Sandi McGoun, that an adverse inference be drawn from this failure. This request of counsel for the General Counsel is hereby granted. It is unnecessary to rely in any way on this adverse inference in reaching the conclusions reached in this decision. There is sufficient evidence of record separate and apart from this adverse inference to warrant the findings and conclusions made below. This adverse inference is not relied on in any way by me in deciding any of the issues in this case.

With respect to what, as here pertinent, occurred on the last day of the trial, namely Thigpen admitting on cross-examination (Tr. 916, 917) that Respondent did not, pursuant to the subpoena of counsel for the General Counsel, provide the solicitation approval forms of Costco and Sam's Club, Thigpen gave the following testimony:

Q. [BY MS. THORNTON] I believe you testified that Costco and Sam's Club requested permission and you got an approval form—

A. Yes, ma'am.

Q. —from them?

A. Yes, ma'am.

Q. And pursuant to the subpoena, you provided the solicitation approval forms. Is that correct?

A. Yes, ma'am.

Q. Okay. I've been looking through here and I don't see one for Sam's Club and—

A. It's not in there.

Q. It's not here?

A. No. It's a different form for our vendors. It's a vendor's approval form or a partner approval form for our benefits fair. This is for the solicitation that's done outside of our cafeterias on an ongoing basis.

JUDGE WEST: Did you provide the approval forms for Costco and Sam's to General Counsel?

THE WITNESS [Thigpen]: No.

JUDGE WEST: You did not.

MR. BROWN: I will note for the—subpoena, it says all documents in request received, number 8, for the purpose of gaining permission and/or approval pursuant to Respondent's distribution and no solicitation policy and all responses. Do you have those ones?

THE WITNESS: They would be back at the hospital.

MR. BROWN: Can we get them? I mean without—we can bring them in and you could—

THE WITNESS: —

MR. BROWN: Okay. Can we do that?

Thigpen did not respond to Brown's last inquiry. Later that day, there was a delay in the trial of at least 20 minutes waiting for Pitts to come from the downtown hospital to the trial site. Arrangements could have been made for Pitts to bring the involved documents with him. However, the sought documents were not produced later that day. Even though the evidence is equivocal with respect to whether Respondent was willing to provide the forms for Costco and Sam's Club, on the last day of the trial it was expected that there would be a continued hearing in this proceeding. Consequently, I do not believe that a finding that Respondent refused to provide the involved documentation is appropriate here. One should add to the mix that there might have been a misunderstanding—whether reasonable or not—with respect to providing the forms for these two entities. Notwithstanding the fact that one of Respondent's attorneys asked about scheduling the filing of briefs at the end of the last day of the trial herein, at that point in time, as noted, it was believed that there would be a continued hearing. When all is considered, I do not believe that an adverse inference is warranted regarding the Costco and Sam's Club forms. It is noted that Settle testified that Sam's Club and anti-SEIU NUNSO did not submit a request for permission or approval pursuant to Respondent's distribution and solicitation policies.

Paragraphs 5 and 6 of the complaint alleges that on or about August 6, 2007, Respondent, by Mark Pitts and Brian Settle, at the Respondent's facility, created the impression that employees' union and other protected, concerted activities were under surveillance. Paragraph 6 of the complaint also alleges that on the same date Respondent, by Settle at Respondent's facility, prohibited employees from posting or having union literature in the employee break/kitchen area.

Counsel for the General Counsel on brief contends that in order to establish an impression of surveillance violation, the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance, *Grouse Mountain Lodge*, 333 NLRB 1322 (2001); that Panebianco was consistent in her testimony that Pitts said he was watching and monitoring her activities, in relaying this conver-

sation to Settle, in her August 7 e-mail to Settle, and in the writeup she submitted to the Union; that while Pitts denied telling Panebianco that he was monitoring or surveilling her activities, his e-mails to Settle indicate that was exactly what he was doing; that the watching that Pitts was doing could only be interpreted to be about union activity; that there were many inconsistencies in the testimony of Respondent's witnesses, i.e., the length of the hair of the person Todd allegedly saw, and whether Todd brought Pitts the ripped documents vis-a-vis Pitts himself having to go into the breakroom and retrieve the ripped NCH documents from the trash can; that Settle also gave Panebianco the impression that her union activities were under surveillance when he told Panebianco that managers were told to keep their eyes open; that Settle's testimony that Pitts was simply fulfilling his management role would support a violation as well, especially in that Settle did not denounce Pitt's watching Panebianco but rather he referenced union activity causing dissension; that Settle violated the Act when he told Panebianco that she could not post union literature in the OH breakroom; that Panebianco testified that she had noticed information about uniform sales, bake sales, baby showers, Christmas parties, and general information posted on the refrigerator; that until August 6, 2007, when she spoke with Settle, no one told Panebianco that she could not post on the refrigerator; that Settle was relying on the e-mail he sent to department heads, supervisors, and mid-managers at the beginning of the union campaign (GC Exh. 10); that there is no documentation that this policy existed prior to July 27, 2007, or that it was disseminated to employees; that it appears that this policy was established in response to the union organizing; that while Panebianco could not recall exactly what she posted in the involved breakroom in August 2007, in his August 6, 2007 e-mail Pitts refers to "three sheets taped regarding SEIU and what to expect when forming a union" (GC Exh. 12); that a two sided union leaflet titled "What to Expect When You're Forming an RN Union" was received in evidence at the trial herein as General Counsel's Exhibit 17(c); that this union leaflet was not a solicitation but instead it clearly was in response to the consulting company, the Burke Group, who Respondent allowed to "round" the hospital at will to discourage employees' support for organizing; and that the leaflet was clarifying information for the nurses, similar to the e-mail in *Register Guard*, 351 NLRB 1110 (2007).

The Charging Party on brief argues that an employer violates the Act if it creates the impression among employees that it is engaged in surveillance, *P.E. Guerin, Inc.*, 309 NLRB 666 (1992); that the Board's test for determining whether an employer has created an impression of surveillance is "whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance," *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001); that Pitts told Panebianco that he was watching her and monitoring her activities; that Panebianco immediately complained to Settle, sent him an e-mail reiterating her complaint, and filled out a contemporaneous note which she gave to the Union (CP Exh. 2); that Pitts' e-mail to Settle indicates the reasonableness of Panebianco's conclusion that she was under surveillance and admits that he was indeed watching Panebianco; that Settle did not deny to Panebianco that Pitts was watching her

and he told her that managers had been asked to keep their eyes open; that after her conversation with Settle, Panebianco had even more reason to believe that she was under surveillance for her union activity; that it is a well-established principle that an employer may not prohibit employees from nonwork-related use of company bulletin boards, if it “acts in a manner that discriminates against Section 7 activity,” *Register Guard*, supra; that as pointed out by the Board in *Eaton Technologies*, 322 NLRB 848, 853 (1997), employees have no general statutory right to use company bulletin boards, but where employee posting is permitted, an employer may not single out and discriminate against union communications; that before Panebianco posted union material in her break room, she had seen a copy of Settle’s July 27, 2007 e-mail which stated “as for breakrooms, if you typically allow your employees to post personal materials in the breakroom, you do not need to remove the union materials unless they are unnecessarily cluttering the room” (GC Exh. 10); that Panebianco quoted this description of NCH’s policy in the notes she gave the Union on or about August 5, 2007, and testified that she had seen a variety of personal materials posted on the breakroom refrigerator previously; that *Register-Guard* is irrelevant here because there is no consistent policy or practice of differentiating between categories of notices; that Settle’s testimony that he was not aware of non-NCH notices posted on the refrigerator in this particular break room carries little weight because there is no evidence he used this breakroom or had any reason to be personally familiar with what was posted on the refrigerator; and that Pitts’ and Todd’s accounts of what was previously posted on the refrigerator were inconsistent, as was their testimony about Panebianco in general, and should not be credited.

Respondent on brief contends that Panebianco testified untruthfully and lacks any credibility whatsoever; that while Pitts’ and Todd’s recollection may have varied regarding whether Todd took the ripped document out of the trash can, it does not call into question the accuracy of their testimony as to why they believed Panebianco removed the flyer; that at what point the NCH document was ripped also has no import on Todd’s credibility; that Panebianco’s entire testimony about the phone call to Pitts and subsequent conversation with Settle is simply unbelievable; that Pitts’ e-mail string regarding the incident from August 6 and 7, 2007, corroborates his testimony that he did not tell Panebianco that he was monitoring her activities; that Settle’s e-mail accurately captures what he said, and shows that there was no unlawful impression of surveillance; that Panebianco’s removal of the *Here are the Facts* was unprotected activity; that assuming Panebianco testified truthfully, there is no evidence that Respondent violated the Act in that if Panebianco’s posting flyers on the refrigerator is unprotected, Respondent did not violate the Act; that “[t]ellingly, Panebianco did not testify ever seeing any notices of a personal nature on the refrigerator prior to her posting the union flyers. In fact the only notice she testified to seeing other than the *Here are the Facts* was Respondent’s newsletter, *The Wave*.” (Tr. 386) (R. Br. 23); that as set forth in *Register-Guard*, employees have no right to use an employer’s bulletin board or any other communication medium to convey union messages if it has not allowed employees the use of its property to make commercial

solicitations; that here “there is no dispute that that Respondent’s notices **exclusively** were placed on the refrigerator prior to the union organizing” (Ibid, emphasis in original); that, therefore, *Register-Guard*, supra, reaffirms that Panebianco was not engaged in protected activity; and that even assuming, for the sake of argument, that Pitts and Settle advised Panebianco that they were monitoring her activities, they did not do anything unlawful since Panebianco was not engaged in protected activity.

Respondent violated the Act as alleged in paragraphs 5 and 6 of the complaint. As noted above, on brief Respondent asserts that “[t]ellingly, Panebianco did not testify ever seeing any notices of a personal nature on the refrigerator prior to her posting the union flyers. In fact the only notice she testified to seeing other than the *Here are the Facts* was Respondent’s newsletter, *The Wave*.” (Tr. 386), and “there is no dispute that that Respondent’s notices **exclusively** were placed on the refrigerator prior to the union organizing.” These assertions are false. At Transcript 381 Panebianco gave the following testimony with respect to what is posted on the involved refrigerator: “Oh, uniform sales, bake sales, baby showers, Christmas parties, just general information we want to communicate with other departments.” The testimony of Pitts and Todd regarding Panebianco taking down a copy of *Here are the Facts* from the refrigerator, ripping it, crumpling it, and throwing it in the trash can is a fabrication. Their stories conflict regarding Todd taking the ripped document out of the trash can, Todd bringing the ripped document to Pitts in his office, Pitts leaving his office after Todd spoke to him, Pitts going to the breakroom, Pitts seeing the ripped document in the trash can, the length of the hair of the person who allegedly walked by OH, and whether the person was seen walking by OH before or after the alleged ripping sound was heard. More than once Todd testified that she brought the ripped document to Pitts in his office. More than once Pitts was given the opportunity to resolve the conflict in their testimony, namely whether Todd brought the ripped document to him or he had to leave his office, go to the breakroom across the hall, and look into the trash can to find the ripped document. Pitts and Todd lost their credibility with the role they played in this fabrication. Their testimony regarding whether the refrigerator is used by the employees to post items other than NCH documents is not credited. No credible witness other than Panebianco testified from personal knowledge that he or she was in a position to know whether employees posted personal notices on the refrigerator. Panebianco’s testimony is credited. The refrigerator was used to post such things as uniform sales, bake sales, baby showers, and Christmas parties. As noted below, of all the employee lounge bulletin boards in Respondent’s downtown and north campuses, the only other employee lounge bulletin board which Respondent takes the position was used solely for NCH official publications is on 3 North downtown.⁵⁰ Respondent established its own policy and with respect to the bulletin board Panebianco used, it chose not to

⁵⁰ In that situation, an open union supporter, Villani, also verbally challenged a management representative about removing union materials from an employee lounge bulletin board.

follow its own policy.⁵¹ Respondent violated the Act by prohibiting Panebianco from posting union literature in the involved break/kitchen area. Respondent violated the Act as alleged in paragraphs 6(b) and 14 of the complaint.

With respect to the allegation that Pitts created the impression that Panebianco's union and other protected, concerted activities were under surveillance, I find Panebianco to be a credible witness. I do not find Pitts to be a credible witness. I credit the testimony of Panebianco. I do not credit the testimony of Pitts. Respondent violated the Act through Pitts by creating the impression that Panebianco's union and other concerted activities were under surveillance. Regarding whether Settle committed this same violation, I agree with counsel for the General Counsel that that Settle also gave Panebianco the impression that her union activities were under surveillance when he told Panebianco, after she told him what happened and that Pitts was not her supervisor, that managers were told to keep their eyes open but he did not explain why, and Settle did not denounce Pitt's watching Panebianco, who had been engaged in union activity. Respondent violated the Act as alleged with respect to Pitts and Settle creating the impression that

⁵¹ *Here are the Facts* first came into being after the involved union organizing drive started. Respondent uses this leaflet to make a case to employees against becoming unionized. In other words, *Here are the Facts* is company campaign literature. It is not normal system news or a notice required by law that Respondent has to give to employees. It was not included in the official NCH bulletin board postings which occurred prior to the union campaign in that it did not exist at that time. Here, Respondent on July 27, 2007, advised department heads, supervisors, and mid-managers that with respect to break rooms, if they allow employees to post personal materials in the breakroom, they do not need to remove union materials unless they are unnecessarily littering the room. Respondent did not follow its own July 27, 2007 policy with respect to Panebianco. And at the same time Respondent used the same bulletin board, which obviously is Respondent's property, to post its own campaign literature. If an employer establishes a policy so as to avoid any appearance of allowing employer-related information about the union campaign while barring similar union-related information and then does not follow that policy, in my opinion a finding is warranted that the employer has engaged in discrimination even if it owns the involved bulletin board. According to Clinical Coordinator Ringle, employees were allowed to put whatever they wanted on the bulletin board in the SICU employee lounge. As the credited testimony of Panebianco demonstrates, that was also the case with respect to the involved refrigerator bulletin board, except for when Panebianco, who is a very active and outspoken union supporter who was willing to challenge management, posted union literature. Discrimination as defined in Webster's New World Dictionary, Third College Edition (1988), is, as here pertinent, "a showing of partiality or prejudice in treatment." Contrary to the conclusion of the court in *Guardian Industries*, 49 F.3d 317 (7th Cir. 1995), the labor law concept of discrimination under Secs. 7 and 8 of the Act, does not involve the unequal treatment of equals. To base an argument regarding a labor law matter on the assertion that discrimination only involves the unequal treatment of equals is to base the argument on a false premise. While employees might not be entitled to use a bulletin board for pronoun messages just because an employer is using it for antiunion messages, if the employer changes its approach with respect to what employees can post on the bulletin board because the message the active and outspoken union supporter employee posts is a union flyer, then it is drawing a line for antiunion purposes and the employer's conduct is discriminatory.

Panebianco's union and other protected, concerted activities were under surveillance. Respondent violated the Act as alleged in paragraphs 5, 6(a), and 14 of the complaint.

Paragraph 7 of the complaint alleges that on or about August 17, 2007, Respondent, by Stella Mason and Lori Preece, at Respondent's facility, told employees that they were not permitted to engage in union and other protected, concerted activities in nonwork, nonpatient care areas.

Counsel for the General Counsel on brief contends that the record evidence supports finding that Mason and Preece told employees that they were not permitted to deliver union literature and pizza to employee lounges; that the testimony of Villani and Phillips should be credited over Preece; that both Villani and Phillips are current long-term employees with a lot at stake when testifying against their employer; that Preece should be discredited since her testimony that she did not understand what Villani was talking about when she said not to take anything down is unlikely; that Mason was not called to testify so the allegation regarding her conduct stands undisputed; that Norman admitted that she did not hear the entire exchange between Mason and the nurse organizers; that any argument that Mason and Preece could lawfully tell Villani, Godwin, and Phillips to leave because they were off duty has no merit; that collectively Phillips, McGoun, Holliday, Villani, Panebianco, and even 3 North (telemetry unit) Clinical Coordinator Gutierrez testified that nurses who are off duty do come back into the hospital to attend a party, etc. and the off-duty nurses are not asked to leave⁵²; and that the evidence of record reflects that the policy regarding off-duty employees has been ignored by Respondent except to the extent that Mason and Preece may have tried to use it as an excuse to prevent the nurse organizers from distributing union literature and talking about the Union in nonwork areas of the hospital.

The Charging Party on brief argues that there is no dispute that nurses' lounges are nonworking areas and that Villani, Phillips, and Godwin were not on duty when they delivered pizza and union literature and spoke with nurses in nurses' lounges on August 17, 2007; that while that portion of Respondent's solicitation and distribution policy which states that off-duty employees are allowed access "to the extent that other members of the public have such access" (GC Exh. 6) is facially valid, it is unlawful to selectively enforce an otherwise valid rule against employees to prevent union activity, *Saint Vincent's Hospital*, 265 NLRB 38 (1982), *enfd.* in relevant part 729 F.2d 730, 735 (11th Cir. 1984); that here, employees and managers testified that the rule is not enforced; that off-duty employees come into the hospital for a variety of reasons including dropping off or picking up Girl Scout cookies, selling Avon products, or promoting items sold for fundraisers for nurses' children; that Weiss and Westman saw Villani, Phillips,

⁵² Other reasons given for an off-duty nurse to be in the hospital include eating lunch in the employee lounge with a coworker, picking up paychecks or schedules, going to their lockers in the employee lounge to get their belongings to go to the Wellness Center (to work out), and to pick up Girl Scout cookies. Panebianco testified that off-duty nurses come into the hospital to hand out Avon booklets and to her knowledge no one had ever been asked to leave.

and Godwin enter the hospital in their street clothes and said hello; that during the union campaign Respondent allowed nonemployees, the Burke Group, in their street clothes to visit nurses' lounges and even patient care areas while they were rounding, unaccompanied by a representative of Respondent,⁵³ to promote Respondent's antiunion message; that in view of the fact that Respondent let nonemployees campaign against the Union in patient care areas while Respondent's RNs who they were soliciting were working and let nonemployees go into the employee lounges, to allow Respondent to rely on the above-quoted language regarding off-duty employees Villani, Phillips, and Godwin would be unlawful selective enforcement and would be discriminatory; that Respondent has offered no evidence contradicting Villani's and Phillips' testimony that Mason told them that they were not welcome in the 5 SW lounge and would not be welcome anywhere; that Norman did not hear all that Mason said; and that the consistent and corroborated testimony of Villani and Phillips should be credited over the self-serving testimony of Preece.

Respondent on brief, contends that Respondent's solicitation and distribution policy contains access restrictions on off-duty employees; that while that off-duty employees come into the hospital for social functions and to pick up their paychecks or schedules, Villani, Phillips, and Godwin came into the hospital when they were off duty to distribute food and solicit and distribute on behalf of the Union for commercial purposes; that under *Register Guard*, supra, there was no discriminatory enforcement of the off-duty access rule and "Mason and Preece were within their rights to ask the off-duty employees to leave their Departments because of the commercial aspects of what they were doing" (R. Br. 49, emphasis added); that Mason did not interrupt any union activity in that she thanked them and "asked them to leave" (Id. at 51); that Mason's comments do not raise to the level of interference with union activity because off-duty employees from other departments have no rights to be in the rehabilitation unit; that Respondent's position that Mason and Preece did not violate Section 8(a)(1) of the Act finds support in Board precedent that holds that employers can restrict the access of off-duty employees to their property via a rule, *Tri-County Medical Center*, 222 NLRB 1089 (1976); that in *Enloe Medical Center*, 345 NLRB 874 (2005), the administrative law judge observed that, as here pertinent, there was no contention that the off-duty access rule had been discriminatorily applied; and that the same is true in this case.

Again Respondent on brief is less than candid. Here, it was obvious during the trial that there was, and there would be a contention that the off-duty access rule had been discriminatorily applied. Mason did not testify at the trial herein. So she does not deny Villani's testimony and Phillip's testimony with respect to what she told them. Norman did not hear what, if

⁵³ It is noted that on one occasion, which is described above, a representative of Respondent, Clinical Coordinator Plosky, accompanied the Burke Group consultant when the consultant interrupted and spoke to Panebianco while she was working at the nurses' station. On another occasion, RN Andersen in the emergency department on the north campus, who was very busy at the time, at the direction of her charge who was acting at behest of her clinical coordinator, went to the nurses' station where three nurses from Missouri spoke out against the Union.

anything, Mason said after she introduced herself and thanked Villani, Phillips, and Godwin for the pizza. Consequently, Norman was not in a position to refute the testimony of Villani and the testimony of Phillips with respect to what Mason said⁵⁴. The testimony of Villani and the testimony of Phillips are credited. Villani, Phillips, and Godwin did not leave 5 SW on their own accord. Director Mason told them that they needed to leave—she had made some phone calls and they were not allowed to be there—and when the three discussed where they were going, Mason told them that they were not allowed in other areas too, they would not be welcome anywhere. With respect to 3 North, Preece did not impress me as being a credible witness. She took what was perceived to be the safest approach under the circumstances, namely to deny that there had been any verbal exchange—just Villani making some statement viz., "[D]on't take anything down."⁵⁵ Preece denied that she told Villani, Phillips, and Godwin that they had to leave 3 North. Preece denied that there was any conversation at all with Villani, Phillips, or Godwin. Villani and Phillips impressed me as being credible witnesses. They gave very detailed accounts which are consistent with the memorialization of the exchange Villani made contemporaneous with the incident (CP Exh. 1). The testimony of Villani and the testimony of Phillips about their verbal exchange with Preece are credited. Preece told Villani, Phillips, and Godwin to leave 3 North. As pointed out by counsel for the General Counsel and the Charging Party, the evidence of record reflects that the policy regarding off-duty employees has been ignored by Respondent, except to the extent that it is being used to prevent off-duty nurse organizers from distributing union literature and talking about the Union in nonwork areas of the hospital. Respondent's language "except to the extent that other members of the public have such access . . ." (GC Exh. 5) must be viewed in the light of Respondent's conduct with respect to the consultant's of the Burke Group and the three nurses from Missouri. As pointed out by the Charging Party on brief, in view of the fact that Respondent let nonemployees campaign against the Union in patient care areas while Respondent's RNs who they were soliciting were working, and let nonemployees go into the employee lounges, to allow Respondent to rely on the above-quoted language regarding off-duty employees Villani, Phillips, and Godwin would be unlawful selective enforcement and would be discriminatory. I agree. Respondent violated the Act as alleged in paragraphs 7 and 14 of the complaint.

Paragraph 8 of the complaint alleges that on or about August 19, 2007, Respondent, by a security guard in the parking garage

⁵⁴ Norman's testimony regarding exactly where this conversation took place is equivocal in that she testified that it was her "recollection" that the three nurses were outside in the hallway when Mason spoke with them; that when Mason entered the room (employee lounge) she was getting ready to leave; and that the verbal exchange took place in the hallway right by the door as they (Villani, Phillips, and Godwin) were exiting the nurses' lounge.

⁵⁵ It is noted that while, as discussed below, Preece was apparently the moving force behind McGoun's coaching, Preece did not testify about that matter when she took the stand at the trial herein. One might say that from Preece's viewpoint that not even testifying about a subject is an even safer approach.

at Respondent's facility, prohibited employees from distributing union literature in a nonwork, nonpatient care area.

Counsel for the General Counsel on brief contends that the record evidence clearly establishes that security guards prohibited employees handbilling in a nonwork, nonpatient care area as alleged in the complaint; that Holliday's testimony and the e-mails setting forth the incident by the security guards are consistent; that Brown admits that there was some confusion about what Respondent's policy was in regards to the walkway/sky bridge area; that any argument Respondent may make that this incident is isolated and de minimis should be rejected since 2 days earlier Roper had experienced an incident where she was not permitted to handbill in the North Collier garage; and that while Holliday handbilled on behalf of the Union at other locations without incident, after August 19, 2007, Holliday never passed out flyers in the downtown garage again.

The Charging Party on brief argues that employees have a well-established right to distribute union literature in nonworking areas when they are off duty, *National Steel Corp. v. NLRB*, 415 F.2d 1231, 1233 (6th Cir. 1969); that there is no dispute that Holliday was on nonworking time and in a nonworking area when she attempted to distribute union literature on August 19, 2007, in the parking garage; that the security guard's report does not contradict Holliday's testimony; and that Holliday's experience on August 19, 2007, was consistent with NCH's overall policy of restricting union activity in the parking garage, which was unlawful.

Respondent on brief, contends that Holliday's version of what happened should be viewed skeptically; and that taking Holliday's testimony at face value, it is at most a technical violation of the Act which should be dismissed as de minimis since it in no way impacted the campaign or had a chilling effect on the organizing activities of the prounion nurses.

The accuracy of Holliday's testimony is not challenged by the two guards who prohibited her handbilling on August 19, 2007, in the downtown garage sky bridge in that neither guard testified at the trial herein. As far as the material facts of this incident are concerned, the report of the incident by Respondent's own security office (CP Exh. 8), corroborates Holliday's testimony. That being the case, it has not been shown that Holliday's testimony, as Respondent contends on brief, should be viewed skeptically. What should be viewed skeptically is Respondent's argument on brief that this violation of the Act should be dismissed as de minimis. This was not an isolated incident. It is one of many violations of the Act found herein. Two days before this incident, a guard at Respondent's North Collier facility tried to confiscate union flyers when an off-duty nurse, Roper, tried to handbill on the garage sky bridge there. Respondent's conduct here had a chilling effect on union activist Holliday in that, as brought out by one of Respondent's attorneys on cross-examination, after August 19, 2007, Holliday never passed out union flyers downtown again. Since neither of the guards involved in the Holliday incident testified at the trial herein, there is no testimonial challenge to the testimony of Holliday's that she told the guard that she believed that they were allowed to be there, the guard said he was calling his boss, the guard went inside the garage, and about a minute later the guard returned to them on the sky bridge and told them

that they had to leave.⁵⁶ The guard who tried to confiscate Roper's union flyers on the North Collier sky bridge did not testify at the trial herein. According to Roper's credible testimony, he also said that he just talked with his supervisor, Barbaccia. In other words, guards were not making these decisions. The decisions were being made on a supervisory, if not a management, level. Director of Public Safety Brown testified that he was aware of the situation because he receives daily morning reports from Supervisors Griffith and Barbaccia. Brown also testified that after this incident he issued instructions to his officers about how to respond to employees distributing in the garage, namely that they were to no longer respond to complaints that purely involved union organizers distributing material unless there was some other overriding reason to do so such as a fight or some other crime. When did Brown give these instructions? Brown testified that gave this instruction verbally in November 2007 and in January 2008 he sent out an e-mail which reiterated this information. It would appear, therefore, that whatever was done in November 2007 was believed to be insufficient. In other words, the director of public safety waited for 3 months to do anything. And then what he did was apparently believed to be insufficient and he had to address the problem 2 months later or 5 months after he originally received notification of the problem. As noted above, in his September 24, 2007 e-mail to Brown, Settle indicated "[a]s far as sky bridges, we are taking the position that solicitation cannot take place in the bridges." When Brown testified at the trial herein, almost 1 year after the incident, he, in effect, testified that Respondent reversed its position and at some point in time it allowed employee handbilling on the sky bridge, and although he did not know when this occurred he asserted that at some point there was clarity, at least in his mind with respect to the policy about handbilling on the sky bridge.⁵⁷ This violation is not isolated, it is indicative of Respondent's attitude, and it should not be treated as de minimis. Respondent violated the Act as alleged in paragraphs 8 and 14 of the complaint.

Paragraphs 9(a) and (b) of the complaint collectively allege that on or about mid-October 2007, Respondent, by a Susan Theroux, at the Respondent's facility, prohibited employees from posting union literature in nonwork, nonpatient care areas where other nonunion literature and materials were posted, and she solicited employee complaints and grievances and impliedly promised to remedy them if employees refrained from engaging in union organizing activity.

⁵⁶ It is noted that the security report does not refer to the guard calling his boss. However, it is also noted that the e-mail indicates that the report "is going to [be] revised . . ." If there was a reference in the report to the call to the guard's boss, it may have been revised out earlier. Or perhaps it was not noted in the original report. Since the guard did not testify, this is not a matter of record.

⁵⁷ It is noted that McGoun, who works on the downtown campus, testified that in October and November 2007 she handed out union literature three times in the parking garage near the skywalk that leads to the hospital and no one stopped her. Brown's September 24, 2007 e-mail to Settle and Dutcher indicates that at the time Respondent was allowing handbilling in the garage but not in the bridges. McGoun was handbilling in the garage near the skywalk.

Counsel for the General Counsel on brief contends that it is well established that absent a previous practice of doing so, the solicitation of grievances during an organizational campaign accompanied by a promise, express or implied to remedy such grievances, violates the Act, *Capital EMI Music, Inc.*, 311 NLRB 997, 1007 (1993); that the inference that the employer is impliedly making a promise to correct grievances is rebuttable, *Gull, Inc.*, 279 NLRB 931, 946 (1986); that the testimonies of Cothran and Saltzer establish that Theroux asked them what Respondent could do to keep the Union out and this testimony should be credited; that Theroux took over the involved department in the midst of the union organizing drive and, therefore, she had no history of asking for suggestions prior to the organizing in this department; that Theroux's question on the occasion at issue was what could she do to keep the Union out with the clear message being that she wanted to influence their union support by remedying their concerns; that there is nothing in writing that communicated to nurses that the cork bulletin boards in the downtown garage elevators were considered to be official bulletin boards subject to the policy in the employee handbook; that although there had been problems with posting on the garage elevator bulletin boards for years, Thigpen did not see it as a major problem warranting sending a memo to hospital personnel; that it is unclear what policy or rule Theroux was relying on when she told Cothran and Saltzer they were not permitted to post in the parking garage elevator; that Theroux did not tell them it was an official bulletin board or that they needed prior approval; that even after consulting with HR, Theroux could not explain which policy applied when she coached Cothran and Saltzer; that before the nurses began posting union material on the garage elevator bulletin boards during the organizing campaign, Respondent did nothing to communicate any rule or policy to employees notifying them of any limitation on posting; that in view of this, Theroux violated Section 8(a)(1) by informing employees that they could not post in the garage elevators.

The Charging Party on brief argues that Theroux's inquiry as to what management could do to keep management out was an implied promise to remedy grievances if Cothran and Saltzer refrained from supporting the Union; that management solicitation of grievances during a union campaign constitutes an unfair labor practice if the employer also promises or implies that it will remedy the grievance if the union is rejected; that although Theroux's promise of remedy was implied, the connection between her question and the union campaign was quite explicit, *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000); that Theroux could not have established a prior practice of soliciting grievances from Cothran and Saltzer prior to the organizing campaign, because nurses began organizing in late June/early July 2007 and Theroux did not start rounding until August 2007; that on the occasion in question Theroux's question about keeping the Union out was different from her prior inquiries about what was needed for patient care; that Theroux met with HR before speaking to Cothran about posting a union flyer on the downtown garage elevator bulletin board; that Theroux testified that Cothran and Saltzer violated Respondent's solicitation and distribution policy and not its bulletin board policy; that, therefore, *Register Guild*, supra, does not apply here be-

cause (a) Respondent was not relying on a rule or policy restricting the use of employer owned equipment, and (b) there is no established practice or policy to analyze; that it is unlawful for an employer to restate its rules in the context of a union campaign in order to prohibit employees from posting union materials, *Register Guild*, supra; that the testimony of Respondent's witnesses that all non-NCH postings in the garage elevators are removed promptly is not credible; that the prohibition against posting on garage elevator bulletin boards is not explicit in any of NCH's written policies concerning posting, bulletin boards solicitation or distribution; that by NCH's own account, it kept the alleged rule secret for years, while employees posted non-NCH material, and then suddenly, during the union organizing campaign, began enforcing the rule and disciplining employees for posting union literature; and that there is no explanation for this behavior other than union animus, to prevent employees from communicating about the Union.

Respondent on brief contends that Theroux did not unlawfully solicit grievances and/or promise to remedy them; that Cothran and Saltzer were both open union supporters; and, as here pertinent, that

Saltzer's recollection . . . varies from Cothran's with respect to who was present when the conversations occurred. Saltzer claims that, in addition to Cothran and Branham, Barbara Bell . . . and Ginger McCamish . . . were also present. [Tr. 364.]. Interestingly, neither Counsel for General Counsel nor the Union presented Branham, Bell or McCamish as witnesses to corroborate Cothran's and Saltzer's testimony. [R. Br. 7.]

Respondent further contends that it is well settled that the solicitation of grievances itself does not violate the Act, *Uarco, Inc.*, 216 NLRB 1 (1974); that the Board recently held that an employer who has a practice and policy of soliciting employee grievances may continue to do so during an organizational campaign, *Wal-Mart Stores*, 352 NLRB 815 (2008); that like Wal-Mart, Respondent has a history of soliciting grievances and other employee feedback that long predates the advent of the organizing activity; that Theroux in no way violated the Act by asking the nurses what they needed to improve care on the unit; that Theroux participated in "TIPS" training in August 2007 and, therefore, she was aware that she could not ask the nurses what could be done to keep the Union out⁵⁸; that Theroux is infinitely more credible than either Cothran or Saltzer; that Cothran never completed a union incident report regarding this matter; and that the reasons given by Cothran for not filing a union incident report are lame and completely unbelievable.

Theroux would not have violated the Act if she only asked the nurses what they needed to improve care on the unit. What Theroux did was beyond that; Theroux asked what could the Respondent do to keep the Union out. With respect to who was present when Theroux asked this question, as noted above Respondent on brief leaves the impression that Saltzer contradicted Cothran on this point. Again, Respondent is less than candid on brief. Respondent attempts to leave the impression that Bell and McCamish were present during the conversation

⁵⁸ Being told and doing are two different things. The facts will speak for themselves.

with Theroux dealing with what the nurses wanted in order to keep the Union out. That was not Saltzer's testimony. At Transcript 364 Saltzer was testifying about who worked on her shift. Saltzer was not testifying that Bell and McCamish were present when Theroux asked what the Respondent could do to keep the Union out. Indeed, on cross-examination when one of Respondents attorneys asked Saltzer if she recalled specifically who was present when the conversations with Theroux about the Union⁵⁹ took place Saltzer answered, "I do not." (Tr. 376.) Branham is not an RN. Respondent could have called Branham as a witness. It did not. No adverse inference is warranted with respect to the fact that Branham was not called as a witness. Cothran and Saltzer impressed me as being credible witnesses. They gave a detailed account of what happened and what was said. Any differences in their testimony are minor and do not in any way undermine their credibility. I credit the testimony of Cothran and the testimony of Saltzer. I did not find Theroux to be a credible witness. Her testimony is not credited. While she admitted that she was told by nurses what they expected the Union to do for them, she was not willing to concede that she asked the nurses what they expected to get out of the Union. Rather Theroux testified that she did not recall if she asked the nurses what they expected to get out of the Union. And she did not recall if she specifically asked the nurses what did they expect the Union to do for them. At least two of the involved nurses, Cothran and Saltzer were open supporters of the Union. This would have been taken into consideration in determining whether such questions were problematic. But it appears that Theroux realized that if she conceded that she asked those questions, it might be concluded that she also asked the question at issue here, namely what could the Respondent do to keep the Union out. Theroux asked the question at issue. With this question, Theroux was not soliciting suggestions or fielding grievances in general to improve the situation in the involved department. Theroux was attempting to influence the involved nurses' union support by finding out what they wanted, thereby impliedly promising to remedying their concerns. Theroux had already indirectly asked for this information when she asked the nurses what did they expect the Union to do for them. Apparently whatever information she obtained indirectly was not sufficient to meet the inquisitor's needs. Respondent violated the Act as alleged in paragraphs 9(b) and 14 of the complaint.

With respect to Theroux giving Cothran and Saltzer a verbal coaching, as noted above, Theroux testified that before she issued the coaching she met with Settle, Thigpen, and a lawyer at HR's behest; that the group decided on the discipline and she was directed to speak with Cothran; and that she approached the incident in terms of the solicitation/distribution policy and not the bulletin board information in the employee handbook.⁶⁰ Also, as noted above, when asked if she was "looking at a rule, or did she have a rule in mind" when she told Cothran and Salt-

zer that they could not post union literature in the elevators, Theroux gave the following testimony:

THE WITNESS: It was my interpretation of the solicitation and distribution policy.

....

THE WITNESS: That things could be handed out.

JUDGE WEST: So it wasn't your interpretation of any rule with respect to bulletin boards?

THE WITNESS: Right. I didn't consider—I owned the bulletin boards in the nurse lounge. I don't oversee the bulletin boards in the public elevators.

JUDGE WEST: But again, you weren't basing the coaching on any rule with respect to the use of bulletin boards. You were basing it on the solicitation and distribution rule or policy.

THE WITNESS: Correct. [Tr. 631.]

Theroux did not give the specific language of the rule or policy she was relying on when she disciplined Cothran and Saltzer at the direction of HR. As noted above, HR was also involved in the disciplining of McGoun for posting a union flyer in a downtown garage elevator. Regarding McGoun, Kling testified that he gave McGoun a copy of the solicitation policy after there was "round tabling with HR and with the executive team and it was decided that there was no solicitation approval form filled out through HR and McGoun did not get proper approval for it." (Tr. 830.) Also, Kling testified that under the solicitation policy McGoun should have requested permission to post and this was determined after the discussion with HR; and that when he spoke with McGoun he was relying on NCH's solicitation policy that indicates that "[r]equests to solicit for organizations representing any protected . . . groups will routinely be denied." As will be found below regarding paragraph 11 of the complaint, this language is unlawful. Respondent did not have any lawful basis under its solicitation policy or rule for disciplining Cothran and Saltzer. In disciplining Cothran, Saltzer, and later McGoun, regarding posting on the downtown garage elevator cork bulletin board, Respondent did not specifically assert any property right in that bulletin board.

And with respect to any "policy" regarding posting on the cork bulletin boards in the downtown garage elevators before the involved union campaign, it must be concluded that there really is none that Respondent can rely on. There might have been a "practice" on the part of at least one member of Respondent's management to remove personal postings from the downtown garage elevator cork bulletin board. But Respondent never demonstrated that there was a "policy." The downtown garage and elevators were built about 10 years ago. Up until January 2008 when Plexiglas bulletin boards were installed with notices prohibiting personal posting, the downtown garage elevators had cork bulletin boards. For the approximately 10 years that those cork bulletin boards were in existence there was never any notice in those elevators limiting what could be posted thereon. Thigpen could not point to anything in writing that communicated to nurses that the cork bulletin boards in the downtown garage elevators were considered to be official bul-

⁵⁹ As noted herein, there were other conversations where what the nurses expected to get from the Union was discussed with Theroux.

⁶⁰ This was not a mistake. As noted below Respondent's HR took this approach with McGoun after Cothran and Saltzer. Also, with Kinsland and Karavas, which occurred before Cothran and Saltzer, Respondent did not cite a specific posting policy.

letin boards subject to the employee handbook.⁶¹ Over the years all kinds of things were posted on these cork bulletin boards. The assertions of Respondent's witnesses with respect to what was or was not posted and whether it was the practice of at least one of the members of Respondent's management⁶² to take the non-NCH postings down from the cork bulletin boards promptly must be viewed in the light of (a) the credible testimony of (1) Cothran that she saw postings of a personal nature stay up for weeks at a time, and one personal non-NCH posting stayed up until all of the tabbed telephone numbers were torn from the flyer; (2) McGoun that the various things she saw posted in the downtown garage elevators included houses or pets for sale, rentals, and some business cards; (3) Holliday that when she worked in the downtown hospital for about 2 years (2003 to 2005), before she was transferred to North Collier, she always saw a variety of things posted on the bulletin board on the elevators on the downtown campus, namely cars for sale, people having parties, nursing education, and CPR classes;⁶³ (4) Villani that in July, August, and September 2007 she saw houses for rent, roommates needed, things for sale, and furniture for sale posted on the garage elevator cork bulletin board; and (5) Panebianco that she has seen postings about the hospital's Spring Fling and an advertisement for a lost pet in the garage elevators, and (b) the fact that, with respect to Respondent's witnesses (1) Theroux, who claims that she rides the downtown garage elevators 5 days a week and sees one personal posting a week for an apartment for rent, a vehicle for sale, a classified—which posting are allegedly gone by the next day—did not even know that there were cork bulletin boards in the elevator in that she testified that the postings were just taped to the elevator walls, and she could not say that she ever saw a cork bulletin board in the elevator before the Plexiglas bulletin board was installed;⁶⁴ (2) Thigpen, who testified that she and others saw personal postings (items for sale and party notices)

⁶¹ The entry for "BULLETIN BOARDS" in the employee handbook, CP Exhs. 4 (updated "05/02/07") and 5 (updated "09/04/07") reads: "For the convenience of employees, official bulletin boards are located throughout NCH. Information posted on these official bulletin boards, such as system news and notices required by law, must be approved by the Human Resources Department or Administration prior to posting."

⁶² Thigpen asserted that she removed personal postings on the cork bulletin boards in the downtown garage elevators. But as found below regarding her role in the McGoun July 31, 2007 coaching, Thigpen is not a credible witness.

⁶³ As noted above, on direct Holliday also testified about bulletin boards in lounges on the downtown campus. She testified on cross-examination, with respect to whether she saw anything of a commercial nature or related to any business, that she also saw postings about people trying to open businesses like baby sitting services, lawn mowing service, and car washing; and that she did not know if these were Respondent's employee's own businesses. It is not clear when Holliday answered the questions about postings of a commercial nature she was referring to the bulletin boards in employee lounges or the bulletin board in the downtown elevators or both.

⁶⁴ The surveillance photos of McGoun posting which Kling identified, GC Exh. 3, show a cork bulletin board in the "W ELEVATOR" of the downtown garage elevators. Theroux testified that she received an e-mail from security asking her if she could identify staff members. The photographs she apparently looked at were not introduced at the trial herein so it is not clear that they showed the cork bulletin board.

on the downtown garage garage cork bulletin boards from time to time (2 or 3 times a month) "for the past 10 years" (Tr. 936), she and others (unidentified) removed the postings since that was Respondent's "practice" (Tr. 890),⁶⁵ but she did not have a memorandum issued to hospital personnel indicating that these materials should not be posted (nor did Respondent post a notice prohibiting such postings in the garage elevators until January 2008 which was well into the union organizing campaign) because she did not see it as a major problem (before the union organizing campaign);⁶⁶ (3) Settle, who testified that he believed that the bulletin board "policy," which is in the employee handbook and on "My Intranet," is the only policy that covers posting materials, and he was not aware of the Hospital ever allowing unauthorized postings for commercial ventures in the hospital garage elevators; (4) Kling, who testified that he uses the downtown garage elevators every day and he has seen postings in the garage elevators for everything from couches, cars for sale, and houses for rent to things for child day care, and that he had no idea whether the posting for cars for sale was authorized (which apparently would mean that Kling did not remove at least the cars for sale posting since he did not determine if the posting was authorized); and (5) Brown, who testified that he rides the downtown garage elevators to get to his office and he could not recall ever seeing any notices of a personal nature posted in the elevator in the parking garage (Obviously this contradicts the testimony of other of Respondent's witnesses.), had to be led by one Respondent's attorneys to testify that there are Plexiglas bulletin boards in the elevators as of January 2008, and even then he was not sure.⁶⁷ To the extent that any of Respondent's witnesses attempted to leave the impression that before the union organizing campaign involved here, there were no non-NCH postings in the downtown garage elevators or, if there were, they are promptly removed, such testimony is not credible and it is not credited. Also, Settle's equivocal testimony that he was not aware of the Hospital ever allowing unauthorized postings for commercial ventures in the hospital parking garage elevators is not credited. For approximately 10 years Respondent allowed all kinds of non-NCH postings in the downtown garage elevators. Then without prior warning to its employees, it began removing non-NCH postings (union literature) during the union organizing campaign. Not only did Respondent remove the union literature but it began to discipline employees for making non-NCH postings, something Respondent has not shown that it did before for the

⁶⁵ As noted above, on the last day of the trial herein, before I ruled on the objection, one of the attorneys for Respondent used the word "practice" in his question after the Charging Party objected to the use of the word "policy," indicating that it was without foundation in that the Charging Party did not believe that there was any evidence relating to a policy.

⁶⁶ Theroux testified that she never communicated to her employees that they were not allowed to post in the elevators, not until the coaching of Cothran and Saltzer.

⁶⁷ Initially he testified that at the time of the trial herein (August 2008) he believed that they were cork "right now." (Tr. 689.) Then, Brown testified, "I don't know" (Id. at 690), when he was asked by one of Respondent's attorneys, "So it's not a corkboard at the moment." (Id. at 689.)

approximately 10 years that non-NCH postings occurred on the garage elevator cork bulletin boards. On July 27, 2007, Settle sent an e-mail to "Department Heads, Supervisors and Mid-Managers" (GC Exh. 10), indicating, as here pertinent, "Today . . . union paraphernalia began appearing around the hospital. . . . As a reminder, we do not allow unauthorized postings in our elevators" Employees were not notified of Settle's July 27, 2007 position perhaps because it was a change of position and publication of this change to employees would be problematic. When Respondent began disciplining employees for posting union literature on the garage elevator bulletin boards, it did not rely on Settle's July 27, 2007 position that Respondent does "not allow unauthorized postings in our elevators." Rather, without meaningful exception, in disciplining employees for posting union literature on the garage elevator bulletin boards Respondent relied on its solicitation and distribution policy. That policy does not indicate "we do not allow unauthorized postings in our elevators" Rather, that policy, as noted above, unlawfully indicates that "[r]equests to solicit for organizations representing any protected . . . groups will routinely be denied." Kling testified that this language did not rule out the possibility of the granting of such request. Respondent was not relying on the bulletin board policy in the employee handbook in disciplining employees for engaging in union activity, namely posting union literature on the cork bulletin board in the garage elevator. Respondent was not asserting the violation of an absolute prohibition. Respondent was informing employees that they had to ask for permission and that such requests "will routinely be denied." Since Respondent did this more than once in disciplining employees and since HR was involved in both of the garage elevator posting incidents covered by the complaint herein (at least once with Respondent's lawyer and once with the executive team), this approach was not a mistake in terms of what grounds were used. To buy into a mistake argument, one would have to believe that Respondent mistakenly did not cite its bulletin board policy the first time on August 3, 2007 (with Karavas), then it made the mistake again on August 10, 2007 (with Kinsland), then it made the mistake again in October 2007 (with Cothran and Saltzer), and then it made the mistake again on November 2, 2007 (with McGoun). Respondent choose not to belatedly assert a property right which would have been problematic once the involved union organizing campaign began. Perhaps Respondent realized that it did not have an explicit prohibition. Perhaps Respondent determined that by allowing all kinds of postings in the garage elevators for approximately 10 years before the involved union campaign began it had waived the right to prohibit employees posting union literature in the garage elevators. Respondent violated the Act as alleged in paragraphs 9(a) and 14 of the complaint.

Paragraph 10 of the complaint alleges that on or about October 31, 2007, Respondent, by John Brown, at the Respondent's facility, told employees that they were not permitted to engage in union and other protected, concerted activities unless they received prior permission and approval from the Employer.

Counsel for the General Counsel on brief contends that around October 27, 2007, Brown told nurses Fuller, Panebianco, and Villani, who were in Respondent's downtown cafete-

ria speaking to employees about the Union and giving out union flyers with small candy treats attached, that they were no longer to pass out their treats and they needed to leave; that Villani asked if they could at least finish their lunch and Brown said no he wanted them to leave; that at the time there was a benefits fair going on and vendors participating had bowls of candy, cookies, and little treats; that Villani had observed NUNSO distributing literature in the downtown cafeteria on another occasion; that Brown told them, contrary to their assertions, that they did not a right to be there because they were set up like a booth, they needed permission for that, and they would have to leave; that the nurses bagged up the treats, put them under the table, and they left shortly after that; that Brown claims that (a) he explained to the nurses that they could eat lunch in the cafeteria and speak with other employees but they had to remove the candy and materials that were displayed on the table; (b) the nurses put the candy and materials under the table and continued talking; and (c) he did not ask the nurses to leave; that Brown was acting pursuant to a new rule or new interpretation of Respondent's policy, namely Settle's October 31, 2007 e-mail to department heads (CP Exh. 14), which indicates that while an employee can hand out materials in the cafeteria, the employee cannot hand out food, candy, or drinks in the cafeteria since that competes with Respondent's cafeteria business; that there is no evidence that this policy existed prior to Settle's e-mail of October 31, 2007; that Respondent was disparately applying its rules in that Holliday testified that she observed anti-SEIU NUNSO distributing candy in Respondent's North Collier cafeteria around Halloween and January 2008 and Settle testified that there were no requests or approvals to solicit or distribute from NUNSO; that RN Anderson testified that she saw the American Heart Association having a fund raiser in an NCH cafeteria and they were selling funnel cakes; that various organizations were allowed to distribute food during the benefits fair; and that the miniature candy attached to the union flyer would not be competition to the cafeteria because it did not sell a similar product.

The Charging Party on brief, argues that a rule prohibiting employees from distributing union literature on their own time in nonworking areas of the employer's property is presumptively invalid, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); that NCH began enforcing a new rule against distributing food in competition with cafeteria sales; that this justification is specious; that NCH's solicitation and distribution policy does not mention distribution of food but it does state that no distribution of any kind is allowed in any working areas which, as here pertinent, does not include cafeterias (GC Exh. 6, par. C); that while both Settle and Brown testified that there was no written policy limiting distribution of food in the cafeteria, Settle claims that there is an unwritten restriction with respect to competing with the cafeteria; that NCH's alleged concern for cafeteria sales is not sufficient to justify restricting employees' Section 7 rights, *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 506 (1978); that the cafeteria does not sell the kind of candy that was attached to the union flyer so there would not have been any competition with the cafeteria; that prior to the union campaign there was no rule against food distribution in the cafeteria, and during the union campaign the rule was only

applied to prounion employees; that Brown learned about NCH's policy for the first time in late September 2007 when NCH's general counsel called Brown and asked him to go to the cafeteria to prevent prounion nurses from passing out cake; and that even if the food distribution policy was facially valid, it was discriminatorily applied to prounion nurses.

Respondent on brief, contends that during the conversation with the nurses on Halloween 2007 in Respondent's downtown cafeteria Brown "merely asked the nurses to remove the candy because it was covering half the table, and they complied" (R. Br. 25); that Brown's testimony is more credible than Villani's and Panebianco's; that the testimony of Villani and Panebianco simply does not make sense in that on September 25, 2007, Brown spoke to Jennings, Villani, and Panebianco in Respondent's downtown cafeteria and "advised them that they could not distribute slices of cake, but could continue to distribute literature. (Tr. 131, 644)" (Id. at 26); that Roper testified, "[T]hat she was always able to distribute literature in the cafeteria without any issues" (Ibid); and that this is yet another attempt by Villani and Panebianco to manufacture an unfair labor practice where none exists.

The credible evidence of record does not support the contentions Respondent makes on brief. Brown did not "merely ask the nurses to remove the candy because it was covering half the table . . ." And Brown on September 25, 2007, did not merely advise Jennings, Villani, and Panebianco "that they could not distribute slices of cake, but could continue distributing literature." (Tr. 131, 644.) Jennings' testimony, as here pertinent, reads as follows:

Q. . . .

Do you recall being in NCH's Downtown facility on September 25th, 2007?

A. Yes.

Q. Where specifically in the hospital were you?

A. The cafeteria.

Q. What time of day was it?

A. Lunchtime.

Q. And who were you with?

A. I was with Mary Villani, Terese Panebianco, and several other nurses that I cannot recall that joined me.

Q. And what did you do?

A. We went to distribute Union literature, as well as to give out some cake.

. . . .

Q. How long did you give cake out for?

A. For about 20 minutes.

Q. And what happened after 20 minutes?

A. Security approached.

. . . .

A. It was one gentlemen, I don't recall his name [Brown].

. . . .

Q. And what did Security do?

A. Security said we've got to go right now. We had to stop everything we were doing.

Q. And how did you respond?

A. I just said that's not true. We have a right to be here.

Q. And why did you—was there a particular reason why you believed you had a right to be there?

A. Well, I knew that the nurses had the right to distribute Union literature. And I also knew that based on Renee Thigpen's testimony the day before at the NLRB hearing that we all attended, and [sic] stated that it was a public space, that I could also be there as well.

Q. And did the security guard respond?

A. Once I claimed, made the statement that Renee had testified, he got a little nervous and he said, okay, hold on, and then he left for a few minutes, and then he came back.

Q. And when he came back what did he say?

A. He said that you can continue to distribute the Union literature, but you cannot give out cake. [Tr. 128–131, emphasis added.]

Also, with respect to Respondent's above-quoted contentions, Roper, contrary to Respondent's assertion, did not testify "that she was always able to distribute literature in the cafeteria without any issues." (R. Br. 26.) As noted above, Roper testified that she was off duty and she went to the (north campus) cafeteria with Jennings and one of the SEIU attorneys, Granderson; that they had a lot of information, packets, material, and Halloween cupcakes; that they gave out the material and cupcakes for about 10 minutes; that the chief security person at North Collier, Val Barbaccia, came up to her and said, "Cindi, what are you doing, You know you can't be here" (Tr. 445); that she asked Val, "[W]hy is that" (Ibid.) and Val said, "[O]h, stop it. You know why. . . . [y]ou need to leave . . ." (Id. at 445, 446); that she told Val that she did not think she was right and Jennings stood up and introduced himself; that Val left them and came back 5 minutes later with Settle who told them that they had to leave; that Settle told them that they had to leave and they could not give out cupcakes; that she asked Settle why they could not do this, and there were other people giving out cupcakes and so forth (candy bars and tootsie rolls); that the other people were local vendors, like Sam's, advising employees about the different benefits available to them; that Settle told them they had to leave, that everyone else there was invited, and they were not invited; that they packed up and left, giving the cupcakes to an employee to take to her unit; and that a security guard walked them out to their car. On cross-examination, Roper testified that they were at a table in the North Naples cafeteria and the cupcakes and flyers were placed on the table; and that they are not allowed to distribute union literature to other people in the cafeteria. Barbaccia did not testify at the trial herein. While Settle did testify, he did not specifically deny Roper's testimony about this incident.

Brown is not a credible witness. He testified that he never saw a personal posting on the downtown garage elevators when other witnesses, including other Respondent's witnesses, testified that there have been personal postings for years on the cork bulletin board in those elevators. Also, Brown, even after being led by one of Respondent's attorneys, was not sure when he testified at the trial herein whether the bulletin boards on the elevators he allegedly uses to get from the garage to his office were cork or Plexiglas. He equivocated on cross about what was said on October 31, 2007, in that when he was asked, "[d]o recall anyone asking if they could finish eating their lunch first?"

he answered, “[n]ot specifically those words, no, I do not recall that.” (Id. at 670.) If he was allowing them to stay in the cafeteria, there would not have been any need for this question on the part of one of the employees. And Brown was not candid about his verbal exchange with Jennings on September 25, 2007. Villani and Panebianco impressed me as being credible witnesses. They gave detailed accounts of what happened during their verbal exchange with Brown. Brown told them they were not allowed to give out treats and they needed to leave. Days earlier, September 25, 2007, in Respondent’s downtown cafeteria when the male union organizer stood his ground and referred to the testimony of Thigpen the day before regarding the cafeteria being a public area, Brown backed down, told Jennings okay hold on, left for a few minutes, and when he returned said that they could continue to distribute the union literature but they could not give out the cake. The stand that Brown initially took with Jennings is the stand that he took with the nurses on Halloween. But there were two differences. On September 25, 2007, Brown had a face off with a union organizer and some nurses. On Halloween, Brown had a face off with employees of NCH without a union organizer present. Could this alone explain the difference in the treatment the employees received by Brown on October 31, 2007, or was there was another factor at play, namely when Brown had this conversation with the nurses on Halloween there may have been a benefits fair going on in the cafeteria? Panebianco testified that Brown told them they could not hand out candy and pamphlets because they needed permission to be set up like a booth, and they would have to leave. Panebianco could not understand why Brown referred to being set up like a booth in that they were just sitting at a table like any other table in the cafeteria. Panebianco testified that there may have been a benefits fair going on but she was not 100-percent sure. Perhaps Brown’s reference to a booth was his indirect way of advising them that there was a benefits fair going on and to solicit employees as the vendors in the cafeteria were doing, they would need permission. As noted above, when the benefits fair was going on at Respondent’s North Collier cafeteria even though Roper, who was off duty at the time, was accompanied by Jennings and one of SEIU’s attorneys, she, along with Jennings and the SEIU attorney were told by Settle that they could not give out their Halloween cupcakes and they were all required to leave the cafeteria. This is what also occurred with Brown at Respondent’s downtown cafeteria on or about October 31, 2007. As Settle did at Respondent’s North Collier cafeteria, Brown, in effect, told the nurses to pack it up and get out. That appears to be why the outcome was different from September 25, 2007, to the extent that the nurses were required to leave the downtown cafeteria. But whether the deciding factor was the benefits fair is questionable in that, as noted above, Andersen testified that she was prohibited from distributing literature in the cafeteria (north campus) on what might have been Valentine’s Day 2008; that the security guards told her that she was not allowed to give out union literature; that she believed that she was passing out candy as well at the time; and that even when she tried to distribute just union literature in the cafeteria she was told by a security guard that she was not allowed to do that. Brown lied under oath. On or about October 31, 2007, he required Villani,

Panebianco, and Fuller to stop handing out union flyers with attached candy treats and to leave the cafeteria.

The vendors at the benefits fair were giving out treats. They were not prohibited from doing this because it would be competing with Respondent’s cafeteria. While Respondent took the position that the vendors were asked to be there, they were given permission to be there, and there were requests and approval forms regarding Respondent’s solicitation and distribution policy. Settle conceded that there was no request for permission pursuant to Respondent’s solicitation and distribution policy for at least one of their vendors, Sam’s Club, which was giving out treats.⁶⁸ Also, Respondent disparately applies its rules in that the anti-SEIU group NUNSO had a table right in front of the North Collier cafeteria and NUNSO was distributing anti union literature and candy one time around Halloween 2007 and one time in January 2008.⁶⁹ Settle testified that there were no requests or approvals to solicit or distribute from NUNSO. Additionally, American Heart Association held a fund raiser in the cafeteria and they were selling funnel cakes. Respondent did not attempt to explain why they were allowed to sell funnel cakes and why it was not competing with Respondent’s cafeteria. Finally, as pointed out by counsel for the General Counsel and the Charging Party on brief, the small candy attached to the union flyer would not be competition to the cafeteria because it did not sell a similar product. Respondent discriminated against Villani, Panebianco, and Fuller when they were distributing union flyers with small candy treats attached in Respondent’s downtown cafeteria on or about October 31, 2007. Respondent treated them disparately. And Respondent violated the Act in refusing to even allow the involved employees to distribute union literature in a nonwork area while they were on their own time. Respondent violated the Act as alleged in paragraphs 10 and 14 of the complaint.

Paragraph 11 of the complaint alleges that at all material times, and at least since on or about September 4, 2007, Respondent, in its employee handbook, has maintained and enforced the following policies and rules regarding solicitation, distribution, and posting of written or printed materials:

D. . . . Employees who wish to solicit for community charitable organizations must request permission on the “Solicitation Approval Form.” The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or designee. Requests to solicit for personal profit, political causes or organizations representing

⁶⁸ As noted above, Respondent did not provide a solicitation approval form for Costco either. Both Sam’s Club and Costco are membership organizations. Both were in Respondent’s cafeterias to solicit membership; to solicit Respondent’s employees to become members. To allow them to give out treats as part of their attempt to solicit employees to become members, even though Respondent did not demonstrate that Respondent had request and approval forms regarding Respondent’s solicitation and distribution policy for them, and not allow the prounion nurses to engage in the same conduct demonstrates the discriminatory approach Respondent took.

⁶⁹ Unless Respondent can show that no supervisor or no one in management went to the cafeteria on those days, Respondent would be hard pressed to argue that it did not know about this.

any protected or non-protected groups will routinely be denied.

Counsel for the General Counsel on brief contends that that portion of Respondent's solicitation and distribution policy quoted above is overly broad and discriminatory on its face; that any rule that requires employees to secure permission from their employer before engaging in protected concerted activity at an appropriate time and place in unlawful, *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001); that in determining whether an employer's mere maintenance of a work rule violates the Act, the Board considers whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights; that in making this determination, the Board gives the rule a reasonable reading and refrains from reading particular phrases in isolation, *Albertson's, Inc.*, 351 NLRB 254 (2007); that under the test adopted by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board first asked whether the rule explicitly restricts activities protected by Section 7; that if it does, the rule is unlawful; and that if it does not explicitly restrict protected activities,

The violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; (3) or the rule has been applied to restrict the exercise of Section 7 rights. [Id. at 647, counsel for the GC Br. 78.]

Counsel for the General Counsel further contends that Respondent's rule on its face appears to explicitly restrict protected activities; that the record is replete of instances where Respondent's solicitation and distribution rule and bulletin board policy were applied to restrict employees in the exercise of Section 7 rights; that in direct response to the union organizing, Respondent communicated its interpretation of what could be done to management but it did not inform its employees; that it is clear that Theroux and Kling did not understand the application of Respondent's solicitation and distribution policies and/or bulletin board policies when they disciplined employees; that it appears that Respondent was making it up as it went along in response to the organizing; that there is no evidence that Respondent effectively repudiated the unlawful rules and/or its unlawful application; and that it has been established that Respondent violated the Act, as alleged, by maintaining the overly broad solicitation and distribution rules in its employee handbook and on its intranet web site, as well as by unlawfully prohibiting union activity in reliance on its rules.

The Charging Party on brief, argues that the involved rule constitutes a per se violation of Section 8(a)(1) of the Act in that "[a]ny rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful," *Brunswick Corp.*, 282 NLRB 794, 795 (1987); that according to the plain meaning of the text, protected union activity would likely fall under the category of "organizations representing protected or non-protected groups"; that, therefore, not only are employees required to request permission to engage in union solicitation, but it will be "[routinely denied"; and that even the mere existence of such an

overly broad rule "tends to restrain and interfere with employees' rights under the Act even if the rule is not enforced." (Id.)

Respondent on brief contends that "[e]stablished board precedent holds that the fact that a solicitation policy requires permission for *worktime* solicitation does not automatically result in a violation of Section 8(a)(1) of the Act" (emphasis added, R. Br. 52); that the alleged facial invalidity of Respondent's solicitation and distribution policy does not end the inquiry in that an employer can avoid the finding of a violation by showing through extrinsic evidence that its rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work, *MTD Products*, 310 NLRB 733 (1993); that the gravamen of an 8(a)(1) violation with respect to an overly broad solicitation and distribution rule is that the rule can be interpreted in such a way as to cause employees to refrain from exercising their statutory rights but this underpinning evaporates when, as here, there is evidence that the rule was not enforced in a prohibited fashion and employees understood that they were permitted to engage in union activities on their own time and, in fact, did engage in such activities; and that two U.S. circuit courts of appeals have held that an overly broad rule is not a violation of the Act where evidence shows that employees freely engaged in solicitation.

Again, Respondent serves up a red herring on brief. The portion at issue of the involved rule is quoted correctly in the complaint. Nowhere does it refer to requiring "permission for *worktime* solicitation." (Emphasis added, R. Br. 52.)⁷⁰ Also, contrary to Respondent's assertions on brief, its involved rule was not communicated or applied in such a way as to convey the intent clearly to permit solicitation when employees are not actively at work. As indicated above, a number of employees who were on their own time were either not allowed to solicit in a nonwork area or were disciplined when they did.⁷¹ On the one hand, there is no evidence of record that the involved rule was actually communicated to employees in such a way as to convey an intent clearly to permit solicitation in nonworking areas when employees were not actively at work. On the other, there is a lot of evidence of record demonstrating that this rule was applied in such a way as to convey an intent clearly to prohibit solicitation in nonworking areas when a number of employees were not actively at work. The rule at issue is overly broad and discriminatory on its face. As the Board pointed out in *Brunswick Corp.*, supra at 795:

. . . any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful. Further, the Board held in *Schnadig Corporation*, 265 NLRB 147, 157 (1982), . . . that

⁷⁰ Another paragraph of Respondents' solicitation and distribution policy, par. C—which is not at issue in the complaint—reads, as here pertinent, "[n]o distribution is allowed during working time." GC Exh. 6. This is an unequivocal prohibition. There is no provision for permission with respect to working time in Respondent's solicitation and distribution policy.

⁷¹ To list just some, McGoun, Cothran, Saltzer, Holliday, Villani, Panebianco, and Fuller.

the mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if the rule is not enforced. We find, accordingly, that the Respondent's promulgation and maintenance of its no solicitation/no distribution rule constituted a per se violation of Section 8(a)(1).

The Board in *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001), indicated as follows:

... any distribution rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in non-work areas is unlawful. . . .

When a rule of this kind is found presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time. *Ichikoh Mfg.*, 312 NLRB 1022 (1993), *enfd.* 41 F.3d 1507 (6th Cir. 1994). A clarification of an ambiguous rule or a narrowed interpretation of an overly broad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule. *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994). Any remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule. See *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

The rule at issue is unlawful on its face. Respondent did not show that it communicated effectively to its employees to eliminate the impact of this facially invalid rule. The two U.S. circuit courts of appeals cases cited by Respondent can be distinguished in that here the evidence shows that a number of employees were not able to freely engage in solicitation. Respondent violated the Act as alleged in paragraphs 11 and 14 of the complaint.

Paragraphs 12(a), (b), and (c) of the complaint collectively allege in or about early August 2007 Respondent issued to its employee Sandi McGoun a verbal discipline and on November 2, 2007, it issued a written discipline to her because she assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

Counsel for the General Counsel on brief contends that McGoun received a verbal counseling on July 31, 2007, because she was perceived as talking about the Union while on duty; that to prove a violation of Section 8(a)(3) of the Act, the General Counsel must show that union activity or other protected activity has been a motivating factor in the Employer's adverse personnel decision; that to establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility; that inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well as from direct evidence, *Washington Nursing Home*, 321 NLRB 366, 375 (1996); that once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer

to prove that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); that McGoun was known as a leading union adherent; that only days before her coaching she was quoted in the local newspaper about the union campaign; that when Ringle gave her the verbal warning Ringle told McGoun it was because she was observed talking about the Union; that no evidence was presented about the second incident cited in the verbal warning; that Gutierrez, who made the initial report, testified that she did not consider McGoun's conduct to be a violation of a hospital rule; that there was absolutely no investigation conducted; that Respondent was unable to offer into evidence a single coaching or any type of discipline that it ever issued to a nurse for being out of his/her work area or disrupting other employees; that there is no evidence that Respondent ever coached or disciplined any employee for posting in the elevator other than in connection with the union campaign; that McGoun was told by Kling that she had violated the solicitation and distribution policy while Settle testified that the solicitation and distribution policy does not cover posting; that it is clear that Respondent was applying its rules in a manner to discriminate against employees, including McGoun, for engaging in union activity and, therefore, the discipline is unlawful; and that Respondent relied on an unlawful rule requiring prior permission to engage in solicitation in disciplining McGoun.

The Charging Party on brief, argues that NCH violated Section 8(a)(3) of the Act by disciplining McGoun because of her union activity and in order to discourage others from union activity.

Respondent on brief, contends that McGoun received the coaching because she was out of her assigned work area during working time discussing nonwork-related matters; that there is un rebutted evidence that Respondent required employees to stay in their assigned work areas and disciplined employees who did not do so; that when Respondent cited its no-solicitation policy when it disciplined McGoun for posting in the garage elevator, "[t]his was a mistake" (R. Br. 42); that this mistake does not transform McGoun's conduct into solicitation; that McGoun clearly engaged in posting union literature on Respondent's bulletin board; that Respondent had a bulletin board posting policy in the employee handbook at the time, page 76 of Charging Party's Exhibit 4; and that:

Moreover, there is evidence in the record that Respondent enforced its posting policy on the parking garage bulletin boards *before* McGoun engaged in her posting. [Exh. GC-4; Tr. 42.] On August 3, 2007, Pete Karavas received a three (3) Point Reminder for placing a flyer in a parking garage elevator. [Exh. GC-4; Tr. 42, 507, 513-514.] Thus, McGoun was treated the same, if not better, as other employees who were observed posting literature on the parking garage bulletin boards. [Emphasis in original, R. Br. 43.]

In reading this quoted portion of Respondent's brief one could conclude, as Respondent leads one to believe, that

McGoun fared better than Karavas since he, according to Respondent's brief, "received a three (3) Point Reminder for placing a flyer in a parking garage elevator" (Id.) and McGoun received only a one (1) point reminder. The Respondent's attorney who signed Respondent's brief elicited the following testimony from Thigpen:

Q. BY MR. BROWN: Ms. Thigpen, would you put General Counsel's Exhibit 4 in front of you? Do you have that in front of you?

A. Yes, sir.

Q. The first page of General Counsel's Exhibit 4, which involves Pete Karavas, do you see that?

A. Yes, I do.

Q. He had a three-point reminder for Employee Standards of Behavior.

A. That's correct.

Q. In the second sentence, it says, "As you know, we had a similar discussion back on with Human Resources."

Were you involved in that discussion?

A. I do not recall.

Q. Well, let me ask you this. Do you know if Mr. Karavas got a three-point reminder solely because he posted a Union flyer?

A. He received it for posting the Union flyer, as well as he had had previous corrective actions, which elevated it to three points.

Q. What were the previous corrective actions, if you know?

A. He had, and I don't recall the specific dates, but previous to this he had received a five-point corrective action for making vulgar comments to a female coworker.

Q. Did he have any other corrective actions that you can recall?

A. He did. He had an additional—sometime later, he had an additional corrective action. I believe it was a one-point corrective action for—he was upset that he had to attend a required staff meeting. So when he came into the staff meeting, and it was the OR, they didn't have any scrubs in his size and he had to dress appropriately to enter the OR, so he showed up at the staff meeting in his underwear.

Q. Anything else?

A. No.

MR. MECHANIC: Is there anything in writing about being inappropriate to show up at a staff meeting in underwear?

THE WITNESS: You need to be in appropriate dress code, yes. [Tr. 567–569.]

As noted above, Respondent cited portions of the transcript. Respondent did not cite pages 567–569. This testimony of Thigpen is hard to overlook. This argument of Respondent is disingenuous at best. Karavas's discipline on August 3, 2007, was the first time Respondent disciplined anyone for posting on the cork bulletin board in the downtown garage elevator. As noted above, non-NCH postings had taken place for about 10 years in the downtown garage elevators. The contradicted testimony of some of Respondent's witnesses that during that 10-

year period such postings were promptly removed is not credited. It was only after union literature was posted that Respondent started disciplining employees, and Respondent has not shown that it has ever disciplined an employee for any non-NCH posting other than union flyers.

The "mistake" argument Respondent raises on brief with respect to McGoun is treated above with reference to the earlier discipline [pursuant to the complaint, prohibition in violation of Section 8(a)(1)] of Cothran and Saltzer for posting union literature in a downtown garage elevator.⁷² HR was involved in both of the garage elevator posting incidents covered by the complaint herein (at least once with Respondent's lawyer and once with the executive team). Respondent's approach was not a mistake in terms of what grounds were used. As noted above, to buy into a mistake argument, one would have to believe that Respondent mistakenly did not cite its bulletin board policy the first time on August 3, 2007 (with Karavas), then it made the mistake again on August 10, 2007 (with Kinsland), then it made the mistake again in October 2007 (with Cothran and Saltzer), and then it made the mistake again on November 2, 2007 (with McGoun). The only mistake was that Respondent belatedly realized that it was relying on a portion of a solicitation/distribution rule or policy that was unlawful.

With respect to the disciplining of McGoun for being out of her work area, under *Wright Line*, supra, it is noted, as pointed out by the General Counsel on brief, that McGoun was known as a leading union adherent. McGoun wore a union organizing committee badge so nurses would know that they could ask her questions about the Union. Her director, Kling, testified that he knew McGoun supported the Union in that "[s]he told me, [s]he always wore purple, [s]he had purple Crocs, the purple lanyard, the buttons, and she's very open with me, very honest" (Tr. 831). McGoun was quoted ("this is the biggest disconnect I've ever felt between us and management," said . . . McGoun, a nurse for 30 years") in an article about the union campaign in the July 27, 2007 edition of the Naples Daily News. The wide spread unlawful activity of the Respondent described in the record herein demonstrates Respondent's union animus. Four days after she was quoted in the local newspaper McGoun was disciplined. As found below, the only explanation for the adverse action, the one given by Ringle when she disciplined McGoun, was McGoun's perceived union activity at the nurses' station on 3 North on July 30, 2007. Since none of Respondent's witnesses testified that she or he overheard what was said between McGoun and DeBillis, it appears that Preece was relying on her knowledge of the fact that McGoun was an open union supporter and McGoun was active in her support of the

⁷² Respondent did not argue "mistake" with respect to the reason for disciplining Cothran and Saltzer. Respondent's "mistake" argument regarding the reason given for McGoun's discipline for posting was included in the Cothran and Saltzer part of this decision so as to avoid repetition, to the extent possible in that logically if the argument applied to McGoun it could also be made regarding Cothran and Saltzer. It appears that Respondent did not make this argument with respect to Cothran and Saltzer because it realized it would be more difficult to sell the argument if it happened twice. But actually Respondent did not rely on its bulletin board policy even more than these two incidents.

Union. Counsel for the General Counsel has made a prima facie case. The burden of going forward shifts to the Respondent.

Has Respondent demonstrated that it would have taken the same action absent McGoun's union activity? In my opinion, Respondent has not. Respondent claims that McGoun was disciplined for being out of her work area. Respondent, however, was unable to show that it had ever disciplined an RN for being out of her or his work area. McGoun was 20 feet from her work area. McGoun's Director testified that McGoun is an honest individual. No one disputed McGoun's testimony that being outside her assigned unit talking to a fellow nurse happens frequently. Gutierrez, who reported McGoun's presence on 3 North to Preece, testified that McGoun did not violate any hospital rule. Other than speaking to Preece, Ringle did not conduct an investigation. The discipline was issued allegedly for two instances of McGoun being on 3 North, out of her work area. Ringle testified that she was relying solely on Preece, and Ringle had no idea what the specifics of the alleged July 25, 2007 instance were. Notwithstanding this, Preece, who testified at the trial herein, did not even attempt to explain what allegedly happened on July 25, 2007.⁷³ Consequently, Respondent has not shown that it had a business justification for one of the two instances it allegedly relied on. With respect to the other incident, Ringle told McGoun that she was observed talking about the Union at the nurses' station on 3 North. McGoun is a credible witness. I credit her testimony. Ringle, who testified well after McGoun, did not deny this until all of her questioning was through and she was asked by me if she told McGoun this. I did not find Ringle to be a credible witness on this point.⁷⁴ Her denial is not credited. Thigpen's initial attempt to distance herself from any role in this counseling—asserting that she was not involved in McGoun's coaching form—only to have Ringle testify that Thigpen reviewed McGoun's coaching form before she, Ringle, issued it to McGoun, not only serves to undermine the credibility of Thigpen but it raises questions regarding why HR became involved and why Thigpen wanted to try to hide this fact. According to Thigpen's testimony, it is unusual for her to become involved in a coaching. So HR gets involved, there is no investigation, no one other than allegedly Preece has the slightest clue what the alleged July 25, 2007 incident is about, there is no indication that Thigpen communicated with Preece, and McGoun is disciplined. On this record, Respondent cannot argue that McGoun was disciplined for what allegedly happened in July 25, 2007. And with respect to

⁷³ As concluded above, Preece is not a credible witness. She limited, as much as she believed she could, her role in the instance where off-duty employees posted union literature in the employee lounge on 3 North. With respect to her role in the July 31, 2007 discipline Preece was silent.

⁷⁴ If Kling was present during this coaching, he did not corroborate Ringle with respect to her denial that she told McGoun that she was observed talking about the Union at the 3 North nurses' station. Kling did testify that the later discipline to McGoun for posting union literature on the cork bulletin board in the downtown garage elevator was related so that the first could be taken into consideration in deciding to give McGoun a one point written warning instead of a verbal warning or coaching. It appears that Kling was conceding that the July 31, 2007 discipline or coaching was also for union activity.

the July 30, 2007, the only explanation is McGoun's perceived union activity. Respondent has not shown a business justification for McGoun's July 31, 2007 discipline (coaching). Respondent has not shown that absent McGoun's perceived union activity she would have been disciplined.

Regarding the disciplining of McGoun for posting union literature in the downtown garage elevator, as pointed out by a majority of the Board in *Register Guard*, 351 NLRB 1110, 1120 (2007), a *Wright Line* analysis is not appropriate where the conduct for which the employer claims to have disciplined the employee was union of other protected activity. Respondent's "mistake" argument is treated above. HR, with the assistance of the executive team and one of its lawyers, chose to rely on an unlawful solicitation policy when, after personal posting had been going on in the garage elevators for approximately 10 years, it started to discipline employees for posting in the garage elevators because the employees were posting union literature. The reasons are specified above for why it was unlawful for Respondent to either prohibit Cothran and Saltzer from posting union flyers in the downtown garage elevators in October 2007 or discipline McGoun for posting a union flyer in a downtown garage elevator on October 29, 2007. Respondent violated the Act as alleged in paragraphs 12 and 15 of the complaint.

Paragraphs 13(a) and (b) of the complaint collectively allege in or about late November 2007 through in or about mid-January 2008, Respondent changed the working conditions of its employee Mary Villani by failing to assign her charge nurse duties as it had done previously because she assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

Counsel for the General Counsel on brief contends that Villani was the most outspoken and perceived leader in the organizing campaign; that there is sufficient evidence that Respondent was aware of it; that the massive antiunion campaign Respondent mounted, including *Here are the Facts*, communications, its implementing and enforcing new rules to deprive employees of their right to communicate with fellow employees, its unlawful enforcement of its overly broad rules, and the unlawful surveillance are sufficient to establish antiunion animus; that Villani's charge assignments were reduced; that Respondent has provided insufficient evidence to dispute Villani's testimony; that Respondent did not provide any evidence that can establish what the SICU initial day shift charge assignments were; that McCloskey's testimony that he relinquished all responsibility for making SICU day charge nurse assignments to the SICU night charge nurse should not be credited since it is not corroborated by the other night clinical coordinator, Alteen, in that when she is working when McCloskey is not there she makes the SICU day charge nurse assignment; that Respondent is taking the position that McCloskey does not know anything about SICU day charge nurse assignments and he does not want to know anything about it; and that Respondent violated Section 8(a)(3) between November 2007 and January 2008 by failing to assign Villani charge nurse duties as frequently as it had before because of her prominent role in the union campaign and to discourage others from engaging in these activities.

The Charging Party on brief argues that Villani's testimony about the decrease in her charge assignments is credible, uncontested, and corroborated by payroll records submitted by Respondent; that the pay and scheduling records introduced by Respondent only show how many hours Villani worked as charge and not what was originally assigned; that as Villani's charge assignments decreased, the charge assignments of Rasmussen, who did not like to serve as charge but would do so if she was assigned, increased; that the General Counsel has established a prima facie case under *Wright Line*, supra, in that there is undisputed evidence of Villani's protected activity and NCH's knowledge thereof, and there is ample evidence of NCH's union animus; that in mid-November Villani was featured alone in the sole photo and quotation on a piece of literature that was mailed to nurses and distributed in the hospital, which challenged NCH's priorities and questioned its financial decisions (GC Exh. 17(e)); that the decrease in Villani's charge assignments limited her access to nurses on other units and prevented her from providing a pronoun counterpoint to the Burke Group's antiunion message; that in mid-January 2008 Villani spoke at a press conference and publicly accused NCH of changing her assignments because of her support of the union; that shortly after that Villani was assigned to work four shifts in a row as charge; that NCH has failed to rebut the General Counsel's prima facie case because it has not established a legitimate cause for the decrease in Villani's charge assignments; that while both clinical coordinators in SCIU's night shift denied that Villani was discriminated against because of union activity, they did not provide any legitimate justification—or any reason whatsoever—for the significant drop in Villani's charge assignments; and that NCH presented no witnesses who work as charge nurses on SCIU's night shift to explain the reasons for assignments or verify McCloskey claim that he has no say in assigning the SCIU day-shift charge nurse, which differs somewhat from the testimony of Alteen and Ringle regarding the role of clinical coordinators in assigning charge.

Respondent on brief contends that the General Counsel has not met her initial burden under *Wright Line*, supra, in two respects; that General Counsel failed to establish an adverse employment action in that she did not prove that Villani's charge nurse assignments were reduced during the period in question; that Villani offered no documentary evidence in support of her testimony even though charge nurse time and extra pay is indicated on employees' pay stubs; that a detailed review of Respondent's Exhibit 9 reveals that Villani actually worked a higher percentage of shifts as charge nurse from November 11, 2007, through February 2, 2008, than she did for the period of time before November 11, 2007; and that:

Aside from the failure to establish an adverse employment action, Counsel for General Counsel's evidence failed to establish a casual [sic] nexus between the Villani's protected activity and her charge nurse assignments. See *Shearer's Foods, Inc.*, 343 [sic] NLRB 1093, 1094 fn. 4 (2003). This is because Villani's charge nurse assignments were not made by Respondent's managers or supervisors. Instead, Villani's charge nurse assignments were based solely upon the decision of the night SCIU charge

nurse who is not a member of management or a supervisor. [Tr. 981.] In these circumstances, there is no casual [sic] nexus sufficient to conclude that Villani's protected activity was a motivating factor in her charge nurse assignments. *Shearer*, [sic] supra. [R. Br. 37.]

Respondent's calculations do not take into consideration the fact that when Villani was asked to be a preceptor training interns, she was not available to be charge. The director of critical care at Respondent's downtown hospital, Kling, testified that Villani, who has 27 years of experience, is excellent in terms of capability and skills, and he has assigned Villani to work as a preceptor (PREC). Additionally, when Villani is floated out (FO) of her regular unit, SICU, and assigned to other units, as need dictates, she is not available to be charge in SICU. If those are also excluded from consideration as to when Villani could have been charge in SCIU, the situation would be viewed in terms of how often was Villani the charge nurse in SICU when she was available to be charge nurse (UTL for unit team leader/charge) in SICU. Viewed in those terms, Respondent's Exhibit 9 shows that (a) in July 2007 Villani was at work 12 times, she was FO 11 of those times, she was available to be UTL 1 time, she was UTL that 1 time, and so she was UTL for 100 percent of the time she was available to be UTL; (b) in August 2007 Villani was at work 15 times, she was PREC 5 times, she was FO 3 times, she was UTL 7 times, and so she was UTL 100 percent of the time she was available to be UTL; (c) in September 2007 Villani was at work 13 times, she was PREC 3 times, she was FO 1 time, she was UTL 9 times, and so she was UTL 100 percent of the time she was available to be UTL; (d) in October 2007 Villani was at work 13 times, she was PREC 1 time, she was FO 3 times, she did not work a full shift 3 times, she was UTL 4 times, and so she was UTL 4 of the 6 times she was available to be UTL for a percentage of about 66; (e) in November 2007 Villani was at work 13 times, she was FO 1 time, she was UTL 6 times, and so she was UTL 50 percent of the time she was available to be UTL; (f) in December 2007 Villani was at work 12 times, she was UTL 4 times, and so she was UTL 33 percent of the time she was available to be UTL; and (g) in January 2008 Villani was at work 13 times, she was FO 2 times, she was UTL 5 times, and so she was UTL about 45 percent of the time she was available to be UTL. Villani's working conditions changed; the number of times she worked as charge was reduced during the period in question.

The Board indicated in *Blue Diamond Growers*, 353 NLRB 50 (2008), as follows:

Under *Wright Line*, the General Counsel bears the burden of showing that protected conduct was a substantial or motivating factor in the adverse employment action. The elements required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *Intermet Stevensville*, 350 NLRB [1350, 1358] (2007). If the General Counsel makes the required initial showing, the burden then shifts to the employer to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. See *Manno Electric*, 321

NLRB 278, 280 fn. 12 (1996). Chairman Schaumber observes that the Board and the circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line sometimes* adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Chairman Schaumber agrees with this addition to the formulation. [Emphasis added.]

RN Villani, who has worked for Respondent for 27 years with 19 years in the downtown SICU, is a member of the union organizing committee, she had at least three press conferences, got union cards signed, passed out union literature at Respondent's facility, wore a lot of purple, wrote letters to the editor which were published in the Naples Daily News, had her name mentioned in other peoples' letters to the editor which were published in the Naples Daily News, was quoted in an August 3, 2007 article in the Naples Daily News, told Preece not to take union literature down on August 17, 2007, when she and others took pizza to employee lounges when they were off duty, handed out cake and union literature on September 25, 2007, in the downtown cafeteria, and handed out treats and flyers on October 31, 2007, in the downtown cafeteria. As noted above, the last two activities resulted in Respondent's director of public safety coming to the cafeteria and speaking to her group, prohibiting the passing out of the cake the first time and having her group leave the second time. Also by flyer dated "11.13.07," which flyer had just her picture with her name on it (in addition to the letterhead of the Union), Respondent's executive compensation and financial priorities were challenged. In part, the flyer indicates:

CEO compensation at NCH has been more than double the national average.

Former CEO Ed Morton's \$3.3 million total compensation for 2005—2006 was more than double the average hospital CEO's compensation.

....

CHART: NCH CEO's compensation went up 248 percent from 2003 to 2006. NCH president's compensation went up 102 percent, up to \$831,882 in 2006.

Many of us believe that NCH could do more to staff units and recruit and retain RNs.

In fact, from 2005 to 2006, the share of NCH's budget devoted to staff pay and benefits actually went down.

.... [GC Exh. 17(e).]

Respondent's human resources' director, Thigpen, conceded that Villani was an outspoken union advocate. As indicated above, the wide spread conduct on the part of Respondent found unlawful in this decision supplies the antiunion animus. Villani suffered an adverse employment action in that the number of times she worked as a charge was reduced resulting in a reduction of her pay. Counsel for the General Counsel has made a prima facie case.

The burden of going forward has shifted to Respondent. Respondent has not met that burden. Respondent has not shown

that the same action would have been taken absent Villani's union activity. Respondent has not shown that it had a business justification for its actions with respect to Villani. Other clinical coordinators, including a critical care, which includes SICU, night-shift clinical coordinator, Alteen, testified that the clinical coordinator designates who will be the charge nurse for the next day shift. Alteen testified that she and the night charge nurse collaborate. At least two of Respondent's other witnesses tried to get out from under testifying about an unlawful situation by pleading ignorance. Thigpen initially testified that she did not play a role in McGoun's July 31, 2007 coaching. Another of Respondent's witnesses, Ringle—who is the day-shift clinical coordinator of critical care, testified that Thigpen was involved and Thigpen actually reviewed McGoun's coaching form before it was issued to McGoun.⁷⁵ Also, Thigpen's initial assertion was belied by documentary evidence. Human Resources Director Thigpen lied under oath. Nursing Director Preece, who initiated the McGoun coaching but did not testify specifically about it, for the most part claimed ignorance about what happened on August 17, 2007, on 3 North when three off-duty nurses, including Villani, dropped off pizza, spoke with nurses in the employee lounge, posted union literature in the 3 North employee lounge, and were unlawfully told to leave. Preece would only admit that she recognized the voice of Villani who said, "[D]on't take anything down." (Tr. 696.) Preece claimed that she did not know what Villani was talking about and she did not even know who Villani was talking to since Villani was not facing her. Nursing Director Preece lied under oath. Night-Shift Critical Care Clinical Coordinator McCloskey, who took over this position on July 4, 2007, and who works when Alteen is off, claims ignorance about what factors were taken into consideration in designating the day-shift charge nurse in SICU during the involved period, notwithstanding the fact that it is his responsibility to designate the day-shift charge nurse in SICU. McCloskey claims that he does not make the designation "[s]o I don't know what they use." (Tr. 986.) McCloskey claims that the night charge nurse designates who will be the charge on the following day shift and he puts "CHG" next to that name and posts the list next to the time clock. Who are the night-shift charge nurses who allegedly make the choice? McCloskey testified that some of the night charge nurses who make this decision are Nass Kinsland, Michelle Behrendt, and Janie Largent who are some of the names that he worked with in the last couple of weeks before the trial herein that he could remember but it could be anyone that was working that night. Respondent did not specifically identify the night shift charge nurses on SICU who allegedly made the decision during the time involved. Respondent did not call those nurses to corroborate McCloskey. So McCloskey, a supervisor, claims that he ceded his designation responsibility to employees, and he has no idea what the employees took into considera-

⁷⁵ As noted above, I did not credit certain of Ringle's testimony. On this note, Chief Judge Learned Hand indicated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) "[i]t is no reason for refusing to accept everything that a witness says because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

tion in exercising McCloskey's responsibility. Also, while McCloskey concedes that he is the person who wrote "CHG" on the Post-its, he could not on cross-examination give the approximate number of times prior to November 28, 2007, he designated Villani as charge on a Post-it, "[b]ecause I have no idea, I don't know." (Tr. 982.) When he was asked if he assigned Villani at least once a week, McCloskey testified, "I cannot answer that. I don't know." (Tr. 984.) When asked if there was any effort to try to balance day-shift charge nurse work assignments, McCloskey testified, "I can't speak to what the charge nurse uses to make his or her decision" (Tr. 985.) When McCloskey was asked if the Post-its were retained, he testified, "[n]o, not that I'm aware of" (Ibid.) and "[t]he only place that record is written down in my handwriting is on a Post-it Note that is not retained." (Ibid.) And when McCloskey was asked whether the day-shift nurses' preferences to be charge were taken into consideration in assigning charge, McCloskey testified, "[a]gain I don't know what the night-shift charge nurse uses to make his or her decision. I don't make the designation. They do. So I don't know what they use." (Id. at 986.) I did not find McCloskey to be a credible witness. His demeanor was that of a person who was not interested in supplying even the essentials necessary to determine whether his testimony was credible. Other clinical coordinators discuss the charge assignments with a charge on the other shift. Respondent did not show that any other clinical coordinator in either of its hospitals lets an employee make the charge assignment decisions and the clinical coordinator has no idea what is going on. As indicated by Chief Judge Learned Hand in *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) "... the denial of one, who has a motive to deny, may be uttered with such ... arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." McCloskey testified that he wrote "CHG" next to the SICU day-shift nurses name on the Post-it. Yet he was unwilling to approximate the number of times he did this next to Villani's name during specified periods or whether, in effect, there was a balance with respect to the number of times he wrote "CHG" next to a nurse's name. He, like Thigpen and Preece, pled ignorance. But here, if McCloskey was telling the truth, Respondent could have called the employees to corroborate his testimony and explain why Villani's charge assignments were reduced during the period involved. Respondent chose not to call the employees. I am not discrediting McCloskey's testimony because it was not corroborated. There is no requirement that testimony be corroborated to be credible. *Marchese Metal Industries*, 302 NLRB 565, 570 (1991). I do not find McCloskey to be a credible witness based on his testimony and demeanor. Corroboration comes into play here only with respect to Respondent in that it had this additional avenue it could have used in its attempt to meet its burden and, it chose not to take it. Respondent has not met its burden. It has not shown that absent Villani's union activity, the same thing would have occurred. Respondent violated the Act as alleged in paragraphs 13 and 15 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) Creating the impression that employees' union and other protected, concerted activities were under surveillance.

(b) Prohibiting employees from posting or having union literature in the employee break/kitchen area.

(c) Telling employees that they were not permitted to engage in union and other protected, concerted activities in nonwork, non-patient care areas.

(d) Prohibiting employees, in the parking garage at Respondent's facility, from distributing union literature in a nonwork, nonpatient care area.

(e) Prohibiting employees from posting union literature in nonwork, nonpatient care areas where other nonunion literature and materials were posted.

(f) Soliciting employee complaints and grievances and impliedly promised to remedy them if employees refrained from engaging in union organizing activity.

(g) Telling employees that they were not permitted to engage in union and other protected, concerted activities unless they received prior permission and approval from the Employer.

(h) Maintaining in its employee handbook and enforcing the following policies and rules regarding solicitation, distribution, and posting of written or printed materials:

D. . . . Employees who wish to solicit for community charitable organizations must request permission on the "Solicitation Approval Form." The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or designee. Requests to solicit for personal profit, political causes or organizations representing any protected or nonprotected groups will routinely be denied.

4. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act:

(a) Issuing to its employee Sandi McGoun a verbal discipline and a written discipline because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(b) Changing the working conditions of its employee Mary Villani by failing to assign her charge nurse duties as it had done previously because she assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

5. The above-described labor practices affect commerce with the contemplation of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily changed the working conditions of its employee Mary Villani by failing to assign her charge nurse duties as it had done previously shall make her whole, with interest, for any loss of earnings and other benefits.⁷⁶

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁷

ORDER

The Respondent, Naples Community Hospital, Inc. of Naples, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that employees' union and other protected, concerted activities were under surveillance.

(b) Prohibiting employees from posting or having union literature in the employee break/kitchen area.

(c) Telling employees that they were not permitted to engage in union and other protected, concerted activities in nonwork, nonpatient care areas.

(d) Prohibiting employees, in the parking garage at Respondent's facility, from distributing union literature in a nonwork, nonpatient care area.

(e) Prohibiting employees from posting union literature in nonwork, nonpatient care areas where other nonunion literature and materials were posted.

(f) Soliciting employee complaints and grievances and impliedly promised to remedy them if employees refrained from engaging in union organizing activity.

(g) Telling employees that they were not permitted to engage in union and other protected, concerted activities unless they received prior permission and approval from the Employer.

(h) Maintaining in its employee handbook and on its website and enforcing the following policies and rules regarding solicitation, distribution, and posting of written or printed materials:

D. . . . Employees who wish to solicit for community charitable organizations must request permission on the "Solicitation Approval Form." The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or designee. Requests to solicit for personal profit, political causes or organizations representing any protected or nonprotected groups will routinely be denied.

(i) Issuing verbal or written disciplines because an employee assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

⁷⁶ On brief, counsel for the General Counsel indicates that interest on the monetary award should be compounded on a quarterly basis. This is not the current Board practice. Unless and until the Board changes its practice, the current Board practice will be applied.

On brief, the Charging Party requests remedies in addition to the normal remedies. No need has been shown for granting this request.

⁷⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(j) Changing the working conditions of an employee by failing to assign the employee charge nurse duties as it had done previously because the employee assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

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

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

(a) Make Mary Villani whole for any loss of earnings and other benefits she suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision, and assign charge nurse duties to Mary Villani on a nondiscriminatory basis.

(b) Rescind in its employee handbook and on its website the following policies and rules regarding solicitation, distribution, and posting of written or printed materials, and notify employees that this action has been taken and that they do not have to request permission to engage in solicitation or distribution on the employee's own time in a nonwork area:

D. . . . Employees who wish to solicit for community charitable organizations must request permission on the "Solicitation Approval Form." The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or designee. Requests to solicit for personal profit, political causes or organizations representing any protected or nonprotected groups will routinely be denied.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful verbal and written disciplines given to Sandi McGoun and the unlawful verbal disciplines given to Janice Cothran and Nike Saltzer, and within 3 days thereafter notify Sandi McGoun, Janice Cothran, and Nike Saltzer in writing that this has been done and that the verbal and written disciplines to Sandi McGoun and the verbal disciplines to Janice Cothran and Nike Saltzer will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Naples, Florida, copies of the attached notice marked "Appendix."⁷⁸ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in con-

⁷⁸ 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."

spicuous 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 August 6, 2007.

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

Dated, Washington, D.C. February 4, 2009

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 create the impression that your union and other protected, concerted activities are under surveillance.

WE WILL NOT prohibit you from posting or having union literature in the employee break/kitchen area.

WE WILL NOT tell you that you are not permitted to engage in union and other protected, concerted activities in nonwork, nonpatient care areas.

WE WILL NOT prohibit you, in the parking garage at our facilities, from distributing union literature in a nonwork, nonpatient care area.

WE WILL NOT prohibit you from posting union literature in nonwork, nonpatient care areas where other nonunion literature and materials were posted.

WE WILL NOT solicit your complaints and grievances and impliedly promise to remedy them if you refrain from engaging in union organizing activity.

WE WILL NOT tell you that you are not permitted to engage in union and other protected, concerted activities unless you receive prior permission and approval from us.

WE WILL NOT maintain in our employee handbook and on our website and enforce the following policies and rules regarding solicitation, distribution, and posting of written or printed materials:

D. . . . Employees who wish to solicit for community charitable organizations must request permission on the "Solicitation Approval Form." The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or designee. Requests to solicit for personal profit, political causes or organizations representing any protected or nonprotected groups will routinely be denied.

WE WILL NOT issue verbal or written disciplines because you assist Service Employees International Union Healthcare Florida and engage in concerted activities, and to discourage you from engaging in these activities.

WE WILL NOT change your working conditions by failing to assign you charge nurse duties as we had done previously because you assisted Service Employees International Union Healthcare Florida and engage in concerted activities and to discourage you from engaging in these activities.

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

WE WILL make Mary Villani whole for any loss of earnings and other benefits she suffered as a result of our discrimination against her; and WE WILL assign charge nurse duties to Mary Villani on a nondiscriminatory basis.

WE WILL rescind in our employee handbook and on our website the following policies and rules regarding solicitation, distribution, and posting of written or printed materials, and WE WILL notify you that this action has been taken and that you do not have to request permission to engage in solicitation or distribution on your own time in a nonwork area:

D. . . . Employees who wish to solicit for community charitable organizations must request permission on the "Solicitation Approval Form." The request will be evaluated on its merits and will either be approved or denied by the Chief Human Resources Officer or designee. Requests to solicit for personal profit, political causes or organizations representing any protected or nonprotected groups will routinely be denied.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal and written disciplines given to Sandi McGoun and the unlawful verbal disciplines given to Janice Cothran and Nike Saltzer, and within 3 days thereafter notify Sandi McGoun, Janice Cothran, and Nike Saltzer in writing that this has been done and that the verbal and written disciplines to Sandi McGoun and the verbal

disciplines to Janice Cothran and Niki Saltzer will not be used against them in any way.

NAPLES COMMUNITY HOSPITAL, INC.