Regency Heritage Nursing and Rehabilitation Center *and* SEIU 1199, New Jersey Health Care Union.
Case 22–CA–27992

February 27, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 3, 2008, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order. We agree with the judge that the Respondent violated Section 8(a)(5) of the Act by refusing to deal with nonemployee Union Representative Hector Pena[3] and that this matter was not deferrable to arbitration.[4] However, for the following reasons, we reverse the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally terminating an alleged past practice of granting nonemployee union representatives access to the Respondent's facility.

The Union and the Respondent's predecessor were parties to a collective-bargaining agreement that granted the Union access to the Respondent's facility upon notification to, and permission from, the predecessor. Before the Respondent began operating the facility on March 1, 2007,[5] it notified its predecessor's employees that it would not assume the predecessor's collective-bargaining agreement and would assume only a limited list of its predecessor's past practices. That list did not include any past practice regarding union access.

Shortly after March 1, Union Representative Pena visited the facility and met with the facility's administrator, Barry Rubin. During their conversation, Pena introduced himself as the Union's representative of employees at the facility. Through the end of May,[6] Pena visited the facility approximately once a week, meeting with employees outside the facility or in the facility's cafeteria. He did not notify the Respondent or seek its permission before conducting those meetings. On June 21, upon discovering Pena on the facility's premises, the Respondent informed him that he was not allowed on the property.

The judge found that, by directing Pena to leave the premises, the Respondent violated Section 8(a)(5) and (1) by unilaterally terminating an established practice of granting the Union access to the facility. We disagree.

There is no dispute that the Respondent was not required to adopt its predecessor's collective-bargaining agreement or past practices. Nor is there any dispute that the Respondent expressly notified prospective employees that it would not adopt that agreement or those practices, with certain specified exceptions not relevant here. Thus, the issue is solely whether, after the Respondent began operating the facility on March 1, Pena's visits created an established condition of employment that the Respondent could not unilaterally change.

As the party alleging an established past practice, the General Counsel has the burden of proof. See *National Steel & Shipbuilding Co.*, 348 NLRB 320, 323 (2006), enfd. mem. 256 Fed. Appx. 360 (D.C. Cir. 2007). Specifically, the General Counsel must show that Pena's post-March 1 visits occurred "with such regularity and frequency that employees could reasonably expect [them] to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). In addition, "[i]t is implicit in establishing a past practice

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] 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.

[3] In adopting the judge's finding that the Respondent unlawfully refused to deal with Pena, we rely on her credibility-based finding that Pena did not, in fact, hold up a sign that said "Fatah." Accordingly, we need not pass on her alternative finding that the Respondent would not have been justified in refusing to deal with Pena even if he had engaged in such conduct.

We also reject the Respondent's claim that its refusal to recognize Pena was justified by the fact that, in mid-2005, he distributed fliers stating that the Board had found David Gross, the Respondent's owner, "guilty of stealing" employees' money at another of the Respondent's facilities. The Respondent continued to deal with Pena in negotiations for that facility after the incident. Thus, the activity described did not create "such ill will that good-faith bargaining is virtually impossible or that [his] participation in bargaining otherwise represents a clear and present danger to the bargaining process." *Missouri Portland Cement Co.*, 284 NLRB 432, 433 (1987).

[4] While Member Schaumber agrees that deferral to arbitration would not be appropriate in this case, he disagrees with the Board's standard for deferral and would revisit the issue in an appropriate case.

[5] All dates are in 2007 unless otherwise indicated.

[6] Although the Respondent did not ban the Union from the facility until June 21, Pena testified that he was on his honeymoon for 3 weeks in June. This indicates that he did not visit the facility that month prior to June 21.

that the party which is being asked to honor it"—here, the Respondent—"be aware of its existence." *BSAF Wyandotte Corp.*, 278 NLRB 173, 180 (1986).

We find that the General Counsel has failed to adduce sufficient evidence to meet this burden. As discussed above, Pena visited the facility approximately once a week between March 1 and the end of May. He met with employees in the cafeteria and outside the facility. Other than his initial introduction to Rubin shortly after March 1, however, there is no evidence that the Respondent was, or reasonably should have been, aware of these visits. Although Pena testified that Rubin did not place any limits on Pena's access rights when he met with Rubin shortly after March 1, there is no evidence that they discussed access rights at all, or that Rubin gave any indication that Pena was permitted to visit the facility. Thus, we find that the General Counsel has not provided sufficient proof that there was a regular and consistent past practice, of which the Respondent was aware, of union access to the facility after March 1. Accordingly, we dismiss the complaint allegation that the Respondent unlawfully terminated such a practice unilaterally.

ORDER

The National Labor Relations Board orders that the Respondent, Regency Heritage Nursing and Rehabilitation Center, Ewing, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to deal with union representatives duly appointed by the Union to represent a bargaining unit of the Respondent's employees.

(b) 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 designed to effectuate the policies of the Act.

(a) Recognize and deal with Hector Pena as a duly-appointed representative of the Union for a bargaining unit of the Respondent's employees, providing him access to the Respondent's facility to perform his representative duties in accord with the provisions of the parties' current collective-bargaining agreement, and, within 10 days of this decision, notify the Union in writing that it no longer has any objection to dealing with Pena and that it will do so on request.

(b) Within 14 days after service by the Region, post at its facility in Ewing, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 21, 2007.

(c) 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.

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 refuse to deal with duly appointed representatives of SEIU 1199, New Jersey Health Care Union (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL recognize and deal with Hector Pena as a duly-appointed representative of the Union for a bargaining unit of our employees, providing him access to our facility to perform his representative duties in accord with the provisions of our current collective-bargaining

[7] 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."

agreement with the Union, and, WE WILL, within 10 days of this decision, notify the Union in writing that we no longer have any objection to dealing with Pena and that we will do so on request.

REGENCY HERITAGE NURSING AND REHABILITATION CENTER

Lisa Pollack, Esq., for the General Counsel.
Morris Tuchman, Esq. (Law Offices of Morris Tuchman), of New York, New York, for the Respondent.
William Massey, Esq. (Gladstein, Reif & Meginniss, LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. This case was heard by me in Newark, New Jersey, on March 19 and 28, 2008. The first amended complaint herein, which issued on February 20, 2008, was based upon an unfair labor practice charge and an amended charge that were filed on June 22, 2007,[1] and August 2, by SEIU 1199 New Jersey Health Care Union (the Union). The amended complaint alleges that since about June 21, Regency Heritage Nursing and Rehabilitation Center (the Regency Heritage or Respondent), has denied Hector Pena, and other union officers and representatives, access to its facility, and since about June 21, has refused to deal with Pena, in violation of Section 8(a)(1) and (5) of the Act. Respondent filed an answer denying the material allegations of the amended complaint and raising the affirmative defense that the matter should be deferred to arbitration. Upon the entire record,[2] and considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties' Collective-Bargaining Relationship

The Union had a collective-bargaining agreement with the Respondent's predecessor, the Central New Jersey Jewish Home for the Aged, covering its nonprofessional employees. This agreement was effective for the period August 19, 2004, through June 30, 2008. The Union's contractual visitation rights, at article 7, section 1 of that agreement, provides:

> A designated Union representative shall have the right to visit the Employer's establishment at reasonable times in order to investigate matters relative to wages, hours, working conditions and grievances. Such visits, however, shall not be made at such times or in such manner as shall interfere with the proper management and operation of the Employer. The Union representative shall notify the Human Resources Director in advance to arrange a time and date and describe the nature of the intended visit.

Respondent began operating the facility on March 1, but did not assume the predecessor's contract with the Union. The name of the facility was changed to Regency Heritage Nursing and Rehabilitation Center (Regency Heritage). As Owner David Gross testified, this change was intended to reflect the nature of the facility and its residents.[3] Pena testified that a few days after the Respondent assumed the operation of the facility, he introduced himself to Administrator Barry Rubin as the Union's representative at the facility, and subsequently, he visited Regency Heritage about once per week, preparing the employees for the upcoming bargaining negotiations. Pena testified that in his meeting with Rubin there were no limitations put on his visitation rights, he never notified any of the Respondent's representatives before going to the facility and, prior to June 21, he never had any problems while at the facility. He usually met with employees in the cafeteria, or outside the facility as they were entering or leaving work. As to whether he encountered any difficulties in any of these visits, he testified: "None whatsoever." Gabriel Knight, who is employed at the facility as a licensed practical nurse, testified that he had seen Pena at the facility several times per month prior to June, distributing information about the Union to employees. Gross testified that union representatives were allowed to be at the facility, but only if they called first to make an appointment to be there.

B. The 10-Day Strike Notice and Events of June 21 and 22

A bargaining session which was held on June 19, was attended by Pena, Union President Milly Silva, secretary-treasurer, Marvin Hamilton, Counsel Ellen Dichner, and about ten employees for the Union. The Respondent was represented by Gross, Counsel Morris Tuchman and Respondent's bookkeeper. At some point during this meeting, the Union asked to caucus. The employee members of the bargaining committee voted to give Respondent a 10-day strike notice and to engage in a strike on June 30 and July 1. When the Respondent's representatives returned to the room, Silva handed the strike notice to the Respondent. Nothing further was said and the meeting ended.

Pena, whose testimony is corroborated in all material respects by Hamilton, stated that he, and Hamilton, visited the facility on June 21, to meet with employees and to discuss the

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2007.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or because it was inherently incredible or unworthy of belief.

[3] According to Gross, the facility maintains a mini-museum of Judaica, including religious objects and art work. There are weekly Shabbat services and other holiday celebrations.

10-day strike notice with them. They stood on the Respondent's premises, outside of the facility, near the parking lot and next to the entrance to the facility, talking to two or three employees at a time. At about 3, Frank Raccuia, an assistant administrator of the Regency Heritage, approached the union representatives and told them to leave the property, otherwise he would call the police. Hamilton responded that they were not going to leave as they represented the employees at the facility, and Raccuia said that he was under orders from Gross to get the union representatives off the property. Pena and Hamilton remained where they were situated and about 5 minutes later Gross came out and, in the presence of employees, told the union representatives to leave since they had no contract. Pena told Gross that he had heard that some employees had been sent home that day, and Gross said that the Union did not represent his workers, and again told the union representatives to leave and that if they had a problem to call his lawyer. Pena again asked Gross what happened with the workers, and he said that they had quit.[4] Shortly thereafter, the police arrived and Pena and Hamilton moved to a nearby park where they continued to meet with employees of the facility.

On cross examination, Gross was asked by counsel for the Charging Party as follows:

> Q. After the Union presented you with a 10 day strike notice on June 19th, isn't it true that you banned all Union representatives from your property at Regency Heritage?
>
> A. Yes.

On June 22, Respondent distributed a letter signed by Gross to its employees stating, inter alia, that "Union representatives, members and anyone on strike are not employees of Regency Heritage and are not permitted on our property." On that day, Pena went to the facility and stood on the sidewalk, which is public property adjoining the facility, and distributed flyers to employees. Facility Managers Raccuia and Al Morris came out and told him that he would have to leave or they would call the police. Pena said that he was on public property, and that if they wanted to call the police, they should do so. The police were summoned, viewed the situation, and left. Pena was later joined by Union Representatives Zoe Baldwin and James Macgregor. The police came on two subsequent occasions that day; on both occasions they said that the union representatives could remain because they were on public property.

C. Events of June 23 and 24

It is alleged by the Respondent, and denied by Pena and Hamilton, that while at the facility on June 23, Pena held up a sign stating "Fatah,"[5] which would be offensive to residents of the Regency Heritage and their families and guests. Respondent asserts that this is the reason that it has barred Pena from its facility.

Pena testified that he arrived at the facility on the morning of June 23 at about 10:25 a.m.; Hamilton arrived at the facility about 10 or 15 minutes later. Both men were situated on public property adjacent to the driveway by which visitors enter and leave the facility. Various family members were arriving for Sabbath services and for family visits, and the union agents planned to use the opportunity to speak with them in order to obtain their signatures on petitions supporting the facility's employees. The petition that they asked the family members to sign as they were entering and leaving the facility stated:

> An unstable workforce would put
> Regency Heritage residents at risk!
>
> New Management is causing an Exodus of quality caregivers. The new operator of the for-profit Regency Heritage nursing home introduced himself by slashing low wage worker's pay by up to $5 an hour. Their actions are causing an exodus of quality caregivers who have devoted more than 15 years to serve our loved ones.
>
> Regency Heritage can't become a revolving door of strange workers.
> Our residents need caregivers they have spent years getting to know. If management values the continuity of care of our loved ones, they will pay good wages and benefits to keep good caregivers who our loved ones know and love.
>
> Count on me
>
> To stand with Regency Heritage workers to
> Hold management accountable to
> Quality jobs and quality care.

Below was a space for residents' family members to list their name, address, and telephone number and to place a check next to three choices:

> I will call David Gross to tell him to do the right thing.
> I will stop by the strike line to support our care givers June 30 . . . .
>
> I will stop by the strike line to support our care givers July 1 . . . .

Pena, corroborated by Hamilton,[6] testified that during this period of time he was wearing a purple t-shirt and purple hat bearing a SEIU Local 1199 logo. He also had, at the time, a full beard.

Pena denied displaying a sign bearing the word "Fatah" on this or any other occasion. He further testified, that, at this point in time, he did not even know what the word signified. Pena further denied that he made any threats to anyone, and stated that he was not approached by any representative from management or by the police that day. He and Hamilton left the facility together, at approximately 2 p.m.

On the following day, June 24, Pena arrived at the facility at about noon accompanied by his wife, Adelya Pena. When he arrived he met with Baldwin and the union representatives stood on public property and asked residents' family members

[4] Some employees were fired, allegedly for wearing union buttons, but after a charge was filed with the Board, the matter was settled and the employees were reinstated.

[5] I take administrative notice of the fact that "Fatah" is a reference to a Palestinian political party which is a constituent member of the Palestine Liberation Organization (PLO).

[6] Hamilton's testimony on this particular issue was adduced through an offer of proof as stipulated by the parties.

to sign the petition signifying their support for the Union and the employees. According to Pena, he again wore a purple T-shirt and cap bearing union insignia. Pena further testified that, based upon his efforts on June 23 and 24, he obtained approximately 20 signatures from residents' family members in support of the Union's petition. He denied displaying a "Fatah" sign on this occasion.

Later in the day a gentleman, who at the time was unknown to Pena (this individual was subsequently identified as Steven Flaks, a family member of one of the facility's residents) who was driving a black Mercedes, passed by Pena, who asked him to sign the flyer. Flaks then asked Pena, "Where is your Fatah sign?" Pena replied, "What sign?" and Flaks left without answering. Pena asserts that he had never previously seen Flaks.

Hamilton testified that he arrived at Respondent's facility on Saturday, June 23, at about 10:35 a.m., about 10 to 15 minutes after Pena arrived. Their purpose in being at the facility that day was to distribute flyers to residents' family members asking them to support Respondent's employees. He and Pena were standing on the sidewalk, Hamilton on the left side of the driveway, and Pena on the right, passing out leaflets to family members as they were entering and leaving the facility. He saw no document containing the word "Fatah," and he left the facility with Pena at about 2:30 on that day. Hamilton did not go to the facility on June 24, or the following week.

Gross testified that Flaks' father is a resident at the facility and that he often attends religious services with his father at the facility's synagogue on Saturday mornings at 10 a.m. About 1 week after the alleged incident, Gross was approached by a member of his management staff, along with Flaks, who told Gross that on Saturday, June 23, at about 10, as he was driving into the facility, he saw a man standing outside the building holding a sign that said "Fatah." When Flaks went into the facility he approached the first employee that he saw, who has since been identified as Frank Foray, and asked Foray to go outside to double check what he had seen. According to Gross, Foray went outside ". . . and confirmed for him that he saw it. That, in fact, it was a Union representative that was standing outside."

Gross testified further that Flaks told him that as he was leaving the facility that day or the next day he saw the individual who had been carrying the sign, but now was requesting his signature, and Flaks asked him where his sign was. According to Gross, he also spoke to Foray, who provided a description which matched Pena's, and on the basis of these two conversations, and his knowledge that Pena was at the facility on June 23 and 24, he determined that Pena was the individual who was carrying the "Fatah" sign.

In answer to various questions from counsel from the Charging Party, Gross' memory began to fail him and he became repeatedly argumentative and unresponsive.[7] What can be gleaned from his testimony is that he was not present at the facility on June 23 or 24, and did not receive a report from anybody at the facility about the alleged incident until "at some time after the Fatah sign incident." Initially Gross testified that Flaks had told him that the sign he saw was in Arabic; he later changed his testimony in this regard.[8] After Gross decided that it was Pena who had carried the "Fatah" sign, he resolved that he would not allow him access to the Regency Heritage to meet with employees for representational purposes. The record does reflect however, that Pena did participate in most of the negotiations for a collective-bargaining agreement, which were held off site. Pena was also allowed on Regency Heritage premises on one occasion to meet with employees to explain the proposed collective-bargaining agreement and obtain employee ratification of the contract.

D. The Union's Investigation of the Alleged Fatah Incident

About 2 weeks after the June 23 leaflet distribution, Union President Silva told Hamilton that an allegation had been made that, while at the Regency Heritage on June 23, Pena had displayed a sign bearing the word "Fatah." Silva asked Hamilton to investigate it. According to Hamilton, his investigation failed to establish that Pena had engaged in any such misconduct.

Hamilton testified that after Silva instructed him to investigate the situation, he spoke to Pena and Foray in person, and Flaks by telephone. Flaks told him that as he drove his black Mercedes to the facility he saw somebody outside the facility carrying a sign that said "Fatah" and he told Hamilton that he found it "weird." He went into the building, got the first employee that he saw, Foray, and took him outside: "Mr. Foray said it sounded like it said Allah. And Mr. Flaks, I don't know if he told me exactly what it said. He may have said it said Fatah, to the best of my recollection." Flaks also told Hamilton that on the following day, ". . . he went up to a guy at the Union and asked him . . . where was his sign."

According to Hamilton, Foray told him that when he went outside he spoke to the person holding the sign and that this person said that he worked for the Union. Both Flaks and Foray told Hamilton that while this was going on a blonde woman was sitting nearby in a beach chair.[9] Neither Flaks nor Foray referred to Hamilton's presence at the facility at the time. When he met with Foray, Hamilton asked him to describe the individual that he saw, and he described him as middle-eastern with a medium build. He asked Foray if he could differentiate between a middle-easterner and a Hispanic, and Foray said that he could. Hamilton, who did not tell Foray that he was with Pena at the facility on the day in question, asked if he had ever seen him before, and Foray said that he had not. Hamilton asked

[7] Examples include Gross' testimony that he does not know whether there is a procedure for an employee to follow if he or she receives a complaint or report of an incident from a family member; that he did not know whether there were generally more visitors to the facility on weekends than during the week; that he did not know who had been left in charge of the facility on Saturday, June 23, or whether he had spoken with anyone from the facility during that weekend; that he did not know whether he was at the facility on the following Monday; that he did "not want to guess" which member of his management staff approached him about the "Fatah" incident; and that he did not recall whether he had received any other reports or complaints about a "Fatah" sign.

[8] Initially Gross testified that Flaks told him: "It had Arabic writing. And he said I found somebody to go out there and just double check what it is I saw." Subsequently, when questioned on this matter by counsel for the Charging Party, Gross replied: "I don't recall he said it had Arabic writing or not. I recall he said it had fatah."

[9] Pena's wife Adelya, is blonde.

Foray whether he reported the incident to anybody, and he said no. Hamilton asked why he didn't report it, and Foray stated that he didn't know.

Adelya Pena testified that she was not at the facility on June 23.[10] She spent the morning shopping, paying a credit-card bill, and then met her husband for lunch at approximately 3 p.m. Adelya Pena further testified that, on Sunday, June 24, she accompanied her husband to Respondent's facility. Baldwin was there as well; Hamilton was not present. While there, she sat in a chair in the shade while Pena spoke to employees. Adeyla Pena denied that her husband carried or displayed a "Fatah" sign on that occasion.

By letter of July 12 to Gross, Hamilton wrote:

> Milly Silva asked me to investigate your complaint that Hector Pena had some involvement with distributing a leaflet at Regency Heritage that had Fatah on it. I have spoken at length with Hector and others involved in literature distribution at Regency Heritage and am confident that Hector did not distribute the Fatah document or have anything to do with it. He had distributed another Union authorized leaflet concerning the workers' issues at Regency.
>
> The Union takes all allegations of ethnic, cultural, religious and racial insensitivity very seriously. When I learned of your complaint concerning Hector, I was very surprised as he has been on staff here for several years and I have neither observed nor has the Union ever received a complaint concerning his behavior that would suggest any such insensitivity. I trust that this letter has clarified matters and that you will no longer bar his access, as he is the Union's designated representative at your facilities.

In response, Respondent's counsel Tuchman wrote to Hamilton, by letter dated July 16, stating, inter alia:

> Your letter does not reflect that you spoke with David Gross and/or his witnesses to the events surrounding the "Fatah" sign allegedly held up by Mr. Pena. I believe that your investigation is clearly incomplete without these witnesses being followed up on. Since Mr. Pena's job is on the line, it is hardly surprising that he would deny holding up such a sign on a Saturday morning as congregants went into the facility Synagogue. I am certain that you do not intend to "whitewash" the events.

E. The November 13 Arbitration

On November 13, the parties held an arbitration regarding Pena's explusion from two other facilities owned by Gross, the Regency Park and the Regency Gardens, where the Union had extant collective-bargaining agreements. According to Pena's unrebutted testimony the arbitration did not involve the Regency Heritage because the position was taken that inasmuch as there was no collective-bargaining agreement covering that facility, it could not be compelled to submit to arbitration.

At the arbitration, both Flaks nor Foray were called as witnesses by the Employer. Neither testified at the hearing herein; however, counsel for the Charging Party and the Respondent stipulated that their testimony, which was sworn and subject to cross-examination, was as follows: [11]

> At the November 13, 2007 arbitration hearing, Stephen Flaks ("he") testified that:
> -He drive into the facility around 10 a.m. on Saturday to attend services with his father
> -He didn't stop his car, a black Mercedes, while driving in, but slowed down and observed a man on the right hand side with a sign that said "Fatah" in English
> -He had no idea of what the man was wearing; the man was wearing pants and a shirt
> -A couple of hours later, around lunchtime, he asked employee Frank to "go out front and see what's going on because something weird is going on."
> -He had known Frank, an employee, for a few months.
> -He was not sure when Frank left to go outside. Frank went outside when asked by Flaks.
> -Frank came in and said, "I saw a guy holding a Fatah sign."
> -He said, "Good, I'm not crazy then."
> -When he left the facility around 2:30 p.m., the same man from the morning was there with a blond lady. The man was on the opposite side.
> -He returned to the facility on Sunday before noon and saw the same man from Saturday, with at least two others, including the same blond lady from Saturday. -He didn't stop his car on the way in and didn't see any signs.
> -He left the facility a couple of hours later; he saw no signs when he drove out. —On his way out he stopped his car and asked the man, "What's going on?" He was told that the Union was trying to accomplish something, and the man asked him to sign a flyer. He responded, "Where's your Fatah sign?" The man replied, "What sign?" He didn't say anything after that and drove away.
> -He spoke to Gross about the man with the Fatah sign.
> -The man had a little bit of a beard; the man was not wearing a purple t-shirt, purple hat or dark glasses. The man was 5'6" or 5'8" and had dark hair.
> -He never saw Marvin Hamilton.
>
> 2) At the November 13, 2004 arbitration hearing, employee Frank Foray (hereinafter "he") next testified that:
> -He was employed by the Employer for 8 months, worked from 9 a.m. -5 p.m. with every other weekend off.
> -He left the job because of an argument.
> -He had known Flaks for a couple of months prior to 6-07.
> -Flaks approached him on Sat. at noon and asked, "Do you know what's going on? There's a guy in front. Do you mind checking it out for me?"
> -He and Flaks had this conversation outside the facility. He walked to the front and saw a man on the right. The man had a sign that said "Fatah." The sign was in English; he knew what the word meant because he understands some Arabic.
> -He stayed outside for 5-10 minutes looking at the man.
> -He went back inside and told Flaks about the sign and what it said.

[10] It does not appear from the record that Hamilton interviewed Adelya Pena in the course of his investigation.

[11] There was no official transcript of this proceeding.

-He never saw the sign again.
-He had seen this man once before, outside the facility earlier that same day at 6:40 a.m. when he drove into the facility with his mother. There was no blond at 6:40 a.m.
-He was not sure what the man was wearing.
-The third time he saw the man outside was around 1:30 p.m.; the man was with the blond lady; the man had the same sign, but it was folded up.
-He asked the man, "What are you doing?" The man said he worked for the Union. He did not ask the man about the sign.
-He did not report this "Fatah sign" incident to anybody (besides S. Flaks). David Gross later approached him to talk about it. He never saw the man again.
-The man had a goatee; the man was not wearing a purple t-shirt, purple hat or dark glasses.
-He did not see Marvin Hamilton at any time.

The stipulation further provides that, at the arbitration hearing, both Flaks and Foray identified Hector Pena as "the man." Pena was present in the hearing room when both witnesses made their respective identifications.[12]

F. The Standstill Agreement and Subsequent Collective-Bargaining Agreement

On July 2 (that is, prior to the arbitration referenced above) under the auspices of Arbitrator Martin F. Scheinman, the Regency Heritage and the Union entered into a standstill agreement which was applicable while the parties negotiated a comprehensive collective-bargaining agreement. It was effective by its terms until November 15, 2007, and subject to extension by mutual agreement.

The record establishes that, pursuant to this standstill agreement, the Union withdrew its strike notice and agreed to negotiate to reach a comprehensive agreement with the Regency Heritage, and the Employer agreed to reinstate several employees, maintain coverage of certain employees in the union benefit fund, and maintain current posted standards, with the exception of certain enumerated terms. The standstill agreement further provided as follows:

> The parties acknowledge each of them has experienced reports from co-workers, supervisors and family members of residents relaying accounts of comments that are unacceptable. Racial, ethnic and cultural slurs are unacceptable and each party, upon notice of such complaints from the other party, shall investigate and use their best efforts to stop such behavior, if found to be true. It is expressly understood that comments and slurs have no place in these parties' relationships. Employees found to have engaged in these unacceptable behaviors shall be removed from their positions working for the Home or servicing the employees working at the Home.

This agreement further provided that the arbitrator "shall be available to mediate, as requested by either side."

On November 13, the parties extended the standstill agreement until December 31, 2008. The extension to the standstill agreement provides that: "Disputes concerning the terms of this extension agreement shall be resolved by binding arbitration it being understood that the arbitrator shall have no authority to set the actual terms for a comprehensive agreement."

Thereafter, the Regency Heritage and the Union entered into a collective-bargaining agreement, which is effective by its terms from March 1, 2008, through February 28, 2011. This agreement contains a grievance arbitration provision, but defines a grievance as a dispute arising during the term of the agreement. There is a visitation clause in the agreement, which is similar to that which was contained in the predecessor agreement, requiring that the union representative seeking access to the facility notify the human resources director in advance to arrange a time and date for and describe the nature of the intended visit. There is no evidence that any union representative, other than Pena, is currently barred from Respondent's facility.[13]

IV. ANALYSIS AND CONCLUSIONS

A. Pena Did Not Display a Sign Bearing an Offensive Message on June 23

There is a clear credibility issue herein regarding the allegation that Pena carried a "Fatah" sign at the facility, a home that caters mainly to people of the Jewish faith and heritage. Pena denies having such a sign and Hamilton, who was with him virtually all day on June 23, also denies seeing any such sign displayed. The only testimony supporting the existence of such a sign was from Gross, whose sole sources of information regarding this matter were the after-the-fact accounts offered by Flaks and Foray.

I found both Pena and Hamilton to be credible and believable witnesses, who appeared to be testifying in an honest and forthright manner on both direct and cross examination. In addition to finding them to be credible witnesses, the surrounding facts and circumstances tend to support their account of events. In particular, I find that the Respondent's allegation (and Flax and Foray's testimony at the arbitration) defies logic. Pena and Hamilton were at the facility on June 23, specifically to obtain the signatures and support of the residents' families to "stand with" the workers. It is difficult to believe that with that purpose in mind, Pena would display a "Fatah" sign at a facility with a Jewish population and tradition, which clearly could be construed as offensive to the residents and their family members and other guests. If Pena had displayed such a sign, it is highly unlikely that he would have been able to obtain signatures from resident's family members. As counsel for the Charging Party states in his brief: "It is illogical and incredible that he would display a sign that would likely offend the very same individuals whose support he was soliciting."

Further, although I cannot make a determination regarding demeanor so as to credit or discredit unseen witnesses, I note that both Flaks and Foray were unable to describe what the sign

[12] The Union's request that witnesses be sequestered was denied by the arbitrator.

[13] At the November 13 arbitration, Respondent's counsel, Ari Weiss, stated that Respondent would deal with other union representatives, but not with Pena.

holder was wearing. I find that a bright purple t-shirt and hat bearing union insignia would be memorable under these circumstances.[14] In addition, although Hamilton was present at the facility with Pena on June 23, neither Flaks nor Foray identified him as being present on that day. Moreover, Foray testified at the arbitration that he first saw the sign holder when reporting for work at about 6:40 a.m. This is several hours prior to the time when Pena first arrived at the facility. I further note that there is no evidence that Foray reported this incident to any superior on that day or that any incident report was filed.[15] Moreover, no other family member or other visitor to the facility reported any individual holding a sign bearing an offensive message.

As stated above, I found Pena and Hamilton to be credible and believable witnesses. On the other hand, I found Gross to be an evasive and argumentative witness whose testimony lacked reliability. An additional factor that detracts from the Respondent's defense herein is that, admittedly, Gross had previously banned the union representatives from the facility after the Union gave him the 10-day strike notice on June 19, and issued a notice reiterating that ban on June 22. Again, this was prior to Pena's alleged misconduct, and well before Gross received any such report.

On the basis of all of the above, I find that the record as a whole, including the credible testimony, in conjunction with the inherent probabilities of the situation, establishes that Pena did not carry a "Fatah" sign at the Respondent's premises on June 23, as Respondent has alleged. I further conclude that Respondent's decision to bar union representatives from its facility stemmed from the issuance of the strike notice and the impending threat of a strike.

B. Respondent Unilaterally Changed its Past Practice of Allowing Union Representatives Access to its Facility, in Violation of the Act

The predecessor's contract with the Union provided that prior to visiting the facility, the Union would notify the employer in advance to arrange for the visit. Other than Gross' nonspecific testimony, which I do not credit, there is no evidence that this contractual requirement continued to be adhered to by the parties after Respondent assumed operation of the facility. There is, to the contrary, unrebutted evidence of a past practice whereby Respondent, for a period of approximately 4 months, allowed union representatives to have access to its facility notwithstanding any prior contractual requirement that they first seek and receive permission. I credit Pena's uncontradicted testimony that in his meeting with Rubin, there were no limitations put on his visitation rights to the facility, and that subsequently he visited the facility on a weekly basis without requesting or obtaining prior approval. This testimony is supported by Knight's credible testimony that he saw Pena distributing literature at the facility several times per month prior to June. The evidence therefore establishes that there was a past practice for the 4-month period after Respondent began operating the facility.

Union visitation is a mandatory subject of bargaining. *American Commercial Lines*, 291 NLRB 1066, 1072 (1988); *The Sacramento Union*, 291 NLRB 540, 550 (1988), *Ernst Home Centers*, 308 NLRB 848–849, 865 (1992). Inasmuch as, beginning on June 21, Respondent unilaterally altered the Union's visitation rights at its facility without prior notice to, or bargaining with, the Union, this change violated Section 8(a)(1) and (5) of the Act.[16] *The Sacramento Union*, supra. *Ernst Home Centers,* supra.

C. Respondent Unlawfully Banned Pena from its Facility and Refused to Deal with Him

Moreover, Respondent has presented no legally cognizable defense for its continuing refusal to deal with Pena regarding the terms and conditions of unit employees. As the Board has held:

> Section 7 of the Act encompasses the right of employees, acting through their union, freely to select their representatives for the processing of grievances and discussion of workplace matters. . . Although a party may, under certain circumstances, refuse to meet with another party's bargaining representatives, the party making such a refusal must establish that the representatives which whom it refuses to meet have created by their own actions an atmosphere of such ill will that good-faith bargaining is virtually impossible or that their participation in bargaining otherwise represents a clear and present danger to the bargaining process.

Missouri Portland Cement Co., 284 NLRB 432, 433 (1987). See also *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976) (requiring *persuasive evidence* that the presence of the banned representative would create ill-will and make good faith bargaining impossible) (emphasis in original).

In those situations where the Board has sanctioned an employer's refusal to deal with a particular union representative, the conduct at issue is generally violent and/or threatening, or of a similarly egregious nature. For example, in *King Scoopers, Inc*., 338 NLRB 269 (2002), the Board found that an employer had not violated the Act when it condoned an employer's refusal to deal with a union representative who had previously been discharged for misconduct including throwing a meat hook at an employee, throwing a 40-pound piece of meat into a saw, thereby breaking its blade, throwing a knife into a box, and threatening a supervisor. The Board found that, in light of this individual's apparent propensity to react violently during confrontations, employer agents assigned to deal with him might be reasonably apprehensive and preoccupied with their safety if they did not agree during adversarial meetings. See also *Fitzsimmons Mfg. Co*., 251 NLRB 375, 379 (1980), enfd.

[14] Moreover, in such an instance, Foray would not have had to have a conversation with the sign holder to discern that he was affiliated with the Union.

[15] I note that Foray, who had been terminated for engaging in an argument, was rehired shortly after the arbitration. He worked for a short time before his name was, unexplainedly, removed from the payroll.

[16] In this regard, I note that Respondent made clear to the Union and its employees and, reiterated at the hearing, that it did not adopt the predecessor's collective-bargaining agreement which contained a visitation clause with notice restrictions. Moreover, Respondent did not try to limit the Union's access or visitation rights but unilaterally stopped all access.

670 F. 2d 663 (6th Cir. 1983) (employer lawfully refused to deal with union representative who physically assaulted employer's personnel director at grievance meeting); *Sahara Datsun*, 278 NLRB 1044 (1986), enfd. 811 F.2d. 1217 (9th Cir. 1987) (conduct outside the bargaining process justified an employer's refusal to deal with a union representative where that individual disseminated a newsletter accusing company owners of involvement in prostitution and the use and sale of cocaine; union representative also made unsubstantiated accusations to employer's bank that certain management officials, including those expected to be involved in bargaining, had engaged in fraudulent financial practices).

Here, as I have found, Pena engaged in no such improper conduct. Moreover, even if I were to find that he had, in fact, displayed the "Fatah" sign, I would be obliged to conclude that, as a matter of law, this would not excuse Respondent from its continuing refusal to deal with him, based upon the standards as set forth above. In this regard, I note that while a display of the word "Fatah" might well have been deemed offensive by residents of the Regency Heritage and their family members, and do not condone such conduct, the sign was, by all accounts, displayed on public property. Moreover, it contained no threat of violence; nor did it contain any specific reference to the Regency Heritage, or any of its managers.

Further, Respondent has not shown that Pena's alleged misconduct would have impeded the bargaining process. In fact, the record shows to the contrary, that notwithstanding the allegations of misconduct, Pena attended the majority of the collective-bargaining sessions between Respondent and the Union, and, moreover, was instrumental in having the proposed agreement ratified by the bargaining unit. Thus, Respondent has failed to establish a legitimate basis for its continuing refusal to deal with Pena. Accordingly, I find that by refusing to deal with Pena, a union representative duly appointed to represent Respondent's employees, Respondent has violated Section 8(a)(1) and (5) of the Act. *KDEN Broadcasting Co*., supra.

D. This Matter is Not Appropriate for Deferral

In its answer to the complaint, and again in its brief Respondent contends that this matter is appropriate for deferral. There are two prongs to this argument. As an initial matter, Respondent argues that the instant dispute is covered by the standstill agreement which, it contends, is a bilateral solution to the issue of Pena's rights to represent employees. In addition, Respondent cites to the parties' collective-bargaining agreement which contains a broad grievance arbitration provision.

It is well settled that the Board has "considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act." *Wonder Bread*, 343 NLRB 55, 55 (2004) (citations omitted). As the Board has held, deferral is appropriate when the following factors are present:

> [T]he dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution.

Id. (citing *United Technologies Corp*., 268 NLRB 557, 558 (1984)).

The standstill agreement states that employees of either the Respondent or the Union who have been found to have engaged in racial, ethnic, or cultural slurs shall be removed from their positions. Here, there is, at best, a continuing dispute over whether Pena had engaged in such misconduct. No party has brought any formal determination in this regard to my attention. Respondent points to the fact that the extension to the standstill agreement provides for binding arbitration. Respondent's argument ignores the obvious fact that on the very date that this extension agreement was entered into, an arbitration on Pena's expulsion from Respondent's other facilities was conducted before the very same arbitrator who supervised the standstill agreement. Clearly, Respondent could have agreed to submit the issue of Pena's access to the Regency Heritage to arbitration but declined to do so, notwithstanding the congruence of the issues presented to the arbitrator and those raised here. In my view, this does not indicate a willingness to utilize arbitration to resolve the dispute, but suggests precisely the opposite.[17]

Finally, and in any event, it is too late to rely upon the standstill agreement to provide a vehicle to arbitrate the dispute at issue here. [18]

Respondent further argues that the matter should be deferred to arbitration based upon the collective-bargaining agreement which has since been entered into by the parties. As noted above, however, the applicable grievance arbitration provision pertains only to those disputes arising during the term of the agreement. Thus, the collective-bargaining agreement does not, by its terms, provide a mechanism either to resolve the underlying statutory issue or to provide an appropriate remedy for the alleged violations herein.

Accordingly, I conclude that deferral is not appropriate in this instance.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

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

[17] Moreover, Respondent has pointed to no provision in either the standstill agreement or the extension thereto which would provide for the arbitration of or a remedy for Respondent's alleged unilateral change of union visitation rights. The Board has long held that it will not defer on an issue if it closely related to another issue that is not deferrable. *Everlock Fastening Systems,* 308 NLRB 1018, 1018 fn. 8 (1982); *15th Avenue Iron Works,* 301 NLRB 878, 879 (1991), enfd. 964 F.2d 1330 (2d Cir. 1992).

[18] Although the extension to the standstill agreement is effective by its terms until December 31, 2008, it is clearly superseded by the collective-bargaining agreement which was subsequently entered into by the parties.

3. By barring union representatives from its facility since on or about June 21, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By refusing to deal with Hector Pena, a union representative duly appointed to represent Respondent's employees, at its facility since on or about June 21, Respondent has violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The standard remedy to correct an employer's unilateral changes is to return to the status quo which existed prior to the institution of the changes in question. However, as noted above, the parties have since entered into a collective-bargaining agreement containing a union visitation clause which differs in certain material respects from the status quo as it existed prior to Respondent's unlawful unilateral change. In this circumstance, the standard remedy is no longer appropriate, since the matter has been bargained and agreed upon by the parties.[19] Accordingly, I recommend that the Respondent be ordered to rescind the restrictions that it imposed upon the access of union representatives to its facility as well as those it imposed upon its dealings with Pena, and his rights to be at its facility, consistent with the undertakings contained in the parties' collective-bargaining agreement and that it notify the Union, within 14 days of the date of this decision, that it has done so.

[Recommended Order omitted from publication.]

[19] See *Essex Valley Visiting Nurses Assn*., 343 NLRB 817, 843 (2004) (and cases cited therein).