Bryant Health Center, Inc. *and* Teamsters Local Union No. 92, General Truck Drivers and Helpers affiliated with the International Brotherhood of Teamsters. Cases 9–CA–43747 and 9–CA–44012

January 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On August 18, 2008, Administrative Law Judge John T. Clark issued the attached decision.[1] The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions and an answering brief. The Respondent filed an answering brief and a reply brief.

The National Labor Relations Board[2] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Bryant Health Center, Inc., Ironton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining overly broad rules prohibiting solicitation and distribution in its personnel policy addendum.

(b) Maintaining an overly broad confidentiality rule prohibiting employees from discussing their salary, performance appraisals, and wage increases with other employees.

(c) Telling employees that they cannot discuss their performance appraisals, wage increases, and discipline with other employees.

(d) Threatening employees with discipline and discharge if they discuss their performance appraisals and wage increases with other employees.

(e) Creating the impression that the employees' union activities are under surveillance.

(f) Discharging employees for discussing their discipline or other terms and conditions of employment with other employees.

(g) 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) Notify all employees in writing that the overly broad rules prohibiting solicitation and distribution contained in the personnel policy addendum are rescinded, void, of no effect and will not be enforced. Further notify all employees in writing that the Respondent will not prohibit employees from soliciting and distributing material in a manner protected by the Act.

(b) Notify all employees in writing that the overly broad confidentiality rule contained in a memorandum dated October 1, 2007, prohibiting employees from discussing their salary, performance appraisals, and wage increases with other employees, is rescinded, void, of no effect and will not be enforced. Further notify all employees in writing that the Respondent will not prohibit employees from discussing their salary, performance appraisals, wage increases, and discipline with other employees in a manner protected by the Act.

(c) Furnish all current employees with inserts for the current edition of the personnel policy addendum that (1) advise that the unlawful solicitation and distribution rules have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised personnel policy addendum that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

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[1] On August 26, 2008, the judge issued an errata correcting two subparagraphs of his recommended Order and substituting a new notice.

[2] 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.

[3] 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.

We affirm the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging Christina Cox. We find it unnecessary to pass on his finding that the discharge also violated Sec. 8(a)(3), inasmuch as the additional finding would be cumulative and would not materially affect the remedy for the discharge.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by proscribing employee discussion of salaries, wage increases, and performance evaluations, and by threatening discipline for engaging in such protected concerted discussion, Member Schaumber relies solely on the judge's finding that even if the Respondent established a legitimate patient care justification for some restriction, its rules were overbroad in application.

[4] The General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham,* 352 NLRB 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

(d) Within 14 days from the date of the Board's Order, offer Christina Cox full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(e) Make Christina Cox whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Christina Cox in writing that this has been done and that the discharge will not be used against her in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Ironton, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2003.

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

[5] 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."

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

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 maintain overly broad rules prohibiting solicitation and distribution in the personnel policy addendum.

WE WILL NOT maintain an overly broad confidentiality rule prohibiting you from discussing your salary, performance appraisals, wage increases, or other terms and conditions of your employment with other employees.

WE WILL NOT tell you that you cannot discuss your performance appraisals, wage increases, discipline, and other terms and conditions of your employment with other employees.

WE WILL NOT threaten you with discipline and discharge if you discuss your performance appraisals, wage increases, discipline, and other terms and conditions of your employment with other employees.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT discharge or discipline you for discussing your discipline or other terms and conditions of your employment with other employees.

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 notify you in writing that the overly broad rules prohibiting solicitation and distribution contained in the personnel policy addendum are rescinded, void, of no effect and will not be enforced, and that we will not prohibit you from soliciting and distributing material in a manner protected by the Act.

WE WILL notify you in writing that the overly broad confidentiality rule contained in the memorandum dated October 1, 2007, prohibiting you from discussing your salary, performance appraisals, and wage increases with other employees, is rescinded, void, of no effect and will not be enforced, and that we will not prohibit you from discussing your salary, performance appraisals, wage increases, discipline, and other terms and conditions of your employment with other employees in a manner protected by the Act.

WE WILL furnish you with inserts for the current edition of the personnel policy addendum that (1) advise that the unlawful solicitation and distribution rules have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised personnel policy addendum that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

WE WILL within 14 days from the date of the Board's Order, offer Christina Cox full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Christina Cox whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Christina Cox, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

BRYANT HEALTH CENTER, INC.

Linda B. Finch, Esq., for the General Counsel.
Ronald L. Mason and *Arron T. Tulencik, Esqs. (Mason Law Firm),* of Dublin, Ohio, for the Respondent.
Rick Kepler and *Ronnie Cox,* of Canton, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Ironton, Ohio, on March 4 through 6, 2008. The original charge in Case 9–CA–43747 was filed by Teamsters Local Union No. 92, General Truck Drivers and Helpers affiliated with the International Brotherhood of Teamsters (the Union) on July 31, 2007,[1] against Bryant Health Center, Inc. (the Respondent). That charge was amended on September 4. The charge in Case 9–CA–44012 was filed by the Union on November 29. On January 2, 2008, the Regional Director for Region 9 of the National Labor Relations Board (the Board), issued an order consolidating cases, consolidated complaint, and an order rescheduling hearing. At the onset of the trial, the complaint was amended to add an additional violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

The amended consolidated complaint alleges that the Respondent's supervisors and agents, at all material times, interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act by: maintaining overly broad rules in its personnel policy regarding solicitation and distribution, which, if violated could result in discipline; telling an employee not to discuss her discipline with other employees; telling employees not to discuss their performance appraisals with other employees; threatening employees with discipline if they discussed their performance appraisals and raises with other employees; threatening to reduce employees' wages if they selected union representation by implying that a movie viewed by the employees stated that wages could be reduced if they selected a union; and creating the impression among its employees that their union activities were under surveillance by the Respondent. The amended consolidated complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged employee Christina Cox on July 25 (Cox is also indentified as Kristina and Christine in the record). The Respondent by its answer denies any unlawful conduct. At the outset of the hearing the Respondent's attorney moved to amend the Respondent's answer to include an additional affirmative defense that Cox is a supervisor within the meaning of Section 2(11) of the Act. The amendment was admitted over counsel for the General Counsel's objection.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, has been engaged in the operation of a nursing home at its facility in Ironton, Ohio. During the 12-month period ending January 2, 2008, Respondent in conducting its operations delivered gross revenue in excess of $100,000. During that same time period, Respondent in conducting its operations, purchased and received at its Ironton, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent's facility is a 93-bed, long-term care nursing home, managed by Omnilife Health Care Systems, Inc. The one-story building contains a corridor that is divided into front

[1] All dates are 2007, unless otherwise indicated.

and back "floors." The Respondent operates three shifts: the day shift, from 6 a.m. until 2 p.m.; the evening shift, from 3 to 10 p.m.; and the midnight shift from 10 p.m. until 6 a.m. A licensed practical nurse (LPN) and three state tested nursing aides (STNA) are assigned to each floor on each shift. The LPN is responsible for the overall care of the residents of that floor, as well as dispensing their medications, as required. Some shifts also have a "float nurse." The LPN in that position is responsible for administering injections and "treatments" to the residents of both floors.

Robert Morris is the administrator of the facility and been in that capacity since he was hired in January 2007. Morris is responsible for the overall functioning of the facility. Deborah Moore is his administrative assistant. Laura Henson, a registered nurse (RN), has been the director of nursing (DON), at the facility since 2006. Henson, who was hired in 1992, has worked as an STNA, LPN, and "minimum data set" coordinator (MDS). Teresa McClain is the assistant director of nursing (ADON). The Respondent admits that Henson and McClain are supervisors within the meaning of Section 2(11) of the Act. The Respondent contends that the LPNs are also supervisors within the meaning of the Act.

B. Supervisory Status of the Licensed Practical Nurses

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This provision is to be read in the disjunctive; thus, "[a]n individual need possess only one of the enumerated indicia of authority in order to be encompassed by Section 2(11), as long as the exercise of such authority is carried out in the interest of the employer, and is not of a merely routine or clerical nature but requires the use of independent judgment." The burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.,* 348 NLRB 686, 687–688 (2006). The party seeking to prove supervisory status, here the Respondent, must establish it by a preponderance of the evidence. *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003).

The Employer contends that the LPNs exercise supervisory authority under Section 2(11) of the Act in "assigning" and "responsibly directing" STNAs in the performance of their duties, as well as the authority to discipline them for failing to perform their assigned duties. The Respondent also contends that the LPNs also have the authority to adjust grievances. These contentions are addressed below.

1. Assignment of STNAs

Oakwood Healthcare, supra, the Board interpreted the term "assign" as referring to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." 348 NLRB at 689.

The Respondent does not currently have written job descriptions for the LPN and the STNA positions. (Tr. 552–553.) The previous job descriptions were not offered into evidence, assuming they still exist. Accordingly, the following is based on testimony. Rebecca Pancake has worked as an LPN for the Respondent for over 3 years. She credibly testified that she has a daily morning meeting with the STNAs who are assigned to work with her. She tells the STNAs the room numbers and they are responsible for feeding, bathing, dressing, and walking the residents in those rooms that are unable to perform those functions by themselves. The number of rooms assigned to an STNA is determined by the number of STNAs working on that floor. That number of STNAs working on the floor is usually the same, as are the room assignments. Although there are generally three STNAs assigned to an LPN there is no contention that the LPN has any input into the number or the identity of the STNAs assigned to work with the LPN.

Pancake acknowledged that the STNAs generally take care of the same rooms, and the same residents. In addition to the daily tasks set forth above, the STNA performs sporadic tasks, such as preparing a resident for a visit to the doctor. These tasks are scheduled in advance by other personnel and the information is conveyed to the STNA by the LPN. During the morning meeting the LPN usually assigns the same STNAs to the same rooms, and then conveys any resident specific information to the STNA. Roxanne Sudderth is a former employee who resigned to be a caretaker for her mother. She worked for the Respondent as an STNA on two occasions, the last from 2003 to 2008. She credibly testified that most of the time the STNAs knew what had to be done when they arrived at work. Similarly, Betsy (Tammy) Workman, who has worked as an STNA for the Respondent for over 13 years, credibly testified that "We usually know our duties when we come in." (Tr. 243.) Teresa Harmon, a STNA with the Respondent for 10 years, acknowledged that the tasks that STNAs perform are routine.

Most of the Respondent's witnesses said that they continued to assign tasks to the STNAs throughout the workday. When asked to provide specific examples, their answers were not impressive. Wes Jackson has been employed as an LPN by the Respondent for approximately 15 months. After being asked to give examples of assignments he made throughout a typical day he said:

> Depends on what happens throughout the day. If certain residents need certain things, you know, we'll direct them to, you know, take care of certain needs of the residents or, you know, passing ice, which is part of the routine but, you know, if certain residents need certain things we will direct them to go do them. [Tr. 392.]

LPNs do not assign breaks (Tr. 447–449). If overtime is required the LPN must select an STNA from a "mandate list," that is prepared by Moore, the administrative assistant to Morris. The Respondent requires that a STNA selected from the mandate list work the overtime.

Morris testified in a general manner that he "observed" a situation in which a STNA was running behind and asked the LPN for help. The LPN went to the other STNAs and made adjustments. He also observed that if a STNA was absent in the back, the two LPNs would get together and share a person. Morris testified that that if a resident needs care a LPN would find somebody whether it was "their assigned person or not." Morris also avers that the LPNs were exercising their own independent judgment and discretion when he observed the foregoing. (Tr. 620–622.) I find that Morris' observations are far too generalized and conclusory to be of significant probative value.

In *Oakwood Healthcare,* supra, the Board found that in a health care setting the term "assign" encompasses the responsibility to assign aides to particular patients. The Board characterized the matching of a patient's needs to the skills and special training of a particular health care worker as "critical" to an employer's ability to successfully provide health care services. 348 NLRB at 689. In contrast to the charge nurses in *Oakwood Healthcare*, who took "into account employee skill or the nature or severity of the patient's conditions," when making assignments, in this case there is no substantive evidence that the LPNs ever matched a resident's needs with the "skills and special training" of a STNA. (Id. at 689, 695.)

Pancake credibly testified that before there was a mandate list for overtime she would ask for volunteers, if there were no volunteers the STNAs would "draw numbers out of a hat." (Tr. 513.) I find this testimony both instructive and consistent with how LPNs went about assigning tasks to STNAs. The evidence in this case establishes that the assignment process is more akin to that of the lead persons in *Croft Metals, Inc.,* 348 NLRB 717 (2006), then to that of the charge nurses in *Oakwood Healthcare*. In *Croft Metals,* decided the same day as *Oakwood Healthcare*, the Board applied the *Oakwood Healthcare* analytical framework to the occasional switching of tasks among employees by the lead person. The Board found that the reallocating of work in those circumstances was not a "designation of significant overall duties . . . to an employee, but "more closely resembles an 'ad hoc instruction that the employee perform a discrete task.'" Id. at 722 (internal citation omitted). Similarly, the evidence in *Croft Metals,* as here, establishes that the employees "generally perform the same job or repetitive tasks on a regular basis and once trained in the position, require minimal guidance." LPN Lisa Harmon credibly testified that she has the authority to transfer a STNA who is working with her in the "front," temporality to the back, if the back is short a STNA. It is evident from her testimony that this action is nothing more than the "mere equalization of workloads," which the Board has found does not require the exercise of independent judgment. *Oakwood Healthcare*, supra at 690 fn. 12. Based on the foregoing I find that the Respondent has failed to adduce evidence sufficient to establish that the responsibilities carried out by the LPNs meet the *Oakwood Healthcare* definition of "assign."

2. Responsible direction of STNAs

In *Oakwood Healthcare,* the Board interpreted the phase "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' (as explained below) and carried out with independent judgment." *Oakwood Healthcare,* supra at 690 (internal quotations omitted). The Board then held that for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. Further, the Board held that to establish accountability, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. at 692. In the health care setting, "direction" may be established by evidence that charge nurses oversee nursing assistants' job performance and act to correct them when they do not follow proper procedures or provide adequate care, or that the charge nurses direct assistants to perform certain tasks such as clipping residents' toe and fingernails, emptying catheters, or changing a resident who is incontinent. *Golden Crest Healthcare Center,* 348 NLRB 719 (2006).

The Respondent has established that the LPNs have authority to direct the STNAs. All of the LPNs testified generally that they had authority to direct the STNAs and that they exercised that authority daily. LPN Lisa Harmon credibly testified that she directs STNAs to search for residents who may have wandered away from the area, "turn" residents who are bedridden, and to clean and change residents who are incontinent. LPN Jackson testified that he verbally counseled an STNA for failing to empty the trash in a resident's room. The Respondent also entered four "Personnel Action" forms given to STNAs by LPNs for being careless in the performance of their duties. (R. Exhs. 8–11.)

Although the record contains sufficient evidence to establish that the LPNs "direct" the STNAs within the meaning of the definition set forth in *Oakwood Healthcare,* the Respondent has not established that the LPNs are held accountable for the actions of the STNAs. The Respondent relies on the testimony of Pancake and Jackson. Pancake claims that the LPNs get in trouble if the STNAs do not do their work. She admits that her evaluations have never contained any comments regarding the performance of the STNAs. Pancake acknowledged that she did not know if the STNA's performance had any effect on her evaluations. Jackson merely states that if the STNAs "don't do their job it falls back on myself." (Tr. 535–536, 392.) Thus, there is no evidence that LPNs may be disciplined, receive poor performance ratings, or experience any material consequences, positive or negative, to their terms and conditions of employment as a result of their performance in directing the STNAs. Nor is there any evidence that the Respondent has ever informed the LPNs that material consequences could result from their performance in directing the STNAs. Based on the foregoing, I find that the Respondent has not shown that the LPNs face "a prospect of adverse consequences" and thus are held accountable for their actions in directing the STNAs. Accordingly, I find that the LPNs do not possess the authority to responsibly direct the STNAs and thus, it is unnecessary to ad-

dress the issue of whether they exercise independent judgment. *Lynwood Manor,* 350 NLRB 489, 490–491 (2007).

Notwithstanding the foregoing, I am mindful that the Respondent specifies "not acting as a supervisor" on the Cox discharge form, based on a July 21, 2007 incident. Pancake was also counseled for failing to act as supervisor as a result of that incident. Those actions are discussed below.

3. Adjusting grievances

The Respondent contends that the LPNs have authority to resolve complaints and grievances brought to them by the STNAs. Lisa Harmon testified, without elaboration, that the grievances concerned "simple things." Pancake testified, without specificity, that she would take a "major thing" to the DON or the ADON. Jackson specifically testified that he resolves problems between the STNAs not getting along with each other, and between the residents and the STNAs not getting along with each other. He testified that he resolves these conflicts by "switching" the adversaries.

Thus, the Respondent has only established that the LPNs have authority to resolve personality conflicts and even then there is no evidence that the resolution is long term or that it is binding on management. The Board has held that the authority to resolve personality conflicts or "squabbles" between employees does not warrant an inference sufficient to establish supervisory status. *Ken-Crest Services,* 335 NLRB 777, 779 (2001), and cases cited. Additionally, Jackson's testimony that he resolves the conflicts by—"switching them out"—does not establish the use of independent judgment in resolving the conflicts. *Network Dynamics Cabling,* 351 NLRB 1423, 1425 (2007). According, I find that the LPNs do not possess authority under Section 2(11) to adjust grievances.

4. Authority to discipline

The Respondent argues that the LPNs are supervisors based on their alleged authority to discipline the STNAs. The LPNs have authority to complete a form entitled "Personnel Action." Immediately under that heading is the statement, "The following warning or separation was issued today and it is to be made part of the official record." A space for the employee's name is followed by two columns of broad categories of offenses. Next to each category is an area that should be marked to indicate the appropriate offenses. Beneath the columns is a space to "Set forth all facts in detail," this area is followed by signature lines for the supervisor, employee, and witness, with additional lines for employee and "facility" comments. There is no specific place to date the document. The forms are available at both LPN stations. At some point after 2006 (R. Exhs. 2–5, 8–9), the form was changed. (Tr. 288; R. Exhs. 6, 10–11.) The statement quoted above is contained in the current form.

The Respondent relies heavily on *Bon Harbor Nursing & Rehabilitation Center,* 348 NLRB 1062 (2006), in support of its argument. There, the Board found pertinent the respondent's use of a progressive disciplinary system whereby the employees automatically receive increasingly severe punishment for rule infractions based on the class of infractions committed and the employee's prior disciplinary record.

A discipline system is set forth in the Respondent's personnel policy addendum, dated January 2003 (GC Exh. 4 at 6). It contains examples of conduct that may result in discipline. The examples are not meant to be exclusive or all-inclusive. The introduction cautions that although the policy contains progressive levels of disciplinary action, there may be circumstances when discipline is imposed that is different than the stated progression levels. The statement concludes that "the progression of disciplinary action is not mandatory, and the facility may implement discipline at any level as the facility deems appropriate under the circumstances." The document then lists examples of minor, major, and intolerable offenses. At the bottom of each list is a statement of consequences. A minor offense subjects an employee to a written or verbal warning. Two such violations constitute a major offense. An employee who commits a major offense is subject to a suspension of up to 3 days. Two violations in that category constitutes an intolerable offense. Commission of an intolerable offense subjects an employee to immediate dismissal.

In *Bon Harbor,* supra, the LPNs used preprinted disciplinary action reports to state the specific rule that was violated, describe how the rule was violated, and indicate the disciplinary action. The LPN had to choose from among the following disciplinary options: first notice, second notice, final notice, discharge warning, or discharge. The preprinted form used by the Respondent characterizes the action as either a warning or a separation. Because LPNs have no authority to layoff, suspend, or discharge employees, there is no choice. Moreover, the evidence demonstrates that "warning" is an inaccurate term. Nothing in the documents "warn" of any negative consequences, let alone of "increasingly severe punishment" for continued transgressions. Each exhibit merely memorializes an incident where the STNA either failed to perform a task or failed to perform a task satisfactorily.

None of the forms contain recommendations. The failure to recommend discipline cannot be attributed to "first offenses." *Sheraton Universal Hotel,* 350 NLRB 1114, 1116 fn. 4 (2007). STNA Teresa Harmon was issued a personnel action form for carelessness on an unknown date in 2006 or earlier, she was issued a second personnel action form for carelessness on May 15, 2006, and she was issued a third personnel action form for carelessness on January 24, 2008. Pancake testified that she believes that the forms remain in the employees personnel folders forever. The fact that the Respondent did not produce any evidence indicating an appropriate level of discipline for any previously recorded discipline, establishes that the personnel action forms are not a basis for future disciplinary action, nor do they impact on the STNAs job status. Id. at 1118 (disciplinary notice referencing prior warnings show role played in employees discipline and affected job status).

Based on the foregoing I find that the Respondent has failed to prove that the completion of the personnel action forms indicates supervisory status. *Ken-Crest Services,* 335 NLRB 777 (2001) (distinguished in *Progressive Transportation Services,* 340 NLRB 1044, 1046 fn. 7 (2003), because no warnings were in evidence that referred back to the previous warnings).

The secondary indicia of supervisory status offered by the Respondent cannot be considered in the absence of evidence that the LPNs possessed any of the enumerated categories of

authority in Section 2(11) of the Act. E.g., *Palagonia Bakery Co.,* 339 NLRB 515, 535 (2003).

Accordingly, I conclude that the Respondent has not met its burden of proof that the LPNs are supervisors within the meaning of Section 2(11) of the Act.

C. The 8(a)(1) Allegations

1. No-solicitation/no-distribution rule

The complaint alleges that since about 2003, the Respondent has maintained the following rules in its personnel policy which, if violated, employees may be disciplined.

The rules provide:

> 5. Soliciting or collecting contributions for any purpose whatsoever, on company time, in the work place.
>
> . . . .
>
> 8. Distribution of literature, written or printed matter of any description on company time or in work areas, not incidental to company. [GC Exh. 4 at 6.]

The Respondent also maintains an associate handbook. The General Counsel contends that the fact that the handbook contains a valid no-solicitation/no-distribution rule does not cure the fact that the rules in the addendum, set forth above, are overly broad. Moreover, there is no evidence that the Respondent has ever indicated to the employees that the rules in the addendum should be read in conjunction with the rule in the handbook.

The Respondent does dispute that the rules set forth in the addendum are overly broad. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 fn. 5 (2004), and cited case; *Laidlaw Transit, Inc.,* 315 NLRB 79, 82 (1994); see also *Hospital Pavia Perea,* 352 NLRB 418 (2008). The Respondent argues that the "policy" regarding solicitation and distribution is articulated in the handbook and not in the addendum. The addendum merely provides the classification of policy violations for the violations listed in the associate handbook and the supplementary policies in the personnel policy addendum. (R. Br. at 47.) The personnel policy addendum referenced by the Respondent is the personnel policy addendum that is addressed above in section 4, Authority to discipline. (GC Exh. 4 at 6.)

The Respondent notes that although the handbook directs the reader to the addendum on numerous policies it does not do so regarding solicitation and distribution. The Respondent points to section 4, page 6 of the handbook. Page 6 is the last page of the "Standards of Conduct" section. That section begins on page 5, and it contains examples of conduct that could result in discipline and discharge. Solicitation and distribution is not included in the examples, but the examples are not "all inclusive." In fact, the reader is directed to the "facility specific addendum for additional information on these issues." In the "facility specific addendum" between the introduction (set forth above in section 4, authority to discipline) and the list of offenses, is the heading "Employee Rules and Regulations for Bryant Health Center." The unlawful solicitation and distribution rules are identical to those alleged in paragraph 5 of the complaint and are set forth above.

An addendum must, perforce, come after the document to which it is added. As such, it could be argued that it supersedes that document. At the very least, the Respondent's two pronouncements create confusion among employees concerning what is permitted, and the confusion itself has the effect of unlawfully discouraging employees from engaging in the protected activity. See *Farr Co.,* 304 NLRB 203, 215 (1991) (employer that maintained an unlawful no-solicitation policy in its handbook, did not avoid liability by issuing a memorandum containing a lawful policy, since "legal confusion" would result even if the employees knew of both policies). Additionally, it is well settled that any ambiguity is construed against the promulgator of the rule. *Lafayette Park Hotel,* 326 NLRB 824, 828 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); *Norris/O'Bannon,* 307 NLRB 1236, 1245 (1992).

Accordingly, I conclude that the Respondent's solicitation and distribution rules set forth above violate Section 8(a)(1) of the Act.

2. Rules prohibiting employees from discussing wages and evaluations with other employees

The Respondent distributed the employees' written evaluations sometime in September 2007. In its answer, the Respondent admits, and I find, that Laura Henson, the DON, orally instructed employees not to discuss their performance appraisals with other employees. The amended complaint also alleges that Teresa McClain, the ADON, during that same time period, orally instructed employees not to discuss their performance appraisals with other employees. Based on the credited testimony of STNA Mary Spencer I find that complaint allegation proven. The Respondent defends by arguing that the rule was announced to prevent employees from getting "hurt feelings," that would lead to an interruption of "patient care."

Counsel for the General Counsel counters by citing *Alaska Ship & Drydock,* 340 NLRB 874, 874 (2003), where the Board found that prevention of "hurt feelings," was not a sufficient justification to ban wage discussions. Counsel for the General Counsel opines that that *Alaska Ship & Drydock,* is indistinguishable from this case. I agree in part with that statement but I also believe that the Respondent's justification based on alleged "patient care," must be addressed.

In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of their Section 7 rights, the Board applies the analytical framework set forth in *Lutheran Heritage,* above. The first inquiry within that framework is "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original.) The Board has held that the discussion of wages and evaluations constitutes protected concerted activity. In this case there is also a correlation between the wage rate and the evaluation (GC Exh. 5). *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 204 (2007) (then Chairman Battista dissenting, another issue, id. at 206), enfd. 519 F.3d 373 (7th Cir. 2008). Once it is established that the Respondent's rule adversely affects the employees' Section 7 rights it is incumbent on the Respondent to demonstrate that a legitimate and substantial business justification outweighs the employees' Section 7 right. For the following reasons I find that the Respondent has not established

the legitimacy of the rule and even if it had, I would find that the rule is overbroad in its application.

Morris and Henson testified that the rule barring discussion between employees about their evaluations was premised not on experience but on an expectation. After reading the evaluations they "felt" that the employees would discuss the evaluations and that some would "probably" be upset. Henson believed that when the employees learned of the variance in the evaluation scores they would become upset and discuss "these things" where patients, families, and doctors would hear the conversation and cause conflict among the whole group. Morris said that he did not want people to be upset while "they're at work."

A fair reading of the testimony shows that "patient care" was not mentioned or alluded to during their discussion regarding the employees' evaluations. Nor did they consider other eventualities, such as what to do about employees who became upset from just reading their own evaluation. Although they agreed to order the employees not to discuss the evaluations, there is no evidence that they ever considered telling the employees the reason for the order. Moreover, neither conveyed their concerns to the LPNs, the Respondent's alleged front line supervisors.

When asked what happened after the evaluations were distributed, Henson references unidentified LPNs who reported to her that STNAs were "bickering" like school kids in the hallway. Henson submits that patient care "was going to go downhill so we had to step in and do something." Henson continues, once again relying on anonymous LPNs, who "were hearing it too." They sought her out "for guidance as to what they should do about having [the STNAs] not discuss this out in the hallway." What Henson did was to wait until Morris arrived. They agreed to "call a meeting and talk to these people." Henson's conduct in September, directly contravenes her actions, only 2 months before, in July. Then Henson supported McClain's discharge of Cox for "improper conduct" because Cox did not act as a supervisor. Cox failed to tell a STNA that the topic about which the STNA was speaking—the clothes the DON wore to work—was not appropriate for a public area. Pancake, who was present, was given counseling notes because she did "not enforce to these fellow employees that this discussion was inappropriate and needed to be stopped." Here, no discipline was issued to any LPN for their failure to prevent the STNAs from discussing their evaluations. Moreover, based on the testimony regarding adjusting grievances (sec. II,B,3), it appears that bickering among STNAS is not unusual. It also appears that "switching them out" is an effective corrective action. I find Henson's statements in support of the ban on employee discussion of evaluations to be contradictory and inconsistent with her previous actions and other credited testimony.

The meeting was held and the witnesses agree that Morris threatened the employees with discharge or discipline if they continued to discuss their evaluations. None of the employee witnesses testified that Morris placed any qualifications on where the employees could discuss their evaluations. No witness corroborated Morris' testimony about giving examples of how he would not tell anyone his score, or how it would look if a family arrived to visit their parent and saw the STNAs talking around the desk about evaluations while their parent was sitting in a "mess."

The complaint also alleges that Morris threatened the employees with discipline if they discussed their raises with other employees. The only testimony on this matter was given by STNA Minnie Kelly. She testified that during the meeting Morris told the employees they would be suspended or terminated if they discussed their raises "like with the evaluations." (Tr. 317.) Kelly is a creditable witness. Her testimony is not refuted and is somewhat supported by the memo Morris posted on October 1, 2007, that is discussed below.

Accordingly, based on Kelly's testimony I find that the Respondent violated Section 8(a)(1) by threatening employees with discipline and discharge if they discussed their wages with other employees.

Henson gave STNA Teresa Harmon's evaluation to her. Harmon testified that Henson never told her not to discuss the evaluation. The next day Harmon discussed the evaluation with another employee and was subsequently summoned to a meeting in the office with Morris, Henson, Moore, and McClain. After admitting that she talked about her evaluation, Morris told her to stop because it might hurt somebody's feelings. Harmon agreed. The Respondent does not dispute this incident. STNA Spencer also testified without refutation that McClain gave her the evaluation and told her, without qualification or explanation, not to discuss it with anyone.

None of the STNAs testified that Henson explained or qualified the absolute prohibition against discussing their evaluations with other employees. In fact a close reading of Henson's testimony shows that she never said that she qualified the prohibition. Her testimony is that she and Morris agreed to prohibit discussion among the employees so that nonemployees would not "hear what's going on and cause conflict among the whole group." (Tr. 579.) Thus, she answered, "yes," when asked, "[C]an you tell me then when the evaluations were given was that instruction then given for them not to discuss it." (Tr. 579.) Even if I did credit Morris when he claims that he told Henson to allow the employees to discuss the evaluations off worktime, on break or lunch, or outside the building, it would do nothing to refute the overwhelming credited evidence that the employees were never told of that qualification.

In fact, I do not credit Morris when he claims that he told Henson where the employees could discuss their evaluations and where they could not. When Morris spoke about this matter his normal loquaciousness disappeared and his words sounded stilted. The second time he claims to have addressed the qualification, when he was talking about the statements he made during the employee meeting, he neglected to mention the qualification at all. Only after being reminded by counsel—"did you make any reference to where you wanted the conversation not to occur or to occur—"does Morris claim that he mentioned that when he was giving his "spiel" about finding a parent in a mess. Based on the foregoing I find that the Respondent issued a blanket rule prohibiting the employees from discussing their evaluations among themselves.

In addition to the foregoing, there is no evidence that any patient/resident did not receive proper treatment for any reason during this time period. There is no credible evidence that any

patient/resident or other nonemployee overheard any STNAs discussing their evaluations. "There is no evidence that the Respondent prohibited employees from discussing other matters in the vicinity of patient's rooms even though such conduct might have a similar impact on patients." *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 205 fn. 7 (2007).

On October 1, 2007, Morris issued a memo announcing a wage increase. The memo explicitly informs the employees that "[a]ll salary, performance appraisals & increase information should be kept confidential and should not be discussed among staff." The memo explains that because not everyone received the same increase "[p]lease be respectful to other staff members and do not try to 'compare' salary information." (GC Exh. 5). Thus, "patient care" has been replaced by "confidentiality" and "hurt feelings" by "respect." Regardless of the words, the explicit instruction remains the same—do not discuss among yourselves, at any time, or place,—anything that has to do with your wages.

The Respondent's confidentiality rule, like the oral instructions issued by Henson, Morris, and McClain, is both explicit and unlawfully overbroad. *Double Eagle Hotel & Casino,* 341 NLRB 112, (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). "It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity." *St. Margaret Mercy Healthcare Centers,* above at 205. With the foregoing pronouncement in mind I note that the Respondent promulgated the unlawful rules only 2 months after putting an end to a nascent union organizing campaign. *Jeannette Corp.,* 532 F.2d 916, 919 (3d Cir. 1976), enfg. 217 NLRB 653 (1975) ("[D]issatisfaction due to low wages is the grist in which concerted activity feeds. Discord generated by what employees view as unjustified differentials also provide the sinew for persistent concerted action.")

Accordingly, I conclude that the oral instructions issued by Morris, Henson, and McClain, prohibiting employees from discussing among themselves their evaluations, explicitly infringe on Section 7 rights and violate Section 8(a)(1) of the Act, as alleged. I also find that Morris threatened employees with discipline if they discussed their evaluations and wage increases in violation Section 8(a)(1). The Respondent also violated Section 8(a)(1) when Morris, on October 1, 2007, by memorandum to the employees, promulgated and maintained an overly broad confidentiality rule prohibiting the employees from discussing their salary, performance appraisals, and wage increases among themselves.

3. Impression of surveillance

Counsel for the General Counsel alleges that the Respondent unlawfully created the impression that the employees' union activities were under surveillance when, on July 12, 2007, Morris followed STNAs Sudderth and Spencer as they left the facility. A union meeting was scheduled for that evening. As they left Sudderth testified that Morris said, "[S]ee you all at the Union meeting." Spencer testified that she heard Morris say, "[B]etter hurry up and get down to the Union meeting."

The Respondent did not cross-examine either of the witnesses about this issue. The record only contains a general denial from Morris that other than the conversations he had after the movie, he never had "any other conversations about the Union with any other employees." (Tr. 683.) Likewise the Respondent's brief contains only a general denial. (R. Br. at 43.) I find that Morris made a comment to the employees indicating that he knew that they were going to attend a union meeting that was scheduled for that evening. Based on his statement I find that the employees reasonably could assume that their protected concerted activities were being monitored. *Mountaineer Steel, Inc.,* 326 NLRB 787, 787 (1998), enfd. 8 Fed. Appx. 180 (4th Cir. 2001). Moreover, it is clear that the only reason Morris followed the employees out of the building was to make them aware that he knew about their protected concerted activity. Under the circumstances, I find his undenied and unexplained conduct "out of the ordinary." See generally *Loudon Steel, Inc.,* 340 NLRB 307, 313 (2003).

I find that the Respondent violated Section 8(a)(1) of the Act by creating the impression that the employees' union activities were under surveillance when, on July 12, 2007, Morris told employees that he knew they were going to a union meeting.

4. The threat of a wage reduction

Also on July 12, and immediately before the incident set forth above, Morris showed the employees a movie about unionization. Neither the movie nor the conditions under which it was shown are alleged as violations of the Act. When the movie ended STNA Betsy Workman asked Morris, "I heard that our wages can go down to minimum wages." Morris testified that he said, "[L]ike the video tape just said that it was a collective bargaining type deal and the only thing that was guaranteed were those minimum federal standards." Workman claims his response was "it possibly could." When asked where she heard that the wages could be reduced to minimum wage she replied "probably at the movie." After counsel asks "had you heard it before that time, though?" Workman said that she had heard an anonymous rumor, but that she was worried about it. When asked if she recalled any other questions she replied, "I'm sure there's a lot, but I don't recall." (Tr. 232–233.)

The discriminatee, Christina Cox, also addressed this matter. She claims that Workman asked Morris "about a statement that was made in the movie about bumping our wages back to minimum wage during negotiations and he said yes, ... or he said it just said so in the movie." Cox also acknowledges that she was also aware of rumors about wages being reduced to minimum wage before seeing the movie. (Tr. 85.)

Former employee Sudderth also spoke about this allegation. She initially stated that Workman asked the question before the movie was shown. She claims that Workman asked, "[I]s it true that we could go back to minimum wage if we joined the Union," and Morris said, "[Y]es." On cross-examination, she admitted making "a mistake," and testified that the question was asked at the end of the viewing. She also added that the question was with reference to the movie and that when Morris answered he also referenced the movie. (Tr. 179–180, 208–209.)

I discredit the General Counsel witnesses for the following reasons. Sudderth's "mistake" certainly indicates, at the very

least, a faulty memory regarding this event. In addition, she alone avers that Morris attributed the decrease in wages directly to joining a union. Thereby articulating a textbook violation of the Act. I do not credit Sudderth's testimony about this incident. I find her memory to be unreliable, her testimony inconsistent with the other witnesses, and I believe it is probably fabricated. Workman and Cox were both concerned about the rumors. They may have viewed the movie through a prism of their own preconceived beliefs, or at the least, were distracted by their concern about a wage reduction. Cox, during cross-examination, states that the movie basically said, "that our wages could be bumped back down to minimum wage during negotiations." She admits that is not a quote. I find that her statement is neither a quote, nor is it accurate. Such a statement—that merely engaging in negotiations would result in a decrease in wages—is a clear violation of the Act. As such, if accurate, it would seem that the showing of the movie would have been included as part of the complaint. I find her testimony to also be unreliable.

Workman did not ask anything about the movie, unions, or negotiations, her question focused wages. Morris testified that he referenced the movie in response to her question. He credibly testified that there was a part of the movie where the narrator suggests that in negotiations the only issue a union can guarantee is the Federal minimum wage rate. I credit his testimony that he responded to Workman's question with a paraphrase of what was said in the movie. I also find that Workman was testifying to the best of her recollection and understanding. She probably did not understand what was said in the movie, or she would not have asked the question. Morris, paraphrasing what was said in the movie, most likely added nothing to her understanding. The understanding that Workman came away with was that her wages "probably could" be reduced to the minimum wage. Her understanding, however, is not fact.

I find additional support for crediting Morris in the testimony of Spencer. Spencer appeared to be a truthful, unbiased witness. She did not recall any statements made by Morris regarding reduced wages as a result of unionization, but she averred that had a statement of that kind been made she would have remembered it. I credit the testimony of Morris about this incident.

Reviewing Morris' statement it appears to be an accurate statement identifying the lowest lawful wage rate that could be negotiated between an employer and a union. As such the statement reflects an economic reality, albeit remote, of the bargaining process and does not violate the Act. *International Baking Co. & Earthgrains,* 348 NLRB 1133 (2006).

Accordingly I recommend that paragraph of the complaint be dismissed.

D. The 8(a)(1) and (3) Allegations

Cox was hired as a LPN by the Respondent in 2005. Thereafter, she resigned and was rehired in 2006 and was discharged on July 25, 2007. Beginning about June 2007 Cox engaged in conversations with other employees about getting a union to represent them. The employees were unhappy with their wages, hours, and other terms and conditions of employment. Shortly after the conversations began the employees asked Cox to contact the union and schedule a meeting for them to meet with the union officials. Sometime in late June the arrangements were finalized and the meeting was scheduled for July 12 at 3 p.m. in a restaurant in Ironton, Ohio. Cox and other employees disseminated this information to the work force.

On July 6 Moore received an anonymous telephone call. The caller said that Cox was trying to organize the employees and that a union meeting was scheduled for July 12. Moore told Morris who said, "[L]et's keep this to ourselves. If she is, she is." On the afternoon of July 6, Morris sent an e-mail to his supervisor, Sally Grant. He wrote about the meeting and identifies the employee organizer as a LPN who is a poor performer. He writes that he and the DON were ready to let her go the previous Monday (July 2) but they delayed doing so because another LPN resigned. He asked Grant if she had any experience with union organizing. The upshot of his contact with Grant is that she sent him the video and told him to show it to those employees who were interested.

The union meeting was held with three employees in attendance.

1. The June 28 incident

Cox went to work on June 28 solely to review the doctor's orders that had been written for the month of July. This is done to ensure that any telephone orders are placed in the main order log for the upcoming month. This task does not involve residents and is done in a separate room. Cox wore torn jeans and a T-shirt with a logo to work. Henson told Cox that her attire was inappropriate. She became visibly upset and was crying. She stated that she was always being griped at and picked on when she came to work to do the doctor's orders. Cox had previously been told that flip flops were not allowed to be worn in the facility.

Henson and Cox differ as to whether Henson told Cox to leave, or Cox said she was leaving. In any case as Henson was walking away, Cox requested that they talk in Henson's office. Henson said that they could, if Cox calmed down. Cox complied. During the conversation in Henson's office Henson said that she was only giving Cox a verbal warning, a "heads up," about her attire because Morris was in the process of changing the dress code. At the end of the conversation Henson asked Cox if she was okay to do the orders and Cox said she was. Henson told Cox to do the orders and not to discuss the conversation about the dress code with anyone. Cox left and went to the room were the orders were located. Pancake was doing orders in the room. Pancake had overheard part of the confrontation between Henson and Cox while they were in the hall. She asked Cox what happened and Cox said that she was no longer allowed to wear jeans and a T-shirt to work. During this exchange the facility's doctor was also present, although he did not join in the conversation.

Discussion

Paragraph 6(a) of the complaint alleges that the Respondent, by Henson violated Section 8(a)(1) when Henson orally instructed Cox not to discuss her discipline with other employees. Based on the foregoing counsel for the General Counsel submits that the Respondent established an overly broad confidentiality rule. The Respondent does not contend otherwise. It

does argue that Henson's order was a one-time occurrence that was necessitated by the magnitude of the task Cox was performing and the severe consequences that could result from an error. It concludes that Henson's unarticulated reason for the complete prohibition was to prevent Cox from getting "herself more upset later in the day" and making a crucial mistake while doing the orders. I find Henson's testimony on this matter not supported by any evidence and unworthy of belief. She did not tell Cox this was the reason. There is no evidence that she even once went to check on Cox. Nor is there any evidence that Henson told Pancake, who was working along side Cox, to be watchful of her emotional state. Based on the foregoing I discredit Henson's testimony on this matter and reject the Respondent argument. See generally *Verizon Wireless,* 349 NLRB 640, 657–658 (2007).

Accordingly, I find that the Respondent maintained an overboard confidentiality rule when it prohibited the employees from discussing their discipline among themselves and thereby violated Section 8(a)(1) of the Act, as alleged in the complaint.

2. The July 21 incident and the Cox discharge

On July 21 the employees were standing by the timeclock waiting to clock out. The group included Cox, Sudderth, Kelly, and Pancake. A STNA entered the area wearing short shorts and a tank top. Members of the group commented on the outfit. Kelly said that she had seen Henson wearing a top that was not appropriate for work and that she had told Henson as much. Cox stated that she had "gotten in trouble" for wearing jeans and a T-shirt with a logo.

On July 25, Henson and McClain met with Cox in their office. On arriving Cox was handed a personal action form that was marked "failure to obey orders" and "improper conduct." (GC Exh. 2.) The form contained a written statement explaining that Cox had told the group standing by the timeclock that she had gotten in trouble for wearing jeans and a T-shirt "which she had been instructed by DON not to discuss once she left the DON's office." The order that Cox was discharged for violating is the unlawfully overbroad confidentiality rule not to discuss her discipline with other employees, described above, that violates Section 8(a)(1).

An employer's imposition of discipline pursuant to an unlawfully overbroad rule constitutes a violation of the Act. *NLS Group,* 352 NLRB 744, 745 (2007), and cited cases. The Respondent's contention that Cox was not engaged in concerted activity at the time of her discharge is without merit. E.g., see *Rock Valley Trucking Co.,* 350 NLRB 69 (2007), and cited cases.

Accordingly, I find that the Respondent's termination of Cox pursuant to the unlawfully overbroad confidentiality rule violates Section 8(a)(1) of the Act.

3. The 8(a)(3) theory

The complaint also alleges, and counsel for the General Counsel argues, that the Respondent was motivated to discharge Cox because of her union activity in violation of Section 8(a)(3).

The analytical framework for determining when a discharge violates the Act was set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line,* the General Counsel must first prove by a preponderance of the evidence, that the discharge was motivated by the employee's protected concerted activity. To carry the initial burden, the General Counsel must show that the employee engaged in protected concerted activity and that the Respondent knew of the activity. The General Counsel also must establish that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence. *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999). Thus, the timing of a discharge may support an inference of discriminatory motivation. Id. at 1282. When an employer's stated motive for an action is found to be false, the circumstances may warrant an inference that the true reason is an unlawful one which the employer seeks to conceal. E.g., *A–1 Portable Toilet Services,* 321 NLRB 800, 806 (1996). If the General Counsel meets this burden, the employer bears the burden of showing that the discharge would have taken place even in the absence of protected conduct. *Wright Line,* supra at 1089. See also *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996). Further, "[a]n employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.,* 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

Discussion

The record establishes that Cox was the primary employee union organizer. In that regard she discussed unionization with other employees, contacted the union on behalf of the employees, and scheduled the first organizing meeting. She clearly was engaged in protected concerted activity and it is admitted that the Respondent had knowledge of her activities by July 6, 2007. The unfair labor practices found above provide the requisite animus. I also find inconsistent reasons advanced for the discharge. Thus, Henson testified, and the Respondent argues in brief, that the sole reason she told Cox not to discuss their conversation was to prevent Cox from making an error in the orders. Clearly, that was not a concern at the time Cox was discharged for disobeying that order, and yet there is no explanation forthcoming from the Respondent for this obvious inconsistency. Thus, I find that the reason offered by the Respondent for the discharge, that Cox discussed her discipline with other employees, is inconsistent with Henson's testimony that the reason she ordered Cox not to talk about the incident was to prevent Cox from making an error with the orders. Accordingly, I find the proffered reason is a pretext and as such provides additional evidence of unlawful motivation. Based on the foregoing I find that the General Counsel has met the initial burden.

I am aware that where the evidence establishes that the reason given for the discharge is a pretext—that is the reason is either false or was not in fact relied on—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct. *Golden State Foods Corp.,* 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th

Cir. 1982). However, because the Respondent argues that the reasons for which Cox was terminated occurred prior to its knowledge of her union activity, and that the decision to discharge Cox was made before the Respondent acquired that knowledge, I will address the Respondent's arguments and the counsel for the General Counsel response.

The Respondent's Case

The Respondent contends that Morris and Henson had decided to discharge Cox on June 29. On that date a LPN unexpectedly resigned and had the Respondent discharged Cox it would not have been in compliance with state nurse-to-patient guidelines. The Respondent argues that it had no choice but to delay the discharge until the LPN was replaced. The replacement LPN was hired on July 9. Morris testified that there is a 2-week training period for new employees. Morris claims that "from time to time" employees quit before the end of the training period. Accordingly, the Respondent decided to retain Cox until after the replacement LPN completed the training period. The Respondent concludes that Saturday, July 21, was the earliest that it could have discharged Cox and remained in compliance with the guidelines. Henson does not work weekends and she therefore planned to discharge Cox on Monday, July 23. When Henson arrived at work that day she learned of the conversation at the timeclock regarding the dress code. The Respondent states that Henson she was required to conduct an investigation. The investigation took 2 days because some of the employees she needed to interview were not scheduled to work. On July 25, Cox was called to the office shared by Henson and McClain. Both were present. Cox was handed a personnel action form and told that she was terminated. Cox read the form and observed that her discharge was not based on her nursing duties. McClain said that there were other reasons. Cox was upset and refused to sign the form. She asked for, and received, a copy of the form and was escorted from the facility.

The Respondent contends that Cox would have been terminated regardless of her discussions about her discipline or her involvement in the July 21 incident. Respondent submits that the decision was made on June 29 for the reasons discussed by Henson and Morris on that date. Morris directed Henson to prepare a document memorializing the issues they had discussed on June 29. (R. Exh. 12.)

The Respondent contends that Cox was discharged based on incidents that occurred in June, before it had knowledge that she was involved in the union organizing campaign. Henson used her personal computer to make a list of the items she and Morris discussed on June 29. She made the list on July 1. She sent an e-mail, with the document attached, to herself at work, the attached document is dated July 2. The subject of the e-mail is "ccox report to Bob," the heading of the attachment is "Concerns with work ethics up to this date." A summary of the document indicates that: (1) the first and second items concern excessive use of her cell phone on company time; (2) the next is leaving the facility while on break without notifying a supervisor; (3) eating food from a resident's tray; (4) demonstrating a negative attitude toward coworkers; (5) refers in detail to the dress code incident; (6) refers to a report that Cox was disrespectful to a STNA; and (7) is a report that employees in housekeeping do not feel that Cox cares for them and that they feel that she seeks them out to report them to the administration.

The counsel for the General Counsel counters that Henson admitted that neither she nor any other supervisor issued any discipline to Cox for excessive use of her cell phone. In fact Henson testified that only once did she tell Cox that she should not be using her cell phone at the LPN desk. Cox was not reprimanded for leaving the facility, having a negative attitude, being disrespectful to a STNA or having an ax to grind against employees in the housekeeping department.

I am mindful that neither the Board nor an administrative law judge can substitute their judgment for that of the employer and decide what constitutes appropriate discipline. *Corriveau & Routhier Cement Block v. NLRB,* 410 F.2d 347, 350 (1st Cir. 1969), citing *NLRB v. Ogle Protection Service,* 375 F.2d 497, 505 (6th Cir. 1967), cert. denied 389 U.S. 843; *All Pro Vending,* 350 NLRB 503, 509 (2007). Nor am I questioning the validity of the accusations against Cox. I do question the truthfulness of the Respondent's claim that Morris and Henson had decided to terminate Cox on June 29.

The subject of the e-mail is a "report." A report generally contains information from which a conclusion may be drawn. Consistent with that view the heading of the report is Henson's "concerns with work ethics up to this date." I find that the language used indicates that the document is a work in progress. Consistent with this view is our the notes Henson wrote regarding the investigation she was conducting about Cox being disrespectful to a STNA. At the top of the first page of the investigation is written "on 6/29/07." The last entry is reportedly made "a few days after the 6–29–07." (R. Exh. 13.) Because Henson does not work on the weekend the last entry may have been written as late as July 2 or 3. In which case the Respondent would have been relying on an issue that was still under investigation as a basis for the discharge. Additionally, as set for above, the dress code incident is not the last item on Henson's list. It is undisputed that the dress code incident happened on June 28. The item regarding the STNA appears to have come to Henson's attention on June 29 and was still under investigation as of July 2 or 3. The matter concerning the housekeeping personnel was last on the list, although there is no clue as to when that matter was reported.

Henson's notes regarding the dress code incident state that "later that day it was reported that [Cox] even explained the events of the torn/ hole jeans to the doctor who visited the facility." (R. Exh. 12 at bottom of 3.) There is no mention of any concern about mistakes or that Henson took any action concerning the reported information.

I also note that the Respondent had not yet availed itself of its progressive discipline system with regard to Cox. As Cox observed at her discharge meeting she was not discharged because she was an incompetent LPN. Morris expressed concern about the abilities and the commitment of the replacement LPN. It would appear that under the circumstances the Respondent would be better served by using progressive discipline in an attempt to change the behavior of Cox rather than resorting to discharge.

I conclude from the foregoing that the Respondent's contention that it had made the decision to discharge Cox on June 29,

is false. Based on the foregoing I find that Morris and Henson were going to meet on July 2 to continue their preliminary discussion regarding the continued employment of Cox, not to discharge her.

That discussion was made moot by the unexpected resignation of another LPN. I do not agree, as argued by the Respondent that the Respondent "had no choice but to postpone her termination in order that they would be in compliance with state regulations. (R. Br. at 43.) Certainly if Cox was abusing the residents the Respondent would not have postponed her discharge. Moreover, Morris did not testify that the Respondent had no choice. He said the Respondent would have had some issues with having enough LPNs to perform the work. He further explained that the guidelines require that medications to be given to the residents within a certain timeframe. He did not specify the timeframe. I find that Cox was retained because her transgressions were not related to her nursing duties, and that the Respondent found it a matter of convenience and or economically advantageous to postpone its decision regarding the fate of Cox. At least until it learned of her union activity on July 6. Shortly thereafter it took advantage of an innocuous statement by Cox as a way to rid itself of the leading union proponent.

The final reason that I find that the Respondent has not satisfied its burden to show that it would have discharged Cox even in the absence of her union activity is because its conduct belies its contention. The Respondent claims that Henson was required to conduct an investigation of the facts surrounding what was said by whom on July 21. The Respondent offers not explanation as to why the investigation involved Cox. Henson admitted that she never interviewed Cox. The record indicates that the discharge probably took at the most no more than 30 minutes. The Respondent contends that Cox would have been discharged Cox even in the absence of her union activity. But the Respondent offers no credible explanation why it did not do so. Accordingly, applying a *Wright Line* analysis, I find that the Respondent has failed to persuade by a preponderance of the evidence that it would have terminated Cox in the absence of her union and protected concerted activity.

Based on the foregoing I find that the Cox discharge violated Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

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

2. By the following acts and conduct the Respondent violated Section 8(a)(1) of the Act:

(a) By maintaining overly broad rules prohibiting solicitation and distribution in its personnel policy addendum.

(b) By promulgating and maintaining an overly broad confidentiality rule prohibiting employees from discussing their salary, performance appraisals, and wage increases with other employees.

(c) By telling employees that they cannot discuss their performance appraisals, wage increases, and discipline with other employees.

(d) By threatening employees with discipline and discharge if they discuss their performance appraisals and wage increases with other employees.

(e) By creating the impression that the employees' union activities are under surveillance.

(f) By discharging employee Christina Cox for discussing her discipline with other employees.

3. By the following act and conduct the Respondent violated Section 8(a)(1) and (3) of the Act:

By discharging employee Christina Cox on July 25, 2007, because of her union and protected concerted activities.

4. The foregoing unfair labor practices affect commerce within the meaning 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 unlawfully discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. Because the Board has consistently refused to deviate from the standard remedy of simple interest, I am bound to follow the current practice. *Glen Rock Ham,* 352 NLRB 516, fn. 1 (2008); *J & R Roofing Co.,* 350 NLRB 694 fn. 1 (2007).

I shall also recommend that the Respondent rescind its unlawful written rules and to notify all employees that it has done so and that it will not prohibit employees from discussing the terms and conditions of their employment in a manner protected by the Act.

[Recommended Order omitted from publication.]