

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

SCC OAKLAND CAMBRIDGE OPERATING
COMPANY, LLC d/b/a CAMBRIDGE EAST
HEALTHCARE CENTER

And

Case 7-CA-53548

PATRICK GORDON, and Individual

Robert Buzaitis, Esq.,
for the General Counsel.
Ruth L. Goodboe, Esq.,
(*Ogletree, Deakins, Nash,*
Smoak & Stewart, PLLC)
Bloomfield Hills, Michigan,
for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 12 and 13, 2011. Patrick Gordon, an individual employee, filed the charge on March 14, 2011.¹ The General Counsel issued the complaint on May 18, 2011, and, during its case in chief, I granted the General Counsel's motion to amend the complaint. The complaint, as amended, alleges that SCC Oakland Cambridge Operating Company, LLC d/b/a Cambridge East Healthcare Center (the Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act): by promulgating an overly broad directive that employees refrain from discussing the investigation of an allegation that Gordon abused a resident of the facility; by threatening to discharge employees if they discussed the matter; and by maintaining in its handbook an overly broad rule regarding confidentiality during investigations. The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

¹ All dates are 2011 unless otherwise indicated.

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FINDINGS OF FACT

I. JURISDICTION

10 The Respondent, a corporation, operates a nursing home in Madison Heights, Michigan,
 where it annually derives gross revenues in excess of \$100,000 and purchases and receives
 materials and supplies valued in excess of \$5000 directly from points outside the state of
 Michigan. 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 a health care institution within the
 15 meaning of Section 2(14) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

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The Respondent operates a nursing home facility that provides long-term care and
 rehabilitation services to residents. Most of the facility's residents have severe cognitive
 impairments caused by Alzheimer's disease or other forms of dementia. The charging party in
 this case, Patrick Gordon, is a certified nurse's aide who has worked at the facility since 2001.
 25 He is represented by the Service Employees Union (SEIU or Union), but he filed the charge as
 an individual. Until January 2011 – when a visitor made an allegation of resident abuse against
 him – Gordon had never been the subject of complaints regarding his care of residents.

B. Allegation of Abuse Lodged Against Gordon

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On January 5, 2011, Gordon was in the facility's cafeteria feeding residents. A visitor
 complained to staff that they had seen Gordon hit a resident. On January 5, Vanette Starks, a
 nurse, informed Melissa Schwartz, the assistant director of nursing, about the complaint.
 Schwartz then spoke to the visitor about what she had seen. According to Schwartz's written
 35 notes regarding that conversation, the visitor stated that "as she [was] walking in the hallway
 near the dining room she thought she saw a female resident in the dining room drop a piece of
 silverware and that [Gordon] tapped the resident on her arm with the back of his hand." As is
 discussed below, the Respondent investigated the allegation of abuse and concluded that it was
 not substantiated. The Respondent returned Gordon to work and paid him for the 3-day period
 40 that he was suspended pending the results of the investigation. This case does not concern
 discipline against Gordon, but rather the Respondent's directives that employees refrain from
 discussing the matter under investigation.

C. Requirements and Policies Relating
to Investigations of Resident Abuse

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The Respondent has, at all times relevant to this litigation, been subject to federal
 regulations relating to the operation of long term care facilities. Those regulations provide that
 when there is an allegation that a resident has been subjected to physical abuse "[t]he facility
 50 must have evidence that [the allegation is] thoroughly investigated, and must prevent further
 potential abuse while the investigation is in progress." 42 C.F.R. Section 483.13(c)(3). If the

5 allegation is substantiated, the facility is required to take “appropriate corrective action.” 42
 C.F.R. Section 483.13(c)(4). In addition, the state of Michigan requires that the Respondent
 notify State officials of an allegation of resident abuse within 24 hours of receiving it, and of the
 results of its investigation within 5 days. There is no evidence that the Respondent has ever
 missed that 5-day deadline, and the evidence shows that it has not missed the deadline for at least
 10 the 4 years prior to the trial.

In response to these federal regulations, the Respondent has issued its own “Abuse &
 Neglect Policy.” That policy provides, inter alia, that the Respondent will investigate any
 alleged abuse, report the allegations and investigative findings to the State, and protect residents
 15 from harm during the investigation. The Respondent’s policy is to complete investigations of
 abuse within 3 working days of receiving the allegation. There is no record evidence of the
 Respondent ever missing the 3-day deadline.

In addition, the Respondent maintains an employee handbook with a “code of conduct”
 20 section that discusses investigations conducted by the Respondent. The section on investigations
 informs employees that:

Depending upon the circumstances of a particular investigation you may be
 requested and expected not to disclose any confidential information that could
 25 compromise an ongoing investigation, including not only the scope and content of
 the investigation, but also the fact that an investigation is being conducted.²

The handbook has been in effect since at least May 2010, and was in effect at the time of trial.
 The employee handbook does not define the term “confidential information” for purposes of the
 30 section on investigations.

The Respondent’s practices regarding how investigations will be conducted, and under
 what circumstances officials will request that employees refrain from discussing a matter under
 investigation, have not been reduced to writing. Officials of the Respondent testified regarding
 35 those practices and the reason that employees are directed not to discuss certain matters under
 investigation. According to Schwartz, the assistant director of nursing, her standard procedure
 during an investigation is to tell employee-witnesses that they may not discuss the investigation
 with other employees, but are free to discuss it with a union representative, the director of
 nursing, the assistant director of nursing, and human resources personal. According to Schwartz,

² The full section provides as follows:

Company Investigations

Occasionally it will be necessary for the Company to conduct internal investigations
 or audits to ensure that Company standards are being met and that policies and
 procedures are being followed. You are expected to cooperate fully in Company
 investigations. This includes the disclosure of any facts known to you that are
 relevant to the investigation. Depending upon the circumstances of a particular
 investigation you may be requested and expected not to disclose any confidential
 information that could compromise an ongoing investigation, including not only the
 scope and content of the investigation, but also the fact that an investigations is being
 conducted.

5 the restriction is lifted when the Respondent completes its investigation, however, she conceded
that she does not inform employees of this. Schwartz's supervisor, Sheryl Amos, director of
nursing, testified that she requests that witnesses refrain from discussing an investigation if the
allegation is sufficiently "serious." She stated that the circumstances in which she makes such a
10 request include those where the investigation concerns alleged resident abuse. According to
Amos, when she tells employees to refrain from discussing an investigation, she also tells them
they are permitted to discuss it with their union steward, the director of nursing, and human
resources personnel. Amos stated that "it's assumed" that the restriction only remains in effect
during the 3-day time period when the Respondent is conducting its investigation, but she
15 conceded that she does not explicitly communicate this to employees. Frank Hazard, the
facility's administrator and highest on-site official, stated that when there is an investigation of
possible patient abuse, the Respondent's policy is that "employees should not talk to other
employees during the course of the investigation." Hazard conceded that the Respondent should
do a better job of informing employees that they may discuss the matter after the investigation
has been completed.

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Theodora "Terry" Carter, an employee who has been a union steward at the facility for 15
years, testified that her understanding has always been that employees may talk to the union
steward about allegations of employee misconduct that the Respondent is investigating, even if
the Respondent has directed the employees not to discuss the matter. Carter stated that, as a
25 union steward, she routinely performs independent investigations of matters that involve possible
misconduct by unit members, even when the same matter is under investigation by the
Respondent. The Respondent permits Carter to interview the alleged wrongdoer and other
employees about the allegation even if the Respondent has told employees not to discuss it. In
the case of the allegation against Gordon, Carter conducted her own investigation, which
30 included talking to employee-witnesses. Transcript at Page(s) (Tr.) 141.

Officials of the Respondent offered two rationales for directing employees to refrain from
discussing an allegation during an ongoing investigation. Amos testified that the restriction is
necessary to protect the integrity of the investigation by ensuring that the employees' answers are
35 unscripted and not unduly influenced by employees' sense of loyalty to one another. Amos
explained that this is particularly important at the facility because, due to their cognitive
impairments, the residents "in most cases cannot really speak for themselves, recall incidents,
remember names and times." Hazard stated that confidentiality is also sometimes necessary to
protect the residents involved from retaliation or abuse during the investigation.

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Testimony regarding the Respondent's investigative practices showed that, upon
receiving an allegation of resident abuse, the Respondent attempts to protect the resident against
retaliation or further abuse by suspending the accused employee and requiring him or her to
leave the facility immediately. The employee remains on suspension during the period of the
45 investigation. The Respondent interviews the other employees who were scheduled to work in
the area where the abuse is alleged to have occurred. If the allegation is not substantiated by the
investigation, the employee is returned to work and paid for the period of the suspension.

The record evidence is thin, and somewhat inconsistent, regarding the question of
50 whether the Respondent may discipline employees who discuss an ongoing investigation after
management has directed them not to. On the one hand, Hazard testified that, based on his

5 understanding of the employee handbook, discipline cannot be issued to an employee for
engaging in such discussions. No witness contradicted Hazard on this point and the record
contains no evidence of the Respondent ever imposing such discipline. On the other hand, in its
brief, the General Counsel points out that the Respondent’s employee handbook provides that
10 violations of the code of conduct (which includes the section, quoted above, about requests for
confidentiality during an ongoing investigation) will result in discipline in the form of a final
warning. This disciplinary section was introduced at trial as part of the entire handbook,
however, it was not discussed by counsel and no witness directly testified about its meaning or
application. More specifically, there was no testimony that an employee’s failure to meet an
15 “expectation” set forth in the code of conduct would constitute a violation of that code, or trigger
the issuance of discipline. The handbook also provides that an employee’s refusal to comply with
any direct order from a supervisor qualifies as “insubordination” and is punishable by
termination. General Counsel’s Exhibit Number (GC Exh.) 6 at Page 21, Paragraph 38. Like the
disciplinary section regarding violations of the code of conduct, the provision regarding
discipline for insubordination was entered into evidence as part of the entire handbook, but was
20 not a subject of any discussion or testimony at trial.

D. Respondent Investigates Allegation Against Gordon;
Gordon Seeks Statements of Support from Co-Workers

25 *1. Schwartz Suspends Gordon on January 5:* On January 5, after Schwartz spoke to the
visitor who made the allegation that Gordon abused a resident, Schwartz met with Gordon in
Schwartz’s office. Schwartz told Gordon that the Respondent had received an allegation that he
abused a resident and that he was suspended pending the investigation of that allegation.
Schwartz directed Gordon not to discuss the incident with anyone but a union steward, Amos,
30 Tamyra Bivings (human resources coordinator), or Schwartz herself. Gordon asked for the
opportunity to speak to union steward Carter, but Schwartz told Gordon that he was required to
leave the facility immediately. Then Schwartz escorted Gordon out of the facility. Later that
day, Gordon contacted Carter by phone.

35 *2. Boggon Meets with Johnson and Iwanicki on January 5:* On January 5, Kamera
Boggon, the Respondent’s staff development coordinator, met with two nursing employees –
Angela Johnson and Oksana Iwanicki – who had been in the cafeteria at the time when Gordon
allegedly struck a resident. It appears that Carter, a union steward, was present for at least one of
these meetings. Neither Johnson nor Iwanicki reported seeing Gordon do anything improper.
40 Boggon did not tell Johnson and Iwanicki to refrain from discussing the investigation with other
employees or even advise them that an investigation was underway.³

³ The General Counsel urges me to find that at her meetings with Iwanicki and Johnson on
January 5, Boggon directed both employees not to discuss the investigation with anyone.
However, Boggon testified that she did not give any such direction, and the General Counsel did
not introduce any contrary evidence based on the account of an individual with personal
knowledge of what was said at that meeting. Instead the General Counsel relies on a portion of
the Respondent’s March 15, 2011, position statement, which states that the Respondent (not
necessarily Boggon) gave such a direction to those individuals. The General Counsel correctly
notes that I may credit a factual assertion in a party’s position statement as substantive evidence
or an admission when it is inconsistent with the party’s trial testimony. *United Scrap Metal, Inc.*,

5 3. *Disciplinary Action Report*: On January 5, Schwartz prepared a disciplinary action report regarding Gordon's suspension. The report stated that Gordon "shouldn't contact staff in regards to allegation." A copy of the report was mailed to Gordon on January 6.

10 4. *Gordon Speaks by Phone with Thomas on about January 6 and Asks her to Obtain Statements from Co-workers*: On about January 6, Gordon called Juliet Thomas, a co-worker. He asked her to obtain statements relating to the abuse allegation against him. Thomas approached employees Iwanicki and Johnson on Gordon's behalf, but each said that she had already provided a statement to the union representative and would not provide an additional statement to Thomas. Thomas also approached Starks, the nurse who initially informed Schwartz that a visitor had made the allegation. Thomas ushered Starks into a restroom and then had her speak to Gordon by cell phone. Gordon also contacted Iwanicki directly.

20 5. *Schwartz Meets with Thomas on January 6*: Starks reported to Schwartz that Thomas had approached her about providing a statement on Gordon's behalf. Subsequently, on January 6, Schwartz met with Thomas. The meeting, which took place in the human resources office, was also attended by Bivings and, for some or all of the meeting, a union steward named Mildred Worthy. Schwartz told Thomas that the Respondent wanted to know what was said between Thomas and Gordon in order to make sure that there was no interference with the investigation. Thomas told Schwartz that she had spoken to Gordon regarding the allegations against him, but denied that she had requested that any other employees give statements in support of Gordon. At trial, Thomas admitted that she was being untruthful during the January 6 meeting when she denied approaching employees to support Gordon. Tr. 27. The meeting ended when Thomas stated "I don't know why I'm in this office, but I'm gone," and walked out.

30 Thomas testified that Bivings was the one who spoke for management at the January 6 meeting, while Schwartz took notes. According to Thomas, Bivings told her, "Well you shouldn't talk to Patrick [Gordon] period." Tr. 21. Schwartz and Bivings both contradicted this, testifying that Schwartz, not Bivings, was the management official who spoke at the meeting and that Schwartz did not direct Thomas to refrain from talking to other employees. Tr. 77-78 and Tr. 154. I conclude that the evidence does not establish that the Respondent made the statement

344 NLRB 467, 467-468 (2005); *Elyria Foundry Co.*, 321 NLRB 1222, 1232-1233 and 1251 (1996), enf. 205 F.3d 1341 (6th Cir. 2000) (Table). However, under the circumstances present here I decline to do so. I note first that there was a confident and unequivocal denial from Boggon – a witness whose credibility was not undermined at trial. In addition, the General Counsel chose not to call either Iwanicki or Johnson to contradict Boggon's account, nor did the General Counsel explain the absence of those witnesses. There was no evidence showing how the relevant portion of the position statement had been prepared, much less showing that anyone with personal knowledge of the Respondent's meetings with Iwanicki and Johnson participated in the creation of, or reviewed, the position statement. Lastly, I note that the Respondent included the following disclaimer in its position statement: "The information contained herein represents Cambridge East's current understanding of the facts as of the date of this letter and is made without prejudice to our right to present new, different, or additional facts and/or argument based on subsequently acquired information or evidence."

5 testified to by Thomas. Not only was Thomas an antagonistic witness, but she had repeated memory lapses,⁴ and contradicted herself regarding relevant matters.⁵ I found Schwartz and Bivings more credible witnesses regarding disputed facts based on their demeanors and the fact that their testimonies were generally free of lapses and significant internal contradictions.

10 6. *Schwartz Meets with Iwanicki on January 6:* On January 6, Schwartz interviewed Iwanicki in the Respondent’s human resources office after Starks reported that Thomas had approached her about supporting Gordon. Also present were Bivings (who served as a witness and did not speak) and Worthy, a union steward. Schwartz told Iwanicki that the Respondent was conducting an investigation and the reason for the interview was to determine whether that
15 investigation had been interfered with. Schwartz asked Iwanicki who, if anyone, had asked her to write a statement or talk to management on Gordon’s behalf. Notes of the meeting report that Iwanicki answered that Boggon had spoken to her, but make no mention of Thomas. During this meeting, Schwartz did not request that Iwanicki refrain from talking to other employees about the investigation.

20 7. *Telephone Conversations Between Amos and Gordon on January 7:* On January 7, Amos spoke to Gordon twice by telephone. Amos’ main objective during these conversations was to schedule a face-to-face meeting with Gordon. Amos believed that such a meeting would complete the investigation. During the first call, Gordon said he wanted to have a lawyer with
25 him when he came for the meeting. Amos opined that Gordon did not need a lawyer, and expressed concern that including a lawyer at the meeting might infringe on patient privacy rights under HIPAA.⁶ Amos stated that she would check with the Respondent’s corporate office and then tell Gordon whether the lawyer could participate. Some minutes later, Amos phoned Gordon a second time and told him that the Respondent would not allow the lawyer to attend the
30 meeting, but that union steward Carter would be present. Gordon agreed to come to the facility later that day for an in-person meeting.

 During the two January 7 phone calls between Amos and Gordon, a number of other individuals were listening, but did not speak. The Respondent included Bivings on the call.
35 Gordon included a personal friend named Michael Donaldson, a second personal friend identified only as Mark, and an attorney to whom Mark had just introduced Gordon.⁷ Gordon

⁴ Tr. 18 (“What was her name? I forgot the nurse name.”); Tr. 20 (“I should know, but my mind is blank.”); Tr. 32-33 (It’s been a long time, so I don’t know. . . .”); Tr. 33 (agrees that her memory regarding events at-issue is “really not that good”).

⁵ Compare Tr. 27 at line 12 (it was after Worthy arrived at the meeting that Thomas was asked whether she was trying to get statements for Gordon) with Tr. 27 at line 21 (it was before Worthy arrived at the meeting); and Tr. 28-29 (Thomas denies that she was shown, or asked to sign a document summarizing the meeting) with Tr. 30 (after being shown a document summarizing the meeting that has her signature on it, Thomas states that she read and signed a document summarizing the meeting).

⁶ Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191, 110 Stat. 1936 (1996).

⁷ Schwartz and Bivings recalled union steward Carter being present for the call, but Carter’s own recollection was that she was not involved. I conclude that the evidence does not establish that Carter participated.

5 and Donaldson both testified that during the first call on January 7, Amos said something along the lines of “If you talk to anyone you will be fired and the investigation will be over.” Amos and Bivings denied that Amos made such a statement during the telephone call. After carefully considering the evidence and testimony, I conclude that the record fails to establish by a preponderance of the evidence that Amos made the alleged threat. I found Amos and Bivings generally credible based on their demeanors, testimonies, and the record as a whole. Both were calm and measured witnesses and their respective testimonies were free of significant contradictions. Gordon, on the other hand, was a palpably angry, and sometimes evasive, witness and I consider him less reliable than Amos and Bivings. More than once Gordon expressed indignation that the Respondent had investigated the allegation against him at all. Tr. 97, Tr. 15 115. In addition, he used strained and nonsensical reasoning to resist admitting that there was any contradiction between his statement that he had not talked to other employees about the abuse allegation, and his statement that he had talked to employees Thomas and Iwanicki about the abuse allegation. Tr. 109-111. I also found Donaldson a somewhat less credible witness than Amos or Bivings. He gave the impression of being a scripted, rather than a spontaneous, 20 witness. His testimony was almost identical to his written account of the meeting. Moreover, I found Donaldson’s testimony that he completed that written account while the meeting was happening, and never revised or re-copied it, dubious. The account is set forth in mostly complete sentences and with almost nothing stricken out or otherwise corrected. This is not the type of skeletal rendering that I have come to expect when even experienced note-takers make contemporaneous notes during a meeting. Moreover, although Donaldson indicated that at the 25 time of the call he only knew of Amos by her first name – “Sheryl”⁸ – his supposedly contemporaneous and unrevised notes identify her as “Sheryl Amos.” Finally, I note that while there were two other individuals who listened to the call on Gordon’s behalf – his friend Mark and a lawyer – neither of those individuals were called to corroborate Gordon’s and Donaldson’s 30 accounts.

8. *Amos Meets with Gordon on January 7:* Later on January 7, Gordon came to the facility to meet with Amos. Also present during this meeting were Carter (union steward) and Bivings (human resources). During this meeting, Amos questioned Gordon about the allegation that he hit a resident on January 5. Gordon denied hitting the resident. He stated that he had merely placed the resident’s hand in her lap so as to discourage her from putting that hand in food. Amos told Gordon that she understood how the action he described could have been misinterpreted by the hospital visitor who made the allegation. Amos also stated that in reaching a conclusion about the allegation she would take into account that Gordon was a long-term 35 employee, had never had any care issues, took pride in his work, and had received positive evaluations. 40

At the conclusion of the meeting, Amos told Gordon not to “discuss” the meeting with anyone because she was “still investigating.” Tr. 137. Amos did not tell Gordon that he would be disciplined if he violated this instruction. Tr. 140.⁹ Carter testified that her understanding was 45

⁸ See Tr. 38.

⁹ There were conflicting accounts regarding what Amos said to Gordon at the January 7 in-person meeting regarding discussions with other employees. I base my findings regarding this meeting on the testimony of Carter who I found a particularly credible witness. Carter testified in a calm and certain manner, and with specificity about what was said at the meeting. Carter is

5 that she and Gordon could talk about the meeting, even though Amos had told Gordon not to
 discuss it with anyone. Carter believed this because she is a union steward and Amos had
 frequently told employees that they could discuss investigations with their union stewards even if
 they were otherwise prohibited from discussing the investigations. At the January 7 meeting,
 10 however, Amos did not articulate that exception. In addition, Amos did not explicitly state that
 Gordon would be allowed to discuss the investigation once it was concluded.

15 *9. Meeting on January 10:* On January 10, Gordon, Amos, Bivings, Carter, and, possibly,
 Schwartz met at the Respondent's facility. Amos told Gordon that the investigation did not
 substantiate any wrongdoing. She informed Gordon that he could return to work and would
 receive full backpay and benefits for the 3-day period of his suspension. Gordon responded, "I
 got accused of doing, hitting, beating up a resident for nothing." He complained that the
 allegation was made by an "unknown white female" who "was down the hall at the
 nurses'station." Gordon was not disciplined in any way for violating the Respondent's directive
 20 restricting him from discussing the investigation with other employees.

E. Complaint Allegations

25 The complaint alleges that the Respondent violated Section 8(a)(1) of the Act: on or
 about January 5, 2011, when Schwartz and Boggon directed employees not to speak to other
 employees regarding a work-related matter under investigation; on or about January 6, 2011,
 when Bivings and Schwartz directed employees not to speak to other employees regarding a
 work-related matter under investigation; on or about January 7, 2011, when Amos directed
 employees not to discuss a work-related matter under investigation with anyone, and threatened
 to discharge employees if they did so; and since about January 5, 2011, by maintaining a rule in
 30 its Employee Handbook, which states, inter alia, that "Depending upon the circumstances of a
 particular investigation you may be requested and expected not to disclose any confidential
 information that could compromise an ongoing investigation, including not only the scope and
 content of the investigation, but also the fact that an investigation is being conducted."

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a union steward, but the Union is not a party to this proceeding, and I had the impression that
 Carter was testifying without bias for or against any party. I credit Carter's testimony over that
 of Gordon, who testified that Amos said, "Well, if I fire you or bring you back, you're instructed
 not to talk about the matter with anyone." Tr. 103. For the reasons discussed above, I
 considered Gordon a less than fully reliable witness regarding disputed matters. I also credit
 Carter's testimony over Amos' denial that, during the January 7 meeting, she told Gordon
 anything about communicating with other employees. Tr. 210-211. Amos' general denial was
 less reliable in my view than the specific account of a witness like Carter, who was particularly
 credible and had no demonstrated bias. I also note that Bivings, the other management official
 who was present at the meeting, declined to corroborate Amos' denial – testifying that "[i]t's
 possible" Amos gave Gordon an instruction about whether he could, or could not, speak to others
 about the investigation. Tr. 162.

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III. DISCUSSION

As discussed above, the record shows that on January 5, Schwartz directed Gordon not to discuss the alleged abuse incident with anyone other than a union steward, Amos, Bivings, or herself, and that on January 7 Amos directed Gordon not to discuss their meeting because the investigation was not complete. In addition, on January 6, the Respondent sent Gordon paperwork which stated, inter alia, that Gordon “shouldn’t contact staff in regards to allegation.”¹⁰ Since at least May 2010, and continuing at the time of trial, the Respondent’s Employee Handbook has contained a section stating that “Depending upon the circumstances of a particular investigation [employees] may be requested and expected not to disclose any confidential information that could compromise an ongoing investigation.” I consider below whether any of the Respondent’s actions unlawfully infringed on employees’ activities under Section 7 of the Act.¹¹

A. Directives to Gordon

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In a case alleging a violation of Section 8(a)(1), the first question is whether the employer’s conduct interferes with the employee’s rights under Section 7 of the Act. If it does, the employer may escape a finding of violation by demonstrating a legitimate and substantial business justification that outweighs the employee’s interests under Section 7. See, e.g., .
Verizon Wireless, 349 NLRB 640, 658 (2007); *Ang Newspapers*, 343 NLRB 564, 565 (2004); *Caesar’s Palace*, 336 NLRB 271, 272 fn.6 (2001); see also *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 494-495 (1978) (The Board’s task is to balance the employees’ Section right to communicate against the employer’s right to protect its business interests.) Where, as here, the employer is a healthcare facility, the Board also factors in the interests of patients when determining whether employees’ Section 7 interests are outweighed. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 779 (1979) (“Congress has committed to the Board the task of striking the appropriate balance among the interests of hospital employees, patients, and employers.”); *Medical Center of Beaver County, Inc.* 266 NLRB 429, 430 (1983) (Board recognizes “the need to balance the interest and comfort of the patients against the Section 7 rights of employees.”).

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The question of whether the oral and written directives given to Gordon were a violation of Section 8(a)(1) is, to my mind, a close one. That is not to say that the question of whether those directives restricted Section 7 activity to some extent is close. The Board has affirmed that an employer interferes with Section 7 rights by prohibiting employees from discussing workplace concerns, particularly if, as here, they relate to discipline or potential discipline.
Verizon Wireless, 349 NLRB at 658; *Westside Community Mental Health Center*, 327 NLRB

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¹⁰ For the reasons discussed above, the record evidence does not substantiate the General Counsel’s contentions that the Respondent directed employees other than Gordon not to discuss the allegation or investigation regarding Gordon. Nor does the record substantiate the General Counsel’s contention that Amos threatened to discharge Gordon or anyone else if they discussed the allegation or investigation regarding Gordon. The complaint allegations based on those unproven factual contentions should be dismissed.

¹¹ Section 7 of the Act provides that employees have the right, inter alia, to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. Sec. 157.

5 661, 666 (1999). Thus, the Respondent's directives prohibiting Gordon from discussing the allegations against him with others clearly interfered with his Section 7 rights.

10 The Respondent contends that the extent of the interference is minimal because even when management prohibits employees from discussing a matter under investigation it always permits them to discuss the matter with their union representatives, and because the duration of the prohibition is limited to the 3 to 5 day period of the investigation. I agree that the extent of interference with Section 7 rights was reduced here because the Respondent permitted Gordon to discuss the allegation with his union steward, Carter, and permitted Carter to gather information from Gordon and his co-workers to use in Gordon's defense. Thus the directives issued to
 15 Gordon restricted him from gathering information from co-workers only to the extent that such efforts had to be made through his union representative.

20 If, in addition, the record had substantiated the Respondent's assertion that the confidentiality directive applied only during the 3 to 5 day period of the investigation, I would be inclined to agree with the Respondent that the infringement on Gordon's Section 7 rights was quite limited. The problem is that the directives the Respondent actually communicated to Gordon were not limited to the time period of the investigation. None of the three versions of the confidentiality directive communicated to Gordon in January 2011 included any language informing him that he would be free to discuss the accusation with others after the Respondent
 25 completed its investigation.¹² Even when the Respondent informed Gordon that the investigation was complete and had failed to substantiate the allegation of abuse, it did not release Gordon from the confidentiality directives. Thus Gordon would reasonably interpret those directives (whether he chose to abide by them or not) as continuing and possibly perpetual.

30 I reject the notion that the confidentiality directives given to Gordon were limited to the time period of the investigation by language in the employee handbook's code of conduct. The Respondent did not advise Gordon that the directives were based on, or controlled by, the code of conduct. The Respondent has not shown that its officials referenced the code of conduct when

¹² I reject the Respondent's argument that the Respondent's January 7 instruction can "only be interpreted to mean the restriction on discussions would end when the investigation ended." Brief of Respondent at Page 13. Amos' January 7 instruction was that Gordon should not discuss the meeting with anyone because Amos was still investigating. Although this can be read to imply that the restriction would be lifted when the investigation was completed, it could also mean a number of other things – for example, that the Respondent's decision about whether to continue the restriction on communications would be based on the results of the investigation. Even if one believes that the January 7 directive is limited to the period of the investigation, that communication would not cure the Respondent's prior oral and written directives to Gordon that were not so limited. "An employer may cure the impact of an unlawfully coercive statement by making an explicit, 'unambiguous, specific' repudiation of it and assuring employees that no such violation will occur again." *Federated Logistics Operations*, 340 NLRB 255, 256 fn. 5 (2003), *enfd.* 400 F.3d 920 (D.C. Cir. 2005), citing *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978). In this case, the Respondent certainly did not repudiate its earlier directives or give such assurances. At any rate, the January 7 directive related only to discussions of "the meeting" that day, not to the broader subjects of the allegation and the investigation in general, which were the subjects of the earlier confidentiality directives.

5 they gave him the confidentiality directive.¹³ At any rate, although the code of conduct states
 that employees may be asked to refrain from disclosing confidential information that could
 compromise an “ongoing investigation,” it does not state either that that is the only circumstance
 10 in which the Respondent may request confidentiality, or that the expectation of investigatory
 confidentiality necessarily expires when the investigation ceases to be “ongoing.” Thus, even
 assuming that the directives to Gordon were issued pursuant to the code of conduct, that would
 not foreclose the possibility that other circumstances – for example, a need to protect residents or
 witnesses from post-investigation retaliation – would lead the Respondent to leave the
 confidentiality directive in place subsequent to the investigation.

15 The extent of interference with Gordon’s Section 7 rights is heightened further by the fact
 that the confidentiality directives were unlimited not only as to time, but also as to place. Those
 directives were broad enough to apply to work-time and non-work-time, both inside and outside
 the workplace. As presented verbally to Gordon on January 5 and 7, it prohibited him from
 20 discussing the matter with anybody – employee or non-employee – with the exception of union
 stewards and certain management officials. The Board has held that an employer’s restriction on
 employee communications is overbroad when that restriction is not limited by time or place.
 See, e.g., *SNE Enterprises*, 347 NLRB 472, 492-493 (2006), *enfd.* 257 Fed. Appx. 642 (4th Cir.
 2007); *Westside Community Health Center*, 327 NLRB at 666.

25 Since the Respondent’s directives to Gordon interfered with his Section 7 right to discuss
 the abuse allegation and investigation with other employees, that interference is a violation of the
 Act unless the Respondent can demonstrate a legitimate and substantial business justification that
 outweighs Gordon’s Section 7 interests. *Caesar’s Palace*, 336 NLRB at 272 fn.6; see also
Verizon Wireless, *supra*; *Westside Community Health Center*, *supra*. I tend to agree with the
 30 Respondent that there was a business justification for prohibiting Gordon from discussing the
 allegations against him with other employees during the 3 to 5 day period of the investigation.¹⁴
 If potential witnesses have the opportunity to compare their accounts, the truthfulness of those
 accounts is in danger of being compromised, either inadvertently or by design.¹⁵ Such concerns
 are heightened in this case because the Respondent is a healthcare facility whose residents’
 35 cognitive impairments often prevent them from serving as witnesses to any mistreatment at the
 hands of staff. In this case, the record indicates that the alleged victim of abuse was not even
 questioned as part of the investigation, presumably because she lacked the requisite mental

¹³ Indeed, there is reason to believe that the confidentiality directive was not issued pursuant
 to the code of conduct language. I note that, on its face, the code of conduct language is about
 requests not to disclose confidential information with anyone, whereas, the directives given to
 Gordon were not limited to confidential information and did not prohibit her from disclosing any
 information to union stewards.

¹⁴ That is not to say that this business justification necessarily would outweigh Gordon’s
 Section 7 rights had the restriction, in fact, been limited to the time period of the investigation.
 Those are not the facts of this case, and I do not mean to imply any determination regarding
 them.

¹⁵ Indeed, the Federal Rules of Evidence recognize an analogous concern, providing that a
 party can have witnesses excluded from the court room in order to restrain them from “tailoring”
 their testimony to that of earlier witnesses. Federal Rule of Evidence 615; see also *Geders v.*
United States, 425 U.S. 80, 87 (1976).

5 capacity. The alleged victim and the Respondent's residents in general are, in other words, an unusually vulnerable population. The condition of patients is one factor to be considered when determining whether a healthcare facility may restrict employees' Section 7 activity. *Northwoods Rehabilitation and Extended Care Facility*, 344 NLRB 1040, 1052 (2005). The Federal government and the Michigan state government have essentially recognized the
 10 vulnerability of nursing home residents by issuing the regulations, discussed above, that require such facilities to promptly and thoroughly investigate allegations of resident abuse.

That being said, the record provides no justification for continuing the confidentiality directive in effect after the investigation of Gordon's conduct concluded. The Respondent has
 15 made no showing that post-investigation confidentiality was necessary to preserve the integrity of the investigation, to protect victims or witnesses, or for any other reason. Indeed, the Respondent makes no argument that there was a business justification for failing to lift the restriction upon completion of the investigative process. Since the restriction on Gordon's Section 7 communications was not limited to the duration of the investigation or lifted upon its
 20 conclusion, the Respondent has not demonstrated a legitimate and substantial business justification for the restriction. Cf. *SNE Enterprises*, 347 NLRB at 472 fn.4 and 493 (confidentiality rule was enforced after the investigation was completed and therefore cannot be justified as necessary to "to protect the sanctity of an ongoing investigation"); see also *Verizon Wireless*, supra, (restriction on employee communications is overbroad where it is not limited by
 25 time or place); *Westside Community Health Center*, supra (same).

For the reasons discussed above, I conclude that in January 2011 the Respondent interfered with Gordon's Section 7 activity in violation of Section 8(a)(1) of the Act by imposing
 30 overly broad confidentiality directives that were not limited to the time-period of the investigation and which restricted Gordon from discussing the investigation and the allegation against him.

B. Code of Conduct

35 In addition to challenging the specific confidentiality directives issued to Gordon, the General Counsel alleges that the Respondent violated Section 8(a)(1) by maintaining an overly broad rule regarding confidentiality in its employee handbook. The provision at issue is the Respondent's code of conduct language on investigations, which states in relevant part that
 40 "[d]epending upon the circumstances of a particular investigation you may be requested and expected not to disclose any confidential information that could compromise an ongoing investigation, including not only the scope and content of the investigation, but also the fact that an investigation is being conducted."

45 The General Counsel alleges that the rule included in the handbook is unlawful because it would "reasonably tend to chill employees in the exercise of their Section 7 rights." Brief of General Counsel at Page 8, quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (Table). In considering this allegation I note first that the handbook language at issue is not really a rule at all. It merely observes that the Respondent *may* request
 50 investigative confidentiality in certain unspecified circumstances. Despite the existence of the handbook language it is clear that employees are free to discuss investigations unless and until

5 the Respondent announces a confidentiality rule regarding a particular investigation. Moreover,
when the Respondent announces a confidentiality rule regarding an investigation, the handbook
language does not retroactively disapprove of any discussions that the employees may have
engaged in prior to imposition of that rule. Thus it is the confidentiality rule announced in a
particular investigation, not the handbook language, which restricts employees' communications
10 and may, as in this case, be challenged as unlawful interference with Section 7 activity. On its
own, the handbook language cannot reasonably be seen as "chilling" any Section 7 activity by
employees.

15 I considered whether the handbook language chills Section 7 activity insofar as, once the
Respondent announces a confidentiality rule, the handbook language increases the degree of
interference with Section 7 activity by stating that employees are "expected" to comply with the
rule and/or by making failure to meet that expectation a grounds for discipline. The record does
not show that the challenged handbook language has that effect. Employees would reasonably
understand that the Respondent expected them to comply when managers or supervisors directed
20 them not to discuss a work-related matter under investigation. The handbook language does not
add anything meaningful to that expectation. Regarding possible discipline, the record does not
show that the challenged handbook language makes an employee's failure to meet the
employer's expectation of compliance with confidentiality rules a grounds for discipline. Even if
the at-issue handbook language did so, that would not increase the extent to which the
25 confidentiality directives actually imposed by the Respondent interfered with Section 7 rights
since the handbook also contains a general provision stating that failure to comply with *any*
direct order from a supervisor is insubordination and punishable by termination.

30 The General Counsel cites *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647
(2004), and argues that even if the handbook language does not explicitly restrict Section 7
activity, it unlawfully chills such activity because: (1) employees would reasonably construe the
language to prohibit Section 7 activity and (2) it has been applied to restrict the exercise of
Section 7 activities. The General Counsel has not established a violation on either of these bases.
As discussed above, the challenged section of the handbook does not include any language that
35 can reasonably be interpreted as restricting employees from discussing investigations or other
work-related matters. In addition, the record does not show that the challenged language has
been applied in such a way as to restrict the exercise of Section 7 activities. Even if one believes
that the at-issue language may be applied to discipline employees, the record does not show that
the language has ever, in fact, been applied as a basis for discipline, much less applied to
40 discipline an employee for Section 7 activity. As discussed above, there is no record evidence
that the Respondent has ever disciplined an employee for failure to abide by a management rule
to keep an investigation confidential, and Hazard, the Respondent's director, testified that no
such discipline is authorized.

45 For the reasons discussed above, I conclude that the General Counsel has failed to
establish that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad
restriction in its handbook regarding employee discussions of information relating to
investigations by the Respondent. The complaint allegations relating to that claim should be
dismissed.
50

5

CONCLUSIONS OF LAW

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

10

2. In January 2011, the Respondent interfered with Gordon’s Section 7 activity in violation of Section 8(a)(1) of the Act by imposing on him overly broad confidentiality directives that were not limited to the time period of the investigation and which prohibited Gordon from discussing the allegation against him and/or the investigation of that allegation.

15

3. The Respondent was not shown to have committed the other violations alleged in the complaint.

REMEDY

20

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

25

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹⁶

ORDER

30

The Respondent, SSC Oakland Cambridge Operating Company, LLC d/b/a Cambridge East Healthcare Center, Madison Heights, Michigan, its officers, agents, successors, and assigns, shall

35

1. Cease and desist from

(a) Interfering with the Section 7 activity of employees by imposing overly broad confidentiality directives that restrict employees from discussing allegations of misconduct against them, or from discussing the investigation of such allegations, where such restrictions are not limited to the time-period of the investigation.

40

(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.

45

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

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (a) Inform Gordon that he is free to discuss both the allegation of abuse made against him on January 5, 2011, and the investigation of that allegation.

10 (b) Within 14 days after service by the Region, post at its facility in Madison Heights, Michigan, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's
15 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic
20 means, if the Respondent customarily communicates with its employees by such means. 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 5, 2011.

25 (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.

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

30 Dated, Washington, D.C. September 28, 2011

35 PAUL BOGAS
Administrative Law Judge

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT impose any overly broad confidentiality directive that restricts you from discussing an allegation of misconduct against you and/or from discussing the investigation of such allegation, where such restriction is not limited to the time-period of the investigation.

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 inform Patrick Gordon that he is free to discuss both the allegation of misconduct that was made against him on January 5, 2011, and the investigation that led us to conclude that the allegation was not substantiated.

SSC Oakland Cambridge Operating Company, LLC
d/b/a Cambridge East Healthcare Center

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (313) 226-3244.