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Grane Healthcare Co. and/or Ebensburg Care Center LLC d/b/a Cambria Care Center, a single employer and Local Union No. 1305, Professional and Public Service Employees of Cambria County a/w the Laborers' International Union of North America

Grane Healthcare Co. and/or Ebensburg Care Center LLC d/b/a Cambria Care Center, a single employer and SEIU Healthcare Pennsylvania, CTW, CLC. Cases 6-CA-36791, 6-CA-36803, and 6-CA-36915

November 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On December 16, 2010, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. In addition, the Acting General Counsel and Charging Party SEIU Healthcare Pennsylvania (SEIU) each filed limited exceptions and a supporting brief, the Respondent filed a brief answering the limited exceptions, and the Acting General Counsel and SEIU each filed a reply brief.

The National Labor Relations Board has considered the decision and the record¹ in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,² and conclusions,³ and to adopt the recommended Order as modified below.⁴

¹ We grant SEIU's unopposed motion to correct the record by adding page 40 to the Acting GC Exh. 18, which is SEIU's last memorandum of understanding with the Respondent's predecessor, Cambria County, Pennsylvania.

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

³ We affirm the judge's conclusion that the Respondent did not unlawfully refuse to recognize SEIU as the collective-bargaining representative of its nursing employees following the Respondent's purchase of the Laurel Crest nursing home from Cambria County, a public employer. The Acting General Counsel's theory was that SEIU enjoyed a continuing presumption of majority status for purposes of collective bargaining under Federal labor law, notwithstanding the limited "meet and discuss" nature of its prior relationship with the County under State labor law covering public employers. On exceptions, SEIU contends that page 40 of its last memorandum with the County contained "suc-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondents, Grane Healthcare Co. and/or Ebensburg Care Center LLC d/b/a Cambria Care Center, a single employer, Ebensburg, Pennsylvania, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

cessorship" language requiring the Respondent to recognize SEIU as the nursing employees' representative. SEIU also contends that a pre-successorship employee petition directed to the Cambria County Board of Commissioners demonstrates the nurses' actual majority support for SEIU. Both of these contentions, however, expand the Acting General Counsel's theory of the alleged violation, and thus we do not pass on them. See, e.g., *Nott Co.*, 345 NLRB 396, 398 fn. 10 (2005); *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

Finally, we affirm the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire five of the predecessor employer's employees, four of whom were officials of Charging Party Laborers Local 1305. In doing so, we find it unnecessary to rely on the judge's statement at sec. II,B,3 of his decision that the Respondent's disproportionate nonhiring of Local 1305 officials relative to nonofficials would be sufficient alone to establish unlawful motivation. Member Hayes would not rely at all on the evidence of a disproportionate hiring pattern to establish animus. He relies solely on the fact that the Respondent's explanation for its decision not to hire the five discriminatees was pretextual.

⁴ Granting one of the Acting General Counsel's limited exceptions, we will add the full name of Laborers Local 1305 to the remedial 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 fail and refuse to recognize and bargain with Local Union No. 1305, Professional and Public Service Employees of Cambria County a/w the Laborers' International Union of North America (Local 1305), as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

The unit of nonprofessional employees more particularly described in the collective-bargaining agreement between Cambria County and Local 1305 which expired on December 31, 2008.

WE WILL NOT refuse to hire you because of your union activities.

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

WE WILL recognize and, on request, bargain with Local 1305 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, within 14 days from the date of the Board's Order, offer Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer instatement to the positions for which they applied or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to hire will not be used against them in any way.

GRANE HEALTHCARE CO. AND EBENBURG CARE CENTER, LLC D/B/A CAMBRIA CARE CENTER

Patricia J. Daum, Esq., for the General Counsel.

Richard J. Antonelli, Esq. and *John A. McCreary Jr., Esq.* (*Babst, Calland, Clements & Zomnir, P.C.*), of Pittsburgh, Pennsylvania, for the Respondent.

Domenic A. Bellisario, Esq. (*The Law Offices of Domenic A. Bellisario*), of Pittsburgh, Pennsylvania, for the Charging Party Laborers' Union.

Claudia Davidson, Esq. (*Law Office of Claudia Davidson*), of Pittsburgh, Pennsylvania, for the Charging Party SEIU.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve a company that acquired a nursing home that for many years had been owned and operated by a county employer. Principals of the company established a new entity for the purpose of operating the nursing home. The new employer hired most, but not all, of the employees who had worked for the nursing home when it was county owned. The new employer refused to recognize or bargain with the two unions that represented employees at the county nursing home.

The government alleges that the employer is a successor employer under National Labor Relations Board (Board) precedent, and that its refusal to recognize and bargain with the unions violates the National Labor Relations Act (Act). The government further contends that the employer's decision not to hire certain of county's employees—specifically, certain employees who were officials of one union and another employee who was active in attempting to assist her union in securing a meeting with the new owners—was unlawfully motivated in violation of the Act. Finally, the government alleges that the buyer of the nursing home, which assists in managing the nursing home, along with the operating entity it established, are a single employer under the Act's precedents.

STATEMENT OF THE CASE

On January 8, 2010, Local Union No. 1305, Professional and Public Service Employees of Cambria County a/w the Laborers' International Union of North America (Laborers or Local 1305) filed an unfair labor practice charge, amended May 24, 2010, against Grane Healthcare Co. (Grane) and/or Ebensburg Care Center LLC temporarily d/b/a Cambria Care Center (Cambria Care), docketed by Region 6 of the Board as Case 6-CA-36791.

On January 15, 2010, SEIU Healthcare Pennsylvania, CTW, CLC (SEIU) filed an unfair labor practice charge, amended May 24, 2010, against Grane and/or Cambria Care docketed by Region 6 of the Board as Case 6-CA-36803. On April 29, 2010, SEIU filed another charge, docketed by Region 6 as Case 6-CA-36915, which was amended by SEIU on June 30, 2010.

On May 28, 2010, based on an investigation into the charge filed by the Laborers, the Board's General Counsel, by the Acting Regional Director of Region 6, issued a complaint and notice of hearing against Grane and Cambria Care alleging violations of the Act in Case 6-CA-36791. The complaint alleged that Grane and Cambria Care constituted a single em-

ployer within the meaning of the Act, and that they unlawfully failed and refused to recognize and bargain with the Laborers as the collective-bargaining representative of a bargaining unit of employees in violation of Section 8(a)(1) and (5) of the Act. The complaint further alleged that Respondents unlawfully refused to hire applicants Mark Mulhearn, Beverly Weber, Joseph Billy, and Sherry Hagerich, in violation of Section 8(a)(1) and (3) of the Act.

On July 1, 2010, the Board’s Acting General Counsel, by the Regional Director for Region 6, issued an order consolidating Cases 6–CA–36803 and 6–CA–36915, and issued a second complaint against Grane and Cambria Care. Similar to the complaint issued in Case 6–CA–36791, the complaint in these consolidated cases alleged that Grane and Cambria Care constituted a single employer within the meaning of the Act, and alleged that Respondents unlawfully failed and refused to recognize SEIU as the collective-bargaining representative of a bargaining unit of employees, in violation of Section 8(a)(1) and (5) of the Act. The complaint further alleged that Respondents unlawfully unilaterally implemented a change in job duties in violation of Section 8(a)(1) and (5) of the Act. Finally, the complaint alleged that Respondents unlawfully refused to hire applicant Roxanne Lamer, in violation of Section 8(a)(1) and (3) of the Act.

By further Order issued July 1, 2010, the Board’s Acting General Counsel, by the Regional Director for Region 6, ordered that Case 6–CA–36791 be consolidated with Cases 6–CA–36803 and 6–CA–36915.

Respondents filed timely answers denying all violations of the Act.¹

A trial in these cases was conducted before me on July 21–23, and August 16–19, 2010, in Ebensburg, Pennsylvania.

Counsel for the General Counsel, the SEIU, and Respondent filed briefs in support of their positions by October 8, 2010. On the entire record, I make the following findings, conclusions of law, and recommendations.²

¹ Hereinafter, references to Respondent, without further delineation, are to both Grane and Cambria Care collectively.

² Counsel for the General Counsel moved, posthearing, to reopen the record to receive Respondents’ amended answer, submitted July 16, 2010, in Case 6–CA–36791, and inadvertently not included in the formal papers entered into evidence at the hearing as GC Exh. 1. This motion, unopposed by any party, is granted and the amended answer is added to the record as Jt. Exh. 7. In addition, on my own motion I amend the transcript to correct the following minor errors:

PAGE	LINE	CHANGE
6	23	“mission” to “admission”
12	10	“alluded” to “alleged”
158	12	“acronym” to “anachronism”
209	3	Engle to Lenge
377	16	“80’s” to “90’s”
432	25	“not” to “my”
433	15	“1(18)” to “102.118”
617	5	insert “don’t” after “I” and before “watch.”
639	8	“Mr. Antonelli” to “Ms. Davidson”
852	1	“sense” to “text”
1088	15	“agree” to “degree”

Jurisdiction

Respondent admits and I find that Grane provides management services to operators of nursing homes, including Cambria Care. Respondent admits and I find that Cambria Care has been engaged in the operation of a nursing home in Ebensburg, Pennsylvania, since January 1, 2010. The complaint³ alleges, Respondent admits, and I find that during the 12-month period ending December 31, 2009, Grane in conducting its business operations derived gross revenues in excess of \$100,000, and, further, purchased and received at its Pennsylvania corporate office products, goods, and services valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint alleges, Respondent admits, and I find that based on a projection of its operations since on or about January 1, 2010, Cambria Care in conducting its business operations will annually derive gross revenues in excess of \$100,000, and further, will annually purchase and receive at its Ebensburg, Pennsylvania facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

The complaint alleges, Respondent admits (Tr. 8–9), and I find that at all material times, the Laborers and the SEIU have been labor organizations within the meaning of Section 2(5) of the Act. The complaint alleges, Respondent admits,⁴ and I find that at all material times, Grane and Cambria Care each has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Cambria Care has been a health care institution within the meaning of Section 2(14) of the Act. The complaint alleges, Respondent denies, but I find, based on the record evidence as a whole, as discussed below, in particular, the finding of single employer status, that at all material times, Grane has been a health care institution within the meaning of Section 2(14) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

Unfair Labor Practices

I proceed in three parts. In Part I, I consider the government’s Section 8(a)(5) and (1) failure-to-recognize-and-bargain allegations. This includes the allegations that Respondent violated the Act by the overall refusal to recognize and bargain with the Laborers and the SEIU, as representatives of the bargaining units those unions represented while the county operated Laurel Crest. For the reasons stated herein, I find that Respondent violated the Act by its refusal to recognize and bargain with the Laborers’ union, but not by its failure to recognize and bargain with the SEIU.

In Part II, I turn to the issue of whether, as alleged by the government, the failure to hire five employees, four of whom

³ References to the complaint are to the May 28, 2010 complaint issued in Case 6–CA–36791 and/or to the July 1, 2010 complaint issued in Cases 6–CA–36803 and 6–CA–36915.

⁴ Pursuant to Board Rules and Regulation 102.20, “any allegation in the complaint not specifically denied or explained in an answer filed . . . shall be deemed to be admitted to be true and shall be so found by the Board.”

were union officers active in the Laborers, and one of whom was a SEIU-represented employee involved with the SEIU in efforts to meet with Grane prior to the transition, was unlawfully motivated and discriminatory in violation of Section 8(a)(3) and (1) of the Act. As explained herein, I find that Respondent violated the Act as alleged.

Finally, in Part III, I consider whether, as alleged by the government, Grane and Cambria Care constitute a single employer under the Act, and, thus, are jointly and severally liable for any unfair labor practices found. I conclude that they are.

Part I

The 8(a)(5) failure-to-bargain allegations

A. *Laurel Crest and the Unions*

Cambria County is in the Commonwealth of Pennsylvania. It comprises the Johnstown, Pennsylvania, Metropolitan Statistical Area.⁵ The county seat is the borough of Ebensburg. For many years, until January 1, 2010, Cambria County owned and operated the Laurel Crest Nursing and Rehabilitation Center (Laurel Crest), a 370-bed nursing home located in Ebensburg.

The Laurel Crest employees were employees of Cambria County. As a “public employer” within the meaning of the Pennsylvania State Public Employee Relations Act (PERA), 43 P.S. § 1101.301(1), Laurel Crest and Laurel Crest employees were subject to the PERA.

Since 1971, Local 1305 has been certified by the Pennsylvania Labor Relations Board (PLRB) as the collective-bargaining representative of a bargaining unit of Laurel Crest employees, composed primarily of nursing aides, housekeepers, dietary employees, maintenance employees, and other nonprofessional employees. Pursuant to the PLRB’s certification, Cambria County recognized Local 1305 as the exclusive collective-bargaining representative of this unit of nonprofessional employees employed at the Laurel Crest facility. This recognition has been embodied in a series of collective-bargaining agreements, including the most recent collective-bargaining agreement between Cambria County and Local 1305, which was effective by its terms from January 1, 2005 to December 31, 2008. Negotiations for a successor agreement did not result in an agreement.⁶

In 1986, the PLRB certified the predecessor to the SEIU as “the exclusive representative” of a unit including the nursing employees, “for the purpose of meeting and discussing with respect to wages, hours and other terms and conditions of employment.”⁷ Since 1986, this unit of nursing and certain other

⁵ *Metropolitan Statistical Areas and Components*, U.S. Census Bureau, Population Division (December 2009).

⁶ The Laborers-represented bargaining unit is more particularly described in the expired collective-bargaining agreement. Although that agreement is not in the record, the parties stipulated that the bargaining unit described therein is an appropriate unit for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

⁷ The precise unit certified by the PLRB was:

all full-time and regular part-time professional and nonprofessional first level supervisors at Laurel Crest Manor including but not limited to staff RN’s, charge Lpn’s, special clinic Lpn’s, assistant supervisors in dietary and assistant supervisors in laundry; and excluding man-

employees at Laurel Crest has been represented by the SEIU or its predecessor.

In a memorandum agreement between Cambria County and SEIU, entered into January 2007, and in effect through December 31, 2009, Cambria County recognized the SEIU

as the exclusive representative of the employees of Laurel Crest Rehabilitation and Special Care Center as certified by the [PLRB] for the purpose of meeting and discussing with respect to wages, hours and other terms and conditions of employment.

B. *Grane and its Purchase of Laurel Crest*

Acting through Grane Associates (owned by the same owners as Grane), Grane owns, or owns controlling share of, and is the managing member in, eleven Pennsylvania nursing facilities.

Grane manages the operations of all the Grane-related nursing facilities along with personal care facilities attached to certain of the nursing facilities. All of these Grane-related health care providers are, according to Cambria Care’s filings with the Commonwealth, under “common management, ownership and/or control.” (GC Exh. 38.)

This model, wherein Grane provides management and other services to Grane-related health care facilities, was repeatedly referenced during the hearing as being part of Grane’s standard business and operational model.

On or about September 11, 2009, Grane entered into an asset purchase agreement with Cambria County for the purchase of the Laurel Crest facility. The agreement was effective by its terms at 12:01 am on January 1, 2010. Pursuant to this agreement, the “Buyer” was “Grane Healthcare Co. or its affiliate.”

C. *The Establishment of Ebensburg Care Center, LLC d/b/a Cambria Care Center*

Prior to the transfer of the Laurel Crest facility from the county to new ownership, Grane established an entity to serve as the operator of the facility. This new entity is Ebensburg Care Center, LLC d/b/a Cambria Care Center (previously and hereafter referred to as Cambria Care).⁸ Cambria Care was formed October 5, 2009, for the purpose of operating Laurel Crest.⁹ Grane Associates owns 99.5 percent of Cambria Care. Trebro, Inc. owns 0.5 percent.

agement level employees, supervisors above the first level of supervision, confidential employees and guards as defined in the [Pennsylvania Labor Relations] Act.

⁸ Cambria Care Center is a fictitious name used by Ebensburg Care. The official name of the new limited liability company is Ebensburg Care Center, LLC. According to filings with the Commonwealth of Pennsylvania, Cambria Care leases the facility from Ebensburg Associates, LLC, which is the owner of the facility and which is related through common ownership and control.

⁹ A Certificate of Organization was filed with the Pennsylvania Department of State on October 5, 2009, intended to be effective “upon filing.” A signature card for a bank account in Cambria Care’s name was executed December 10, 2009. A consent of members in lieu of organizational meeting document was executed November 24, 2009, intended to be effective as if approved at a members’ meeting November 1, 2009. An operating agreement for Cambria Care was entered into by the members November 1, 2009.

D. Cambria Care's Assumption of the Operation of the Laurel Crest Facility

Cambria Care assumed operation of the Laurel Crest nursing home facility from the county effective January 1, 2010, and since then has continued to operate the nursing home at this facility. There was no hiatus in operations during the transfer. The residents/patients of Laurel Crest became the residents/patients of Cambria Care on January 1, 2010.

Owen Larkin, who had been the assistant administrator at Laurel Crest (the second highest management representative on site) became, effective January 1, 2010, the administrator of the facility, making him the highest ranking management official on site at the Cambria Care facility. Al Daisley, who, as of December 31, 2009, had been a nurse manager/supervisor at Laurel Crest, became, as of January 1, 2010, the director of nursing (DON) at the Cambria Care facility. Michelle Winning, a nurse supervisor/manager at Laurel Crest, became the assistant director of nursing on January 1, 2010. Nancy McMahon, the assistant finance officer for the county at Laurel Crest, became, effective January 1, 2010, the business office manager at the Cambria Care facility. The parties stipulate that each of these individuals had the authority to discipline employees and/or effectively recommend such actions, in their positions with Laurel Crest, and similarly, each has the authority to hire or fire or discipline employees, or effectively recommend that these actions be taken, in their positions at the facility operated by Cambria Care. The parties stipulate that these individuals are supervisors with the meaning of Section 2(11) of the Act.

The parties have stipulated that as of January 1, 2010, Cambria Care employed a substantial and representative complement of employees at the facility formerly known as Laurel Crest. The parties further stipulated that as of January 1, 2010, a majority of those employed by Cambria Care in positions within the unit formerly represented by Local 1305 had been employed by Cambria County at Laurel Crest. The parties also stipulate that as of January 1, 2010, a majority of employees employed by Cambria Care in positions within the unit formerly represented by SEIU had been employed by Cambria County at Laurel Crest.

On December 23, 2009, Matthew Yarnell, from the SEIU, wrote Leonard Oddo, Grane's chief operating officer (and also a vice president of Cambria Care), "on behalf of the nurses at Laurel Crest." In the letter, he requested recognition as the exclusive collective-bargaining representative of a nurse unit, and requested to schedule dates to bargain a successor labor agreement. A response came, dated January 11, 2010, from Respondent's counsel. In the letter, counsel asserted that Cambria Care was the new operator of the facility and that it did not have "successor employer bargaining obligations with the Union." Referencing the fact that Laurel Crest was owned and operated by a public entity, counsel asserted that, as a result, Laurel Crest was not an "employer" within the meaning of the Act, "the Union was not a labor organization, since it did not represent 'employees' of an 'employer' within the meaning of the [Act]," and "Cambria Care is therefore not a successor employer" and, "[c]onsequently, Cambria Care will not recognize and/or bargain a CBA with the Union." This refusal to recog-

nize and bargain with the SEIU has been maintained by the employer at all times to date.

By email dated December 30, 2009, Local 1305, through its counsel, requested recognition from Grane as the exclusive collective-bargaining representative of nonprofessional employees employed by Cambria Care at the facility formerly known as Laurel Crest.

On about January 11, 2010, Grane, by letter, refused to recognize Local 1305 as the exclusive collective-bargaining representative of a unit of nonprofessional employees. Cambria Care has also refused to recognize Local 1305.

Analysis

The issue here is whether Respondent unlawfully refused to recognize and collectively bargain with the Laborers and the SEIU. Although much of the analysis of the duty to bargain with the Laborers is the same as the analysis of the duty to bargain with the SEIU, there is one very significant difference, as discussed below. However, the relevant background precedent is the same.

Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) of the Act, in turn, provides, in pertinent part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

As Sections 8(a)(5) and 9(a) make clear, the support of a majority of employees within the bargaining unit for collective-bargaining representation is the premise on which both exclusive collective-bargaining representation rights of a union and the employer's duty to bargain rests. However, the Supreme Court has also recognized that "[t]he object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). "To such ends, the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit, the precondition for service as its exclusive representative." *Id.* at 785-786. As the Board explained in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001):

Absent specific statutory direction, the Board has been guided by the Act's clear mandate to give effect to employees' free choice of bargaining representatives. The Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subject to constant challenges. Therefore from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as

employee free choice, by presuming that an incumbent union retains its majority status.

Under long-settled Board practice and precedent, a union that has been voluntarily recognized by an employer, or certified through an election process, as the exclusive collective-bargaining representative of a unit of employees, enjoys a presumption of majority support. This presumption is irrebutable at certain times (e.g., within the first year after certification, or during the life of a collective-bargaining agreement), and otherwise in place unless overcome with requisite proof of loss of majority support. The presumption of majority support eliminates the need for a recognized union to prove its majority status anew in order to compel the employer to recognize and collectively bargain with it.

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 39 (1987), the Supreme Court endorsed the Board's view that a union's presumption of majority support should continue where there has been a change in employer. Indeed, the Court observed that "[t]he rationale behind the presumptions [of majority support] is particularly pertinent in the successorship situation":

[The union] has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

482 U.S. at 39.

Extending the concepts it first articulated in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court in *Fall River Dyeing* announced that

[w]e now hold that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified. Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employers.

482 U.S. at 41.

Continuing its analysis, the Court in *Fall River Dyeing* explained that where a union enjoys a presumption of majority status, the new employer's duty to bargain turns on the satisfaction of two further tests:

And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor.

Id.

As referenced by the Court in *Fall River Dyeing*, the question of successorship "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River*, 482 U.S. at 43. It "requires that the Board focus on whether the new company has 'acquired substantial assets of its

predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Id.* (quoting *Golden State Bottling v. NLRB*, 414 U.S. 168, 184 (1973)). "Hence, the focus is on whether there is a 'substantial continuity' between the enterprises." *Fall River*, 482 U.S. at 43.

"Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Id.*; *Great Lakes Chemical Corp.*, 280 NLRB 1131, 1132 (1986) ("In determining whether there is a substantial continuity the Board has considered several factors including employees, supervisors, employees, employee skills and functions, business location, and equipment and types of product lines"), *affd.*, 855 F.2d 1174 (6th Cir. 1988). The question of the substantial continuity of the enterprise is to be analyzed primarily from the "employees' perspective." *Fall River*, 482 U.S. at 43. In its analysis, the Board is mindful of whether "those employees who have been retained will understandably view their job situations as essentially unaltered." *Id.* (quoting *Golden State Bottling*, 414 U.S. at 184); *Vermont Foundry*, 292 NLRB 1003, 1008 (1989) (calling this "the core question"); *Derby Refining*, 292 NLRB 1015 (1989), *enfd.* 915 F.2d 1448 (10th Cir. 1990).

Thus, successor status is an overwhelmingly factual inquiry (*Fall River*, 482 U.S. at 43) and based on a comparison of the operations of the old and new employer. In this case, it is not seriously disputed—as a factual matter—and I find, that Cambria Care is a successor to Laurel Crest. The Cambria Care employees are, for the very most part, working the same jobs, using the same work methods and equipment, in an enterprise devoted to the same purpose—the operation of a nursing home—for the same residents and patients, with many of the same supervisors, as they did for Laurel Crest. Cambria Care began operation of the nursing home without hiatus in operations, at the same facility, at the same location. This is, undoubtedly, what a successor looks like.

As set forth in *Fall River*, once it is determined that a respondent is a successor employer, then the inquiry turns to "if and when [the] duty to bargain arose." 482 U.S. at 46. The successor's bargaining obligation chiefly turns on whether the predecessor's employees form a majority of its workforce. *Vermont Foundry*, 292 NLRB at 1009. "As a general rule, the relevant measuring day to determine if the Company employed a majority of union members is the initial date it began operating." *Id.* That was the case in *Burns*, where the successor began operating the day after the predecessor ceased operations with a majority of its employees drawn from the predecessor's workforce. *Burns*, *supra*. "In other situations . . . there is a start-up period by the new employer while it gradually builds its operations and hires employees. In these situations, the Board, with the approval of the Courts of Appeals, has adopted the 'substantial and representative complement' rule for fixing the moment when the determination as to the composition of the successor's work force is to be made." *Fall River*, 482 U.S. at 40.

In the instant case, the parties have stipulated that a substantial and representative complement of employees was employed by Cambria Care as of the first day of operations, on January 1, 2010. Thus, there can be no doubt that the date on which to measure whether employees of the predecessor constitute a majority of the successor's workforce is January 1, 2010. And the parties have stipulated that as of that date, a majority of the Cambria Care work force (in each relevant bargaining unit) was composed of former Laurel Crest employees. As of that date, both the SEIU and the Laborers had already made a demand to bargain on the management of the new facility.¹⁰

In defense to the application of the successorship doctrine, Respondent does not contest the *fact* of the substantial continuity between its facility and the Laurel Crest facility operated by the county. Nor does it question the stipulated fact that a majority of its work force (in each unit) is composed of former Laurel Crest employees. Rather, Respondent's defense is rooted in its contention that, as a matter of law, it may not be found to be a successor employer where, as here, the predecessor was a public employer, not covered by or subject to the Act. In Respondent's view, because the SEIU and the Laborers did not represent Laurel Crest employees pursuant to or under the aegis of the Act, the successorship doctrine is inapplicable and the question of its bargaining obligation must be analyzed and considered as it is when a union newly seeks to represent employees under the Act. According to Respondent, the duty to bargain under state law that existed at Laurel Crest cannot "transfer" to Cambria Care under the Act.

I believe that Respondent's defense misconceives the issue and the Board's successorship doctrine. This case is not about, as Respondent asserts, the Board "enforc[ing] legal obligations that arose before the Act as applicable to the parties and that do not have their origins in the Act." (R. Br. at 5). Rather, the issue is whether Cambria Care had a duty on January 1, 2010, to recognize and bargain with the SEIU and/or the Laborers.

Given the fact of continuity of operations (successorship) and the fact that a majority of its workforce are former Laurel Crest employees, the question of Respondent's bargaining obligation turns—not at all on whether the predecessor Laurel Crest was a public employer, but—on whether a presumption of majority support by employees for the unions to serve as collective-bargaining representative is applicable to the unions bargaining demands.

It is the application of this presumption of majority support that is the issue. And under settled principles the Board determines whether the application of majority support applies based on whether a collective-bargaining representative was previously elected or recognized. As the Board has explained, "it is clear from the Supreme Court's opinion in *Fall River* that the usual presumptions of majority status inherent in Board law apply in successorship situations to ensure stability in collec-

¹⁰ I note that in *Fall River Dyeing*, the Court also approved the Board's "continuing demand" rule, which provides "when a union has made a premature demand that has been rejected by the employer, this demand remains in force until the moment when the employer attains the 'substantial and representative complement.'" *Fall River Dyeing*, 482 U.S. at 43.

tive-bargaining relationships. Such presumptions include those that flow from voluntary or historical recognition and contractual relationships." *Lincoln Park Zoological Society*, 322 NLRB 263, 265 (1996) (citations omitted), *enfd.* 116 F.3d 216 (7th Cir. 1997). Neither law nor logic requires that this original demonstration of majority support have been exhibited under the Act. Board precedent is unequivocal in this regard.¹¹ Indeed, Respondent's argument has been specifically rejected by the Board. *Lincoln Park Zoological Society*, *supra*; *JMM Operational Services*, 316 NLRB 6, 11 (1995).

With regard to the bargaining unit represented by the Laborers, the presumption of majority support is unremarkable, stemming from Laurel Crest's years of recognition of the Laborers as the unit's collective-bargaining representative, and that recognition, in turn, having been based on certification after an election conducted in the unit in which a majority of the employees chose the Laborers as their exclusive collective-bargaining representative. There is no basis in the record to rebut the Laborers presumption of majority support.¹²

However, the presumption of majority support for the SEIU poses a more difficult question. It is not that SEIU's support by a majority of employees is in question—it was certified by the PLRB after a secret-ballot election and continued, without incident or display of dissatisfaction, as far as the record shows, to represent the Laurel Crest unit and sign memoranda with the employer until the transfer of operations. But, while the basis to presume majority support in the SEIU unit is sound, the question must be asked, majority support for what?

As Respondent stresses, SEIU was not certified as, and did not act as, the bargaining unit's "collective-bargaining" representative. As recited in the PLRB's order of certification, SEIU

¹¹ *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001) ("the successorship doctrine continues to apply even though the predecessor [] is a public employer."); *University Medical Center*, 335 NLRB 1318, 1332 (2001) ("The fact that Respondent, a private, nonprofit enterprise took control of . . . a public sector employer owned and operated by [a] county . . . does not change the normal rules of successorship."); *enfd.* in relevant part 335 F.3d 1079 (D.C. Cir. 2003); *Siemens Technologies, Inc.*, 345 NLRB 1108, 1113 (2005) ("The mere fact that the employing entity changes from a governmental unit, or public sector employer, such as a State or county, to a private sector employing entity does not mean the new employer—the private sector employer—is not a successor."); *Dean Transportation, Inc.*, 350 NLRB 48, 58 (2007) ("The Board has applied this [substantial continuity] test even where, as here, the predecessor is a public entity."), *enfd.* 551 F.3d 1055 (D.C. Cir. 2009).

¹² I note that the PERA, 43 P.S. § 1101 et seq., under which the Laborers and the SEIU received their certifications, provides essentially the same safeguards for employee free choice as the Act. Absent certification based on voluntary recognition by an employer, certification requires a secret ballot election. 43 P.S. § 1101.605). The PERA also provides for the filing of decertification petitions. 43 P.S. § 1101.607. Many of the provisions of the PERA are clearly modeled upon the Act (compare, e.g., Section 7 of the Act to Section 401 of the PERA). As the Pennsylvania Supreme Court has explained, "our Court has not hesitated to consider, and to follow, federal interpretation of the NLRA due to the similarity between the federal labor law and our own laws dealing with labor relations." *Commonwealth of Pa. Office of Administration v. Pennsylvania Labor Relations Board*, 916 A.2d 541, 550 (2007).

amended its original petition seeking to represent the employees for collective bargaining to reflect “that the employe[e]s involved are first level supervisors and that the unit petitioned for is a meet and discuss unit.” After an election to ascertain employee sentiment on being represented in a “meet and discuss” unit, in January 1986, the Union was certified as the “exclusive representative” of the unit employees “for the purpose of meeting and discussing with respect to wages, hours and other terms and conditions of employment.”

This “meet and discuss” status is foreign to the Act. A creature of state law, its statutory basis is in section 704 of the PERA, and it is an alternative to and distinct from collective bargaining. It is an effort to provide representation—but not collective-bargaining rights—to front line supervisory employees. Section 704 of the PERA states:

Public employers *shall not be required to bargain* with units of first level supervisors or their representatives but shall be required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employees covered by this act.

43 P.S. § 1101.704. (Emphasis added.)

Section 301(17) of PERA defines “meet and discuss” as:

[T]he obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employees: Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.

43 P.S. § 1101.301(17).

Thus, selected to represent employees under Section 704 of the PERA, the SEIU was not a collective-bargaining representative for the employees. No duty to collectively bargain was imposed upon the public employer Laurel Crest. Rather, the employer was required to engage in a process of consultation in which, at all times, the employer retained the right of unilateral and final decisionmaking. By the terms of the PERA, SEIU could not enter into enforceable agreements with Laurel Crest. Rather, SEIU entered into “memoranda,” which by their terms¹³ and as a matter of state law,¹⁴ cannot be enforced by the union or employees.

¹³ Art. 22.8 of the most recent memorandum states:

Cambria County intends to abide by the provisions set forth in this Memorandum in good faith, but reserves its right under Section 704 of Act 195 (43 P.S. Section 1101.704) to alter those provisions prospectively at any time after meeting and discussing such changes with the Union.

¹⁴ In *Pennsylvania Association of State Mental Health Physicians v. PLRB*, 125 Pa. Commonwealth Ct. 276, 282–283, 557 A.2d 825, 827–828 (1989) (quoting, *Independent State Store Union v. Pennsylvania Labor Relations Board*, 119 Pa. Commonwealth Ct. 286, 293–294, 547 A.2d 465, 469 (1988)), the Pennsylvania Commonwealth Court explained:

The Memorandum [of Understanding] . . . represents a memorialization of the views arrived at by the public employee labor organization and the public employer after discussion as to what would be sound policy for the employer to adopt with respect to issues affecting first-level supervisory employees. This is so despite the fact that the public

This history of “meet and discuss” representational status—with no history of collective-bargaining representational status—provides no grounds on which to presume majority employee support for the SEIU to be the employees’ *collective-bargaining* representative. This history would provide a basis to find a presumption of majority employee support “meet and discuss” representation, but the concept, as noted, is foreign to the Act and not a finding sought by the General Counsel.

I stress that the issue here is not that the unit employees were or are supervisors. I do not reach the issue. The fact that they were certified as part of a front-line supervisors unit by the State in 1986 does render the circumstances of this case unusual, but it is not a point on which I am relying. The issue is not whether anyone in the unit is or was a supervisor, but the fact that the SEIU-represented employees were *not* represented for purposes of collective bargaining, and the employees *did not* express support for such representation.

This issue is not free from doubt. After all, the SEIU was chosen and certified as the “exclusive representative” of the unit employees with respect to conditions of employment. In other words, the SEIU functioned something like a collective-bargaining representative for these employees. The employees chose this representation and there is no indication that they do not wish to continue to be represented. And in this regard, the Board has never required that for a presumption of majority support to be applied in the successorship situation to a union previously operating in the state law context, that the union and employees must have been entitled under state law to exercise the full panoply of rights available under the Act. Many public employees and their unions are barred from striking to enforce their collective-bargaining demands. Many public employee unions and employers are free to collectively bargain over only a limited range of subjects, with the rest being established by statute or other legislative or administrative process. This has not been deemed significant. The presumption of majority support could be applied because the union had been—without regard to the specific range of rights permitted under state law—selected and/or designated as the employees’ collective-bargaining representative.

Here, however, we confront a state law context, and a union’s representation of employees, that explicitly and affirmatively did *not* involve representation for purposes of collective bargaining, even while the state law recognizes collective bargaining representation as an available option for many employees.

Thus, the SEIU was not recognized by Laurel Crest as the employees’ collective-bargaining representative. The SEIU-represented employees were not represented for purposes of

employer is not bound to accept the proposal contained in the Memorandum, and the public employees union has no right to insist the public employer implement such proposals. See *Independent Association of Pennsylvania Liquor Control Board Employees v. Commonwealth*, 35 Pa. Commonwealth Ct. 133, 384 A.2d 1367 (1978). *Memoranda of understanding are viable not because such documents are legally binding upon the public employer, since they are not, id.*, but because the public employer makes a good-faith effort to resolve matters affecting the public employer’s first-level supervisory employees in a manner agreeable to such employees.

collective bargaining. They did not vote for collective-bargaining representation, and did not, as far as the record shows, express support for collective-bargaining representation. Accordingly, there is no basis on which to presume majority support for collective bargaining. The SEIU did not have collective-bargaining representative status and, although Cambria Care is a successor employer to Laurel Crest, majority employee support for collective-bargaining representation may not be presumed.

I find that by failing to recognize and bargain with the Laborers unit, Respondent violated the Act, as alleged. I will dismiss the allegations that Respondent unlawfully failed to recognize and bargain with the SEIU-represented unit.¹⁵

Part II

The 8(a)(3) Refusal-to-Hire-Allegations

The government alleges that Respondent's failure to hire five Laurel Crest employees was unlawfully motivated. The five employees are: nurse's aide Mark Mulhearn, who was the business manager of Local 1305; first floor unit clerk Sherry Hagerich, who was Local 1305's president; nurse's aide Joseph Billy, who was Local 1305's vice president; LPN Roxanne Lamer; and business office employee Beverly Weber, who was Local 1305's secretary-treasurer.¹⁶ Each of the five were long-time Laurel Crest employees.¹⁷ Of the group, Lamer was the only SEIU-represented employee and she was not an officer of the SEIU local. However, she had been active in SEIU efforts to meet with Grane and with county officials regarding the transfer of operations. Along with an SEIU official, Lamer had traveled to Grane headquarters in Pittsburgh in an unsuccessful effort to meet with Oddo.

A. Background

Grane and some of its personnel had familiarity with the Laurel Crest workforce from 2003, when Grane managed the facility for a six-month period. Around this same time, Grane unsuccessfully attempted to purchase Laurel Crest from the county, coming close enough to begin considering and offering employment to Laurel Crest employees. In 2003, the Unions publicly opposed the sale to Grane and wanted the county to retain ownership and operation of the facility. Union-initiated legal action sought to stop the sale of the facility. The sale did not occur.

In 2009, according to Laborers business manager and Laurel Crest employee Mark Mulhearn, Local 1305 publicly took the

¹⁵ Given my conclusion, I also dismiss the allegation that Respondent violated the Act by unilaterally implementing IV therapy training, and, arguably, began the process of adding IV therapy duties to the work regimen of licensed practical nurses (LPNs). Given my conclusion, I do not reach the issue of the appropriateness of the SEIU-represented unit or the employer's defense that certain unit positions were supervisory.

¹⁶ The Local 1305 officials are identified by the position they held as of December 31, 2009. Each held other positions over the years, as discussed below.

¹⁷ Lamer had the least service. She had worked at Laurel Crest since 2004. The other alleged discriminatees each had between 15 and 22 years of service.

position that "[w]e were not for the sale at all." In August, the Local and Mulhearn went to commissioners' meetings and talked about the sale. After August, union counsel and a union official from Pittsburgh attempted to set up meetings about the sale. The Local's activities around the sale were reported in the area newspapers and on television news. According to SEIU-represented employee Roxanne Lamer, in 2009 her union did not oppose the sale outright to Grane. However, public "information pickets" and rallies were held in an effort to discuss issues with the county commissioners relating to the sale and the labor issues surrounding it.

Grane officials (or officials from Grane-controlled companies) were responsible for staffing and hiring employees for Cambria Care, which, as discussed, assumed operations from Laurel Crest on January 1, 2010. Most Laurel Crest employees applied to work at Cambria Care. Most, but not all, who applied were hired. The vast majority (perhaps all) of the Cambria Care employees hired as of January 1, 2010, were employees of Laurel Crest the day before.

Grane representatives performed the initial hiring of Cambria Care's work force in December 2009. The record is replete with assertions from Grane personnel, including chief operating officer Oddo and Beth Lengle, Grane's vice president of nursing, that the assumption of the operation of the Laurel Crest facility on January 1, 2010, including the hiring of employees in December 2009, proceeded in a manner "no different than any other entity we manage." According to Beth Lengle, who, as described below, played a central role in the hiring, at Cambria Care, "[w]e used the same process we always do." As referenced, above, Grane manages and owns the operating companies of numerous health care facilities in Pennsylvania.

Oddo was primarily responsible for determining the initial wages to be paid to Cambria Care employees. He interviewed, hired, and developed the job description for the top onsite manager for Cambria Care, Owen Larkin, Laurel Crest's assistant administrator, who became the administrator under Cambria Care.

Grane's quality improvement (QI) department is headed by Lengle. This department is composed of clinicians who, as Oddo explained it, "teach, orient, write policy" for "[e]mployees of the various operating entities that [Grane] manages," including Cambria Care. Lengle explained that "[w]e provide service to the nursing departments in the facilities in which Grane Healthcare manages, includ[ing] survey compliance, risk management, anything that the facilities may request."

The QI department, and Lengle in particular, played a key role in the initial hiring of nursing staff employees (nurses and nursing assistants) to work at Cambria Care. In October 2009, Lengle was assigned by her supervisor, Oddo, to involve herself and the QI department in the hiring for Cambria Care.

In addition to hiring nursing-related employees, Lengle was "primarily responsible for processing all employees" for hiring, meaning that she, and the QI staff working under her direction, processed prospective employees from all departments, and managed the preemployment screening requirements utilized by Grane.

All applicants underwent a Grane-established screening procedure, involving, according to Lengle, an application for the position, physicals, drug screens, tuberculosis testing and criminal background checks. According to Lengle, she and QI nurses followed a checklist that set forth State and Federal hiring standards for longterm care facilities. Lengle and the QI staff were responsible for the health screenings. Lengle kept track of the eligibility, based on the preemployment screening, of all applicants, even those outside of nursing.

In addition, according to Lengle, Federal guidelines also require a reference check and that was part of the preemployment process, although, as discussed below, there is some question as to how this portion of the process was carried out by Grane. According to Lengle (and Vivian Andrascik, a Grane-affiliated official who investigated staffing for the business office) if an applicant failed the other preemployment screening tests (such as the criminal background, drug test or physical), then the reference portion of the application was not undertaken as the applicant was already excluded from being hired.

Approximately 300 employees in the building applied, most were nursing-related staff. Somewhere between 10–20 percent of the employees were excluded based on the preemployment (pre-reference) checks.

Applicants who “made it through every single step . . . were offered” a position, thus, the screening was a critical part of the process.

Vivian Andrascik, a consultant with Practical Administrative Solutions (PAS), testified that she was responsible for hiring employees to work in the Cambria Care business office. She was assigned to this task by David Kearney, who is an officer of Grane, PAS, and Cambria Care. Grane uses PAS to work with the business offices at the facilities it manages and to ensure compliance with State and Federal guidelines. PAS has no clients other than Grane, and was part of Grane, until two or three years ago when, according to Andrascik, “they did an LLC, and we became consultants there.”¹⁸ Andrascik went to the facility sometime in October and met with Laurel Crest officials as part of Grane’s due diligence, and to begin the process of making sure the Cambria business office would be adequately staffed.

In carrying out the hiring, Grane did not review employee personnel files, which contained annual evaluations of employees undertaken by Laurel Crest. (According to Lengle that was not a part of the Grane protocol for hiring employees when Grane buys a facility.) There was no interview process for nonmanagement employees for the initial January 1 hiring.

In late October 2009, Laurel Crest employees were informed that they could pick up an employment application packet to be completed and returned either on-the-spot, or within the week.

¹⁸ PAS’s board of directors is composed of Nese, and Richard, David, and Jeffrey Graciano. Richard Graciano is the chairman of the board and CEO. Nese is president. Kearney is vice president and treasurer. Creagh is the general counsel and secretary. Andrascik testified that she could recall one PAS contract with another entity, a contract with the city of Erie, during the 13 years she worked in her capacity as a consultant for PAS or for Grane, before PAS was created two to three years earlier. PAS’s offices remain at the same address in the building utilized by Grane for its corporate offices.

The applicant packet included an application, a citizenship form (I-9), direct deposit information, a questionnaire, and certain other authorization forms relating to a background check, a medical exam and other screenings. As part of the process applicants were asked to go through a preemployment screening process involving a physical exam and tuberculosis screening (conducted by Grane QI employees), and a criminal background check. Applicants who needed a license or certification for their work were expected to have one that was active or current.

On December 21, 2009, employees who were being hired by Cambria Care were informed and provided with employment packets. Based on the experience of the alleged discriminatees who testified, applicants not hired by Cambria Care were told nothing, and, in that way, learned that they were not among those hired. Laurel Crest employees ended employment with Laurel Crest on December 31, 2009, and, as of January 1, 2010, the facility was operated by Cambria Care.¹⁹

With regard to the Laborers-represented employees, out of approximately 180 employees, 38 were not hired by Cambria Care. Of those not hired the record does not reveal the number who failed to apply either because they retired or chose not apply for some other reason.

In any event, the percentage of Laborers local union officials who applied and were not hired is striking. Even assuming that every one of the Laborers-represented employees not hired by Cambria Care had sought employment, approximately 80 percent were hired. However, of the Laborer’s local union officers, only one Pat Joyce, the secretary is not alleged to be a discriminatee. As noted, the Local president, vice president, secretary-treasurer, and business agent, were not hired. Thus, contrary to the general employee complement, of which at least 80 percent was hired, 80 percent of the union leadership was rejected for hire by Cambria Care.

There is also evidence that two shop stewards, and a recently-named executive board member of the laborers were hired by Cambria Care. But the union involvement and experience of the executive board member appears to have been limited. The record contains no information on the two shop stewards. In any event, the failure to hire the officers of the Local is clearly disproportionate to the hiring of employees generally.

With regard to the SEIU-represented employees, there is less record evidence of the hiring patterns. As noted, only one employee is alleged to have been discriminated against in the hiring. The record reveals that of the main activists in the SEIU campaign around the sale of Laurel Crest, one and perhaps two were hired by Cambria Care. Two, including the alleged discriminatee Lamer, were not.

B. The Individual Alleged Discriminatees (Mulhearn, Hagerich, Billy, Lamer, and Weber)

Mark Mulhearn—Mulhearn worked fulltime at Laurel Crest from 1985 through December 31, 2009. He worked as a nurse’s aide on the third floor for this entire period. He has

¹⁹ There was at least one exception to this. One of the alleged discriminatees, Beverly Weber, who was not hired by Cambria Care, testified that she continued working in the business office, for Laurel Crest, through January 2010, finishing up the December billing.

been a member of Local 1305 since 1991. He was a shop steward from approximately 1992 to 1998. He was a member of the Local's executive board beginning in the late 1990s. In approximately 2002, he became vice president. From 2006, until the end of his employment in 2009, he was Local's business manager, making him responsible for running the operations of the Local on a daily basis, and setting up and running labor/management meetings.

During Grane's 2003 management of Laurel Crest, and its failed effort to purchase the facility, Mulhearn recalled having significant interaction with Grane representatives. He was active in opposing the sale on behalf of the Union. During that near assumption of the operations by Grane, Mulhearn applied and was offered a position, although Grane, in the end, did not assume the operations.

In August 2009, the Local and Mulhearn went to commissioners' meetings and talked about the sale. After August, union counsel and a union official from Pittsburgh attempted to set up meetings on the sale. The Local's activities around the sale were reported in the local press.

As the Local's business agent, Mulhearn was copied, with his title, on correspondence dated September 11, 2009, sent by the union's counsel to Grane seeking to meet to discuss "the pending sale and its impact on the employees." The letter was received by Grane, and a response sent by Grane counsel to the union's counsel.

In late October, along with most of the other Laurel Crest employees, Mulhearn filled out the employment application provided by Cambria Care and returned it to the administrator's secretary. He was sent to the drug screening and took the physical, which was conducted by three Grane employees from the QI department, Angel Waddell, Debra Hoover, and Jolene Polantz, each of whom was a former Laurel Crest employee, and at least one of which, Debra Hoover, Mulhearn had interacted with in his capacity as business manager when she was employed by Laurel Crest. Mulhearn was introduced briefly to Lenge when he said hello one day to Jolene Polantz, who introduced Mulhearn to Lenge and told her, "[t]his is Mark Mulhearn, he is an excellent nurse's aide."

Mulhearn learned he was not hired when, in December he was not called and given an acceptance letter indicating he was being hired.

Sherry Hagerich—Hagerich began at Laurel Crest as a nurse's aide in 1989. In approximately 2001, she became the switchboard operator, and from 2002 to 2009, worked as a unit clerk on the first floor. The unit clerk is in charge of the desk. In that position, Hagerich answered phones, directed families to residents, and maintained patient charts and lab books for the doctors and nurses.

Hagerich was president of Local 1305 from approximately 2005, through the time of the transfer of operations to Cambria Care at the end of 2009. Prior to being president, Hagerich was on the Union's executive board from approximately 2003 or 2004, and had always been active in the Union. As president of the Local, and because of her position, which was removed from "hands on patient care," employees often sought out Hagerich to request grievance forms or to talk about potential grievances. In addition, because her position made it easier for

her to leave the unit on short notice, Laurel Crest's human resources department often called on her to attend meetings conducted to discipline or counsel another employee.

Hagerich was involved in the Union's 2009 activities related to the sale of Laurel Crest. In conjunction with these activities her photo was on the front page of the area newspaper and she was on local news reports.

Hagerich applied to work at Cambria in the same manner as the other Laurel Crest employees. She went in on her day off and took the physical and TB test and returned to have the TB test read. The Grane employees administering the physical were former Laurel Crest employees who had worked there when Hagerich had been active in the Union. Hagerich was not hired by Cambria Care, and like the other rejected applicants learned this when, as of December 31, 2009, she had heard nothing, while most Laurel Crest employees learned on or about December 21, 2009, that they were being offered employment.

Joseph Billy—Billy began fulltime at Laurel Crest in 1994 and worked there until December 31, 2009. He was a nurse's aide during this time, and worked on the first floor for almost the entire time.

Billy was a shop steward for four years, and then an executive board member of the Local. He was vice president for about a month before Cambria Care assumed operations.

In 2003 when Grane was unsuccessfully attempting to purchase Laurel Crest, Billy applied for employment with Grane but was not offered employment. He was not permitted to complete the process.

During this effort to buy the facility, Grane interviewed applicants in group interviews of six to eight people. Grane representative Wendy McDonald told the employees what the pay and benefits were going to be with Grane. Billy commented during the interview that the union contract still had two years until expiration. This seemed to upset McDonald who declared the interview over after Billy's comments. ("[t]his interview is done everybody out.") Later, when Billy was taking the physical required for applicants, McDonald came in, saw that Billy was among the employees taking the physical, and said, "He's not allowed to finish completing this." When Billy asked why, McDonald told him, "I do not have to give you an answer why. You are just not allowed to finish."²⁰

In 2009, Billy again applied to be employed by the successor entity to Laurel Crest. He picked up the application, took it home, completed it, and returned it the next morning. There is a dispute about how completely he filled in the application. I will discuss that dispute, below. In any event, there is no dispute that Billy applied for employment.

Billy learned that he had not been hired by Cambria Care in the same way as the other rejected applicants: employees offered positions were notified before Christmas, he received no such notification.

²⁰ I credit Billy's account of this event, which was undisputed. McDonald remains employed by Grane and was involved in the hiring for Cambria Care and serves as a Grane consultant to Cambria Care. She did not testify.

Roxanne Lamer—Lamer began working at Laurel Crest in January 2004 and worked there through the end of December 2009. She began as a nurse’s aide, and in February 2006, became an LPN. Coincident to the change in position, Lamer changed from membership in the Laborers to membership in SEIU.

In her last three years at Laurel Crest, Lamer worked on the fourth floor, on the second shift, which began at 3 p.m. Occasionally, perhaps once a month during the last three months, she would start four hours early at 11 a.m.

Lamer did not hold any office with SEIU or the Laborers. She was, however, extensively involved in SEIU activities around the sale to Grane. The SEIU conducted what organizer Nathan Williams described as a “fairly expansive campaign” that included “public actions,” including attendance at county commissioner meetings and the delivery of multiple petitions to the commissioners.

Williams described Lamer as “very integral” and “very active” in “what we were doing.” He described her as “instrumental” in the campaign particularly beginning in late July or early August 2009. Once she became involved more and more employees from second shift began showing up to SEIU events.²¹ Lamer attended commissioner’s meetings with the union and participated in an “informal picket” outside the county courthouse directed toward having the county honor certain benefits to employees.

In early November, Lamer traveled with Williams—just the two of them—to Grane headquarters in Pittsburgh in an effort to speak to Oddo, and present him with a copy of an employee petition that had been delivered to the county commissioners the previous week. They did not call ahead. Williams had heard from other SEIU officials that previous efforts by other SEIU officials to reach Oddo had not been successful, so Williams, with Lamer, showed up at Grane headquarters.

Williams introduced himself and Lamer to the receptionist who then called someone, announcing that “[t]here is a Mr. Williams and Roxanne Lamer from SEIU Healthcare PA, would like to speak to Mr. Oddo.” A few minutes later a woman came downstairs and told them that Oddo was on a conference call. Williams left his business card with the woman, left the petition, and asked that Oddo call him.

Lamer applied to work for Cambria Care in a fashion similar to the other employees. She picked up her application and returned it as instructed by the end of October. Some weeks later she had her physical. In December, she was not offered employment.

Beverly Weber—Weber was hired fulltime at Laurel Crest in 1987. In 1993 she bid into the business office and worked numerous jobs there until the transfer to Cambria Care. In her last six months at Laurel Crest Weber worked in the business office

doing Medicare and insurance billing, worked with residents’ accounts, and sent billing statements to families of residents.

Weber was off work at Laurel Crest from October 22 to November 16, 2009, and then again, on December 2, 2009, for about 2 weeks.

Weber applied, but was not hired by Cambria Care. She worked for Laurel Crest through January 2010, finishing up some billing.

Weber held numerous positions in Local 1305 over the years. In the late 1990s she served as vice president of the Union, and then as president. In approximately 2002 or 2003, she became the Union’s business manager. Midway through 2009, Weber became the Union’s secretary-treasurer.

As business manager, Weber had particular responsibility for employer-union relations. During Grane’s initial effort to purchase Laurel Crest in 2003, Weber met with a number of Grane officials, including Vivian Andrascik, to discuss union issues such as whether the labor agreement would be assumed by Grane, seniority guidelines, and hiring issues. Grane representatives took the position with Weber that Grane was not obligated to recognize the collective-bargaining agreement.²² As noted, the sale did not occur and the Union initiated legal action designed to enjoin the sale.

In October 2009, Weber applied, along with other Laurel Crest employees, for a position at Cambria Care. She went through the screening process, taking the physical, drug screen and other items. She learned on or about December 21, 2009, that she was not going to be hired when she was not among those offered employment and receiving employment packets on or about that day.

C. Grane’s Explanation for Not Hiring Mulhearn, Hagerich, Billy, and Lamer

Grane Vice President of Nursing Lenge testified that she made the decision not to hire Mulhearn, Hagerich, Billy, and Lamer. (“I was the decision maker.”) As to Mulhearn, Lamer, and Hagerich, Lenge testified that her decision was based solely on negative references received from Laurel Crest’s then Director of Nursing Rebecca Nelen. As to Billy, Lenge testified that her decision was based in part upon Nelen’s reference, and in part on some other factors, discussed below.

According to Lenge, Nelen told her that Mulhearn had poor performance and attendance problems; she told Lenge that Hagerich had attendance issues and was loud, obnoxious and caused trouble with coworkers; she told Lenge that Billy had a negative attitude toward coworkers and his responsibilities; and that Lamer had poor work performance.

In reaching her decision, Lenge claims to have relied upon Nelen’s references. She did not review, or seek to review, any personnel records or folders maintained on employees. According to Lenge, “[t]he director of nursing, or the department head in which they are applying, is the best person to speak with” in securing references on the applicants.

²¹ Williams also named three other SEIU-represented employees as “main contact people”: Chapter President Mary Jane Fitzsimmons, Vice President Janice McKnight and Secretary Treasurer Helen Bassett. Williams had heard that McKnight was hired by Cambria Care (the record does not establish it for sure). Bassett was hired by Cambria Care. Fitzsimmons was not.

²² I credit Weber’s uncontradicted testimony in this regard. Andrascik testified extensively but did not contradict or address this interaction with Weber from 2003.

Lengle testified that the reference process was undertaken by her for all nursing and nursing-related positions. Lengle testified that “I sat down with Miss Nelen, and went through all potential applicants, for reference.” Lengle testified that she did this repeatedly, until they had reviewed every applicant. The best estimate Lengle could give of the number of meetings she had with Nelen on this subject was “[m]ore than one” but less than ten.

Lengle testified that as she sat with Nelen, she had a box containing a file folder for each applicant and she had her computer. Lengle testified that she kept no notes of her discussions with Nelen, other than notes contemporaneously entered into a computer file listing Laurel Crest employees not being hired (a printout of which was introduced into evidence as GC Exh. 21). She testified that she made no notations in or on the applicants’ file folders. Lengle testified that while meeting with Nelen, when she received a negative reference that would exclude an applicant from being hired she would mark the reason on a computer file and put the rejected applicant’s file in a separate box.²³

Lengle testified:

I had two bankers boxes. I had the one bankers box with all of the potential applicants that had already passed the necessary requirements.

And then I had an empty bankers box, and as I got references that were poor, that would exclude them from being hired, from being offered, I took the file out of the one bankers box, and put it in the other, so I knew that those people would not be offered employment.

According to Lengle, the references which she sought and which she relied upon were part of Grane’s standard practice, and mandated by Federal Government guidelines related to abuse prevention in long-term care facilities. “It is listed under abuse prevention, but you have to get a reference check.” Lengle testified that “[y]ou check the form, there is a list of things. . . . [such as] [p]erformance, attitude, attendance . . . would they rehire . . . [t]hose are the biggies I can remember.” Lengle stated “that all goes in with what the background check is for, the reference check is part of it.” According to Lengle, she asked Nelen “all four of those of everybody.” Lengle testified that she went through the applicants with Nelen in alphabetical order, asking these questions.²⁴

²³ Lengle at first testified that she didn’t remember whether she had the computer with her when she met with Nelen to go over references, but quickly corrected herself, realizing that “[y]eah it would have had to have been, yes,” so that she could record the information from Nelen contemporaneously. If she did not have the computer with her to contemporaneously record this information she could not later have created GC Exh. 21, given that she took no other notations with regard to her meetings with Nelen or the information gleaned through them. This list included Mulhearn, Billy Hagerich, and Weber. It did not include Lamer. Lengle testified that “I am sure I left people off of there. That was just a working tool for me.”

²⁴ Lengle appears to be referring to “Employer Reference” forms as the source of the questions. These (partially) completed forms were included in the personnel files that were introduced for certain nursing employees. They show the date of the reference, the Grane representative who sought the reference, and who it was secured from. No simi-

The most salient problem with Lengle’s explanation for her hiring decisions, and the reference procedure on which it was based, is that Nelen—the putative source for Lengle’s references, and the person Lengle proposes was central to the reference process—endorsed not a word of Lengle’s story.

Nelen, who had been the director of nursing at Laurel Crest from February 2008 through the end of December 2009, applied for and was offered, but turned down, the position of director of nursing for Cambria Care. She moved on to other employment. She testified in a manner that cannot be reconciled with Lengle’s assertions. Nelen testified as follows:

Q. Did you talk to Beth Lengle about the RN’s, CNA’s and LPN’s, under your direction?

A. In what respect?

Q. In terms of their employment ability, job performance?

A. As far as how they particularly performed job duties?

Q. Yes.

A. Again, in what respect? Because we did have conversations about what their duties were.

Q. You had conversation about the general duties?

A. Sure.

Q. Did you have any conversations with Beth Lengle about specific employees, and their job performance for Laurel Crest?

A. Not that I recall.

Q. Did you speak with Beth Lengle about Mark Mulhearn?

A. Not that I remember.

Q. Did you speak with Beth Lengle about Joseph Billy?

A. Not that I recall.

Q. Did you speak with Beth Lengle about Roxanne Lamer?

A. Definitely not.

Q. Why do you say definitely not?

A. Because in all honesty, I did not remember who she was.

. . . .

Q. Did you speak with Beth Lengle about Mark Mulhearn’s attendance record?

A. No.

Q. Did you speak with Beth Lengle about anyone’s attendance record?

A. No. I didn’t have access to their attendance records.

Q. Who handled the attendance issues for the county?

A. Human resources did. . . .

. . . .

Q. Well, in the what it’s worth category, had you been asked about Mark Mulhearn’s work performance, would

lar documents, which might have corroborated Lengle’s testimony, were provided for any of the discriminatees.

you have been able to tell Beth Lengle anything about his work performance?

A. I may have been able to, but without a good review of his chart, employee file, I may not have.

Q. As you sit in the witness stand today, is there anything about Mark Mulhearn's work performance under Cambria County, that you would characterize as poor performance?

A. Not off the top of my head. But again, without a review of his employee file, I can't say for sure.

Nelen also testified that, having only been the director of nursing for about a year, and having spent most of that time consumed with preparation of plans of direction and for visits by regulators,

[u]nfortunately, I didn't have time to get to know the employees, because the regulatory problems that we had. I spent the majority of my time writing plans of direction, for 14 visits in 12 months, so, no, unfortunately, I didn't get to know them very well. . . . I knew very little about all of the employees.

In addition, Nelen specifically denied that she would have been in a position to comment on any employees' attendance issues. "There probably were individuals with attendance problems, but I didn't handle those. I didn't handle it, so I really can't say who it is."

On cross-examination, Respondent's counsel focused on a cautionary aspect of Nelen's testimony: she repeatedly said she didn't "recall having" any "substantive conversation with Beth Lengle about any RN, LPN, or CNA, in terms of work performance," instead of declaring absolutely that it never happened at all (although she was definitive with regard to Lamer, whom Nelen did not know, and, in addition, Nelen was definitive that she had not reported on anyone's attendance). Ultimately, Nelen agreed that she "could have said something about the first floor [employee staff]. First floor was difficult." Nelen agreed that Joseph Billy was "difficult" and that "[f]rom time to time, I would say he had a bad attitude," although she resisted suggestions that Hagerich could be "categorized" that way.

It may be that at some point Nelen "could have said something" negative about first floor employees. But nothing in Nelen's testimony—nothing—provided the slightest endorsement, support, or corroboration for Lengle's testimony that she sat with Nelen, more than once but less than ten times, banker boxes at her side, folders for each applicant with her, and asked Nelen four questions—relating to attendance, attitude, performance, and willingness to rehire—in alphabetical order, about every Laurel Crest employee applicant for a nursing-related position, and entered the negative information into a computer with her while they talked.

Contrary to the suggestions of Respondent, the import of Nelen's answer that she "didn't recall" speaking to Lengle about the employees—and I mean this both in terms of the text of the transcript and in terms of the impression that her demeanor made on me as she testified—was that she wanted to take care as she was cross-examined not to agree that she had *never* had *any* conversation at any time with Lengle that mentioned an employee's performance or conduct. She did not

recall any such conversation, but given the comings and goings of Grane staff during this period and multiple interactions with Lengle during this period, Nelen wanted to allow that there could have been such a conversation.²⁵

But allowing for the possibility of some stray remarks being made by Nelen to Lengle about staff, such remarks are a far cry from and irreconcilable with the reference process involving scores of employee applicants that Lengle claimed she engaged in with Nelen and that Lengle so directly attributed to her decision not to hire the discriminatees. If Nelen and Lengle had sat down and gone over the performance, attendance, attitude, and willingness of Nelen to rehire each applicant, or even each alleged discriminatee, Nelen would have remembered it, or something of it. She didn't.

It is also notable that Nelen was a disinterested party, working neither for Grane nor Cambria Care, having moved on to other employment. She had declined the DON job that had been offered to her at Cambria Care. And when I say she was disinterested, I mean beyond the formal legal sense, i.e., her lack of current relationship to the parties. There was no suggestion, and no basis revealed for suspecting that Nelen had an axe to grind with Grane or Cambria Care. Her testimonial appearance and demeanor were also that of a disinterested witness. She did not appear to have come to testify for the purpose of defending the employees, or for the purpose of criticizing Grane. She showed no reluctance to criticize employees as "difficult" or having a "bad attitude," but did so only when required to in answer to a question.²⁶ And Nelen refused to be

²⁵ In follow-up to saying that she did not recall having *any* substantive conversation with Lengle about individual employee's work performance, Nelen testified:

A. I can't say it did or didn't happen.

Q. Okay.

A. Or that something wasn't said in passing. But—or something wasn't overheard.

Q. Okay.

A. But I don't recall.

²⁶ Asked for an example of what she meant by "bad attitude," Nelen explained that "when the Department of Health would come in" Billy used them as "a sounding board for staffing issues, and not being able to get his work completed." Nelen explained that she had to have someone warn Billy when the Department of Health "was in the building, so that nothing was said." In Nelen's view Billy exhibited a "bad attitude" by talking to a state inspector about staffing issues instead of to his supervisors first: "we expect you to take it up the chain of command, and that's not what we saw." In his testimony, Billy recalled this encounter with Nelen, from April 2009, and stated that the state surveyors had asked him a question and Nelen had told him that "I should just be quiet." Billy testified that he told her that "[i]f they ask me a question, I'm going to tell the truth, I won't lie for you."

This testimony further suggests that, as a witness, Nelen harbored no bias in favor of employees. Indeed, while it is not a matter I need rule on, and I do not, it is worth noting that Nelen's basis for criticizing Billy's attitude might well form an illegitimate basis for a negative reference, as employee complaints to third parties, including governmental authorities, about working conditions generally are protected conduct under the Act, and this includes staffing levels at health care facilities. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (citations omitted), *enfd.* 358 Fed. Appx. 783 (9th Cir. 2009); *Riverboat Services of Indiana*, 345 NLRB 1286, 1294 (2005). (no

led into criticizing employees where she did not believe it was accurate. She did not appear eager or happy to be testifying. She had nothing to “get off her chest.” If anything, Nelen seemed mildly displeased to have been dragged into this dispute. But this affect, to my mind, contributed to her credibility. If it had happened the way Lengele said it happened, I do not doubt that Nelen would have remembered it and would have corroborated it. Nelen’s testimony is inconsistent with, and contradicts the story told by Lengele. I do not believe Nelen was fabricating her testimony, was unwilling to say what she knew, or suffered from memory loss.²⁷

I credit Nelen’s account, and find that Lengele did not undertake the reference process as she described it, and did not base her decision not to hire Mulhearn, Lamer, Hagerich, and Billy, on the reference process.

In short, Grane’s explanation was that its official, Lengele, relied upon Nelen, the former director of nursing, no longer on the scene. Grane’s position makes Nelen effectively responsible for the decision by Grane not to hire (four of) the discriminatees. In the abstract, it is a reasonable position. Indeed, given that Nelen had declined an offer from Cambria Care and moved on, it is not lost on me that had she not appeared at trial, all we would have had was Lengele’s word on it. But Nelen showed up at trial, and did not know what Lengele was talking about.

I discredit the explanation offered by Lengele for failing to hire Mulhearn, Hagerich, Billy, and Lamer.²⁸

With regard to Respondent’s failure to hire Billy, Lengele asserted that she relied only in part on Nelen’s reference. She did not state explicitly what other factors she relied upon, or the contribution they played in her decision. However, I will as-

requirement that employees first give their employer the chance to respond to their grievances). Nelen was not a “pro-union” or “pro-employee” witness. Rather, she was a candid witness.

²⁷ In a couple of instances, Nelen added that the events happened “a long time ago.” The concept is relative, of course. But in terms of my experience with witnesses, and in terms of litigation generally, the events she was asked about were not from the distant past. Lengele’s alleged reference checks occurred in December (November at the earliest) 2009. Nelen testified in July 2010. Moreover her affidavit, of which I undoubtedly would have heard more about had there been material inconsistencies with her testimony, was executed in May 2010. The timing only adds to my conclusion that Nelen would have remembered Lengele’s reference process, had it occurred.

²⁸ I discredit Lengele’s explanation for all of the reasons stated in the text. In view of Nelen’s credited testimony, it is not believable, and I do not believe it. I note also that no one corroborated even the occurrence of the reference meetings Lengele described with Nelen. It seems likely, given that they were interrupted by other pressing work matters that someone would have seen or known about these meetings. If they did, there was no testimony to this effect. In terms of demeanor, I note that I adjudged Lengele to be an extremely capable person, but that attribute can sometimes make credibility harder not easier to judge. But between her and Nelen, I found Nelen’s demeanor more compelling as a witness. Lengele was less spontaneous, more planned, more practiced. None of those are necessarily bad attributes in a witness, but in this case, I find Nelen’s demeanor far better than Lengele’s. Lengele’s demeanor was consistent with that of a witness adhering to a story invented to explain events. That is my considered view of what she was doing in her testimony.

sume that she is claiming that the other factors were a series of negative personal observations she made of Billy, as well as comments about Billy she solicited from Charge Nurse Sheila Knee.

Having discredited as a fabrication Lengele’s asserted process-based rationale for failing to hire Billy and the other nursing department discriminatees, I am not inclined to put much credence in a claim—that she does not make—that she would not have hired Billy solely based on personal observations and the comments of Knee. For one, Knee’s comments to Lengele were made between Christmas and New Year’s Day, after the offers of employment and after the hiring decisions were made, and, thus, could not have contributed to the decision not to hire Billy.²⁹ As to Lengele’s negative personal observations of Billy,

²⁹ Lengele testified that she followed up the Nelen reference by asking first floor supervising charge nurse Sheila Knee about Billy. However, Knee testified that she was off work on leave until sometime between Christmas and New Year’s Day and did not talk to Lengele until after she returned to work. If Lengele is saying that she relied upon Knee’s comments in the decision not to hire Billy that would be further evidence diminishing Lengele’s credibility. The clear weight of the evidence is, and I find that the hiring and (nonhiring) decisions had already been made by the time Knee told Lengele, in “casual conversation,” that certain of the nurse’s aides, Becky Hildebrand, Cindy Jewitt, Misty Minton, and Billy had bad attitudes and “negativity.” It is notable, however, that Knee’s comments sound an awful lot like the comments Lengele attributed to Nelen, but which Nelen did not recall making. Lengele likely drew upon Knee’s comments in developing the claims regarding the reference she received from Nelen.

with one exception,³⁰ each was disputed by Billy,³¹ and otherwise uncorroborated.³²

Given that I have discredited as a fabrication Lengle's chief explanation for not hiring the four discriminatees—Nelen's references—I am not inclined to put credence in Lengle's contradicted and uncorroborated testimony that these other issues occurred as Lengle says they did, or if they did, that they provided an independent basis for not hiring Billy. Indeed, Lengle did not really testify that these were reasons she did not hire Billy, only that these interactions left her with a bad impression of him. The implication, certainly, is that these were her reasons, other than Nelen's reference, for rejecting Billy, but there is no indication of the role they played. And since the reason for his rejection offered as the standard part of the process—Nelen's reference—was bogus, I do not believe these contradicted, uncorroborated make weight rationales either.³³

³⁰ Lengle and Billy agreed that Billy had circled and wrote "I do not agree" by the small print paragraph above the application's signature line that stated that "I understand that I may be required to work shifts other than the one for which I am applying and agree to such scheduling change as directed by my department head or administrator of this institution." Billy testified that he did this because he did not agree with it, "because I felt it was a negotiable item" and also an "end around" state law restricting mandatory overtime in health care facilities.

³¹ Lengle claimed that in 2003, when Grane managed the Laurel Crest facility, as she took smoking breaks on the loading dock with other employees, she overheard Billy saying "Fuck Grane" more than once, and that it was directed at her, the only Grane representative on the dock. Lengle claimed that in 2009, Billy's application was not signed and was missing lots of information. Lengle claimed Billy told her, "[t]hat was all I was getting." She also related two further incidents that occurred when Lengle was with Jolene Polantz, a Grane representative who knew Billy from having previously worked as a charge nurse for Laurel Crest. In both incidents, Polantz had said to Billy "how are you," as Polantz and Lengle walked by, and Billy allegedly responded, "I haven't been fired yet," in one instance, and in the other, responded in some fashion about taking care not to slip in "the puddle of my awesomeness." Lengle testified that she found these comments inappropriate. In his testimony, Billy specifically denied each of these incidents. He testified that "I never made that statement" ("fuck Grane"), although he witnessed employees, who got boisterous at times on the loading dock, saying such things; he described running into Polantz, who was with other Grane representatives, including Lengle, and Polantz and he exchanged greetings; and he gave a detailed description of passing Polantz and Lengle on a stairwell and hurriedly saying "I'm just lovely today" and "Careful, what just drips off of me."

³² Lengle testified that the applications for applicants with last names beginning A-C had been misplaced, and so they were not available for inspection at trial. Thus, the two most obvious methods of corroborating either Lengle or Billy on the question of whether he filled out his application and refused to provide more information, would be to produce the application and to call Macaluso testify. Respondent lost the applications A-C (the only ones that at trial, related to a dispute over how the applicant filled out the application); Macaluso was not called to testify. Polantz, a Grane representative who was present for both comments Lengle claimed were inappropriate, was also not called to testify.

³³ It is worth noting that Billy too, is not without his credibility problems. His demeanor was fine. I had no problem with it. But, as was revealed on cross examination, he was not forthcoming about the extent of his disciplinary record and made misleading statements about it both

Finally, I want to address the employment evaluations and disciplinary records of these discriminatees. Both the General Counsel and Respondent rely on portions of them in an effort to bolster their positions.

The most salient threshold point to emphasize is that Respondent did not review any of these records as part of its decisionmaking process. It did not talk to anyone about these records as part of its decisionmaking process. Thus, their relevance is limited to their potential to support or detract from the likelihood that Nelen gave the references as alleged by Lengle.

Thus, the General Counsel points to the uniformly positive evaluations of, for example, Mulhearn and Lamer, set forth in annual evaluations conducted from 2003 to 2009, as undermining Lengle's claim that Nelen told her that Mulhearn had a problem with poor performance and attendance, or that Lamer had performance problems. It is true that Mulhearn and Lamer's evaluations offer no support for such claims.³⁴ However, for reasons set forth above, I do not believe Lengle, and the lack of corroboration in the personnel records for Nelen's alleged comments is somewhat superfluous.

Indeed, no matter whether the evaluations reveal a poor or excellent record, Nelen was clear in her testimony that she would have been reluctant, without reviewing records (which she did not do), to characterize the employees' performance, and much less so, their attendance.

Accordingly, even considering any negative statements in the evaluations and disciplinary records, they do not lead me to believe that Nelen made the statements Lengle attributed to her—in a reference process she credibly (and inexplicably were it to have occurred) did not recall engaging in, and a process which she credibly testified that she would have had to look at records in order to be able to competently participate in. In this regard, it is worth remembering that even the records that are arguably consistent with Lengle's claims could have been consulted after-the-fact and then attributed to Nelen and the reference process. Indeed, this appears to have been what happened with regard to Knee's posthiring comments about Billy, attributed by Lengle to Nelen.³⁵

on direct examination and in his pretrial affidavit. But given that Grane did not rely on (or even look at) the disciplinary records prior to making its employment, I consider Billy's misstatements, while definitely a negative factor in assessing his credibility, to have been offered on a collateral matter. This must be contrasted to Lengle's misstatements on the central issue in this case: her explanation of her decision not to hire the four alleged discriminatees based in whole or in part on a reference process that never took place.

³⁴ These evaluations reflect the annual assessments of Mulhearn, notwithstanding various (approximately four) counseling or disciplinary actions received between 1994 and 2008 by Mulhearn, and introduced into evidence by Respondent.

³⁵ In this regard, it is notable that the negative comments attributed to Nelen seem, in some instances, to track negative comments in the annual evaluations that were written in years *prior* to Nelen coming to work at Laurel Crest.

Consider Lengle's claim that Nelen told her that Hagerich had attendance issues and caused trouble with coworkers. While Hagerich's evaluations for 2007–2008, and 2008–2009—the period of time Nelen was DON—reflected no remotely similar criticisms, in the 2005–2006 evaluation the otherwise positive evaluation contained the comment

Consideration of the negative portion of the annual reviews does not convince me that Nelen gave the references Lengle claimed to have relied upon.

D. Grane's Explanation for Not Hiring Weber

As referenced, Vivian Andrascik, from Grane-spinoff PAS, was assigned responsibility by Kearney for the staffing decisions in the business office.

Andrascik testified that she received five Laurel Crest employee applications for the business office positions and hired three of them as of January 1, 2010. Two more employees were hired later, probably in February.

At trial, Grane's rationale for not hiring Weber was provided by Andrascik, who was called as an adverse witness by the General Counsel. There were, however, significant problems with her testimony and explanation.

Andrascik initially testified that Weber was screened out as a result of the health screening. She later corrected, or "completed" this, as she put it, explaining that "[p]art of that health screen[ing] as [counsel for the General Counsel] refers to, is the reference checks." Challenged on this unlikely claim by counsel for the General Counsel, Andrascik changed her testimony again and said, "[t]hen I misunderstood you," clearly suggesting that references were not part of the health screening. She testified that she could not speak to whether Weber passed the health-related screenings, but "I can only answer that she didn't pass the reference checks." And, "the reference checks [were] part of our screening."

This testimony is of concern. While each aspect is problematic, to my mind, the most concerning thing about this testimony is not that Andrascik claimed that Weber was screened out for health reasons—there is no evidence of that, and Andrascik retracted it. The most concerning thing is not that when Andrascik was permitted to explain her answer—after two recesses, and under nonadverse questioning—she made the disingenuous and odd claim that she answered the way she did because (to her) the term health screenings included the reference checks. The most concerning thing is not even that when the unlikelihood of her explanation set in, she retreated to asserting that she had "misunderstood" the counsel for the General Counsel's question (an explanation at odds with her previous explanation).

No, the most concerning thing about this mess is the suggestion—both in the letter of the transcript and in my recollection of the manner in which the testimony was delivered—that We-

ber may have been screened out by the time applications were received by her from the QI department. Here is her testimony:

Q. At the time the applications were given to you, had those employees already been subjected to the pre-employment health screening?

A. Yes.

Q. And how many applicants are we talking about here?

A. About five.

Q. Of those five applications, had any been screened out as a result of the health screening?

A. Yes, there was.

Q. How many were screened out?

A. One.

Q. Who was that?

A. Bev Weber.

If Andrascik was trying to say that references are part of the screening process and she screened Weber out by giving her bad references, it is difficult to find that here.³⁶

I am not entirely sure what to make of this. I am cognizant of the likelihood that Andrascik, like many witnesses, might have been nervous, and inadvertently made some misstatements. And yet, there is a great deal of them here. And there is no coherent explanation for them all.

This is the witness that Respondent put forward as responsible for the decision not to hire Weber. That her account is fraught with inexplicable assertions, and backpedaling is concerning. If it was only references that did Weber in, that is all she had to say. But Andrascik's testimony raises the specter that Weber failed the screening, or was tarred as a no-hire, *before* the applications got to Andrascik. There is no innocent explanation for that based on the record evidence. It is suspicious, unexplained, and at odds with the logic of Respondent's defense.

On top of these concerns, there is the issue of the references that Andrascik allegedly secured from Nancy McMahon, Andrascik's first hire in the business office. In the final version of the story endorsed by Andrascik, McMahon's reference is the chief basis for Weber's rejection.

Andrascik testified that she hired three employees for the business office effective January 1, 2010, each of whom had worked for Laurel Crest.³⁷ She testified that she was looking into all three, and Weber, in December. She hired Nancy McMahon, who had been the assistant finance officer for Laurel Crest, to be the department manager. Andrascik testified that as to the other two positions she relied upon her observations and sought references from McMahon. Andrascik testified that she spoke to McMahon about each of the employees who had applied. Andrascik stated that "I went to Nancy, and I asked her to give me an opinion of how they were to work

that Hagerich "could improve on interpersonal relations," and at times came across as "abrupt." The 2004–2005 evaluation noted her attitude and abruptness as well.

Similarly, Lengle claimed that Nelen told her that Billy had had a negative attitude toward coworkers and his responsibilities. Billy's evaluations, which were overall positive as to his work and ability to work with coworkers, contained some comments limited to 2004–2005 and 2005–2006 evaluation, before Nelen's arrival, reflecting that he needed to increase sensitivity and patience with coworkers and comments suggesting he should have less call offs and work toward being a better "team player." No such comments appeared in the 2007–2008 evaluation or the 2008–2009 evaluation, the time period when Nelen was at Laurel Crest.

³⁶ It is worth noting here that the document employees signed consenting to "conditions of preplacement" lists among the criteria a physical exam, tuberculin test/chest x-ray, criminal background check, and drug screen—but not references—as part of the preplacement screening process.

³⁷ Two more, one a former Laurel Crest employee was hired later. Andrascik thought this was in February 2010.

with” and “[h]ow they interacted with each other.” Andrascik could not recall when this conversation took place. No notes or documentation of the Weber reference was entered into evidence, although “Employer Reference” forms included in other employees’ personnel files demonstrates that such forms were used by Grane in hiring.

According to Andrascik, McMahon told her that Weber “was not a team player, she had trouble communicating with her co-workers, she had an absentee problem.”

As with her testimony about the screening process, Andrascik’s testimony about securing the references was not compelling. McMahon, who currently works for Grane, provided a tentative, half-hearted corroboration of *some* of Andrascik’s account of the alleged reference process. It is true that it was not a bad as the testimonial fiasco of Lengle attributing the references to Nelen, in the face of Nelen’s absolute unwillingness to endorse that the conversations even occurred. McMahon, recalled speaking to Andrascik about Weber but described it as “pretty much” in a passing conversation, in a phone call from Andrascik while McMahon was out on medical leave.

At first when questioned about whether she had been “asked, at any time, by Miss Andrascik, to give an assessment of the employees’ work performance,” McMahon answered by saying “I was asked who did what in our department . . . was asked what their specific job duties were, and what they performed.” Nothing about the quality of their work performance.

Pressed on the subject of whether she was asked about employee work performance, McMahon hesitantly stated, “Yes. If—how they—how they got along with others, things like that. Just in conversation.”

Even as to that, McMahon could not recall telling Andrascik anything at all about the applicants for employment *other than* Weber. Andrascik claimed she asked McMahon about *each* of the applicant’s performance. But McMahon did not recall this. As to Rozsi’s performance, McMahon testified, “I don’t remember if I really said anything with her.” Asked if they talked about Biller, McMahon stated, “I don’t think so. I think that was just, I was asked if she was in the department.” McMahon also denied talking to Andrascik about Yeckley. However, as to Weber, she had some recall:

Q. What did you tell Andrascik about Weber?

A. Communications sometimes could be an issue, and I—my opinion was, I wasn’t sure if she would be a team player all the time.

Q. What about the communication problem? What was that? Did you give any specifics?

A. No, I did not. That was just in general.

Q. You said she wasn’t—you weren’t sure she would be a team player all the time.

A. Yeah. It was—she was not a team player.

Q. So, did you say she was not a team player, or that you weren’t sure she would be a team player all the time?

A. She was not a team player.

I do not credit Andrascik’s account of events.³⁸ I find that, in accordance with McMahon’s testimony, Andrascik called McMahon sometime in December, during the time McMahon was on medical leave and asked her about Weber in passing. I find that she asked about no one else in that conversation. McMahon expressed some general doubts about Weber’s communication and “team” work. McMahon did not, contrary to Andrascik’s claim, say anything about Weber’s attendance.³⁹

I note that the timing of the call to McMahon is not established in the record, although McMahon thought it was after she had been hired, but before she returned from medical leave on December 28. The record does not speak to when McMahon was hired. The record does not answer the question of whether the conversation with McMahon took place before or after the hiring decisions had already been made, and announced on December 21.⁴⁰

Andrascik also testified that, based on her own observations of Weber during December, she found Weber “very unfriendly, and I was just afraid it was going to extend into the residents’ families.” These observations occurred when Andrascik was in the building arranging the transfer of operations, and worked primarily from a conference room that was near the cubicles used by Weber and other employees. Notably, Weber went off work December 2 and was off for approximately 2 weeks. This left only a very few days in December for Andrascik to observe Weber before the hiring decisions were announced on December 21.

Andrascik’s initial testimony that “what I looked at is experience” in hiring did not apply to consideration of Weber. Unlike other applicants (such as McMahon and Rozsi), Andrascik did not talk to Weber about her work experience.

Andrascik testified that this was all she based her decision on. She testified that she did not know Weber was a union officer when she made the decision.⁴¹ She looked at no per-

³⁸ As discussed, Andrascik’s various changes in her discussion about Weber’s screening do not inspire confidence in the accuracy of her testimony. Moreover, as to the reference issue, McMahon corroborated only certain portions of Andrascik’s testimony, and indeed, contradicted certain matters, as discussed in the text. Overall, Andrascik’s demeanor did not support her credibility. She appeared wary and uncertain. Many witnesses are, and it is not necessarily a negative in terms of credibility. But in this case, Andrascik’s demeanor, compounded with the testimonial missteps, lead me to believe her testimony was not accurate.

³⁹ McMahon did not report having discussed Weber’s attendance with Andrascik. Indeed, attendance came up only tangentially in McMahon’s testimony, specifically with regard to Weber asking for time off for union business at Laurel Crest, and the suggestion was that there was no problem. McMahon stated that “my point was to . . . run my department, and if she needed that time, I knew that I was asked to give it or not give it, and if I could run my department, and that’s what I did.” In other words McMahon granted Weber time off when McMahon thought, operationally, the department could afford to, and didn’t when it could not. There is no indication in McMahon’s statements of an attendance problem.

⁴⁰ Recall that Lengle made such a posthiring call to Knee and obtained a negative reference on Billy, that was, in all likelihood, later attributed to Nelen.

⁴¹ Recall that Weber’s undisputed testimony was that in 2003, when Grane was previously attempting to purchase the facility, Weber met

sonnel records or files in making her decision. As with Lengle's hiring process, Grane produced no notes or written documents of any kind that related to Andrascik's hiring process. She took notes of the references she allegedly secured from McMahon, no notes of her observations, and no notes of the experience of the employees that she was interested in.

As with Lengle and the other discriminatees, Andrascik was clear that Weber's annual evaluations and personnel file were not consulted in making the hiring decision. They were, however, entered into evidence on grounds that they could corroborate or undercut various testimony.

Notably, the evaluations from 2008–2009, and 2007–2008, which were the evaluations conducted during and covering the time period McMahon was at Laurel Crest, contain no negative comments at all about Weber. On the other hand, earlier evaluations, made prior to McMahon's employment with Laurel Crest contain mostly positive comments but also some negative comments, which appear to track the reference Andrascik attributed to McMahon. Thus, the 2003–2004 evaluation stated that "improvement is needed in punctuality and call offs" and that she needed to be a "team player." The 2004–2005 evaluation stated that Weber "sometimes can be overpowering—at times abrupt. Needs to watch how she states things." "Can be abrupt to staff." In 2005–2006, the evaluation (amidst many positive comments) mentioned that "Sherry could improve on her interpersonal relations, [at] times she comes across as being abrupt." The 2006–2007 evaluation stated that Weber needed to work on "sensitivity toward others" and mentioned "a tendency to become short w/ your co-workers."

It is notable that Andrascik attributed to McMahon comments about Weber found in the earlier evaluations—for instance, about attendance—that McMahon did not endorse, and that occurred before McMahon's employment. And, it is notable, that McMahon's "team player" comment is in the evaluations, but only during a period some years before McMahon came to Laurel Crest. Either the more recent evaluations are inaccurate, or McMahon and Andrascik imbibed the substance of the earlier evaluations in some unexplained way.

Analysis

A. Wright Line Provides the Appropriate Analytical Framework

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in concerted or union activities. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39–40 (1954); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). The discharge of an em-

ployee or the refusal to hire an employee applicant that is motivated by his or her union activities is archetypal unlawful discrimination under Section 8(a)(3). Actual discouragement of union activity or membership by the ill-motivated discrimination need not be proven. It is enough that "discouragement can be reasonably inferred from the nature of the discrimination." *Radio Officers' Union*, 347 U.S. at 51, citing *Republic Aviation v. NLRB*, 324 U.S. 793, 798, 800 (1945). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

The Supreme Court-approved analysis in cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Planned Building Services*, 347 NLRB 670 (2006), the Board held that *Wright Line* provides the appropriate framework for deciding whether a successor employer violated Section 8(a)(3) by refusing to hire predecessor employees. This includes cases, such as this one, where many of the predecessor employees were hired, but the General Counsel alleges that the successor employer unlawfully discriminated by refusing to hire certain union activists. *TCB Systems*, 355 NLRB No. 162 (2010).

"To establish a violation of Section 8(a)(3) under *Wright Line* where a refusal to hire is alleged in the successorship context, the General Counsel has the burden of showing that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. Once the General Counsel has made this showing, the burden shifts to the employer to demonstrate that it would not have hired the predecessor's employees even in the absence of its unlawful motive." *Downtown Hartford YMCA*, 349 NLRB 960 (2007).

The General Counsel's proof of unlawful motivation for the refusal to hire can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Of significance here, "a pretextual explanation of the employer's action will support an inference of discriminatory motivation." *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 3–4 (2010); *El Paso Electric Co.*, 355 NLRB No. 71, slip op. 1 fn. 3 (2010) ("we rely only on the judge's finding that the Respondent's reasons for its actions were pretextual, raising an inference of discriminatory motive and negating the Respondent's rebuttal argument that it would have taken the same action in the absence of [the employee's] protected activities"); *All Pro Vending*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an

with Andrascik, in her capacity as a union official, and they discussed labor management issues. It is also clear that McMahon, as Weber's former supervisor, who used to excuse her for union business, knew of Weber's union activity.

unlawful motive.”) (internal quotation omitted); *Whitesville Mill Service*, 307 NLRB 937 (1992) (“we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility”), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Indeed, even something short of a pretext: merely the failure to “substantiate [an] asserted rationale for not hiring [alleged discriminatees], coupled with evidence undercutting th[e] rationale,” will support a finding of unlawful motivation. *TCB Systems, Inc.*, 355 NLRB No. 162, slip op. at 3 (2010).

Notably where “the evidence establishes that the reasons given for the Respondent’s action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Rood Trucking*, 342 NLRB at 898, quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *El Paso Electric Co.*, supra.

B. Application of *Wright Line* in This Case

In a *Wright Line* case, the General Counsel’s initial burden is to establish that antiunion animus was a motive for the adverse employment. “The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.” *Kentucky River Medical Center*, supra, slip op. at 2 fn. 5.

1. Union activity

Here the employees’ union activities and inclinations are well established in the record, and support the contention that an employer with antiunion animus and intentions would have motive to take action against these applicants. Four of the five alleged discriminatees were union officers with the Laborers at Laurel Crest, and each held different positions over the years. Some of them had conflict with Grane going back to 2003, when Grane managed and first attempted to purchase Laurel Crest. They were active in the Laborers activity around the 2009 sale. They were union officers at the time they applied with Grane. Similarly, Lamer played a key role for SEIU in the public campaign over the sale, as well as traveling to Grane headquarters in an effort to confront Oddo.

Grane would stop the inquiry here, contending (R. Br. at 33–34) there can be no 8(a)(3) violation for its failure to hire Billy, Hagerich, Weber or Mulhearn, as a consequence of their activities for Local 1305 because, argues Grane, the employees’ union activities while employed at Laurel Crest were not protected by the Act. Grane contends that as a representative of employees of a public employer, Local 1305 was not a “labor organization” under the Act. In Grane’s view (R. Br. at 35), “it is not an 8(a)(3) violation to refuse to hire them because they held those positions.”

This is a meritless contention. At the latest, once the discriminatees applied for work with Grane, they became employees under the Act (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)) and protected by the Act from antiunion discrimination. They were still union officers at the time they became appli-

cants, so their union activity of holding union office was protected activity under the Act at that point. But more generally, it is important to point out that whether or not the prior union activity that makes an employee a target for an employer’s antiunion animus was union activity governed by the Act is an irrelevancy. The relevant issue is Grane’s motive for not hiring these (statutory) employee applicants. If the discriminatory refusal to hire was motivated by antiunion concerns, the antecedent legal regime under which the employees displayed their union inclinations is not important. The ultimate issue under the Act is whether “encouragement or discouragement [of union activity] can be reasonably inferred from the nature of the discrimination.” *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 51 (1954), citing *Republic Aviation v. NLRB*, 324 U.S. 793, 798, 800 (1945). The strength of that inference is not reduced one iota on grounds that the employer’s antiunion discrimination was directed at applicants because they were union officers of a union that previously represented employees under a state law regime. Absolutely no rational Cambria Care employee (or applicant) contemplating union activity would be less likely to be discouraged based on the distinction drawn by Respondent. (Section 8(a)(3) of the Act prohibits discrimination “to encourage or discourage membership in any labor organization,” long understood to include encouraging or discouraging union or protected activities. *Radio Officers’ Union*, 347 U.S. at 39–40; *Erie Resistor*, 373 U.S. at 233.)

2. Respondent’s knowledge of union activity

Notwithstanding the denial by Lenge and Andrascik of their personal knowledge of the discriminatees’ union activity, I conclude that Respondent knew of the union activities of these discriminatees. The evidence is strong, albeit indirect. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007) (“The General Counsel need not prove knowledge by direct evidence; knowledge may be reasonably inferred or imputed”), *enfd.* in relevant part 570 F.3d 354 (D.C. Cir. 2009).

The names and positions of the union officers were posted in two different bulletin boards within the facility. This includes every discriminatee with the exception of Lamer. These items were posted through the end of December 2009, when Cambria Care assumed operations of the facility. By all testimony, Grane representatives (including Lenge and Andrascik) were frequently at the facility particularly from late October through the end of December, when they were making plans to assume operations from the county and were actively heading up the hiring process. If Grane representatives did not know who the union officers were, then the whole concept of posting notices must be reconsidered. *Windsor Convalescent Center*, supra at 983 fn. 36 (display of steward certificates on union bulletin board when successor toured plant before assuming operations supports finding that successor had knowledge of stewards’ activities). Grane representatives would have to be indifferent to the labor relations at the facility they were taking over in order not to make note of the posted names of the union representatives. They clearly were not. Indeed, the postings were gone *one day* after Grane/Cambria Care assumed operations, indicating Grane/Cambria Care was not indifferent to—or un-

aware of—the postings. By itself, this is enough to establish Respondent’s knowledge of the officer’s union activity.

But it is also notable that Grane was not in the position of a wholly new employer encountering Laurel Crest for the first time. It had managed, and almost purchased the facility in 2003, coming close enough to consummating the purchase that it held meetings with employees and made job offers to employees. Lenge, for one, recalled that she was at the facility on a daily basis during this period. At that time, the Union actively opposed the sale, with public actions, and legal action seeking to enjoin the sale. Mulhearn, for one, recalled having significant interaction with Grane representatives during this period.

In addition, as is evident from the purchase agreement, and from the correspondence between the Laborers and Grane, Grane was aware of the existence of the unions at Laurel Crest. Grane received a copy of the expired Local 1305 agreement, which undoubtedly was signed by at least some of the officers and discriminatees. Mulhearn was the Union’s business agent in 2009. He is copied, with his title, on correspondence dated September 11, 2009, sent by the Union’s counsel to Grane, and replied to by Grane’s counsel. Grane knew Mulhearn.

In the case of one of the discriminatees, Billy, his union sympathies and activities were very much brought to the attention of Grane representative Wendy McDonald in 2003, when she angrily terminated a group interview after Billy voiced his view that the collective-bargaining agreement should be honored when Grane took over. Billy was then prevented from completing the hiring physical by McDonald. McDonald remains with Grane in 2009 and 2010, and was active in the Cambria Care operations. Grane knew Billy.

Weber also had interaction related to the Union in 2003 with Grane representatives. At that time she was the business manager for the Union and in that capacity met with a number of Grane officials, including, Andrascik, to discuss union-related issues. These Grane officials took the position that Grane was not obligated to recognize the collective-bargaining agreement.⁴² Moreover, McMahan, who was a supervisor for Laurel Crest, hired as a department head by Cambria Care, and allegedly relied upon by Grane for information on Weber, knew that Weber was a union representative and that, with McMahan’s concurrence, Weber took off work for union duties. Grane knew Weber.

Hagerich was the Local’s president from 2005 through 2009. She was involved with the Union’s 2009 activities related to the sale of Laurel Crest. As such, as noted, her name and position with the Union was posted on two bulletin boards in the facility. In conjunction with her fall 2009 activities her photograph was on the front page of the area newspaper and she was on local TV news reports. The Grane employees who adminis-

tered her physical were former Laurel Crest employees, at least one of whom knew Hagerich when she was active in the Union and on the executive board of the Union. Grane knew Hagerich.

Lamer, who was active in public union activities held in conjunction with the proposed sale of Laurel Crest, was featured in newspaper and TV coverage of the Union’s events. More pointedly, Lamer traveled to Pittsburgh to Grane headquarters with an SEIU organizer for the purpose of talking with Oddo. They arrived unannounced at Grane headquarters and were not able to see Oddo. But the credited evidence is that their names were relayed upstairs and probably written down for Oddo. Lamer was at Grane headquarters on union business, with a union representative, and this information was provided to Grane. Grane knew Lamer.

The indirect and circumstantial evidence strongly supports the conclusion that at least some Grane representatives were aware of the union activity of each discriminatee. These representatives’ knowledge is appropriately imputed to Grane. *State Plaza*, 347 NLRB 755, 756 (2006) (supervisor’s knowledge of union activity appropriately imputed to employer); *Dobbs International Services*, 335 NLRB 972, 973 (2001). I find that Grane was aware of the union activities position of each alleged discriminatee.

3. Antiunion animus and motive

In terms of the General Counsel’s initial burden to show that antiunion animus contributed to the decision not to hire the discriminatees, the first factor is how few of the Laborers local union officers were hired. As discussed, even assuming that all Laborers-represented employees applied, over 80 percent of them were hired by Cambria Care. But among local union officers, the business representative, the president, the vice president, and the secretary-treasurer were not hired. The evidence suggests a newly (as in December) appointed executive board member was hired by Cambria Care as well as two shop stewards. But the leadership of the Union was—completely disproportionately to the high rate of hiring of the general workforce—rejected for employment. It could be coincidence. It could be that the Local’s officers are below par (not that there is any evidence of that, or any credible evidence that Grane thought that). The other inference is that it was discrimination. The grossly disproportionate refusal to hire these local union officers is evidence in support of the General Counsel’s affirmative case that discrimination played some role in the failure to hire the discriminatees. *Holding Co.*, 231 NLRB 383, 390 (1977) (disproportionate number of union adherents discharged is evidence of discrimination); *American Wire Products*, 313 NLRB 989, 994 (1994) (“the Board and the courts have long held that, absent a reasonable explanation, the disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination”) (and cases cited therein); *Baker Mfg.*, 269 NLRB 794, 816 (1984) (“Such a lopsided percentage favoring layoff/termination of only union supporters is indicative of an unlawful motivation and has been so recognized by the Board and the courts”), *enfd.* in relevant part 759 F.2d 1219 (5th Cir. 1985).

⁴² As noted Weber’s uncontradicted testimony on this subject is credited. I believe Weber’s 2003 interactions with Andrascik and other Grane representatives brought Weber to the attention of Grane, and I specifically discredit Andrascik’s assertion that she did not know Weber was a union official. This discrediting is based on Weber’s testimony, the objective evidence that would have called Weber’s status to Andrascik’s attention, and my lack of confidence in Andrascik’s testimony generally, discussed above.

With nothing else, I would find that this failure hire the entire officer corps of the Local would satisfy the General Counsel's initial case and shift the burden to Respondent to persuade that it would have taken the same action in the absence of union activity.

But there is more, and it is very powerful evidence under the circumstances. In her case-in-chief, counsel for the General Counsel adduced compelling evidence that Respondent's explanation for its decision not to hire the discriminatees was a pretext. As discussed, above, I have found that Lengle's explanation that Grane failed to hire the discriminatees as a consequence of its nondiscriminatory reference-check protocol was, indeed, a falsehood. The process described by Lengle, in particular, did not occur, and was not the basis for the decision not to hire any of the discriminatees.

This explanation constituted an attempt—seized on as early as January 2010, when Lengle offered her affidavits to the Board—to manufacture an explanation to the questions being asked by a federal agency about the failure to hire certain union activists. In short, Lengle tried to pin it on Nelen, who was no longer on the scene, having moved on to other employment. However, this was a ruse designed to conceal the true motive for Respondent's actions. I infer that there is some other motive for the refusals to hire, but one the employer desires to conceal. Under the circumstances, I infer that it is the unlawful motive alleged in the trial: the alleged unlawful discriminatory motive. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995). As noted above, “a pretextual explanation of the employer's action will support an inference of discriminatory motivation.” *Kentucky River Medical Center*, supra; *El Paso Electric Co.*, supra; *All Pro Vending*, supra; *Rood Trucking Co.*, supra; *Whitesville Mill Service*, supra.

Accordingly, with regard to those Local 1305 officials rejected by Lengle (Mulhearn, Billy, and Hagerich), the government has amply met its *Wright Line* burden and proven that antiunion motives played a motivating role in the decision not to hire them. Given that Respondent's account of its hiring decisions is a pretext, this “defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities.” *Rood Trucking Co.*, supra at 898; *La Gloria Oil & Gas*, 337 NLRB 1120, 1124 (2002). “This is because where ‘the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.’” *Rood Trucking*, supra, citing, *Golden State Foods*, 340 NLRB 382, 385 (2003). Respondent's refusal to hire Mulhearn, Hagerich, and Billy violated the Act as alleged.

With regard to the refusal to hire Weber, I am less certain that Andrascik's account was *wholly* pretextual. On balance, I believe, and find, that it was. But I am less certain of this conclusion than I am with regard to the rejections for which Lengle took responsibility. At least in the case of Weber, McMahon tentatively corroborated part of Andrascik's story. Still, as to the failure to hire Weber, I am left with the following regarding Respondent's contention.

Andrascik's testimony—all the misstatements, and confusion around whether Weber was screened out as part of the health screening process—was suspect, as discussed extensively above. Her testimony cannot be credited. Andrascik, without rationale, interviewed some of the applicants, but not Weber, about their experience. She claimed to have received, but did not receive, according to McMahon, a negative report from McMahon on Weber's attendance. She claimed to have sought a reference from McMahon on all the applicants in the business office, but McMahon's best recollection is that she only provided comments to Andrascik as to Weber only—not as to the other applicants—and even the comments on Weber were offered, “pretty much” in passing. These references are at the core of Respondent's defense. Yet, in McMahon's telling they amounted to a fleeting and seemingly inconsequential passing remark in a phone call about one employee only—the alleged discriminatee. Indeed, initially questioned about whether she had been asked to give an assessment of employees' work performance, McMahon answered, essentially, no, saying she had been asked “who did what in our department” and “what their specific job duties were.” Reluctantly, when pressed, she then endorsed making comments to Andrascik about Weber's relations and communications with others. The timing of this call from Andrascik to McMahon—whether before the hiring decisions were made or, like the call placed by Lengle to Knee, after the hiring decisions had already been made—is not discernable from the record. No records, no notes—not one piece of paper—corroborates the process Andrascik claims was the basis for her decision.⁴³ Annual evaluations of Weber's work (that no one relied upon) provide no basis for McMahon's (or Andrascik's version of McMahon's) reference for the period in which McMahon was at the facility. However, earlier evaluations (developed in years before McMahon was there) seem to echo the negative reference that Andrascik says she received in 2009. Then there is Andrascik's negative personal “observations” of Weber, allegedly gleaned sometime in December 2009. Of course, Weber was out on leave from December 2 until approximately December 16. The hiring decisions were announced December 21. Given Andrascik's demeanor, and testimonial confusion, I am not inclined to credit as true these “observations,” which, of course, are uncorroborated, even by a single contemporaneous note.

My conclusion is that the preponderance of evidence supports the conclusion that Respondent's claim about the reason it did not hire Weber is a pretext, as Lengle's explanation clearly was. But even assuming, arguendo, that the allegations regarding Weber are appropriately viewed as a dual motive and not a pretext case, then I find that Grane has failed to carry its burden of persuading that it would have refused to hire Weber even in the absence of her union activity. In other words, pursuant to *Wright Line*, I have already determined that the unaccounted

⁴³ As noted, we know that a written account of references for some employees does exist, as their references are contained in their application materials. These forms show the date the reference was provided, which Grane representative sought the reference, and from whom it was secured. No such documents were provided for Weber, or, for any of the discriminatees.

for disproportionate failure to hire any of the chief Laborers officeholders provides evidence that antiunion animus played some role in the decision not to hire Weber. If Grane also had a legitimate motive for failing to hire Weber (such as the comments procured from McMahon) I find that Grane has not shown that it would have acted on the legitimate motive and not hired Weber in the absence of Weber's union activity. Grane has provided a dubious and unconvincing account of its actions with regard to Weber. The evidence does not persuade that Grane would have undertaken the same hiring decision had Weber not been a union officer.

Analysis of the refusal to hire Lamer is similar, but slightly different. Lamer was not a union officer. There is no evidence that she was a victim of a disproportionate (much less the wildly disproportionate) refusal-to-hire results documented for Laborers officers. Yet, the violation of the Act I have found for refusing to hire four Laborers office offers relevant evidence of animus in hiring decisions when considering the failure to hire her. While the animus inherent in the refusal to hire the Laborers is relevant, if there were nothing else, that would be a weaker case for the General Counsel in terms of Lamer.

However, just as much as in the case of the Laborers discriminatees, the inference of antiunion animus gains heft from the exposure of Respondent's pretextual fabricated "explanation" for the decision not to hire Lamer. Lenge claimed that in the reference process, Nelen told her that Lamer had poor work performance, and that these discussions were the basis for not hiring Lamer. For reasons discussed above, I have discredited this testimony, and credited Nelen's testimony that she "definitely" did not speak with Lenge about Lamer, an employee that she had little chance to observe (they worked different shifts), whom she did not remember, and appears not to have known. Lamer's evaluations (which, Respondent, admittedly, did not review in making the hiring decisions), provide no support for a claim by anyone that Lamer had poor work performance.

This makes the General Counsel's case. And it stands un rebutted in the record. Respondent offers absolutely no rationale for its decision not to hire Lamer, except the pretextual one that it invented: that Lenge relied upon Nelen, in comments made as part of a reference process engaged in between Lenge and Nelen. As I have found, Nelen did not provide a reference as to Lamer, and Nelen and Lenge did not undertake the reference process described by Lenge. Grane's articulation of this false explanation for refusing to hire Lamer raises an inference of discriminatory motive. *El Paso Electric Co.*, 355 NLRB No. 71, slip op. 1 fn. 3 (2010) (in finding a violation, "we rely only on the judge's finding that the Respondent's reasons for its actions were pretextual, raising an inference of discriminatory motive"); *Whitesville Mill Service*, 307 NLRB 937 (1992) ("we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility"). In other words, Respondent's reliance on a pretextual explanation for not hiring Lamer leads me to believe that Grane is concealing the true motive, which I infer to be an unlawful discriminatory one. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Kentucky*

River Medical Center, supra; *All Pro Vending*, supra; *Rood Trucking Co.*, supra.

Accordingly, Respondent's refusal to hire Lamer violates the Act as alleged.

Part III

Single-Employer Allegations

A. Grane's Cession of Cambria Care; Representations to the State; Preparation for the Transfer to Cambria Care

Some of the relationship between Grane and Cambria Care has already been discussed as part of the consideration of the other aspects of these cases. But the record reveals significant additional interrelationship.

Grane is owned by Richard A. Graciano, Jr., David F. Graciano, Jeffrey J. Graciano, (all brothers) and Ross J. Nese. Richard Graciano is the CEO and chairman of Grane. Nese is the president of Grane. Oddo is a vice president. Oddo also serves as the chief operating officer, and has done so since 1992.⁴⁴ Herb Hennell is a vice president for reimbursement. David J. Kearney is Grane's CFO and treasurer. Theresa Creagh is the general counsel and secretary. Grane's offices are located at 209 Sigma Drive in Pittsburgh, Pennsylvania.

Cambria Care is a limited liability corporation, formed October 5, 2009,⁴⁵ for the purpose of operating Laurel Crest. As noted, Grane Associates owns 99.5 percent of Cambria Care. Trebro, Inc. owns 0.5 percent. Nese is the President of Trebro, Inc. Richard Graciano is the Chairman and CEO of Grane Associates.

Cambria Care's offices are, like Grane's, at 209 Sigma Drive, in Pittsburgh. Richard A. Graciano Jr., is the CEO and chairman of Cambria Care. Nese is the president of Cambria Care. Oddo is a vice president. Kearney is vice president and treasurer. Hennell is vice president. Creagh is the general counsel and secretary. Jeffrey Brown is a vice president.

Oddo, Nese, Kearney and Hennell are authorized to write checks on both Cambria Care and Grane bank accounts.

As referenced, above, on or about September 11, 2009, Grane entered into an asset purchase agreement with Cambria County for the purchase of the Laurel Crest facility, to be effective January 1, 2010. The purchase was financed with a revolving credit bank loan of (up to) \$20 million dollars made jointly to borrowers Ebensburg Associates, Cambria Care, Grane, PAS, Pace Healthcare and Trade Services Inc. This loan was guaranteed by the Graciano brothers and Nese individually (and spouses), as well as by a score of entities (some, identified oth-

⁴⁴ According to the minutes of the 2009 board of directors, Oddo was elected vice president and Theresa Creagh was elected general counsel and secretary of Grane. However, in a December 2009 bank signature form Oddo signs as vice president and secretary.

⁴⁵ A Certificate of Organization was filed with the Pennsylvania Department of State on October 5, 2009, intended to be effective "upon filing." A signature card for a bank account in Cambria Care's name was executed December 10, 2009. A consent of members in lieu of organizational meeting document was executed November 24, 2009, intended to be effective as if approved at a members' meeting November 1, 2009. An operating agreement for Cambria Care was entered into by the members November 1, 2009.

erwise in the record as “Grane entities,” such as Grane Supply and Quality Nursing Solutions), for which Richard Graciano serves as the CEO. The loan was secured by a mortgage on the property executed by Richard Graciano, on behalf of Ebensburg Associates, in favor of the bank. The facility property is owned by Ebensburg Associates. As stated in the license application information submitted to the state, Cambria Care “will lease the facility from Ebensburg Associates, LLC[,] who will be the owner of the facility and is related through common ownership and control.” Ebensburg Associates, which has the same corporate address as Cambria Care (and as Grane, and Grane Associates) has the identical ownership (i.e., 99.5 percent Grane Associates) as Cambria Care.

Ebensburg Associates and Cambria Care are parties to a lease, under which Ebensburg Associates is the “lessor” and the lease requires payment of rent by Cambria Care to Ebensburg Associates. That rent, set forth in section 1.3 of the lease, provides for payment of a base rent (which includes but is not limited to the mortgage principal and interest payment, a reserve, taxes and interest, and insurance).

More unusually, the lease *also* requires payment of “additional rent” which is defined as the “positive difference, if any, between (a) [Cambria Care’s] operating and non-operating revenue and (b) [Cambria Care’s] operating and non-operating expenses.” In other words, Ebensburg Associates receives all of Cambria Care’s profit, as that term is most basically understood (and as defined by Cambria Care’s administrator, Owen Larkin, at the hearing). The record does not speak to Ebensburg Associate’s agreements with its 99.5 percent owner Grane Associates, other than the acknowledgment that, as referenced above, that Ebensburg Associates is related through common ownership and control.

In conjunction with the application filed with the State of Pennsylvania for a license to operate the facility, Respondent filed papers with the state providing requested information (GC Exh. 38). The information report stated that Graciano, Nese, Kearney, Creagh, Hennell and Brown are “responsible for the overall business direction of [Cambria Care].” The license application also explains that,

Grane Healthcare Company manages the operations of all of the Grane related nursing facilities along with four personal care facilities each of which are attached to one of the nursing facilities.

This document lists the Grane-related facilities and states that they are under “common management, ownership and/or control.”

The license application submission also states:

Adapting to the changing healthcare environment is an ongoing concern for Grane and its facilities in order to meet the constantly changing needs of their residents. Grane will work with the existing staff in order to improve the quality of care at the facility and to correct any existing deficiencies. Grane will also look at hiring outside personnel to improve the number, quality, and experience of the staff in order to facilitate the correction of any deficiencies and improve the quality and effectiveness of care.

Furthermore, Grane’s management team will continue to evaluate the primary service area in order to indentify any services that may not be fully satisfied by the resources currently available. The team will then look at developing programs that will assist in meeting those community needs. The management team will also continue to evaluate other programs that may assist residents and make the facility a more comfortable home, assist with resident rehabilitation, and ease their adjustment to the new environment.

.....

The Center’s staff will be evaluated and staffing at the facility will be adjusted appropriately as the resident population and acuity changes. On an on-going basis Grane will be looking to recruit new staff from outside of the facility that will provide additional knowledge and experience to that of the existing staff.

Additionally, as the resident population changes staff will be added in a manner which will allow each new employee, whether professional or non-professional, time to orientate to the facility and the specific needs of the residents.

The appropriate staffing will also be adjusted as new programs are developed and added to meet the needs of the residents and assist them in their rehabilitation and recovery.

.....

The operation of the facility will be evaluated by the Administrator, Grane’s management team (including Quality Assurance, DON, RNAC, Dietary Director, Therapy Director, etc), and the existing staff of the facility and changes implemented as necessary.

On an on-going basis, Grane’s management team is continually looking for, analyzing and discussing new approaches to the delivery of services. Grane implements those changes that the facility and medical staff agree will be beneficial to the residents.

The license application responds to questions asking the “Applicant’s previous experience in operating health care facilities inside or outside Pennsylvania.” These questions are answered by Grane. The first subparagraph question in this section asks for a list of “[t]he type of health care facilities currently or previously owned, managed or operated by Applicant.” The answer lists eight Grane-related health care facilities and then contains the following statement:

Grane Healthcare has in the past managed Good Samaritan Nursing Care Center located in Johnstown, PA. Grane has also managed the Cambria County nursing facility, Laurel Crest Nursing & Rehabilitation Center in Ebensburg, from January 2003 through June 2003 and is in the final stages of the acquisition of this facility which is expected to occur January 1, 2010.

The answer goes on to provide information about other facilities that Grane has managed and, in response to further questions, identifies the “four Grane-related facilities” that “have had actions taken against them by a state agency.”

The license application lists Owen Larkin, Cambria Care's administrator, as the individual appointed to act on the applicant's behalf in the overall management and operation of the facility, and states that he will have responsibility for day-to-day operations and will provide immediate direction and control over the delivery of health care services to the individuals served by the facility. In addition to listing Larkin, this section also states "See attachment C," although the attachment is not attached to the copy of the application entered into evidence.

As discussed, above, the record is clear that Grane, and its spinoff PAS,⁴⁶ were responsible for the staffing of Cambria Care and for making sure that the facility was ready to operate as of the January 1, 2010 transfer of operations from Laurel Crest. As referenced, the record contains a number of assertions from Grane personnel that the assumption of the operation of the Laurel Crest facility on January 1, 2010, including the hiring of employees in December 2009, proceeded in a manner standard and familiar to Grane, which, as noted, manages and owns the operating companies of numerous health care facilities in Pennsylvania.

Oddo, the COO of Grane, and a vice president of Cambria Care as of January 1, 2010, was the "boss." He assigned Lengle, Grane's QI department head, to lead the hiring and processing of applicants from Laurel Crest to work at the Grane-managed Cambria Care. The QI department is composed of clinicians who, as Oddo explained it, "teach, orient, write policy" for "[e]mployees of the various operating entities that [Grane] manages," including the Cambria Care Center in Ebensburg. Lengle explained that "[w]e provide service to the nursing departments in the facilities in which Grane Healthcare manages, includ[ing] survey compliance, risk management, anything that the facilities may request."

Lengle was familiar with the task of hiring employees and arranging for the assumption of operations at Cambria Care from similar work performed during other Grane purchases and she did not need instructions from Oddo on how to undertake this task.

Oddo was personally involved to some extent: he was primarily responsible for setting the initial wages at Cambria Care. He interviewed some of the top management applicants, and hired the administrator, Owen Larkin. A variety of additional Grane consultants helped to staff the facility. Oddo developed the job description used for Larkin's position, using "something that I've done in the past," that was similar to job descriptions used for other facilities that Grane manages. He also interviewed Rebecca Nelen to be director of nursing, but she did not accept the offer. In the end, Lengle interviewed the successful candidates for DON and assistant DON, and Oddo simply confirmed her choice. Oddo also interviewed a registered nurse assessment coordinator, an admissions case management employee, and a social worker.

The QI Staff, headed by Lengle, was responsible for deciding which of the Laurel Crest employees would be offered nurse's aides, and LPN positions. This was also the case for

the hiring of staff nurses, charge nurses, and nurse supervisors. Housekeeping employees were selected by Wendy McDonald of Grane. Candidates for positions in the dietary department were selected "by our consultant dietitian," Chris Mazilak. Business office candidates were selected by Vivian Andrascik, as discussed extensively, above. At Oddo's request, maintenance candidates were recommended by Tom Tomassey who runs Trade Construction. (Oddo could not recall to whom those recommendations were made).⁴⁷

Ultimately, the Grane QI nurses made offers of employment to Laurel Crest staff to work at the facility with Cambria Care as of January 1. They established schedules for all shifts to be used upon the transfer to Cambria Care. Oddo met with the Grane QI nurses casually during this period to see how the hiring and scheduling process was coming along.

The offer-of-employment letter provided to employees states that questions could be answered by Jim Woodley, a Grane HR consultant, and the letter provided his phone number and extension.

Owen Larkin, Cambria Care's administrator, was hired as the administrator by Oddo in December 2009. He was the chief Cambria Care official on site at the facility as of January 1, 2010.

Larkin reports to Oddo and Oddo has the authority to fire him. According to Larkin, when he was hired, Oddo never discussed anything with him about which entity would operate Cambria Care, or own the building. There was no discussion about the management agreement between Cambria Care and Grane, discussed below, that formalizes Grane's management role at Cambria Care. At the hiring meeting with Oddo, there was no discussion about whether Grane or some other entity would operate the facility.

Even before January, working from his home Larkin reviewed vendor contracts, verified computer inventory, and took questions regarding computers that needed to be used by Cambria Care. During this period of time Lengle called to ask his opinion regarding department heads, but otherwise he was uninvolved in hiring decisions regarding any employees or in decisions about the wages and benefits to be offered to Cambria Care employees.

B. The Role of Grane in Cambria Care's Affairs After January 1, 2010

Larkin testified that as of January 1, 2010, he became responsible as administrator for the day-to-day operation of Cambria Care, and, ultimately, responsible for hiring decisions. At the hearing, Larkin and Respondent were intent on offering testimony that showed Larkin, and Cambria Care personnel working under him, in charge of the facility. There is no denying, however, the sustained and ubiquitous involvement of Grane individuals and entities in the operations of the Cambria Care facility.

As stated in the license application provided to the Commonwealth, Grane manages the operations "of all of the Grane

⁴⁶ As noted, PSA's CEO and chairman is Richard Graciano; its president is Ross Nese; its vice president and treasurer is David J. Kearney; and its general counsel and secretary is Theresa Creagh.

⁴⁷ Tomassey introduced Larkin to Trade Facility Services, listed on Grane and Cambria Care's financials as an affiliated company. Trade Facility Services performs construction work at Cambria Care.

related nursing facilities.” This modus operandi is in place at the Cambria Care facility. The arrangement is formalized at Cambria Care (and at other Grane-purchased facilities) through a management agreement that retains Grane to manage the facility. The management agreement at Cambria Care was entered into December 5, 2009, effective January 1, 2010, and is between Grane and Cambria Care. Pursuant to the management agreement, Cambria Care retains Grane to “manage the business and operations of the Facility.” The agreement designates Grane as the “Manager” and Cambria Care as the “Operator.” The agreement was executed by Richard A. Graciano, Jr. for Cambria Care and Ross J. Nese for Grane. As discussed above, both are top officials of Grane and of Cambria Care. Graciano is the CEO and chairman of Grane and of Cambria Care. Nese is the president of Grane and of Cambria Care.

Oddo testified that the management agreement was similar in content to the management agreements used at other Grane facilities with which he has worked. As far as he knows, there were no negotiations involved with respect to its adoption. Someone, Oddo believes it was not he, provided Larkin with a copy of the management agreement in January 2010. Larkin has never attempted to change the management agreement, or negotiate over it. The management fee is calculated based on the agreement and set forth in the financial statements provided to him monthly by consultants Andrascik and O’Brien. No one at Cambria Care calculates the management fee to ensure that it is accurate.

The management agreement appears to be the formal basis justifying the presence and utilization for a coterie of Grane-affiliated individuals and entities working at and on behalf of Cambria Care. Despite testimony quite obviously intended to emphasize his personal authority over the facility, Larkin and other witnesses described a management operation that relies heavily on assistance and support from Grane (and Grane-affiliated personnel).

Through the course of his testimony Larkin identified numerous different consultants who assisted him at Cambria Care. Larkin did not hire any of them. He testified that “I was informed who my consultants were, and that’s who I call.” His “consulting attorney” is Terry Creagh. His maintenance and construction consultant is Tom Tomassey, who “introduced” Larkin to Trade Facility Services, a “Grane entity” that performs construction-related maintenance for the facility. Wendy McDonald of Grane is his “laundry consultant.” Mark Fox, a Grane VP, is his “marketing and business development consultant.” His accounting consultant is Lisa O’Brien, along with Andrascik, Trudy Lytle, and “a gentleman named Brian.” Jim Woodley is his HR consultant. There is a consultant pharmacist from Grane Supply, another commonly owned Grane entity and the pharmacy service brought in to be Cambria Care’s pharmaceutical supplier. Larkin’s administrator’s consultant is Becky Jobe. Larkin usually testified that he did not know by whom any of these consultants were employed, although he referred generally to many of them as “my consultants from Grane Healthcare.” In fact, each is employed by an entity controlled by Grane (or Grane Associates). Larkin was vague about whether there were contracts with each of these entities,

or what the contracts looked like. For the most part he did not know.

After the assumption of Laurel Crest by Cambria Care on January 1, 2010, Grane consultants and employees continued to provide their services to Cambria Care. They are “very frequently” at the facility as of the date of the hearing, although Oddo claims this will decrease over time. These include Grane QI department employees, PAS administrative personnel, financial personnel and other consultants. Lengle estimated that for the first two or three months of 2010, she was at Cambria Care five days a week, and then approximately two or three days a week since then. Other QI nurses also continued working at Cambria Care in 2010 as well. No time records are kept of the Grane employees/consultants work at Cambria Care.

Prior to January 1, 2010, Grane decided to implement a new software program at the facility to allow it to track accounts payable and receivable, as well as resident’s trust accounts. The implementation of this new program continued into March 2010.

According to Oddo, when the Grane personnel work at Cambria Care they are not working under Larkin and do not have to report any of their work to Larkin. According to Lengle, QI nurses often let Larkin know at the end of the day “what we had accomplished, and where our progress was, was there anything else” and Lengle would ask Larkin “was there anything he needed me to do for him.” Larkin testified that he decides what tasks the QI nurses perform each day. However, Lengle testified that she did not receive any documents or paperwork from Larkin during her time at Cambria Care. In 2010, Lengle and her staff spent time training nursing staff in policies adopted by Cambria care, policies that Lengle had provided to the Cambria Care DON. A similar process occurred with regards to dietary staff. Lengle testified that her duties included providing updated “policies, procedures, educational materials, and articles that we wanted them to read.” Lengle did not consult with anyone, such as Larkin, before providing these materials to the Cambria Care managers and/or staff. Lengle also engaged in training nursing supervisors at Cambria Care. She would check with Larkin or the DON Daisley to schedule these.

Larkin described Lengle and her staff as consulting with him regarding oversight of the clinical departments in the building. “They do rounds, and observe the staff, and then come to me and make recommendations about things they should or should not be doing. . . . [T]hey occasionally will give me recommendations on admissions, if they are clinically complex.” Larkin also described Lengle and her staff as “monitoring” the nursing home staff, sometimes moving unaccompanied through Cambria Care, or, normally, with the DON or assistant DON. “Lengle does rounds on the floors to observe the work product, the care of the residents . . . [a]nd then she reports that to me.” Larkin testified that “[g]enerally” Lengle and her staff’s suggestions for changes or modifications are implemented. Larkin described two cases in which he delayed implementation of changes to programs recommended by Lengle, but subsequently implemented one of them. Larkin described another incident where Oddo had asked him about removing a pavilion that served as a covered outdoor structure on grounds for resi-

dents to use. Larkin objected to it being torn down and as a result, asserted Larkin, “the pavilion is still there, and will be staying there.”

Attorney Creagh, the General Counsel, and an officer of both Cambria Care and Grane, collaborated with Larkin in writing letters to employees regarding the NLRB case and works with other legal matters. Larkin has not seen any bills from the firm representing Cambria Care in this proceeding, and is not sure if Cambria Care gets those bills.

A variety of “Grane entities” (as identified on Jt. Exh. 1, p. 3) operate at Cambria Care. Apex Rehabilitation Solutions provides therapy. Quality Nursing Solutions provides agency personnel for the nursing department at Cambria Care. Trade Facility Services does the construction-related maintenance for the Cambria Care facility.⁴⁸

Apex Rehab Solutions is a Grane affiliate. They provided ventilator care for Laurel Crest. Since Cambria Care has taken over, the Apex employees providing this care have become Cambria Care employees. However, Apex continues to provide physical, occupational, and speech therapy. Larkin testified that this was his decision and he did it without seeking permission, although he may have discussed it with Oddo. Larkin took credit for deciding to use particular vendors or contractors for food,⁴⁹ medical supplies, elevator servicing, landscaping, medical waste removal, fire suppression, records management, none of which were Grane-affiliated. Larkin testified that he was unaware of any Grane related business that provided these services (with the exception of the possibility that Trade Facility Services could provide landscaping).

In January 2010, Cambria Care began using Grane Supply as the facility’s primary pharmaceutical supplier. Grane Supply provides over 97 percent of pharmacy services for Cambria Care. Oddo made the decision in December 2009 to use Grane Supply as the supplier of pharmaceuticals for the Cambria Care facility. In doing so Oddo removed the pharmaceutical supply company used by Laurel Crest, deciding “to go with the one that we have used in all of . . . the other managed entities, and we have had success with them.”⁵⁰

⁴⁸ Larkin testified that, as to each of the companies, he did not know whether or not they were Grane-related entities.

⁴⁹ Although, as to the new food vendor, Larkin also testified that this vendor was recommended to him, by a party or person whom he could not recall.

⁵⁰ Asked if Grane Supply was a “related company to Grane Healthcare,” Oddo responded, as he was wont to do, that Grane Supply was “[a] separate entity.” Asked if Grane Supply had the same owners as Grane Healthcare, Oddo responded that “I don’t know what the ownership structure is, exactly, no.” These answers struck me as, if not evasive, then less than forthcoming. Clearly, Oddo, understood that Grane’s defense to the single employer allegations involved accentuation of the distinction between Grane and its network of companies. Oddo tailored his testimony to that end. But Cambria Care’s filings with the Commonwealth confirm the common ownership of Grane Supply and Grane. Larkin testified that he did not know if Grane Supply has a relationship to Grane. As set forth in the information provided to the state, Grane Supply is owned by the Graciano Brothers, and Nese, the same individuals who own Grane and Grane Associates, the 99.5 percent owner of Cambria Care, Ebensburg Associates.

Oddo told Larkin that “Grane Supply would have the best price, and that’s who you should use.” Larkin did not take bids or look at other pharmaceutical options, and has not done so. Larkin testified that he did not ask Oddo for any verification, or why he thought this, because “I feel that Mr. Oddo has my facility’s best interests at heart.” Nonetheless, in 2008, while working at Laurel Crest, Larkin had recommended termination of Grane supply as the pharmacy used by Laurel Crest, in part because another pharmacy had better prices. That change was made. Grane Supply was then reinstated as the pharmacy service for the facility upon Cambria Care’s assumption of operations.⁵¹

In addition to its own laundry, the laundry of another Grane-managed facility, Altoona Care Center, is done at the Cambria Care facility. It is one of the facilities listed on the license information provided to the state as being under common management, ownership and control with the other Grane facilities. Larkin testified that he believed that plans were in the offing for the laundry of an additional facility, or two, to be performed at Cambria Care, but he added, “I wouldn’t know.” He identified laundry consultant and Grane employee Wendy McDonald as the individual who would be in charge of and knowledgeable about that. Larkin testified that the Altoona laundry had begun being done at Cambria Care about three weeks before. The matter came to his attention when Oddo asked Larkin if he felt his facility was large enough to handle other laundry from outside the building. Oddo told Larkin that McDonald would handle the issue of the need for increased personnel stemming from the added work on the laundry. Larkin is unaware of any financial changes or arrangements related to this increase in laundry. The laundry at Cambria Care is done by a company called Preferred Laundry Service (PLS), another Grane entity. This began with the changeover from Laurel Crest. Larkin did not know much of the details. He did not know if the Cambria Care laundry workers were terminated to make way for PLS, but he contended they were the same employees who began as Cambria Care employees in 2010, or at least, the same laundry employees who worked for Laurel Crest. Larkin did not know the timing of the change. He could not recall if this was ever discussed between himself and Oddo. He then said that Oddo presented the idea to him. He is unaware if PLS pays Cambria Care for water, electricity or other costs of doing the laundry onsite, or how much, if anything, Cambria Care pays PLS.

⁵¹ Generally, Larkin committed himself to an ignorance of the Grane affiliation of many servicing vendors that is simply not believable. He testified that he did not know why companies listed as “affiliates” on the financial statements he received were so listed, and denied knowing if it was because they were Grane-related companies. With regard to the relationship between Grane and Cambria Care, there was an unmistakably self-serving quality to Larkin’s testimony. Whenever asked by counsel for an opposing party about whether another entity or individual was affiliated with Grane, Larkin said he did not know. This happened repeatedly, to the point where he declared a lack of knowledge of the employer of an individual whose email ended in @grane.com. However, when Respondent counsel sought information, Larkin was more forthcoming and readily agreed with suggestions that a particular company or person was “Grane affiliated.” I think Larkin knows (no matter who asked the question) whether a person or company was “Grane-affiliated.”

However, Oddo told him there would be a cost savings to using PLS. Because Cambria Care is still responsible for maintenance and repair of the laundry machines, Larkin believes that Cambria still owns the machines used by PLS, but later testified that he did not know if PLS purchased them when they came in to the facility. There is, in fact, a payment from Cambria Care to PLS beginning in the February accounts payable documents for Cambria Care.⁵²

Andrascik and PAS employees continue to perform work at Cambria, several days a week. Prior to January 2010, in addition to hiring employees for the business office, Andrascik worked at the facility setting up resident accounts. As of the date of the hearing PAS was building the software system used at Cambria Care. Andrascik would direct employees of Cambria Care in the use and implementation of the software program that organized patient accounts that she had set up as part of the transition. Andrascik met with Larkin for the first time in January. After January when she came to Cambria, Andrascik would discuss with Larkin what she would like to accomplish. She was often accompanied by two PAS subordinates who worked with her. Andrascik testified that Larkin never interfered or told her to do something else. In other words, he did not direct her work.

Larkin's business office consultant, Lisa O'Brien works for Grane (or perhaps, PAS) and prepares a budget for Cambria Care. The initial Cambria Care budget was prepared before January 2010 but received by Larkin in January. He made some changes to it.

At the hearing, Larkin testified that he did not know what entity owns the facility building, and did not know who are the principals of Cambria Care. He testified that he has never seen the lease for the building, and did not know there was a lease between Cambria Care and Ebensburg Associates. He does not know how it works. He does not know what Ebensburg Associates is. He is unfamiliar with payments made to that entity by Cambria Care. In fact, there is a lease, signed for both parties by Nese as president of each entity. Larkin has never seen the operating agreement governing Cambria Care. He does not know Oddo's position with Grane or his position with Cambria Care. He does not know who his consultants O'Brien and Andrascik work for. No one affiliated solely with Cambria Care checks the management fee paid to Grane each month to see if it is in accord with the fee required by the management agreement. Although Larkin testified that he was unfamiliar with Ebensburg Associates, he also testified that he reviewed and was responsible for the completion of the monthly financial statements—prepared by consultants unknown—which were combined financial statements for Ebensburg Associates and

⁵² Larkin was unaware of whether the laundry machines were leased to PLS. There is a lease between PLS and Ebensburg Associates, for space in the facility, and requiring payment of monthly rent. Larkin had never seen the lease prior to the hearing. The lease reveals that both PLS and Ebensburg Associates share the same address, which is the same address as Grane. The lease is signed by Nese for the tenant PLS and Kearney for the landlord Ebensburg Associates. Kearney is the treasurer of Grane, Cambria Care, and PLS. Nese is the president of Grane, Cambria Care, and PLS.

Cambria Care. Larkin testified that he only looks at the portion relating to Cambria Care.

Larkin oversees the purchase of equipment (such as wheelchairs, lifts, a tractor) for the facility. A Cambria Care employee, Tim New is the supply manager. However, Larkin indicated that if he needed expensive, such as a "million dollar piece of equipment, I would be asking my consultants for help and recommendation."

Larkin has "monthly administrator's meeting" by video conference with Oddo to report on the previous month's resident census, and financial data.⁵³ This conference call also includes Lisa O'Brien, Mark Fox and occasionally Rick Graciano or Ross Nese.

Most generally stated, the record overwhelmingly supports the conclusion that the financial administration of the facility is wholly in the hands of Grane consultants and officials. Larkin is largely ignorant of those aspects of the operation. He is more involved in staffing and labor relations issues, but is heavily reliant on the assistance of the Grane consultants.

According to Larkin, after January 2010, the hiring at the facility has been done by Cambria Care personnel. More specifically, the staffing office at Cambria Care does initial hiring, with a follow-up interview by the DON or his designee. Ultimately Larkin reviews and passes on the recommendations. Applicants come from walk-ins, newspaper ads, and the Grane website, where Cambria Care openings are posted. It is also true that in February 2010, when the business office hired two additional employees, Andrascik interviewed the applicants recommended by McMahon.

Larkin testified that he has ultimate and exclusive authority to make hiring decisions on employees at Cambria Care. He testified that he makes decisions on whether or not to fill a position (although he appeared unsure, for instance, whether more staff nurses were employed as of the hearing than on January 1, 2010, when Cambria Care began operations). Larkin testified that he would have "signed off on any" such decisions. Larkin testified that he reports to Oddo, and also consults with Oddo and seeks his recommendations regarding operational issues such as pay raises, and staffing levels.

Larkin could not recall whether, prior to the hearing in this matter, he had had discussions with anyone about SEIU's demand for recognition. Since January 2010, Larkin "may have had discussions" with Oddo "regarding [wages and benefits for] specific employees, and his opinion on my ideas for . . . adjusting wages." In each of the three or four specific cases he recalled, the employee was given a wage increase after these discussions. Larkin has not had discussions about the overall wage package on a general basis.

In January, Cambria Care began operating with the job descriptions that Laurel Crest used. Since then, Larkin has obtained job descriptions from Grane, available on a Grane website available to facility administrators (and perhaps certain other facility personnel). According to Oddo, and according to

⁵³ Early in his testimony Larkin denied that he met with Oddo on a regular basis since January 1, 2010. Later he revealed that he has a monthly video meeting with Oddo in which "I report to him numerous things."

the management agreement, Cambria Care has “ultimate responsibility” as to whether these job descriptions from Grane are implemented or amended. However, Oddo, while describing himself as not being directly responsible for their preparation, added, “I am the boss, so I guess indirectly . . . I have overall responsibility.”

Larkin provided the Grane job descriptions to the relevant department heads for review, and to suggest changes for him to then approve. As of the date of the hearing, Cambria Care was still using the Laurel Crest facility job descriptions, except in the dietary department where the new Grane-based (as modified by Larkin) job descriptions were in effect. New job descriptions for the maintenance department were in the process of being implemented. The changes made to both dietary and maintenance Grane job descriptions were “minor.”

More generally, the Grane management website is available to Grane-affiliated facility administrators and makes available reference materials, including job descriptions that administrators can use for their facilities. Lengle told Larkin that he could use this site “to get documents to help me run the building, job descriptions, policies and procedures . . . [and] the employee handbook is there.” Preplacement criteria forms used by Cambria Care come off the website.

It is also notable that the Grane public website is a detailed source of information about Cambria Care and other Grane-related facilities. Larkin claimed responsibility for reviewing items that would be posted on the Grane website for Cambria Care, although he did not know that job openings were put there. Larkin then indicated that those would come from a staffing coordinator at Cambria Care and go straight to the Grane consultant Mark Fox. Grane’s website identifies Cambria Care, and the other facilities it manages, as “our locations.” Links to each related nursing care facility, including Cambria Care are provided on the Grane website. Clearly, the design of the websites was commonly prepared.

At Larkin’s request, Grane HR consultant Woodley provided ideas on an employee-of-the-month program and suggested a star program that Larkin implemented after making some revisions. Larkin received the draft employee personnel handbook from Woodley. Larkin testified that he doesn’t know who Woodley works for but he associates him with a Grane-related company. Larkin used the handbook as a template and, in conjunction with the department heads, made some changes to it to make sure it was appropriate for the Cambria Care facility. Larkin also looked at personnel manuals he had from prior employment. Off the top of his head Larkin was able to identify a number of sections that he made changes in to tailor the handbook to Cambria Care. The revised manual was implemented in late January or early February 2010. He did this without further aid from anyone associated with Grane.

The personnel handbook issued to employees by Cambria Care provides for a four step complaint procedure culminating in arbitration (if arbitration is mutually agreed to). Steps one and two involve efforts to resolve the dispute by speaking, first, with the relevant supervisor, and then second, by requesting a meeting with the DON, or assistant DON and/or the facility administrator. An employee not satisfied with the step 2 decision “may prepare a written summary of your concerns and

request that the matter be reviewed by a complaint resolution committee at the home office.*”

The asterisk references the following instruction:

*To contact the home office please use the **employee hotline number** (1-866-869-5987) or send to Grane Healthcare, 209 Sigma Drive, Pittsburgh, PA 15238, attention: Employee Relations. (Original emphasis.)

The personnel handbook explains that this home office committee “is composed of the director of employee relations, the head of your division, and a third member from outside your division to be selected by the other two committee members.”

The benefit plans available to Cambria Care employees were presented to employees on a sheet similar to one used at other Grane-related facilities. It is created by PAS and approved by Oddo for distribution. The 401(k) plan offered to Cambria Care employees is also offered to some employees at other facilities managed by Grane. The employee assistance program offered to Cambria Care employees is also available to employees at other facilities managed by Grane, and it is approved by Oddo. The benefit plans available to Cambria Care employees are administered by CHC Management which, according to the benefit plans document “is the management company of all Grane entities.” Grane pays a fee to CHC Management on behalf of the entities managed by Grane. Cambria Care employees choose their benefits from a “cafeteria” plan of different benefit options. The format they chose from was a Grane format approved by Oddo. Oddo also approved the 401(k) plan description distributed to the new Cambria Care employees.

Cambria Care recently implemented voluntarily training for LPNs to learn how to administer and maintain intravenous (IV) lines. The idea originated with Larkin, who consulted with Lengle about why the LPNs at the facility do not work with IVs. In consultation with Lengle, Cambria Care developed a program to train LPNs to do this work. The intention is to implement this change in the LPN job duties.

The Cambria Care resident handbook sets forth a multistep complaint process and procedure for residents to utilize in registering complaints. Step one directs the complaining resident to contact the relevant department supervisor, and step two directs the resident to file a written grievance/complaint report and also suggests that the resident may contact Larkin, or DON Daisley. Step three directs residents to contact Grane and provides a phone number and hours when the line is answered at Grane. Step four and step five direct the resident to contact relevant county and state agencies. Larkin discussed the resident handbook with Lengle and with Becky Jobe, his “administrator’s consultant.” Larkin drafted some of it, and based portions of it on the Laurel Crest handbook. He claimed that step three, directing residents to contact Grane with complaints, emanated from the management contract Cambria has with Grane.

Analysis

A single-employer analysis is appropriate where two ongoing businesses are coordinated by a common master. See *APF Carting, Inc.*, 336 NLRB 73 fn. 4 (2001) (citing *NYP Acquisi-*

tion Corp., 332 NLRB 1041 fn. 1 (2000), enfd. 261 F.3d 291 (2d Cir. 2001)). “Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level.” *Emsing’s Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989) (footnotes omitted). In *Radio & Television Broadcast Technicians v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965), the Supreme Court, in considering which factors determine whether nominally separate business entities should be treated as a single employer, stated:

The controlling criteria set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

In *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1181–1182 (2006), the Board explained:

In determining whether two entities constitute a single employer, the Board considers four factors: common control over labor relations, common management, common ownership, and interrelation of operations. *Emsing’s Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

“While the Board considers common control of labor relations a significant indication of single-employer status, no single aspect is controlling, and all four factors need not be present to find single-employer status. Instead, the ultimate determination turns on the totality of the evidence in a given case.” *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007), enfd. 551 F.3d 772 (8th Cir. 2008) (footnotes and internal citations omitted); *Flat Dog Productions*, supra. “Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm’s-length relationship found between unintegrated entities.” *Dow Chemical*, 326 NLRB 288 (1998).

In this case, the totality of the evidence strongly supports the conclusion that Cambria Care and Grane are a single employer.

Grane created Cambria Care. It shares the same corporate headquarters, the same owners and the same officers. The funds for the purchase of the facility were jointly borrowed by Grane, Cambria Care, a number of other Grane entities, and guaranteed by still more Grane entities and by the common owners of Grane and Cambria Care. Cambria Care and Grane, and the other entities, were committed to these arrangements by the signature of the CEO of all the entities, Richard Graciano. Grane arranged that Cambria Care would rent the nursing home facility from Ebensburg Associates, the lease between the two was signed by one individual, Nese, acting for both parties. The lease includes a provision that rent, in addition to base rent, “additional rent,”—in the amount of the any difference between Cambria Cares revenue and expenses—is to be paid to Ebensburg Associates.

The chief of operations for Grane, Oddo is the vice president of Cambria Care and the individual to whom Larkin, the facility’s administrator, reports. Oddo hired Larkin, and can fire Larkin. Oddo’s roles for each company are undelineated. Indeed, Larkin did not know what positions Oddo held or for what entity he was employed.

Oddo assigned Grane personnel to staff and Cambria Care and he got Cambria Care up and running. Grane determined the initial wages, staffing, and hiring. Grane determined the

benefits programs that Cambria Care would have (ones available to employees at other Grane-managed facilities) and determined that the administrator would be CHC Management, the “management company of all Grane entities.” Grane determined that the pharmacy supply company it owns and controls would be used at the new facility. Grane determined that Cambria Care would be bound by a management agreement that guaranteed that Grane personnel would be deeply and permanently involved in the management of the facility. Notably, this management agreement was executed by two individuals: first, the president of Grane and Cambria Care, acting for Grane; and second, the CEO and chairman of Grane and Cambria Care, acting for Cambria Care.

In short, Grane used its financial and ownership control of Cambria Care to pursue a role in establishing the initial operations, management, and labor relations of Cambria Care that is fairly characterized as total. Grane was Cambria Care. Thus, Larkin was hired as the facility administrator by Oddo without any discussion or knowledge that he would work for a separate entity, or that this separate entity would be bound by a management agreement. The significant point is that in these initial months, Cambria Care maintained *no* independent identity at all.

Respondent dismisses the total identity of interest exhibited between Grane and Cambria Care in establishing the operation, responding (R. Br. at 26) “who else but the organizers of the corporation” would be responsible, “the management team at [Cambria Care] was not capable of hiring itself,” and time was short. This is glib.

In the first place, contrary to Respondent’s claims, independent enterprises typically—not unusually—hire their own employees, set their own wages, choose their own benefit plans, set schedules, answer prospective employees’ questions, determine whether to recognize existing unions, choose binding consulting and management arrangements that bring in other entities to manage the facility, and make decisions about leasing of property and negotiate the terms on which that should occur. In this case Grane’s control in establishing the initial day to day operations of Cambria Care was total. Larkin advised Lengle of his opinions of the Laurel Crest department heads, but he played no role otherwise in hiring, staffing, or the establishment of wages and benefits for employees. Grane could have incorporated Cambria Care as an independent entity and removed itself and permitted Cambria Care to establish itself at arms length as an independent entity. Grane decidedly did not do that. Moreover, as is evident from the nature of Grane’s initial domination of Cambria Care affairs, this intervention—e.g., the management agreement, the leasing arrangements, the hiring and staffing—is the kind of involvement that continues to affect the operations even after Cambria Care is up and running.

Second, Grane did not get Cambria Care up and running and then walk away, leaving Cambria Care as an independently functioning operation that would succeed or fail on its own. To the contrary, to begin with, Grane and Cambria Care continue to have, as Respondent concedes (R. Br. 26) common ownership and common management at the executive level, two factors the Board looks to in determining single employer analysis.

But more than that, the potential control of Cambria Care that is a function of Grane's common ownership and common upper management with Cambria Care is actualized every day by the ubiquitous presence of Grane personnel in the affairs of Cambria Care—a state of affairs deliberately established by Grane when it set up Cambria Care's operations in the fall and winter of 2009.

Thus, in some aspects, Grane's ongoing control of the operations of Cambria Care appears to be exclusive and total. For instance, the business end of the operation has been wholly left in Grane's control. The testimony at trial made clear that Larkin—the Cambria Care official alleged to be in charge of the independent entity—knows little of the financial dealings of Cambria Care with Grane companies. This includes little to no knowledge of Cambria Care's arrangement with its "landlord," Ebensburg Associates (an entity also created and commonly controlled by Grane), which, by the terms of the lease, receives the excess of revenues left over after the payment of expenses. Larkin had no knowledge of this peculiar arrangement, inexplicable for an entity that is allegedly operated at arms length from Grane and its other affiliates, and inexplicable if Larkin in any sense controls Cambria Care.

This lack of arms length in the relationship is further emphasized by the fact that although Larkin testified that he was unfamiliar with Ebensburg Associates, he also testified that he reviewed and was responsible for completion of the monthly financial statements—prepared by consultants unknown—which were *combined* financial statements for Ebensburg Associates and Cambria Care. (Larkin testified that he only looks at the portion relating to Cambria Care).

Grane consultants have authority to pay Cambria Care bills. Payments submitted at trial show that in some cases no one from Cambria Care authorizes payment. And no one affiliated solely with Cambria Care checks the management fee paid to Grane each month to see if it is in accord with the fee required by the management agreement. Grane consultants handle these matters. Cambria Care's business operations are fully controlled by Grane.

Grane's enmeshment in Cambria Care affairs goes beyond the not unimportant matter of its business and financial operations and decisionmaking. Its decisions about running the nursing home are heavily controlled by Grane. Larkin, for instance, had no idea why, or whether it made sense to use Grane Supply as the facility's pharmacy supply company. He did not think it made sense to use them when he worked for Laurel Crest, but now that he was allegedly "in charge," he followed Oddo's instructions on this matter. Incredibly, Larkin denied knowing if Grane Supply had a relationship to Grane. Larkin knew little about the arrangements by which a Grane-affiliated entity, PLS, performed the laundry at "his" facility for Cambria Care and another Grane-affiliated home. He testified that his laundry consultant, Grane employee McDonald was in charge of the laundry operations, and he deferred questions of how PLS came to operate at Cambria Care to McDonald. With little to no involvement by Larkin, Grane has begun using the laundry at the Cambria Care facility to do the laundry of additional Grane-affiliated facilities in the area. These are not hallmarks of an arms length relationship between Grane and Cambria Care.

These are the hallmarks of entities whose operations are interrelated and controlled by a common master.

The fact is, Grane is deeply entrenched in the operations of the facility through the myriad of consultants it provides to Cambria Care. As Larkin put it in a candid moment, "I was informed who my consultants were, and that's who I call." This method of operation is not, of course, fortuitous. It is Grane's standard method of operation with the facilities it acquires.

Moreover, it is not true, as Respondent asserts, that labor relations is carved out from the operations and conducted wholly by Larkin, without Grane's exercising control.

While it may serve Grane (and Cambria Care's) purpose in this proceeding to stress Cambria Care's independence from Grane, no such purpose was at stake when information was submitted to the state in conjunction with the health care facility license. In that document, Grane's anticipated role was touted as "ongoing" and part of an effort to meet the "constantly changing needs" of residents. This document, with its pledge that "[o]n an on-going basis Grane will be looking to recruit new staff from outside of the facility that will provide additional knowledge and experience to that of the existing staff," provides, I believe, an accurate characterization of Grane's role at Cambria Care.

Oddo testified very clearly that the Grane personnel working at Cambria Care are not working for Larkin and do not report to Larkin. Lingle and her staff of consultants, in particular, hand out materials to staff without consulting Larkin and play an important role in determining employment procedures. They "do rounds," monitor and observe staff and make recommendations on changes that need to be made. "Generally," these recommendations are implemented. The record is clear that while the relationship between Larkin and the consultants may be collegial and cooperative, in no way do the Grane consultants "report" to Larkin, or serve at his pleasure. Moreover, it is revealing that Cambria Care employees who cannot solve their employment problems at the facility level are instructed to call Grane—i.e., "the home office"—on a "hotline" number. Even facility residents are told to contract Grane if their complaints are not satisfactorily resolved by the facility staff. And although Larkin testified that he makes the hiring decision at Cambria Care, he was unaware that Cambria Care job openings were advertised on the Grane website—even while maintaining that he was responsible for reviewing items that would be posted on the Grane website.

Larkin testified that, at least since January 2010, new hiring of employees for Cambria Care is a matter within his (and Cambria Care department head's) purview. He testified that Grane was not involved in that. However, the Grane consultants are, as mentioned, very much involved in determining the operational needs of the departments and facility. Larkin also admitted that he "consults" on labor relations issues with Oddo:

In Mr. Oddo's purview, as a consultant to me, I will . . . seek his recommendations regarding operational issues, or pay raises. . . . I will ask for suggestions on his feelings regarding increasing or decreasing staffing levels in different departments."

Of course, the tendentious nature of Larkin's testimony must be disregarded. It is not credible.⁵⁴ He characterizes his discussions with Oddo as "suggestions on his feelings" and other phrasing designed to minimize Oddo's role. But Larkin reports to Oddo. Oddo is his "boss" and Oddo can fire him. The consultants report to Oddo (or other highly placed Grane officials). Oddo's views in staffing, pay decision, and "operational issues" cannot be ignored.

Thus, the record demonstrates, at so many levels, and in so many areas, that in Grane's relationship to Cambria, "there exists overall control of critical matters at the policy level." *Emsing's Supermarket, Inc.*, supra. Whether those critical matters involve financial dealing, decisions about union recognition, major leasing and contractual arrangements, employee benefits, staffing or pay raises, who employees and residents must contact if on site Cambria Care officials cannot satisfy their concerns, or observing employees working and making suggestions for changes, Grane exercises overall control. "It is well settled" that this is "the fundamental inquiry" in a single employer case. *Centurion Auto Transport, Inc.*, 329 NLRB 394, 395 (1999); *Emsing's Supermarket*, supra.

The nub of Respondent's argument against single employer status is, when vetted, limited to reliance on Larkin's self-serving assertions of autonomy. Respondent protests that Larkin is "no figurehead." I accept that. His job is not a sinecure. He does a lot. He is the administrator of the facility, no less, but also no more. The record evidence does not support the claim that he operates Cambria Care independent of the pervasive involvement of Grane consultants, and independent of Grane's control. Larkin's monthly meetings with Oddo and some of the financial consultants, sometimes also attended by Graciano and Nese, ensure that no one gets too far afield.⁵⁵

Respondent contends that while Grane owns, helps operate, and has the same upper management as Cambria Care, when it comes to labor relations, Grane's ubiquitous presence is merely in an advisory capacity. Larkin, it appears to contend, can run Cambria Care as he sees fit.

⁵⁴ I note that Larkin's frequent and purposeful description of the facility as "my facility," the staff as "my employees," etc., throughout his testimony served as another ready reminder that his testimony was slanted toward evincing his authority over Cambria Care, and by implication, Cambria Care's independence from Grane.

⁵⁵ Larkin recalled three instances (two with Lenge, one with Oddo) where he either delayed taking, or did not take their advice on an issue. This does not demonstrate Cambria Care's arms length relationship with or independence from Grane. These examples where Larkin's view prevailed took place in the context of a much larger permanent relationship of intensive involvement by Grane and Oddo—the boss—in the details of Cambria Care. Indeed, the fact that Oddo would be thinking about and involved in detailed decisions about whether an outdoor pavilion sitting area for residents remains on the grounds highlights the close attention he pays to Cambria Care, and cuts directly against the claim that Grane has no involvement in or control over day to day affairs at Cambria Care. Larkin offered this as an example of his power and declared that because of his "objection" the pavilion "will be staying there." Based on the record as a whole, I think it is fair to conclude that the pavilion, and, indeed, Larkin "will be staying there" as long as Oddo permits.

I do not agree. First, as stated, I do not believe the tendentious effort by Larkin to amplify his independence, a tendency that runs through his testimony.⁵⁶ Second, and related, I believe that the objective record evidence, on its own terms, overwhelms these claims by Larkin. Finally, even if I believed, which I do not, that the Grane consultants and Oddo merely give "suggestions" and "advice" to Larkin, I believe that under the circumstances this would still demonstrate—absent the strongest and clearest evidence to the contrary—that Grane controlled all aspects of the operation on which it provided "advice" and "consultation." We have here a situation in which Grane owns Cambria Care. In addition, Grane's top officials are Cambria Care's top officials. Respondent stresses that under Board precedent, ownership, alone, is not sufficient to demonstrate a single employer relationship. But neither is it irrelevant. To the contrary, it is the potential for control provided by ownership—its readiness to effectuate accentuated by virtue of the commonality of officers—that renders so-called "advice" and "consultation" by the parent company, as a practical matter, truly an exercise in control of Cambria Care's day-to-day activities. It is one thing for a parent company to own a subsidiary, but play no role in affairs at the facility. But when it is regularly in the facility "consulting" and "advising," that assistance is, by virtue of the ownership and, particularly with upper management control, more than a suggestion—it is a directive and an example of control by the owners. This concept, well known to statutory employees—the supervisor's "suggestion" that the employees move the pallets is well understood as a directive—is no different than what we have here. Given its ownership of Cambria Care, and given its commonality of top management, Grane's deep and permanent involvement in Cambria Care's affairs constitutes control of those affairs.⁵⁷

⁵⁶ In terms of Larkin's quite transparent effort to emphasize his independence from Grane, my view of the situation here was perfectly stated by Judge Learned Hand, many years ago, and relied upon by the Supreme Court in *NLRB v. Walton Mfg.*, 369 U.S. 404, 408 (1962):

[T]he demeanor of a witness "... may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

quoting, *Dyer v. MacDonald*, 201 F.2d 265, 269 (2d Cir. 1952).

⁵⁷ Grane argues (R. Br. at 31) that it had essentially the same management agreement with Laurel Crest, in 2003, as it does now with Cambria Care, and yet there has never been a claim that Laurel Crest and Grane constituted a single employer. The comparison is instructive, but not for the reasons advanced by Respondent. First, of course, the relationship of Grane and Laurel Crest has never been subject to the lens of litigation, so there simply is no evidence of what their actual relationship was or was not like. The specific terms of the management agreement—expressly written with intent to avoid a finding of common relationship—are not particularly important: the actual practices are. But the point must also be made that even assuming the same management agreement and same managerial involvement with Laurel Crest in 2003 as with Cambria Care in 2010, the unique fact of Grane's ownership and managerial overlap with Cambria Care—presumably, not present with the county employer, makes a huge difference. The power of ownership and managerial control transforms the nature of the onsite

Cambria Care's operations labor relations, its management, its ownership, and its managerial decisionmaking is wedded to Grane officials acting on behalf of Grane, and Cambria Care. Grane exercises common control with Cambria Care over operations, management, and labor relations. Grane and Cambria Care are single employers under the Act.⁵⁸

CONCLUSIONS OF LAW

1. Respondents Grane Healthcare Co. and Ebensburg Care Center LLC d/b/a Cambria Care Center (hereinafter referred to collectively as Respondent) are single-integrated enterprises and a single employer, and a health care institution engaged in commerce within the meaning of Section 2(2), (6), (7), and (14) of the Act.

2. The Charging Party Local Union No. 1305, Professional and Public Service Employees of Cambria County a/w the Laborers' International Union of North America (Local 1305 or Laborers) is a labor organization within the meaning of Section 2(5) of the Act.

3. SEIU Healthcare Pennsylvania, CTW, CLC (SEIU) is a labor organizations within the meaning of Section 2(5) of the Act.

4. The following employees of Cambria Care constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

The unit of non-professional employees more particularly described in the most recently expired collective-bargaining agreement between Cambria County and Local 1305.⁵⁹

5. Since on or about January 1, 2010, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with Local 1305 as the bargaining representative of the above-described unit of employees.

6. Since on or about January 1, 2010, Respondent has violated Section 8(a)(1) and (3) of the Act by discriminating against employee-applicants Mark Mulhearn, Sherry Hagerich, Joseph Billy, Beverly Weber, and Roxanne Lamer, by refusing to hire them to discourage employees' union activity.

7. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Grane Healthcare Co. and Respondent Ebensburg Care Center LLC (a single employer, collectively referred to herein as Respondent) have engaged in certain unfair labor practices, I find that they are joint and severally liable for the unfair labor practices found and must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with Local 1305 as the collective-bargaining representative of an appropriate bargaining unit of employees (described above), Respondent shall recognize, and, upon request, bargain with Local 1305 as the exclusive representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Mark Mulhearn, Sherry Hagerich, Beverly Weber, Joseph Billy, and Roxanne Lamer, Respondent shall offer them reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. Respondent shall make these individuals whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them, computed on a quarterly basis, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall remove from its files any reference to the unlawful refusal to hire Mulhearn, Hagerich, Weber, Billy, and Lamer, and, within three days thereafter, notify each of them in writing that this has been done and that the refusals to hire will not be used against them in any way.

Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

consulting from day-to-day involvement to day-to-day control. It is one thing for a standalone entity to agree—in an arms length transaction—to contract to provide management services for another independent entity. It is another thing when an entity contracts, essentially with itself, to provide management assistance for an entity it created, owns, and controls the officers of. In the latter case, the involvement in day-to-day management is unlikely to be anything but the actualization of the potential for control inherent in the financial arrangements.

⁵⁸ During the hearing, the SEIU offered a document into evidence—marked as ALJ Exh. 1—to which Respondent objected, asserting the attorney-client privilege, and contending that the document had been inadvertently provided to the SEIU. Respondent contended that the memo—which was a summer 2009 memo from Lengle to various Grane personnel and administrators of Grane-managed entities—was privileged as it was a report of legal advice received by Lengle from Grane General Counsel Creagh and reported by Lengle to administrators of the entities Grane managed. Essentially, Respondent contended that the document was covered by the common interest doctrine of the privilege. I deferred ruling on the issue. I note that part of the asserted relevance by the Union is not the substance of the communication, but the fact that it was made, the contention being that Lengle's joint communication with various Grane-related entities supports the single employer theory of the General Counsel. The fact that the communication was made, and the names of the author and recipients, is not privileged and is established in the record. However, given that the only conceivable relevance of the document—its substance or the fact that it was made—is to support the single employer allegations of the complaint, and given my resolution of that issue, I decline to rely on the document and decline to resolve the attorney-client privilege issue. *American Girl Place, Inc.*, 355 NLRB No. 84, slip op. 1 fn. 2 (2010). Reliance on the document would make no difference to the outcome of the case or to my understanding of the facts. I assume, without deciding, that it is privileged. By separate order counsel will be directed to return all copies of the document and ALJ Exh. 1 is hereby stricken from the record.

⁵⁹ This description of the Local 1305-represented unit was stipulated to by the parties. The record does not contain a more precise unit description.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁰

ORDER

The Respondent Grane Healthcare Co. and Ebensburg Care Center, LLC d/b/a Cambria Care Center (a single employer) Ebensburg, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 1305, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

The unit of non-professional employees more particularly described in the most recently expired collective-bargaining agreement between Cambria County and Local 1305.

(b) Refusing to hire employees because of their union activities.

(c) 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) Recognize, and on request, bargain with Local 1305 as the exclusive representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of this Order, offer Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer reinstatement to the positions for which they applied or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired on January 1, 2010.

(c) Make Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and

Roxanne Lamer, and within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful refusals to hire will not be used against them in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its Ebensburg, Pennsylvania facility, copies of the attached notice marked "Appendix."⁶¹ Copies of the notice, on forms provided by the Regional Director for Region 6, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic 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 1, 2010.

(g) 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.

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

⁶⁰ 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.

⁶¹ 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."

Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to recognize and bargain with Local 1305 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

The unit of non-professional employees more particularly described in the most recently expired collective-bargaining agreement between Cambria County and Local 1305.⁶²

WE WILL NOT refuse to hire you because of your union activities.

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

WE WILL recognize and, on request, bargain with Local 1305 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

⁶² This description of the unit was stipulated to by the parties. The record does not contain a more precise unit description.

WE WILL, within 14 days from the date of the Board's order, offer Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer reinstatement to the positions for which they applied or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire Mark Mulhearn, Beverly Weber, Sherry Hagerich, Joseph Billy, and Roxanne Lamer, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to hire will not be used against them in any way.

GRANE HEALTHCARE CO. AND EBENSBURG CARE CENTER, LLC D/B/A CAMBRIA CARE CENTER