

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

NASAKY, INC. D/B/A
YUBA SKILLED NURSING CENTER,

and

THEKKEK HEALTH SERVICES, INC.,
Joint or Single Employers

and

Case 20-CA-068854

SEIU UNITED HEALTHCARE
WORKERS-WEST

David B. Reeves, Esq. and Joseph Richardson, Esq.

for the Acting General Counsel

Richard I. Dreitzer, Esq. and Charles Zuver, Esq.

for the Respondent

Yuri Y. Gottesman, Esq.

for the Charging Party

DECISION

STATEMENT OF THE CASE

Gerald M. Etchingham, Administrative Law Judge. This case was tried in San Francisco, California, on May 9 and 10 of 2012. The SEIU United Healthcare Workers-West (the Union) filed the charge on November 14, 2011.¹ The Acting General Counsel issued the complaint on March 30, 2012. It alleges that Nasaky, Inc., d/b/a Yuba Skilled Nursing Center (Nasaky) and Thekkek Health Services, Inc., (Thekkek, Inc.) (collectively, Respondent)² have violated Section 8(a)(1), (3), and (5) of the Act by refusing to rehire employees of its predecessor for discriminatory or antiunion reasons and by refusing to recognize and bargain in good faith with the Union as the statutory representative of its employees.

¹ All dates are in 2011 unless otherwise indicated.

² The parties stipulated that the two named Respondents would be treated as a single employer within the meaning of the Act for the purposes of this proceeding. (General Counsel's Exhibit 1(dd)).

Post-trial briefs³ were filed on June 28, 2012, by Respondent and Acting General Counsel and have been carefully considered.⁴ On the entire record, including my observation of the demeanor of the witnesses and my evaluation of the reliability of their testimony, for the reasons set forth below, I find that Respondent violated the Act as alleged.

FINDINGS OF FACT

I. Jurisdiction and Labor Organization

Nasaky is a corporation that operates a long-term care skilled nursing facility in Yuba City, California. Nasaky will annually derive gross revenue in excess of \$100,000 from its Yuba City facility. It will annually purchase and receive more than \$5,000 in goods and materials that originated from points outside the State of California.⁵

Thekkek, Inc. is a corporation that provides services to skilled nursing facilities in the state of California. Thekkek, Inc. admits and I accept that, during the calendar year ending December 31, 2011, it derived gross revenue in excess of \$100,000 from this business and purchased and received at its California facilities goods and materials that originated from outside the State of California which were valued in excess of \$5,000.

Respondent admits and I accept that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a healthcare institution within the meaning of Section 2(14).

Respondent admits and I accept that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Background Facts

This is a successorship case about a long-term care skilled nursing facility (the Facility or the Yuba Facility) in Yuba City, California. Prior to September 1, 2011, the Facility was owned by Nazareth Enterprises, which ran the Facility through a subsidiary called Yuba Skilled Nursing Center, Inc. (Tr. 33, GC Exh. 2). Since at least 2006, the Union represented a large group of

³ For ease of reference, testimonial evidence cited here will be referred to as “Tr.” (Transcript) followed by the page number(s). Documentary evidence is referred to either as “GC Exh.” for a General Counsel exhibit, or “R Exh.” for a Respondent exhibit. References to post-trial briefs shall be either “GC Br.” or “R Br.” followed by the page numbers. Citing to specific evidence in the record is for emphasis and by no means is it meant to preclude further evidentiary support elsewhere in the record.

⁴ By letter of June 28, the charging party joined in and adopted the brief for the Acting General Counsel as its own.

⁵ At least in the case of a new business, prospective transactions and revenue may be considered in determining jurisdiction. See, e.g., *Big Sky Hospitalities, LLC*, 358 NLRB No. 83 (2012).

employees there. The bargaining unit (the Unit) included the following job classifications: “CNA, RNA, licensed vocational nurse or LVN, laundry worker, housekeeper, cook, dietary aide, activity aide, central supply, and medical records clerk.”⁶ (Tr. 32). The Unit employees enjoyed the benefits of a 2006 collective bargaining agreement (CBA). (GC Exh. 2). Although
5 the CBA expired on June 30, 2009, its terms remained in effect. (Tr. 33).

Preema Thekkek and her husband own Respondent business. (Tr. 41). In May of 2011, Thekkek decided to buy the Facility. (Tr. 177). The Facility is not the first nursing home that Thekkek has purchased. All told, she and her husband own eleven skilled nursing facilities. (Tr.
10 78–79). When she acquired four of these, they were unionized facilities, and she collectively bargained with the employees at three of them. (Tr. 80–83, 87, 92).⁷ She recalled receiving requests from the Union to bargain for at least two of these facilities. (Tr. 83–86).

After agreeing to buy the Facility in May, Respondent advertised in the media for new
15 workers to staff it. (Tr. 52). About the same time, it held a meeting with the existing employees to let them know that they would have to reapply to have a chance of keeping their jobs under the new regime. (Tr. 51). Applications were left for employees who wished to do so. Id.

Applicants did not officially learn of their acceptance or rejection until August 31 (Tr.
20 57). The next day, Respondent assumed control of the Facility. (Tr. 395–96). Operations continued as before with the same patients receiving the same services.⁸ The main difference was the workforce: the new staff included ninety employees in erstwhile bargaining unit positions, of which forty were former employees of the predecessor employer and fifty were newcomers.⁹
25 (GC Exh. 8).

Prior to the changeover, the Union sent a letter dated July 18 demanding recognition and bargaining from Respondent. (GC Exh. 3). In a letter dated September 1, Respondent informed the Union that it would not honor the CBA, that it did not accept any of the predecessor’s terms and conditions of employment, and that the Union would not be allowed on the premises. (R
30 Exh. 3). By letter dated October 12, the Union again demanded recognition and bargaining, but no response was received.¹⁰ (GC Exh. 3; Tr. 40).

Union official Frank Martinez testified that the July 18 letter was returned but that the
35 Union received the certified mail receipt for the October letter. (Tr. 38–39). Thekkek initially

⁶ The Facility’s RNs are notably not included.

⁷ The fourth facility was decertified prior to any bargaining. (Tr. 88–89).

⁸ An exact citation to the record for this proposition is hard to come by. Nevertheless, the
40 issue is not contested. As Respondent states in its brief, “Nasaky does not contest that *continuity of the business enterprise* would likely be found under current Board law.” (R Br. 37 n.27).

⁹ Wages in some job classifications fell as well. Whereas the starting wage for a dietary aide listed in the CBA is \$9.27 an hour, (GC Exh. 2, at 35), the offer letter to outside dietary aide Sienna Huerta-Houser declares a starting wage of \$8.50 an hour, (GC Exh. 5(b)). The same
45 documents for outside housekeeper Hardip Rai show a decrease from \$9.46 to \$8.50.

¹⁰ The October 12 letter also contained a request for a list of employees and payroll records. (GC Exh. 3).

testified that she could not recall a request for recognition from the Union. (Tr. 47). A moment later, she corrected her testimony, saying that there was a letter received sometime after she dispatched her September letter. *Id.* Although she subsequently did not recall seeing the October 12 letter when it was shown to her, I assume that it was the letter of which she was speaking. In sum, I find that Thekkek was aware that the Union had requested recognition via the October letter.¹¹

III. The (Re)Hiring Process

The reader should be aware that this case turns primarily on the question of disparate treatment of the old “inside applicants,” employees of the predecessor, vis-à-vis the new “outside applicants,” off-the-street hires. One employee in particular, former shop steward Sandra Escobar (Escobar), is alleged to be a model case of discrimination. The paragraphs that follow describe the application process with special attention paid to the circumstances of the rejection of Escobar’s application.

A. Interviews

Interviews of both inside and outside applicants took place on the same days in late May. (Tr. 52–54). Thekkek assigned different helpers to interview different groups of employees. She personally interviewed LVN and RN applicants, her consultant Alicia Devara interviewed CNA applicants, and her consultant Trilochan “Bobby” Singh (Singh) interviewed the non-licensed applicants, e.g., dietary, housekeeping, and laundry employees. (Tr. 52).

“Interview Guide” forms were used by Thekkek and Devara to interview some of the CNA and LVN applicants. (E.g., GC Exh. 24(c)). The record contains forms for every inside applicant but lacks them for outside applicants, with the exception of four outsiders who were rejected.¹² The parties stipulated that these were the only interview forms. (Tr. 403–04). As such, I am persuaded and find that the Interview Guide forms were only used with inside applicants and with the four rejected outside applicants for whom we have forms.¹³

The Interview Guide forms instruct the interviewer to begin with basic getting-to-know-you questions, e.g., “What motivated you to become a CNA/LVN?” (GC Exh. 24). It then shifts to more difficult questions, posing specific professional dilemmas regarding emergency

¹¹ The General Counsel by motion of July 5 requested that I strike certain portions of Respondent’s brief that it alleges mischaracterize the record as to Thekkek’s and Singh’s recollections regarding the Union’s letters. While I regard the General Counsel’s request as meritorious, I need not rule on the motion for two reasons: (1) I am capable of examining the record and reaching my own conclusions absent the briefs’ characterization of it, and (2) I have here already made findings of fact in disagreement with Respondent’s representations.

¹² These forms are collected as part of General Counsel’s Exhibit 24, which is organized by applicant.

¹³ Respondent replies that whether or not the forms were used for all applicants, *the same questions* were asked of each group. As evidence, it cites Thekkek’s recital of the topics covered in interviews, topics which mirror those mentioned on the Guide forms. (Tr. 388–89).

scenarios—how to react in an earthquake for instance—as well as examples of patient abuse or misconduct by other employees. *Id.* There is not adequate space on the forms to record responses, but interviewers did take short notes in the margins. *Id.*

5 Although Devara and Singh conducted some of the interviews, the ultimate hiring decisions were made by Thekkek. (Tr. 56). She testified that Devara turned over her interview notes to her but did not make recommendations about who to hire. *Id.* Singh, on the other hand, was present when Thekkek made her selections. (Tr. 57).

10 *B. Reviewing the Personnel Records of the Predecessor’s Employees*

 Shortly after the conclusion of the interviews, Thekkek spoke with Shellay Thomsen (Thomsen) about each of the inside applicants. (Tr. 58–59, 390–91). At the time, Thomsen was Director of Staff Development with the predecessor employer and had also been hired by
15 Thekkek as a consultant. (Tr. 337). Thomsen had not been at the Facility long: she was hired in September 2010. Thekkek asked Thomsen to answer ten questions about each employee from a document entitled “Supervisory Interview Questions.”¹⁴ Thekkek recorded Thomsen’s replies on her copies of the form. (Tr. 392). The questions dealt with topics like punctuality, relations with
20 coworkers or patients, productivity, and whether the employee had caused the facility to be cited by the Health Department. (GC Exh. 24).

 Along with talking to Thomsen, Thekkek also looked at the personnel files of all the inside applicants herself. (Tr. 60–61). In her words, she went to the filing cabinet and “just
25 thumbed through it, went through it and looked at their write-ups and old notes.” (Tr. 390).

30 *C. References and Background Checks for Outside Employees*

 Thekkek sought references from some but not all of the outside applicants. The application asked employees to list their former employers and three named individuals as
35 references. (GC Exh. 24). Thekkek, Singh, and Thomsen spoke with the references themselves via telephone (Tr. 61–62). That said, most of the people they spoke to were friends or family members rather than former supervisors or employers. (Tr. 91; GC Exh. 4). While the record includes a few references obtained from the former employers, the vast majority were from friends, family, or old co-workers. (GC Exh. 4). Additionally, the calls were conducted using
40 standard forms that asked for answers to softball questions like, “Would you trust this person with your family member or loved ones?”, or “Do you believe this applicant is an honest person?”. *Id.*

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¹⁴ These forms are located in General Counsel’s Exhibit 24.

In regard to references, it is important to note that Respondent did not obtain references for all outside employees. I reach this conclusion from the fact seventeen of the outside applicants who were hired do not have references in the record.¹⁵ (GC Exh. 4).

5 As admitted by Thekkek, California law demands that skilled nursing facilities like the one in this case conduct criminal background checks on all of their employees. Cal. Health & Safety Code § 1569.17 (West 2012) (requiring that the information be obtained from law enforcement); (Tr. 113). The employment application asked if prospective hires had committed a crime other than a minor traffic violation. If an applicant checked “Yes” to admit his criminal
10 past, he was questioned about the matter at the interview. Id.; (Tr. 171–72). Respondent conducted no other research into applicants’ criminal records. (Tr. 127).

D. Timing of Hiring Decisions and Orientations

15 Thekkek testified that she made her hiring decisions on August 31. (Tr. 57). This is hard to believe for several reasons:

20 First, the offer letters state on their face that they must be returned by seven in the evening on August 31. (GC Exh. 5(a)). Thekkek testified that she telephoned applicants on August 31 and told them to come in that day at three or five in the afternoon. (Tr. 74–75). As the Acting General Counsel points out, this is a very small window of time in which to both contact the applicants and have them come to the facility to read, sign, and return the offer letter. Moreover, operations under new management were to commence the next day, it is unreasonable to expect that employees drop their existing employment on such short notice.

25 Second, the offer letter speaks of an employee handbook that had already been distributed to the acceptees. (GC Exh. 5(a)). Since handbooks are guides for employees and not for applicants, it is implausible that Respondent would have given these employees a handbook if its decision to hire them had not been made until that day.

30 Third, most of the W4 Forms for the new hires were completed on August 26. In light of common workplace experience, it does not make sense for employees to have had completed this paperwork before they were hired. Thekkek’s explanation for this odd sequence of events was that *all applicants* were brought in on August 26 and asked to complete paperwork, including the W4 forms. (Tr. 101–03). When she was asked whether this was the practice at her other
35 facilities, she unbelievably answered that she did not know. (Tr. 103).

40 Fourth and finally, Respondent held orientation sessions on August 26. (Tr. 101). These were the same sessions at which the W4 forms were completed. (Tr. 101–02). Again, when asked why she would hold an orientation for employees who had not yet been hired, Thekkek gave unhelpful answers. (Tr. 101–03). She initially said that the orientation was for potential

45 ¹⁵ The missing employees are Felicia Baird, Jasmin Bilbo, Alicia Castillo, Tina Clavelle, David Dhaddy, Christine Docken-Thomas, Sienna Huerta-Houser, Satinder Kaur, Yasmina Khan, Tyrone McCauley, Christine Mora, Stacey Mullens, Rachel Navar, Sandeep Vraitich, Rachel Vantassel, Ebony Walker-Brown, and Shameeka Williams.

hires and explained that not all applicants were invited to it. (Tr. 101–02). She also claimed that not everyone at the orientation was an employee who was eventually hired. (Tr. 102). Indeed, she continued to squarely contend that hiring took place on August 31, not August 26. *Id.* That said, she could not name an employee who had been at the orientation but who was not hired. *Id.*
 5 Even more suspiciously, Thekkek’s subordinate Thomsen, who was hired as a consultant in part to conduct the orientation, stated clearly that “[o]rientation is for new employees.”¹⁶ (Tr. 315, 344). For all these reasons, it is implausible and incredible that Thekkek made hiring decisions on August 31. Instead, I find that they were made *at the latest* on August 26.¹⁷

10 *E. Alleged Hiring Criteria*

Thekkek testified about her reasons for purchasing the Facility. She explained that it had a bad reputation before she bought it. (Tr. 383). Specifically, she claimed that area doctors did not want to send their patients to stay there, and it had received low ratings (one or two stars of 5 with 5 being highest) from the Department of Public Health in years past. (Tr. 383–85). To reverse this record, Thekkek planned to make patient care a priority and to bring in a consultant to keep an eye on management. (Tr. 385). Interestingly, however, Thekkek retained many managerial employees, including key policy makers like the Administrator, Nursing Director, and Director of Staff Development, as well as all of the RNs.¹⁸ (GC Exh. 8; Tr. 113–15). Better patient care demanded good employees; so Thekkek said she looked for customer care, customer satisfaction, knowledgebase, and receptiveness to training or constructive criticism in her new employees. (Tr. 386).
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When she was asked what role a candidate’s experience played in her hiring decisions, Thekkek answered, “Not much.” (Tr. 389). She explained that: “a person could have 20 years of experience but not doing the job what they’re supposed to do [sic.]. So you need to be looking at the work performance and the ability to do the performance, perform the job, and also the knowledgebase of the job.” *Id.*
 25

Thekkek’s subordinate Singh, who interviewed non-licensed employees on her behalf, also testified as to Respondent’s hiring criteria. He listed generic factors like knowledge of protocols for emergencies and elder abuse, work habits, performance, interview presentation, rule violations, and punctuality. (Tr. 244, 273, 276–77). He described experience as one of many considerations. (Tr. 283). He also recognized that knowledge of the rules and regulations applicable to skilled nursing facilities was an important quality, at least when interviewing experienced employees. (Tr. 245).
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¹⁶ Thomsen made this statement in the context of explaining why the predecessor’s employee Escobar was not present at the orientation.
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¹⁷ It is worth noting that, since hiring occurred on or before August 26, it follows that many of the calls to references (specifically those with forms dated August 28, 29 or 31) were placed after hiring occurred. (GC Exh. 4). We should also accept that calls to references on August 26 were made after decisions had been reached—it is not reasonable to believe that employees’ references were called, a decision was made to hire them, they gave notice to quit their jobs and they were invited to the orientation, all on the same day.
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¹⁸ Once again, RNs were not part of the bargaining unit. (Tr. 117).

On cross examination, Singh was asked how one obtains knowledge of nursing home policies and procedures. (Tr. 289). His answer: “During the hiring process we provide them orientation and on periodic intervals or an on-going basis.” Id. Counsel was perplexed by the notion of an orientation coming before a job interview. Id. Yet, Singh claimed that he could not remember whether or not an orientation occurred before the interviews. Id. When asked how applicants would even know to attend an orientation before they interviewed, Singh claimed that the job advertisements advised them of the date and time. (Tr. 290).

The interviews actually occurred before orientation sessions, as the parties eventually stipulated. (Tr. 296). Once it was thus established that there were no orientations prior to the interviews, counsel asked how an employee would acquire knowledge of nursing home protocols and procedures without having worked at one previously. (Tr. 297). Singh’s responses were incongruous and evasive, continuing to cite orientations as the source of that knowledge, and conflating background at nursing homes with job history as a fast-food fry cook. Id.

I do not credit Thekkek’s and Singh’s explanations for their hiring choices. I discuss my reasons at length in the section on credibility. That said, Singh’s unbelievable, unhelpful, and dodgy testimony about how one acquires knowledge of nursing home rules without working in a nursing home is an example on point.

F. Comparison of Inside and Outside Applicants

There is a striking disparity between the qualifications of many inside applicants who were rejected and the newly hired outside applicants. Relevant data is summarized in Acting General Counsel’s brief. (GC Br. 14–20). Counsel compiled it by selecting the job applications of twenty-four rejected inside applicants and twenty-two accepted outside applicants.¹⁹

The disparities are most striking in the realm of experience. Whereas twelve insider CNAs possessed an average of roughly 8.5 years of experience, ten out of twelve outside applicants had no experience whatsoever. (GC Exh. 24(a–mm); GC Exh. 14; GC Exh. 26(a–j); GC Exh. 16). Indeed, five of the outsiders had not received their CNA certifications at the time they were hired.²⁰ (GC Exh. 28; GC Exh. 29).

Turning to LVN applicants, Respondent declined to hire insiders Aja Gentile (twelve years of experience), Trinidad Matta (thirty-five years of experience), and Manpreet Kaur (seven

¹⁹ Accusations of cherry picking in this regard are inapposite. Even assuming that counsel handpicked the best rejected insiders and the worst accepted outsiders, it stands to reason that a rational, law-abiding employer would prefer *any* more qualified insider to a less qualified outsider. The fact that there may be other rejected inside applicants with worse credentials than those of accepted outside applicants does not change the fact that positions that could have been filled by the inside unit applicants identified by counsel were given to less qualified outside applicants.

²⁰ They are Kirampreet Bajwa, Justin Dew, Hannah Willis, Camie Crawford, and Rayme Jones.

months of experience). (GC Exh. 24(oo, ss, & vv)). Instead, Thekkek hired three LVNs with no job experience whatsoever in that role: Harjinder Kaur, Sandeep Vraitch, and Rajveer Kaur (who had worked as a CNA for three years and not as an LVN). (GC Exh. 26(k, l, m)).

5 Inside dietary aides also by and large had more experience than the accepted outsiders. Information is available for two of the insiders, Sonja Hill (three years experience) and Ashley House (one year experience). (GC Exh. 24(eee–jjj)). This contrasts with the outsiders: Sienna Huerta-Houser had worked three months as a dietary aide in 2007, but her most recent employment was at coffee shops and fast-food establishments. (GC Exh. 26(n)). Jose Thomas
10 worked many years for Midas Rubber. (GC Exh. 26(o)). Finally, Jonathan Vargas had no experience whatsoever as a dietary worker or in nursing homes. (GC Exh. 26(p)).

 Looking at housekeeping employees, outside applicants Jacqueline Edwards, Hardip Rai, and Hardip Toor had no experience as housekeepers or as nursing home workers. (GC Exh.
15 26(q–s)). Outside applicant Vanwinkle had four years experience working at a nursing home in dietary. (GC Exh. 26(t)). In contrast, the four inside applicants had between six and fourteen years of experience. (GC Exh. 24 (lll, mnn, ppp, rrr)).

 Respondent replaced Kathryn Ralph as Medical Records Clerk with Stacey Mullens.
20 Mullens has six years of experience as a CNA; during one of those years, she was also a Ward Clerk. (GC Exh. 26(v)). Ralph had been the Records Clerk at the Facility for four years, records clerk at another facility for ten years, and a CNA and RNA for seven years. (GC Exh. 24(uuu)). In total, she had twenty-one years of experience working at nursing homes in California. Id.

25 Respondent replaced the Activity Assistant of nine years, Rosalind Methuin, with Rachel Ludlow Langley, who had served as an activity assistant for one year at another facility in 2007. (GC Exh. 22; GC Exh. 26(u)).

 With some exceptions, the insider applicants had good disciplinary records. CNA
30 Kulwinder Kaur had been accused of slapping a patient, but according to the disciplinary form, the allegation was not substantiated and discipline was not issued. (GC Exh. 24(t)). LVNs Aja Gentile and Manpreet Kaur had made medication errors but no Health Department citations or discipline were reported. (GC Exh. 24(tt, ww)). Activity Assistant Rosalind Methuin once caused
35 the facility to receive a citation when a patient received a cut while Methuin was pushing her in a wheelchair. (R Exh. 1).

 Although the inside applicants as a group had nearly perfect discipline records, Thomsen gave many of them poor reviews in her discussions with Thekkek.²¹ By way of example,
40 Thomsen described CNA Emma Abundo as being “very slow,” having a work ethic that was “not good,” and as someone who “doesn’t get the job done.” (GC Exh. 24(d)). CNA Karamjeet Bains had an “ok” work ethic but was “very slow,” with poor time management and “poor patient care.” (GC Exh. 24(g)). Thomsen’s evaluations of the other inside applicants highlighted

45 ²¹ In evaluating Thomsen’s reports, I am skeptical about her credibility for the reasons discussed below in relation to the case of Escobar. Specifically, I find that Thomsen exaggerated the employment blemishes of the employees under her supervision.

by the Acting General Counsel appear comparable. For example, one CNA is described as having a “terrible” work ethic and another as being “very rude.” (GC Exh. 24(k, s)).

5 Lastly, it bears mentioning that Astrina Martin, an outside CNA hired by Thekkek, indicated on her application that she had been convicted of a felony or crime other than a minor traffic violation. (GC Exh. 26(h)). Thekkek was questioned about Martin by the Acting General Counsel. (Tr. 171–75). In a conclusory fashion, Thekkek claimed that, since Martin had been hired, the issue must have been raised in the interview and discussed to the satisfaction of her or her subordinate. *Id.* However, she could not remember discussing the issue with a subordinate and did not interview Martin herself. (Tr. 172, 174). She also implied that she relied on Martin’s status as a CNA. As she explained, Martin’s license would reflect a criminal conviction and state whether or not the conviction was of a character to preclude her from working as a CNA. (Tr. 175).

15 *G. Sandra Escobar*

1. Career Background

20 Escobar is a CNA/RNA with eighteen years of experience working at the Facility with no disciplinary record until a questionable July incident 2011 incident discussed below. (Tr. 187). Before being passed over for rehire in September, she had also been a union steward for ten years. (Tr. 194). In that role, she was called upon to attend grievance meetings and participate in disciplinary procedures on an almost daily basis. (Tr. 195). Besides acting as a steward, Escobar was also a member of the Union’s negotiating committee and had participated in informational picketing at the Facility many times. (Tr. 194).

30 As an employee, Escobar had a good record: her most current performance evaluation rated her ninety-four out of one hundred. (GC Exh. 30). Performance evaluations were conducted by Thomsen in her capacity as Director of Staff Development. Thomsen testified that ninety-four was a good score, (Tr. 342), and that only five to ten of the thirty to fifty ratings she had assigned were a ninety-four or above. Escobar also speaks fluent Spanish, an asset at a facility where the language is needed to communicate with some residents. (Tr. 189).

35 2. Escobar’s Application

40 After she applied, Escobar was interviewed by Alicia Devara in May. (Tr. 197). As was the case for the other inside applicants, Devara used the Interview Guide form. (GC Exh. 24(n)). As Respondent’s brief explains, (R Br. 30), some of her answers to interview questions—about emergency response or reporting patient abuse—deviated from protocol. (GC Exh. 24(n)). Likewise, she said that if requested to substitute for two absent CNAs, she would stick to her RNA duties. *Id.*

45 As the reader will recall, Thekkek met with Thomsen to discuss all the inside applicants. Thekkek’s notes from the meeting paint a mixed picture of Escobar’s work ethic and relations with other employees. (GC Exh. 24(o)). They also describe several specific incidents of bad behavior: leaving a patient in his room, failing to report complaints of verbal abuse, taking pictures of a patient, and a write-up for insubordination. *Id.*

Thekkek asked Escobar to come to a meeting with her in June at which these incidents were discussed. (Tr. 200). As Thekkek, admitted, Escobar was the only applicant so treated. (Tr. 134). Thekkek testified that she had heard positive and negative remarks about Escobar and wanted to hear her side of the story. Id. However, Thekkek also admitted that there were other employees about whom similar concerns were raised whom she did not ask for a second interview. Id.

Escobar convincingly testified about what was said at the meeting. (Tr. 200). She clarified to Thekkek that she did not report the abuse the patient told her about because she was aware that the issue was already known to supervisors. (Tr. 203–04). She also denied taking pictures of a patient’s wound and pointed out that no discipline arose from the allegations, suggesting the allegations were spurious and unsubstantiated. (Tr. 202).

Thekkek was satisfied with Escobar’s explanations. (Tr. 134). Escobar was not disqualified; on the contrary, Thekkek planned to hire her after the interview. Id. The reason she was ultimately not hired, according to Thekkek, was an event that occurred later that summer. Id.

3. The July Incident

The incident that supposedly caused Thekkek to change her mind about Escobar occurred on July 14. (GC Exh. 31). Escobar was given a documented verbal warning, (GC Exh. 31), which is the lowest stage of the predecessor’s progressive discipline system. (Tr. 348). The documentation states, “Investigation revealed/corroborated by six (6) witnesses statements R/t incident of 7/14/11, resulting in insubordination, violation of resident rights, HIPPA & refusal of Tx P&P [Treatment Policy and Procedure].” (GC Exh. 31). However, the accompanying reports and the testimony of Escobar herself reveal that this statement of the supposed infraction is inaccurate or, at least, exaggerated.

Escobar credibly recounted the events of July 11 as follows. It was lunchtime and Escobar was working in rehab dining with fellow RNA Trini Matta. (Tr. 207–08). Escobar was feeding one of the patients when she noticed that another of her charges was backing away from the table. Id. She approached the gentleman, a Spanish speaker who looked to be crying, and asked him what was wrong. Id. He said that he did not want to eat any further, and she asked him to reconsider. (Tr. 209). He repeated his wish, however, explaining that he was experiencing some sad memories, did not want to eat, and desired to return to his room. Id. Escobar assented. Id.

At a nurse’s station, she ran into charge nurse Amele Waterman, an RN who happened to be the patient’s nurse. Id. Waterman approached and asked what was wrong. (Tr. 210). Escobar explained that the resident was crying, he did not want to eat, and he wished to return to his room. Id. Waterman did not agree with that assessment, claiming that he in fact did want to eat and that she knew the real cause of his behavior. (Tr. 210–11). Escobar repeated her version of events, but Waterman insisted that he would eat. (Tr. 211). Using Escobar as a translator, Waterman tried convincing the patient to eat. Id. Although the patient resisted, Waterman kept insisting until an exasperated Escobar rhetorically asked her, “If you do not believe me, why are you having me translate?” Id. With that, she told Waterman that she needed to return to rehab

dining; at which point, Waterman suggested that the resident return with her. Escobar refused, dismissed Waterman with a waive of her hand, and returned to her work alone. Id. In the meantime, the patient, who had stopped crying after leaving the dining room, had begun crying again during the conversation with Waterman at the nurse's station. (Tr. 239).

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After Escobar had returned to rehab dining, CNA Heidi Langston brought the patient to the dining room. Id. Escobar asked Langston what she was doing and Langston said she was following Waterman's orders. Id. Langston left, and the patient never did eat. (Tr. 239-40). Shortly after the incident, Escobar wrote down her account of events. (GC Exh. 34(e)). Except for a few noncrucial details, it agrees with her hearing testimony.

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Trinidad "Trini" Matta gave a written statement during the investigation. (GC Exh. 32). She confirmed that a patient became upset and started crying. She recalled Escobar attending to the patient and asking him what was wrong. She stated that Escobar notified the charge nurse who came to the dining room. According to Matta, the nurse, presumably nurse Waterman, did not understand the situation and failed to ask the patient what was upsetting him. In Matta's words, "I don't think the Nurse [Waterman] understood. She just kept saying different things."

15

Nurse Waterman wrote a "Social Services Referral" which confirms that the resident was crying because he remembered something sad from his past. (GC Exh. 34(b)). When Social Services followed up with the resident, he confirmed that it was an upsetting memory that made him emotional and denied that events in the dining room or maltreatment by the staff were responsible. (GC Exh. 34(f)).

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Waterman did not testify at hearing and her side of the story is reflected in a "Performance Report" where she wrote as part of her investigation. (GC Exh. 24 (c-d)). She stated:

On 14 July at approximately 12:25 hours RNA Sandra Escobar brought [the resident] to Station 2 hallway from dining room and reported that he suddenly became sad and was crying during his lunch. She also said that he had not eaten any of his food. When I asked for more details and if I could accompany them to RNA dining room so that we could begin to assess what the issue was I attempted to tell her his diet recently changed, but she interrupted me and said "No, I am not taking him. He doesn't want to eat. He remembered his past problems." This occurred at the Station 2 hallway. She was very loud and everyone could hear her. She left the patient in the hallway and returned to RNA dining room. CNA Heidi and I then took [the resident] to the RNA room. I found that he had eaten all of his mashed potatoes but none of the other food. Pointing at the food I asked him if there was something here he didn't like [the resident] responded in Spanish and I asked RNA Sandra what exactly he had said. She loudly and angrily said "I told you, you don't listen. He doesn't want to eat! he has problems! you nurses don't trust us!" Trini, who was sitting far away assisting residents with feeding, said "yeah, they don't!" RNA Sandra was being loud and rude disturbing residents. I took Mr. Gonzales to his room and went to social services to report his state of mind and find another spanish speaker to translate.

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Later, at approximately 14:15 hours, I was at Station 1, RNA Sandra was at Station 3 loudly asking the nurses what my name was while pointing and glaring at me. RN Rajvender was present at Station 3.

5 Id. Escobar did not speak of a new incident in the second paragraph immediately above in her testimony or her written statement. RN Rajvinder Kaur, however, corroborated Waterman's account. (GC Exh. 24(h)).

10 CNA Heidi Langston's brief written statement is largely in harmony with Waterman's report. (GC Exh. 33). She did add one unflattering detail about Escobar. She stated that after the resident had returned to rehab dining, Escobar told him, in a loud voice, that unless he was going to eat, they did not have the time to feed him. Langston took pains to identify RNA Escobar as the person who spoke in a loud voice to the resident.²²

15 After collecting the written statements just canvassed, Waterman authored a document summarizing the conclusions of her investigation. (GC Exh. 34(a)). Its four numbered sections match the infractions on Escobar's disciplinary form. Id. For each infraction, I consider the basis Waterman presents and then evaluate it in light of my own reading of the evidence. My
20 conclusions here are influenced by the positive impression I had of Escobar as a witness. On the stand, I found her testimony convincing and uninterrupted. She appeared nervous but confident with her responses and was the most credible of all the witnesses I observed.

25 The alleged violation of resident dignity consisted in Escobar's explanation of the reason for the resident's refusal to eat. Waterman wrote that Escobar violated resident rights "by speaking angrily and condescending toward the Resident . . . stating 'He has problems, past personal problems'! causing the Resident to start crying again, embarrassed and humiliated . . . Res[ident] putting his head down & crying." Id.

30 I find this description distorts the facts as demonstrated by Escobar's testimony and the investigatory documents. For one thing, it is clear from the record that when Escobar spoke of the "resident's past problems," she was not speaking to the resident. Rather, she was talking to Waterman about the reason for the resident's refusal to eat. Second, it distorts matters to blame Escobar for causing the resident to recommence crying. Escobar did become angry and frustrated with Waterman and that display of emotion could have disturbed the resident. At the same time,
35 it takes two people to make an argument, and Waterman's refusal to let the resident return to his room is also blameworthy. Furthermore, both Waterman's referral to social services and the follow-up report show that the resident was upset because of remembrances of things past, not from Escobar's behavior.

40 _____
²² Langston's story is perplexing for several reasons. First, it is clear that Escobar was happy to oblige the patient and return him to his room; it was Waterman who insisted that the patient eat more. Second, Waterman spoke to the patient via Escobar. If Escobar was speaking rudely to the patient, she was probably only translating Waterman's words. Finally, any words that passed
45 between Escobar and the patient would have been in Spanish. There is no evidence to show that Langston is more than monolingual in English. In that case, however, I find that Langston would not know what Escobar was saying to the patient.

The alleged violation of HIPPA consisted in “discussing Resident information in hallway & RNA dining room while staff members & residents were present.” Becoming more specific, Waterman again quotes Escobar’s words, “He has past personal problems.”

5

I find this supposed violation to be exaggerated at best. Explaining that a person does not want to eat because they are remembering something sad from their past, however loudly stated, is a far cry from discussing a patient’s diagnosis or medical condition.

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The alleged insubordination consists in vague descriptions of rude conduct and poor decorum during the encounter between Waterman and Escobar. It also mentions the incident later in the afternoon, when Escobar waived her finger at Waterman. Speaking in the third person, Waterman reports that this “caus[ed] charge nurse Amele to feel afraid and intimidated by a staff member.”

15

The label “insubordination” is an incorrect description of the behavior described. While Escobar failed to maintain appropriate professional calm during her conversations with Waterman, and while her finger pointing antics are unprofessional for a nurse, these acts are not the same as disobeying orders. As such, the term “insubordination” used in the disciplinary write-up exaggerates the seriousness of Escobar’s behavior. There does appear to have been insubordinate behavior, namely the refusal to return the resident to the dining room and the refusal to continue translating, but these events were not cited in this section.

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The alleged failure to follow treatment policy and procedure consisted in Escobar’s refusal to continue translating. Waterman also mentions that Escobar’s subsequent outburst, “You nurses don’t trust us,” caused the resident to become upset and cry again. Waterman was forced to obtain another translator to complete “her assessment” of the resident.

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This description is correct that Escobar refused to continue translating for Waterman. On the other hand, the claim that Escobar’s behavior caused the resident to restart crying is less credible for reasons already discussed.

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In sum, I find the conflicting testimony surrounding the July 11 incident to show that the case against Escobar was exaggerated. The offenses listed in the disciplinary write-up are more severe than warrant mention: HIPPA violations are no laughing matter for healthcare providers. However, once the underlying facts are considered, it is apparent why the incident only resulted in a minor verbal warning and not more serious discipline.

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4. Thekkek’s Update on Escobar

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Thekkek testified that she learned of Escobar’s July write-up in August when she contacted Thomsen for “updates.” (Tr. 137). She said she received updates for other employees as well but could not recall any of their names. *Id.* Over the phone, Thomsen told Thekkek about the four violations cited in the verbal warning. (Tr. 138). Thekkek claimed that she did not make the decision not to hire Escobar until she had received and read the relevant documents, including the investigation reports, on August 31. (Tr. 139–40).

45

For the sake of comparison, the Acting General Counsel draws our attention to discipline received by other inside applicants who were hired by Respondent.²³ For example, Toni Whitman, Maria Villalobos, and Jatinder Saroya had received verbal warnings for absences. Sital Singh had been suspended for failure to report a skin tear, had received a written warning for not reporting a resident who was not eating, and had two warnings for absences. Lisa Martinez had three warnings for absences and not clocking-in. Rosa Escobar had been suspended for three days for using profanity and had a verbal warning for work mistakes.

ANALYSIS

I. Credibility²⁴

I have outlined my credibility findings in the findings of fact above and in the analysis below. As a general matter, however, I found that significant portions of the testimony of Thekkek, Singh, and Thomsen lacked credibility because each of them provided testimony that at times was unbelievable, evasive, or contradicted by documentary evidence. Unless otherwise noted, I generally credited the testimony of the other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence.

A. Preema Thekkek

I place very little weight in the testimony of Thekkek. At numerous points in her testimony, she offered answers that were either extremely incredible or demonstrably false.

1. Thekkek's misleading testimony about negative references for outside applicants

During the hearing, Thekkek was asked whether any of the friends of applicants contacted as references gave a negative review. (Tr. 107). Thekkek responded, "I think so." Id. When next asked whether that negative answer would be found in the documents produced, she said, "That person probably was not hired." Id.

The trouble with Thekkek's testimony is that none of the reference checks in the record contain negative evaluations of the applicants. (GC Exh. 4). They are all positive, as one would expect of reference checks taken from friends and family members. At the hearing, Counsel for the Acting General Counsel represented, without being challenged, that his office had subpoenaed all the reference checks and that all of these—except those for non-bargaining unit positions—were entered into the record. (Tr. 183–84). It is also true that every applicant with a reference check in the record was hired. (Compare GC Exh. 35, with GC Exh. 4). These two facts cast doubt on Thekkek's representation that applicants with negative references "probably w[ere] not hired." Indeed, they belie a basic assumption of that claim, viz., that reference checks were made of applicants who were not hired.

2. Thekkek falsely testified that the same hiring process was used for inside and outside

²³ The discipline forms can be found at Acting General Counsel's Exhibit 12.

²⁴ The above findings of fact were shaped by the credibility judgments that follow.

applicants

Thekkek testified that she used the same hiring process for every employee that was interviewed. (Tr. 387).

5

She spoke falsely. The “Interview Guide” forms were used with inside applicants but not with outside applicants. Thekkek examined the personnel files of inside applicants but did not do so for outside applicants. Admittedly, she had access to personnel files for inside applicants as purchaser of the predecessor. Nevertheless, the record does not disclose an attempt to obtain comparable information from the past employers of outside applicants. Similarly, while Thekkek spoke with Thomsen about each of the inside applicants, she did not make any serious effort to contact the past and present supervisors of outside applicants. Instead, she accepted references from friends and family - an opportunity not extended to inside applicants.

10

15 3. Thekkek falsely testified that she was unaware of Escobar’s status as a shop steward

Thekkek reviewed the personnel files of inside applicants. She was asked whether she noticed Escobar’s signature and her identification as union steward on some of the discipline forms. She responded, “I did not look and see who signed it. I did not look and see who signed it. I did not –²⁵.” (Tr. 121). I find that this detail itself is false. While a person could gloss over signatures (a person’s signature is often illegible), Escobar signed a great number of them. On some of these, she also wrote her title, shop steward.

20

Thekkek was also asked if she noticed documents in Escobar’s own personnel file indicating her shop steward status. She answered, “I don’t remember seeing anything like that.” (Tr. 119). The next day of the hearing, Respondent’s counsel asked Thekkek if she was aware of Escobar’s work as a shop steward when she made decisions about her. (Tr. 395) She responded, “I was not aware. There was no nothing—there was no writing I saw in her file that said she’s a shop steward.” Id.

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Thekkek’s denials are unbelievable. Escobar’s file contained a letter from an attorney identifying her as a shop steward. (GC Exh. 11). It was an important letter alleging misbehavior by Escobar. Its first sentence states, “I am writing to you at this time to express the significant concern of our client, Yuba Care & Rehabilitation, about the recent conduct of an SEIU shop steward [Escobar]. . . . Several Yuba Care bargaining unit employees have reported to Yuba Care management that they have been subjected to harassment, coercion, intimidation and threats by one of the shop stewards, Sandra Escobar.” Id. The discipline imposed (a suspension) resulted in the filing of a grievance, papers from which were also part of Escobar’s file.²⁶ It is not credible that Thekkek did not notice the attorney’s letter: it should have been conspicuous to her as a letter from an outside law firm connected to a major disciplinary proceeding.

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4. Thekkek’s misleading testimony on wages

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²⁵ At this point, counsel cuts her off.

²⁶ The grievance ultimately resulted in the imposed discipline’s rescission. (Tr. 206–07).

I asked Thekkek about continuity of wages at the facility before and after the takeover:

Q: [S]ince the takeover in September of 2011, would you say that for the most part the employees are paid a higher or a lower wage than they did with the Nazareth facility?

5 A: They're paid same.

Q: What do you base that on? That their exact same wag[e] rates were carried over with no changes?

A: I don't know their rate —

Q: To the extent they were incumbents.

10 A: Yeah, the wage rates were carried over almost—yes.

(Tr. 415–16). While it may be true that wages remained the same for some employees,²⁷ the record shows they decreased for housekeepers and dietary aides. This is demonstrated by comparisons of the wage rates listed in CBA and those stated in the offer letters to new employees. For instance, the starting wage for a dietary aide listed in the CBA is \$9.27 an hour. (GC Exh. 2, at 35). The offer letter to outside dietary aide Sienna Huerta-Houser declares a starting wage of \$8.50 an hour. (GC Exh. 5(b)). The same documents for outside housekeeper Hardip Rai show a decrease from \$9.46 to \$8.50.

20 5. Thekkek implausibly denied knowing whether “Interview Guide” forms were used with outside applicants

Thekkek said she was “not sure” whether the Interview Guide forms that were used for inside CNA and LVN applicants were also used for outside applicants. (Tr. 55). This is highly implausible. As I found above, the forms were in fact only used for inside applicants and a small number of rejected outside applicants. Since Thekkek ultimately made the hiring decisions, it is not believable that she would not know of this difference in the interview process for the two groups. At a minimum, her testimony is evasive.

30 6. Thekkek falsely testified that she made hiring decisions on August 31

Thekkek claimed that her hiring decisions were made on August 31. For reasons discussed above, I find that hiring could not have occurred later than August 26.

35 7. Thekkek testified falsely about background checks

Thekkek claimed that she conducted background checks of applicants. (Tr. 113). As discussed above however, her “background checks” consisted in nothing more than a question on the paper application that asked applicants if they had committed a crime, accompanied by a follow-up at the interview if the person admitted to a past offense. Respondent did not contact law enforcement or otherwise independently investigate applicants’ criminal records.

45 ²⁷ For instance, the offer letter for outside CNA Rachel Alergus lists a starting wage of \$10.33. (GC Exh. 5(b)). The starting salary for CNAs in the expired CBA is \$10.33. (GC Exh. 2, at 35). Some LVNs even saw an increase under the new regime. Outside LVN Felicia Portugal’s offer letter shows an increase over the CBA rate of \$17.88 to \$18.50 an hour.

8. Thekkek dubiously claimed that she could not remember the names of applicants for whom she received August updates other than the name of Sandra Escobar

5 Thekkek explained that she learned about Escobar’s July incident when she “called Shellay Thomsen for updates.” (Tr. 137). She was asked whether she received updates for anyone other than Escobar. *Id.* She answered in the affirmative but could not remember any of the other applicants’ names. *Id.* The next day of the hearing, she explained that these August updates with Thomsen consisted in going over the employees “one-by-one.” (Tr. 396).

10 I find Thekkek’s testimony not credible. Given her later claim that she reviewed each employee “one-by-one,” she should have been able to furnish at least one name. I am also skeptical because Thomsen did not corroborate Thekkek’s version of events. (See Tr. 364–65). Although Thomsen was asked *how* she conveyed news of Escobar’s write-up to Thekkek, she said nothing about a session in which she and Thekkek reviewed the names of applicant’s “one-by-one.” *Id.* Finally, Thekkek’s record of credibility problems weighs against crediting her testimony. Here I further find that Thekkek had a motive to distort her testimony because it would harm Respondent’s case if she had admitted to singling-out Escobar for special scrutiny.

20 9. Thekkek unbelievably claimed she did not know whether she hired only incumbent RNs

 Counsel asked Thekkek whether she hired all of the predecessor’s registered nurses, and she responded, “I don’t know. I have to check.” (Tr. 115). I found this response disingenuous. As mentioned above, Thekkek hired all of the predecessor RNs, whom she personally interviewed.

25 10. Thekkek falsely denied knowledge of the *Burns*²⁸ rule

 During her testimony, Thekkek was asked about if she knew about the *Burns* rule. (Tr. 76–77). Counsel identified it by name and described the principle to her. (Tr. 77). She claimed that she did not know of it until March of 2012, when her affidavit was taken in this case. *Id.*

35 I find Thekkek’s declaration of ignorance incredible for multiple reasons. For one thing, Thekkek is an experienced businesswoman who owns eleven nursing homes. At three of these, Thekkek recognized and bargained with the Union after she purchased them. (Tr. 80–87). Although she implausibly claimed that she recognized the Union at two of these facilities based solely on receipt of a letter from the Union, (Tr. 85–86), I find that she recognized the Union only after consulting with counsel and being informed that she was obligated to do so by law. Indeed, Thekkek admitted that she hired more than 50% of the predecessor’s workforce after these previous acquisitions, (Tr. 83–84), enough to trigger her *Burns* obligation as a successor employer. Aside from her considerable past experience in labor relations, Thekkek’s expertise

45 ²⁸ *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272 (1972). *Burns* recognized that “a mere change of employers or of ownership in the employing industry is not such an ‘unusual circumstance’ as to affect the force of the Board’s certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer.” *Id.* at 279.

was bolstered by the assistance of able labor counsel in her dealings with the Union over the Yuba Facility. Specifically, she was represented by local attorney Maria Anastas. (Tr. 407). I take notice of the fact that Anastas is a seasoned practitioner of labor law.

5 Furthermore, I continue to regard Thekkek’s testimony with suspicion. Here there were ample incentives for Thekkek to claim ignorance of the *Burns* doctrine. Namely, if Thekkek had admitted to knowing the consequences of hiring more than 50% of her employees from the predecessor’s rolls, the Acting General Counsel’s path to proving that she made her hiring decisions with an eye to falling short of that number would have been eased considerably.

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In sum, I do not credit Thekkek’s denial of knowledge of the *Burns* rule. It is more probable—and I do find—that she was well aware of the rule throughout the process of acquiring the Facility

15 *B. Trilochan “Bobby” Singh*

Singh has been in the employ of the Thekkeks for the preceding four or five years and currently acts as regional director of operations for the Thekkek nursing home empire. (Tr. 273). He also served as a consultant to Respondent during the takeover of the Yuba Facility. (Tr. 46).
 20 He worked with her on the hiring process as well, including interviewing the non-licensed applicants. (Tr. 243, 274–75).

As a witness, I did not find Singh to be credible. Below, I document two instances of incongruous or evasive testimony.

25

1. Singh’s misleading testimony about references

In his testimony, Singh exaggerated the scope of Respondent’s efforts to contact references for outside applicants.:

30

Q: Okay. What did you do to investigate the outside applicants?

A: I did their reference checks.

Q: And what did that consist of?

A: Their references provided by them and we checked if they have any prior work history. We checked with the employer.

35

* * *

Q: [D]id you contact everyone that the applicants listed on the application forms?

A: To the best of my knowledge, yes.

40 (Tr. 284). The reference check process was discussed at length above. In reality, reference checks are lacking for seventeen of the outside employees. Moreover, the record shows only four reference checks from employers, the rest are from friends and family. It was misleading and exaggerated for Singh to claim that Respondent “checked with the employer” and that “to the best of [his] knowledge” all of the applicants’ references were contacted.

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2. Singh falsely and ridiculously asserted that orientation was held prior to interviews

Previously, I discussed Singh's testimony about hiring criteria. He claimed that knowledge of nursing home protocols was a factor he considered in applicants. When questioned how one could acquire such knowledge without working in a nursing home, he responded that it could be gained through orientation. However, he claimed not to remember whether orientation or interviews occurred first. The truth obviously is that orientation came after the interviews. The parties even stipulated to this fact. Singh's testimony on this point was highly disingenuous. Accordingly, I did not credit his testimony in regards to hiring criteria. On the contrary, I saw in those purported criteria a veil for unlawful practices.

II. Legal Background

A successor employer is obliged to bargain with the union of its employees if "the bargaining unit remains unchanged and a majority of employees hired by the new employer were represented by a recently certified bargaining agent." *NLRB v. Burns Sec. Servs.*, 406 U.S. 272, 281 (1972). Elaborating on this principle, the Board has explained that there must be both "continuity in the workforce" and "continuity of the business enterprise" to trigger the obligations of a successor. E.g., *Marine Spill Response Corp.*, 348 NLRB 1282, 1285 (2006).

With respect to continuity of the business enterprise, the Supreme Court prescribes a totality of the circumstances test. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The Board considers "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.*

Continuity in the workforce is established if a majority of the successor's employees were employed by the predecessor. *Id.* at 41. The Board, with the approval of the Courts, gauges the union's majority status at the time when a "substantial and representative compliment" of employees has been hired. *Grane Healthcare Co.*, 357 NLRB No. 123 (2011) (citing *Fall River*, 482 U.S. at 40). To determine whether a substantial and representative compliment exists, the Board considers "whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production." *Fall River*, 482 U.S. at 49 (quoting *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983)). It also looks at "the size of the complement on th[e] date and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer's expected expansion." *Id.* (quoting *Premium Foods*, 709 F.2d at 628).

In assembling its workforce, a successor "may not refuse to hire the predecessor's employees solely because they were represented by a union or to avoid having to recognize a union." *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), *enfd.*, 944 F.2d 1305 (7th Cir. 1991). In judging discrimination by a successor, the Board uses the familiar *Wright Line* test. *Planned Bldg. Servs.*, 347 NLRB 670, 670 (2006) (citing *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981)). The General Counsel carries the initial burden of establishing that the successor failed to hire employees of its predecessor and was motivated by antiunion animus. *Id.* at 673. The burden then shifts to the employer to show that it would not have hired the predecessor's employees even in the absence of an unlawful motive. *Id.*

In the *Wright Line* context, the General Counsel demonstrates antiunion animus by establishing three elements. As the Board explained in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), “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.” Animus and discrimination may be inferred from the circumstances and need not be established directly. E.g., *Sunshine Piping, Inc.*, 351 NLRB 1371, 1390 (2007). In addition, the Board approves the use of the following factors to establish an unlawful refusal to hire:

“[S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.”

Planned Bldg., 347 NLRB at 673 (alteration in original) (quoting *U.S. Marine*, 293 NLRB at 670).

If an employer is found to have discriminated in hiring, the Board assumes that, but for the unlawful discrimination, the successor would have hired the predecessor employees in their unit positions. *Id.* at 674 (citing *Love's Barbeque Rest. No. 62*, 245 NLRB 78, 82 (1979), *enfd.* in relevant part sub nom., *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981)). More to the point, it also assumes that the union would have retained its majority status. E.g., *GFS Bldg. Maint.*, 330 NLRB 747, 752 (2000) (citing *State Distrib. Co.*, 282 NLRB 1048 (1987)). Consequently, if in the meantime the employer has refused to recognize and bargain with the union, it will be held to have violated Section 8(a)(5) and (1) of the Act. *Id.* Under these circumstances, the successor is also disqualified from setting initial terms and conditions of employment. *Massey Energy Co.*, 354 NLRB No. 83 (2009) (citing *Love's Barbeque*, 245 NLRB at 82).

The foregoing review of applicable law terminates with a conclusion under Section 8(a)(5) of the Act. The reader should be aware, however, that a finding of discrimination also sounds as a violation of Section 8(a)(3). See *Planned Bldg.*, 347 NLRB at 674 (treating a finding of discriminatory hiring by a predecessor in violation of 8(a)(3) as a predicate to finding a violation of 8(a)(5)). As was done in *Planned Building*, I analyze the claims of discrimination under Section 8(a)(3) first before preceding to the question of failure to bargain.

III. Respondent violated Section 8(a)(3) of the Act by discriminatorily refusing to hire many of the inside applicants

A. The Acting General Counsel has satisfied its burden of establishing antiunion animus

As an initial matter, there is no question that Respondent refused to hire many inside applicants. Similarly, it is plain that Respondent was aware of the union affiliation of the predecessors' employees. For example, when asked if she was aware of Escobar's involvement in the Union, Thekkek explained, “I know she's a union member because all of the employees in

the building is [sic] union.” (Tr. 394).

The last element of the Acting General Counsel’s case, antiunion animus, is well-established by circumstantial evidence in this case. I find Respondent harbored antiunion animus based on (1) the disparate qualifications of inside and outside applicants, (2) the disparate hiring procedures used for the two groups, and (3) its managers’ false testimony.

In my findings of fact, I set out the qualifications of twenty-four rejected inside applicants side-by-side with the qualifications of twenty-two accepted outside applicants. The comparisons demonstrate that, not only did the inside applicants greatly exceed the outside applicants in experience, but the outside applicants were almost completely bereft of practice working in nursing homes or in the positions that they were hired to fill. Moreover, the rejected inside applicants had good disciplinary records, with only minor blemishes. In contrast, one of the outside applicants whom Respondent favored admitted to a criminal conviction on her application form. In the past, the Board has considered disparities in qualifications, particularly experience, in finding discrimination. E.g., *FiveCAP, Inc.*, 331 NLRB 1165, 1217 (2000), enfd. in relevant part, 294 F.3d 768 (6th Cir. 2002); cf. *Custom Leather Designers, Inc.*, 314 NLRB 413, 418 (1994) (“The failure of [the successor] to hire experienced, unionized employees, whose work had proved satisfactory in the past, indicates at the very least that its selection process was deliberate and was aimed specifically at them because of their status as former [predecessor] employees.”).

My findings of fact also demonstrate significant disparities in the hiring procedures used for inside and outside applicants. Whereas Respondent used the Interview Guide form in its interviews with inside applicants, it only used the same form with four outside applicants. Whereas Respondent reviewed the personnel files of inside applicants, it did not make a serious attempt to obtain comparable information from the past employers of outside applicants. Whereas Respondent’s manager Thekkek spoke with Thomsen about each of the inside applicants, Respondent did not make a substantial effort to communicate with the past or present supervisors of the outside applicants. Instead, it accepted and sought references from friends and family, only obtaining references from a minimal number of the outside applicants’ employers.²⁹ In total, these findings demonstrate that greater scrutiny was applied to the applications of insiders than those of outsiders.

Past cases show that disparate scrutiny supports a finding of discrimination. The facts of *Montfort of Colorado*, 298 NLRB 73 (1990), enfd. in part, 965 F.2d 1538 (10th Cir. 1992), are strikingly similar:

The Respondent had available and closely scrutinized the personnel files of all former employees to verify whether they met its criteria. These files contained information on employees’ absenteeism, discipline, and medical condition, which, in a substantial

²⁹ As discussed earlier, I find that some reference checks were conducted *after* Thekkek had made her hiring decisions on August 26. This, of course, diminishes the significance of these reference checks, which, in turn, bespeaks a further disparity in the scrutiny applied to each group of applicants.

majority of instances, constituted the exclusive basis for deciding not to rehire former employees. By contrast, past employment records for non-former employee applicants were reviewed only if sufficient information was provided through the Respondent's use of authorization release forms to check references. These forms sought only attendance, discipline, and accident records, and they gave no guidance to employers about how to set forth such information in a manner permitting meaningful evaluation under the Respondent's hiring criteria. Lovelady's testimony indicates that no more than 25 percent, and perhaps as few as 12-1/2 percent, of the forms were returned with sufficient information. The Respondent made no effort at followup. Nonformer employee applicants were presumed to meet the hiring criteria if there was no specific disqualifying information.

Montfort, 298 NLRB at 80. Faced with these facts, the Board held that the use of former employees' personnel files to subject them to greater scrutiny proved discrimination in violation of Section 8(a)(3). *Id.* at 81. The Board reasoned similarly in *Dafuskie Club, Inc.*, 328 NLRB 415, (1999), *enfd. per curiam sub nom., Int'l Union of Operating Eng'rs, Local 465 v. NLRB*, 221 F.3d 196 (D.C. Cir. 2000). In that case, the employer spoke with the predecessor's supervisors and asked them to rate individual employees. *Id.* at 420. The employer did not attempt to obtain supervisor evaluations for outside applicants. *Id.* at 420-21. The Board found this variant treatment (along with disparate use of personnel files as occurred in *Montfort*) to be demonstrative of animus. *Id.* at 421.

My findings of credibility amply document false, evasive, or disingenuous testimony by Respondent's managers. For example, Thekkek falsely testified that she used the same hiring process for all applicants, that she did not know Escobar was a union steward, and that she made hiring decisions on August 31. Likewise, Singh perplexingly claimed that orientation could have occurred before interviews. In each case, there existed a palpable motive for Respondents' witnesses to distort their testimony. For instance, if Thekkek had admitted to using a different hiring process for inside applicants, she would have revealed obvious evidence of discriminatory treatment. Accordingly, I find that both Thekkek and Singh gave their false or evasive testimony with an eye to disguising discrimination in hiring. As previous cases teach, false testimony designed to obscure discrimination supports a finding that it occurred. E.g., *Universidad Interamericana de P.R.*, 268 NLRB 1171, 1178 (1984).

B. The Respondent failed to establish that it would have refused to hire the inside applicants even in the absence of an unlawful motive

To explain its hiring decisions, Respondent offers a narrative in which Thekkek first recognized the dilapidated shape of the Yuba Facility and then purchased it with an eye to improvement. As part of her plans for reform, she needed to improve patient and customer care; so she hired her new staff with an eye to ensuring those enhancements. During interviews, she and Singh supposedly looked for traits like work habits, work ethic, interview presentation, knowledge of abuse and emergency procedures, productivity, and teamwork. Experience was considered but not given much weight.

I do not credit this account of the reasons for Respondent's hiring decisions. My first reason is that Thekkek and Singh are not believable witnesses. My grounds for discounting their

testimony have already been discussed at length. It is through their testimony that Respondent seeks to establish that it employed innocuous hiring criteria. (See R Br. 62–660. If their testimony is excluded as unreliable, Respondent’s asserted hiring rationale falls for want of foundation.

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Secondly, it is implausible that an employer like Thekkek, who cites the predecessor’s poor performance as her reason for her hiring choices, would retain most of the predecessor’s management and all of its RNs on her new staff. *See TCB Sys., Inc.*, 355 NLRB No. 162 (2010), enfd. per curiam, 448 F. App’x 993 (11th Cir. 2011) (rejecting the rationale of an employer who complained about dirty work areas but retained the supervisors in the problem zones); *Lemay Caring Ctr.*, 280 NLRB 60, 70 (1986), aff’d mem. sub nom., *Dasal Caring Ctrs. v. NLRB*, 815 F.2d 711 (8th Cir. 1987) (expressing perplexity that an employer dissatisfied with the quality of work would retain several of the supervisors with responsibility for that work).

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Next, the weak qualifications of many accepted outside applicants render it improbable that Respondent’s hiring decisions were motivated by a desire to obtain the best possible employees. As documented in the findings of fact, many outside applicants had no experience whatsoever working in nursing homes or in the job classifications for which they were hired. Five of the CNAs had not even received their certifications at the time they were accepted.

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Fourth and finally, the light scrutiny employed in evaluating outside applicants belies the notion that Respondent was seeking to improve the quality of its workforce. Respondent sought and accepted references from friends and family members, rather than past employers, and failed to conduct outside investigations of applicants’ criminal records, despite its legal obligation to do so.

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IV. Respondent violated Section 8(a)(3) of the Act by discriminatorily refusing to hire Sandra Escobar

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A. The Acting General Counsel has satisfied its burden of establishing antiunion animus

I mention at the outset that, as a member of the bargaining unit, Escobar is encompassed by my finding of discrimination in the previous section. Hence, remedies growing out of that violation are just as applicable to her as they are to her fellow unit members. That said, there is a further, independent basis for finding a violation of Section 8(a)(3) in Escobar’s case.

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To begin, there is no doubt that Escobar engaged in union activities; she was a shop steward and had served on the union’s negotiating committee. It is also established that Respondent was aware of Escobar’s role as a shop steward. Although Thekkek denied awareness of this fact, I found her testimony to be false for reasons already discussed in the credibility section.

40

The third element of the Acting General Counsel’s case, animus, is well supported by circumstantial evidence. There are three distinct bases for finding anti-union animus in Escobar’s case: (1) Thekkek subjected Escobar’s application to greater scrutiny, (2) Thekkek

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falsely denied knowledge of Escobar’s union leadership role, and (3) Respondent’s justification for not hiring Escobar was exaggerated and pretextual.³⁰

5 There were two instances in which Escobar was singled out for special scrutiny as an applicant. The first came in June when Escobar was called for a second interview with Thekkek after her initial interview with Devara. No other applicant was interviewed twice. While Thekkek claimed the second interview was prompted by issues documented in Escobar’s personnel file, Thekkek has proven herself to be an unreliable witness and I give very little credence to this explanation. Moreoever, the files of other inside applicants revealed past disciplinary infractions, 10 but they were not asked to interview a second time.

15 Escobar again came under special scrutiny in August when Thekkek sought “updates” from Thomsen. Although Thekkek claimed that during the updates, she reviewed each applicant “one-by-one,” I found this testimony to be unworthy of belief: Thekkek could not remember the name of a single other applicant about whom she received an update. In light of Thekkek’s other self-serving, false testimony, it is more likely that Escobar was the only employee so treated. Per Board law, disparate treatment of a union activist may furnish a basis for a finding of animus. *Fluor Daniel, Inc.*, 311 NLRB 498, 499 (1993), enfd. in part, 161 F.3d 953 (6th Cir. 1998) (finding animus where applicants who wrote “voluntary union organizer” on their applications 20 were subjected to more challenging skills test); cf. *Montfort of Colo.*, 298 NLRB 73, 80 (1990), enfd. in part, 965 F.2d 1538 (10th Cir. 1992); *Dafuskie Club, Inc.*, 328 NLRB 415, (1999), enfd. per curiam sub nom., *Int’l Union of Operating Eng’rs, Local 465 v. NLRB*, 221 F.3d 196 (D.C. Cir. 2000).

25 As established in the section on credibility, Thekkek falsely claimed that she was unaware of Escobar’s status as a union steward. A person who wished to conceal an antiunion motive could be well-served by pleading ignorance of an applicant’s union affiliations. Accordingly, I draw an inference of animus from Thekkek’s false denial. See e.g., *Universidad Interamericana de P.R.*, 268 NLRB 1171, 1178 (1984).

30 Lastly, I infer animus from the fact that the Respondent’s explanation of its decision not to hire Escobar was exaggerated and pretextual. Specifically, Respondent relies on the July incident involving Escobar and Nurse Waterman. Although I will discuss these events at length in considering Respondent’s portion of the *Wright Line* test, my finding of pretext is also 35 relevant to the question of animus. Although this may seem to muddle the *Wright Line* framework, the Board has approved demonstrations of pretext as part of a General Counsel’s initial case. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003) (citing *Nat’l Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 n.11 (1997)). It wrote, “[I]t has long been recognized that where an employer’s reasons are false, it can be inferred ‘that the [real] motive is one that 40

45 ³⁰ Aside from these three grounds, my prior finding of animus in regards to the mass of inside applicants demonstrates that Respondent was of an anti-union mind. Nonetheless, I focus in this section on the Escobar-specific evidence in order to demonstrate an alternative basis for finding a violation with respect to her alone.

the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference.” Id. (second and third alterations in the original) (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

5 *B. Respondent did not establish that it would have failed to hire Sandra Escobar even in the absence of an unlawful motive*

Respondent argues that it failed to hire Escobar because of the discipline she received in connection with the July incident. It argues that the violations cited on the write-up are very
10 grave and would ordinarily merit termination. On its face, the write-up is indeed serious; it finds that Escobar violated HIPPA, committed insubordination, and infringed on a patient’s dignity. The difficulty for Respondent’s case is that, once one probes underneath the paper disciplinary findings, it becomes evident that the description of Escobar’s July infractions is inaccurate, or at best, exaggerated. The HIPPA violation, for example, consisted in Escobar explaining that a
15 resident was upset over bad memories. Likewise, the insubordination and violation of patient dignity consisted in little more than a disagreement—a personality clash—between Waterman and Escobar centered on how to handle the patient. Once the matter is understood in full, it is apparent why Escobar was not terminated but, instead, only received a verbal warning, the lowest sanction in the predecessor’s disciplinary system. Thekkek claimed that she made her
20 decision not to hire Escobar after reading the relevant documents (including the investigation reports) concerning the July incident. Thus, Respondent cannot contend that its decision was made solely on the basis of the disciplinary form alone without regard for the underlying facts.

There is a further reason to doubt Respondent’s stated reason for not hiring Escobar. To
25 wit, several other inside applicants had disciplinary records but were nonetheless hired. Some of these employees, Toni Whitman, Maria Villalobos, and Jatinder Saroya, had received verbal warnings for absences. Others, however, committed more serious offenses and received more substantial discipline. Rosa Escobar, for instance, had been suspended for three days for using
30 profanity.

With these considerations in mind, I find that Respondent’s proffered explanation for not hiring Escobar was pretextual. See *Radisson Muehlebach Hotel*, 273 NLRB 1464, 1475–76 (1985) (finding pretext where Respondent exaggerated the seriousness of an employee’s
35 infraction); *Harris-Teeter Super Mkts., Inc.*, 307 NLRB 1075, 1080–81 (1992) (finding Respondent failed to carry its burden where other employees with records of more persistent infractions escaped sanctions).

40 **V. Respondent violated Section 8(a)(5) of the Act by failing, as a Burns successor, to recognize and bargain with the Union, to provide the Union with requested information, and to bargain with the Union prior to instituting changes to terms and conditions of employment**

As the Acting General Counsel alleges, I find that Respondent’s takeover of the Yuba facility did not occasion a change in the type of work done at the Facility or the manner in which
45 the work was done. This issue is uncontested. As Respondent states in its brief, “Nasaky does not contest that *continuity of the business enterprise* would likely be found under current Board

law.” (R Br. 37 n.27). I agree; there is nothing in the record to indicate a dramatic shift in the kind of services performed at the Facility or the way they were performed once Respondent took ownership. In sum, I find the continuity of the business enterprise element to be satisfied.

5 Continuity of the workforce is also established, but by force of a legal assumption. Given that Respondent violated Section 8(a)(3) of the Act by discriminating against the employees of its predecessor in hiring, I must assume that, absent this discrimination, Respondent would have hired the inside applicants in their unit positions. See *Planned Bldg. Servs.*, 347 NLRB 670, 674 (2006) (citing *Love’s Barbeque Rest. No. 62*, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom., *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981)). Per the Board’s pronouncements, I further assume that the Union would have retained its majority status.³¹ See, e.g., *GFS Bldg. Maint.*, 330 NLRB 747, 752 (2000) (citing *State Distrib. Co.*, 282 NLRB 1048 (1987)).

15 Since both continuity of the business enterprise and continuity of the workforce have been established, Respondent, as a *Burns* successor, was under an obligation to bargain on request with the Union. See *id.* This obligation accrued as of September 1, the date a substantial and representative complement of employees had been hired. Respondent received the Union’s October 12 letter requesting bargaining. Subsequently, by failing to recognize and bargain with the Union, the Respondent violated Section 8(a)(5) of the Act. See *id.*

20 Given that Respondent was obliged as a *Burns* successor to recognize and bargain with the Union, it follows as well that Respondent violated Section 8(a)(5) by failing to furnish the Union with the information sought in its October 12 request. See *Dearborn Gage Co.*, 346 NLRB 738, 738 (2006) (finding a *Burns* successor violated the Act by failing to furnish information); see generally *HTH Corp.*, 356 NLRB No. 182 (2011) (discussing the contours of the obligation to furnish information).

30 In addition, the Respondent violated Section 8(a)(5) of the Act by instituting unilateral changes to terms and conditions of employment upon commencing operation of the Facility. See *Love’s Barbeque*, at 82. A *Burns* successor does not share the default right of a successor to set initial terms and conditions of employment. *Id.*

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31 Though the question is somewhat inapposite in a discrimination case such as this, I find that a substantial and representative complement of employees had been hired by September 1, the first date of the transition. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 49 (1987) (considering “whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production”). Thekkek agreed that she wanted to “hit the ground running” the first day of her takeover. (Tr. 178). To fulfill her wish, she held orientations and asked employees to complete payroll forms the week before their start date. Additionally, there has been no allegation that the Facility subsequently underwent expansion or that such expansion is planned.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a healthcare institution within the meaning of Section 2(14) of the Act.
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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been the exclusive collective-bargaining representative of the following appropriate collective-bargaining unit:
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All employees performing work covered by the collective-bargaining agreement between the Union and Nazareth effective for the period September 2, 2008, to September 1, 2010. The classifications covered by the collective-bargaining agreement were Certified Nursing Assistant, Restorative Nursing Assistant, Licensed Vocational Nurse, Laundry Worker, Housekeeper, Cook, Dietary Aide, Activity Aide, Central Supply, and Medical Records Clerk.
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4. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire the unit employees of its predecessor.
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5. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire Sandra Escobar.

6. The Respondent has been violating Section 8(a)(5) and (1) of the Act by failing to recognize and bargain in good faith with the Union as requested in the Union's October 12 letter.
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7. The Respondent has been violating Section 8(a)(5) and (1) of the Act by refusing to provide the Union with information requested in its October 12 letter.
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8. The Respondent violated Section 8(a)(5) and (1) of the Act by making changes to terms and conditions of employment without affording the Union an opportunity to bargain.

9. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
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REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. Apart from the ordinary swath of remedies, the Acting General Counsel requests certain relief that I regard as unusual enough to warrant special mention or discussion.
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The Acting General Counsel requests that the Respondent's employees (not the discriminatees) be compensated for any loss of wages or benefits stemming from Respondent's unilateral change to terms and conditions of employment. I agree that this relief is appropriate. *See Love's Barbeque*, at 83 (ordering a like remedy).

5
 Acting General Counsel also requests that Preema Thekkek be ordered to read aloud the notice to employees in this case. I agree that she should be required to do so. As the Board has explained, the purpose of requiring a manager to read a notice aloud to employees is to better impress upon the employees the fact that the employer and its officials are bound by the Act.
 10 *Marquez Bros. Enters., Inc.*, 358 NLRB No. 61 (2012) (citing *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), *enfd.*, 400 F.3d 920 (D.C. Cir. 2005)). The Board explained that it will require a notice to be read aloud "where an employer's misconduct has been 'sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion.'" *Jason Lopez' Planet Earth Landscape, Inc.*,
 15 358 NLRB No. 46 (2012) (quoting *HTH Corp.*, 356 NLRB No. 182 (2011)). In this case, the unfair labor practices occurred on a large scale. There were dozens of discriminatees. Moreover, the unfair labor practices in this case were very serious. After purchasing the Facility, Respondent, driven by antiunion animus, discriminated against members of the bargaining unit in assembling its workforce. This is tantamount to an effort to wholly dislodge the Union from
 20 its statutory role as bargaining representative of the employees. As a deliberate attempt to deprive the Union of its role as bargaining partner, it strikes at the heart of the national policy embodied in the Act, *viz.*, "encouraging the practice and procedure of collective bargaining." Since Thekkek made the illegal hiring decisions in this case, she ought to be the one to read the notice. *See Planet Earth Landscape*, 356 NLRB No. 182 (requiring the individual who
 25 personally committed the unfair labor practices to read the notice).

The Acting General Counsel requests that, as part of the make-whole remedy, Respondent be ordered: to reimburse the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed but for the illegal lockout, and to submit documentation to the
 30 Social Security Administration so that back pay would be allocated to appropriate periods. Both remedies are sensible applications of the make-whole concept to bureaucratic and mathematical realities and should not be controversial. *See Design Tech. Grp., LLC*, No. 20-CA-35511, 2012 WL 1496201 (NLRB Div. of Judges Apr. 27, 2012) (explaining that employees receiving backpay may still miss out on credits with the Social Security Administration, ultimately
 35 reducing the benefits the Administration pays them). However, just this year, the Board considered an identical request in *Park Avenue Investment Advisor, LLC*, 358 NLRB No. 30 (2012). It found that the relief sought would require a change in Board law. *Id.* Since the issue had not been briefed to the Board, it turned down the opportunity to make such a change. *Id.* For my part, I am unwilling to take such a step absent the Board's blessing and will deny the
 40 requested order.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with its members and/or employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). The posting of the paper notice by the Respondent shall occur at all places where notices to employees are customarily posted.

The amount of the make-whole remedy applicable to violations of Section 8(a)(3) shall be calculated according to the formula of *F.W. Woolworth Co.*, 90 NLRB 289 (1950). See, e.g., *KLB Indus. Inc.*, 357 NLRB No. 8 (2011); *R.E. Dietz Co.*, 311 NLRB 1259, 1268 (1993). With respect to violations of 8(a)(5), any make-whole remedy shall be calculated on the basis of *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. per curiam, 444 F.2d 502 (6th Cir. 1971). In either case, interest shall be compounded daily as described in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), set aside by 647 F.3d 1137 (D.C. Cir. 2011). E.g., *KLB*, 357 NLRB No. 8.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:³²

ORDER

The Respondent, Nassaky, Inc. and Thekkek Health Services, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively with the SEIU United Healthcare Workers-West (the Union) as the exclusive collective-bargaining representative of its employees in the bargaining unit;

(b) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the bargaining unit without first giving notice to and bargaining with the Union about such changes;

(c) Failing to comply with the Union's information request of October 12;

(d) Discouraging activity and support for the Union by refusing to hire or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions of employment in order to avoid having to recognize and bargain with the Union;

(e) 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 collectively with the Union as the exclusive representative of its employees at the Yuba Facility with respect to wages, hours, and other terms and conditions of employment, and if agreements are reached embody such agreements in a signed document;

³² 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.

(b) At the request of the Union, rescind any departures from terms and conditions of employment that existed prior to its commencing operations at the Yuba Facility and restore preexisting terms and conditions of employment until it negotiates in good faith with the Union to agreement or impasse;

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(c) Make whole, in the manner set forth in the remedy section of this decision the unit employees for losses caused by Respondent's failure to apply the terms and conditions of employment that existed prior to its commencing operation at the Yuba Facility, subject to Respondent demonstrating in a compliance hearing that, had it lawfully bargained with the Union, it would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under its predecessor;

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(d) Within 14 days from the date of this Order, offer—to all of the former employees of Yuba Skilled Nursing Center, Inc. who were members of the bargaining unit and whom Respondent did not hire—employment at the Yuba facility in their former positions, and if such positions no longer exist, offer them substantially equivalent positions. In any case, reinstatement will be without prejudice to the returning employees' seniority and other rights and privileges previously enjoyed. If necessary, Respondent will discharge any employees hired in their place.

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(e) Make the employees referred to in the preceding paragraph 2(d) whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's unlawful refusal to employ them, in the manner set forth in the remedy section of this decision.

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(f) 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.

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(g) Within 14 days after service by the Region, post at the Yuba Facility copies of the attached notice marked "Appendix."³³ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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. In the event that, during the pendency of this proceeding, Respondent has gone out of business or closed the

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³³ 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."

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facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at the Yuba Facility any time since September 1, 2012 and to the employees referred to in paragraph 2(d).

5 (h) Respondent's manager Preema Thekkek shall read a copy of the attached notice aloud to the employees of the Yuba Facility in English. The readings shall be conducted at the beginning of each shift, at the Yuba Facility, and during the employees' paid working time. Employees will be notified, in writing, at least 5 business days prior to the scheduled readings as to the times and dates of the readings. Respondent will provide copy of this notification to the
10 Region via facsimile at the same time it is provided to the employees. A representative from the NLRB will be permitted to attend the readings.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that
15 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.

20 Dated, Washington, D.C., August 16, 2012.



Gerald M. Etchingam
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board,
an Agency of the United States Government**

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize and bargain with the SEIU United Healthcare Workers-West (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at Nasaky, Inc., d/b/a Yuba Skilled Nursing Center (Nasaky) and Thekkek Health Services, Inc., (Thekkek, Inc.) (collectively, Respondent).

WE WILL NOT tell bargaining unit employees that there is no union serving as their collective-bargaining representative once Respondent took over ownership of the nursing home operations at the Yuba Facility.

WE WILL NOT unilaterally change bargaining unit employees' terms and conditions of employment without first giving the Union notice and an opportunity to bargain with the Union about such changes.

WE WILL NOT refuse to hire or otherwise discriminate against former Yuba Facility employees because they are represented by the Union or to avoid an obligation to recognize and bargain with the Union.

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

WE WILL recognize, and on request, meet and bargain with the Union in good faith as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

CNA, RNA, licensed vocational nurse or LVN, laundry worker, housekeeper, cook, dietary aide, activity aide, central supply, and medical records clerk.

WE WILL, at the request of the Union, rescind any departures from the terms and conditions of employment that existed before Nasaky, Inc. or Thekkek Health Services, Inc. began operations at Yuba Skilled Nursing Center, restore preexisting terms and conditions of employment, make employees whole for any loss of earnings and other benefits, and negotiate in good faith with the Union to agreement or impasse.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Sandra Escobar and all other former unit employees who were not hired by Respondent on September 1, 2011, to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, make Sandra Escobar, and all other former unit employees who were not hired by Respondent on September 1, 2011, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

**THEKKEK HEALTH SERVICES, INC. and
NASAKY, INC. d/b/a YUBA SKILLED
NURSING CENTER**

(Employer)

Dated _____ By _____
Preema Thekkek, Vice-President

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market St., Suite 400
San Francisco, CA 94103-1735
Hours: 8:30 a.m. to 5:00p.m.
(415) 356-5130.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5130.