

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WOODCREST HEALTH CARE CENTER

and

Case 22-CA-083628

**1199 SEIU, UNITED HEALTHCARE
WORKERS EAST**

ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

A Complaint and Notice of Hearing issued on November 30, 2012 upon an unfair labor practice charge filed on June 18, 2012 and amended on July 24, August 30 and November 20, 2012 by 1199 SEIU, United Healthcare Workers East, herein called the Union against Woodcrest Health Care Center, herein called the Respondent. The Complaint, as amended at the hearing, alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act, by interrogating employees, by soliciting grievances and creating the impression of surveillance, and by discriminatorily withholding a reduction in health insurance premiums from unit employees granted to employees who had not petitioned for union representation. General Counsel's Exhibit 1(k) and (n); Transcript p. 16.¹

The Board conducted a hearing on the alleged unfair labor practices before Administrative Law Judge of the Board William N. Cates on February 5, 2013. The Administrative Law Judge issued a Decision and Order on April 2, 2013 finding that Respondent had interrogated employees in violation of Section 7 of the Act and announced and thereafter implemented a reduction of health benefits to all employees except those who were eligible to vote in the representational election in violation of Section 8(a)(1) and (3) of the Act. The Judge dismissed allegations that the Employer had solicited grievances and created the impression of surveillance in violation of Section 8(a)(1). Respondent filed Exceptions to that Decision on May 22, 2013. Counsel for the General Counsel filed Cross Exceptions this date.

¹ Hereinafter, General Counsel's exhibits will be referred to as GCX, the Charging Party's exhibits as CPX, Respondent's exhibits as RX, Transcript references as Tr., Respondent's Memorandum as RM followed by the page or exhibit number as appropriate. The decision of the Administrative Law Judge will be referred to as JD followed by the page and line number.

STATEMENT OF FACTS

1. Background.

Woodcrest Health Care Center is an employer engaged in the operation of a rehabilitation and nursing facility in New Milford New Jersey. GCX 1 and k and (m). On January 23, 2012, the Union filed a petition in Case 22-RC-07308 for an election for a unit of approximately 200 employees. JX 1, para. 1 Following an election on March 9, Respondent conducted an investigation of possible objectionable conduct including supervisory interference with employee free choice, voter suppression by the union, and union representatives visiting unit employees at their homes. Tr. 177-8. Following a hearing on objections, the Board certified the Union as collective bargaining representative of Respondent's non-professional employees. *Woodcrest Health Care*, 359 NLRB NO. 58 (January 9, 2013).

2. Health Insurance Premium Reductions.

The parties entered into the following Factual Stipulations setting forth the evidentiary basis for the allegation that the Employer violated Section 8(a)(3) of the Act by announcing and thereafter implementing a reduction of health care premiums to all employees except those who were eligible to vote in the upcoming union election. JCX 2:

On January 23, 2012, 1199 SEIU, United Healthcare Workers East ("Union"), filed a petition in Case 22-RC-073078 for an election for a unit of approximately 200 employees of 800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center ("Employer" or "Woodcrest"). An election was conducted on March 9, 2012. Respondent filed objections to the election. On January 9, 2013, the Board issued a Decision and Certification of Representative, which is reported at 359 NLRB No. 58 (2013).

Woodcrest is managed by HealthBridge Management, LLC ("HealthBridge"). In New Jersey, HealthBridge manages four centers. Each of the 4 companies provides a common health insurance plan for its employees, which is arranged through HealthBridge. Effective January 1, 2012, there were changes in that health insurance coverage that resulted, among other things, in reduced benefits and increased cost for all employees at Woodcrest, Oradell, and South Jersey. Employees at Somerset Valley in classifications that had not been eligible to vote in an election held on September 2, 2010 were subject to the same cost and benefit changes. As a result of these changes, some employees of those 4 companies changed their coverage or dropped their coverage.

In response to complaints about these changes, HealthBridge arranged certain improvements to the common health insurance plan, including a reduction in employee premiums. These improvements applied to all employees except those involved in a union representation campaign. At each of the 4 companies, a common memorandum announcing these improvements was distributed to all employees who were not eligible to vote in a union election. At facilities with no union campaign, the memorandum was distributed to all employees. The improvements were subsequently implemented, retroactive to January 1, 2012, for the employees to whom the memoranda were distributed.

On March 5, 2012, Lorri Senk, who was then the Administrator for the Employer, directed the distribution of a memorandum to all Woodcrest employees, except those eligible to vote in the March 9, 2012 union election, announcing the improvements in the health insurance plan. A copy of that memorandum is marked as Joint Exhibit 1. The classifications identified on the memorandum were those classifications at Woodcrest that were not part of the election unit to which the Union and Employer had stipulated and, therefore, were not eligible to vote in the March 9 election. The memorandum was distributed at the Employer's facility solely to employees who held the positions identified on the memorandum. The improvements were implemented retroactive to January 1, 2012 only as to the employees to whom the memorandum was distributed. To date, the health insurance improvements have not been implemented as to the employees within the Woodcrest election unit.

The Employer did not announce or raise the matter of the health insurance improvements to the election eligible employees either at communication meetings with them or otherwise. When election eligible employees asked about the health insurance improvements being applied to them, managers or supervisors responded on behalf of the Employer "We cannot discuss this matter at this time."

JX 2.

Nursing Assistant Jeffrey Jimenez first learned of the premium changes shortly before the election when he found a copy of the Employer's March 5 letter on the table in the employee break room. Tr. 35. Jimenez testified that after the election, at a regular monthly meeting attended by unit and non-unit employees, a unit employee asked Administrator Senk about the insurance plan changes described in the announcement found in the break room. Senk replied, "We cannot negotiate your contract, your benefits and your insurance because right now you are in the critical period with the union." Tr. 36-7. Senk did not testify. Respondent's Cherece Steele who served as Respondent's acting director of nursing between February and April 2012 testified that Respondent's counsel Lisa Crutchfield answered an employee question about how the benefit changes would affect them, stating that the company was not allowed to discuss the

matter at this time. Tr. 167. Steele did not deny Jimenez's testimony that Senk had specifically referenced the critical period, but rather generally denied that any other manager ever – in her presence - “addressed employee questions or comments about improvements they might want.” Tr. 176.

Steele testified that she believed the letters were distributed to the less than 75 non-unit employees in their pay envelopes. Tr. 168-70. Respondent offered no record evidence to support its assertion that Respondent went to extreme lengths “to minimize election eligible voters’ knowledge of the changes.” RM 19.

3. Alleged Coercive Statements

a. *Interrogation by Unit Manager Janet Lewis²*

The contradicted testimony at the unfair labor practice hearing record and her admissions at a hearing on objections in Case 22-RC-073078 supports the finding of the Administrative Law Judge that Unit Manager Janet Lewis interrogated unit employees. GCX 2, at 128 ff.

Janet Lewis, a registered nurse, has been employed as a unit manager since February 5, 2012, overseeing between 7 or 8 registered nurses, licensed practical nurses and certified nursing assistants. Tr. 134; GCX 2 at 128-130, 160. She attended management meetings discussing the union campaign and, at the direction of management, distributed Respondent's campaign flyers. Tr. 137, 185. Ms. Lewis testified that at one such meeting, one of the COMPANY lawyers reported that employee Donna Dugger was in favor of the union. Tr.137. Ms Lewis described her relationship with Ms. Dugger as “co-worker,” “friend,” and “mentor,” having trained her as she had also trained many others. GCX 2 at 150; Tr. 135. Lewis was surprised and after the

² Respondent made no contention of prejudice and proffered no argument to support its exception to the ALJ's grant of the General Counsel's motion to amend the complaint to include this allegation. The record established that the amendment added a third allegation of interrogation based upon a supervisor's admissions in a representation hearing in 2012, that the General Counsel exclusively relied on transcript testimony previously known to Respondent, that the General Counsel gave notice of her intent to amend a several days before the trial. GCX 1(n).

meeting spoke with Dugger and informed her that her name was brought up at the meeting. Tr.

138. In her objections case testimony, Lewis stated:

It was a surprise. So I had asked her, I said – afterwards, I asked her are you in favor of the union. She said no.

GCX 2 at 152. Likewise, at the unfair labor practice hearing, Ms. Lewis testified that she said to Ms. Dugger: “I heard that you are a member of the - - you are in favor of the Union.” Tr. 139.

While Ms. Lewis testified that she asked that question because she had heard Dugger was in favor of the union and wanted to find out, and that she had questioned Dugger because she was her friend, the record also reveals that Lewis reported the results of her inquiry at the next management meeting: “when her name was called, I said she’s not.” Tr. 139, 142; 146. Lewis was more specific in her testimony at the objections hearing:

In a meeting, the next meeting that we had, whenever that time happened when all the heads were there, I said I spoke to Donna and she said she is not for the union. She said I like Lorri (Administrator Lorri Senk) very much and we should give Lorri a chance.

GCX 2 at 153. Lewis testified that she did not tell Ms. Dugger that she had reported her sentiments to management. GCX 2 at 164.

b. Interrogation and Solicitation of Grievances by Assistant Director of Nursing Ansel Vijayan

Record testimony supports the finding that Assistant Director of Nursing Ansel Vijayan questioned Certified Nursing Assistant regarding her union sympathies in February 2012, before the union election. Tr. 94. Dolcine’s native language is Creole but was able to understand managers who spoke to her in English and testified without a translator. Tr. 93. Vijayan had served in that position since 2003 and had hired Dolcine in 2004. Tr. 93, 99. Vijayan trained Dolcine, reported to the Director of Nursing and supervised other supervisors. Tr. 119, 130. Supervisory staff included case managers and supervisors. Tr. 131.

The Administrative Law Judge credited Dolcine's account of the alleged interrogation. JD 4: 44 to 5:4. Dolcine testified that Vijayan was in her unit distributing "Vote No!" campaign flyers headlined "Do you really want to pay 1199 SEIU dues and assessments?" and listing the relative costs of annual union dues to various employee wage rates. Tr.121-3; GCX 4.

Dolcine testified that Vijayan called to her from the nurses' station to speak with him in an empty patient's room. Tr. 94-5, 103. When he asked her if someone had come to her house to talk to her, Dolcine replied that she had been out for two months and no one came to talk to her. Tr. 102-3, 95. Vijayan then asked if they had called her. She said no. Tr. 95, 108. Dolcine testified that Vijayan asked her if she needed a union, and when she said yes, asked her why she needed a union. Tr. 95, 97, 103. In the exchange, Dolcine also referred to her experience with a union at a different job. Tr. 105, 109. Ansel responded by asking her how much they took from her paycheck. Tr. 97, 109.

Vijayan admits he had a conversation about the union with Dolcine when he was handing out educational flyers but asserted that she had initiated the conversation. Tr. 117. He denied that he asked why she needed a union but did not deny that he asked if she needed a union. Tr. 118. Vijayan's testimony was evasive. Despite his admissions that he distributed one vote-no flyer, and that he had seen other anti-union flyers handed to employees, he claimed he could not recall the Employer ever telling employees that they couldn't or shouldn't vote no. GCX 4; CPX 1; Tr. 127:22-23; 130-1. Respondent excepted to the finding of the Administrative Law Judge relying on the credibility of Dolcine over Vijayan (JD 4:22-24) but withdrew that contention in its Exceptions Brief. RM 6 n.4.

Interrogation by Counsel James Monica

The record supports the finding that Respondent's counsel, James Monica twice questioned Nursing Assistant Jeffrey Jimenez about the union activities of other employees. The

record revealed that Respondent conducted interviews with unit employees on in connection with its investigation of possible objections to the union election.

Jimenez testified that the first conversation took place about two weeks after the election in the Director of Nursing office. Monica introduced himself and explained his purpose of the interview and that participation was voluntary. Tr. 39-40; 70-1; Monica then gave him a document to sign confirming his rights. RX 1. After asking general questions about his title and length of employment, Monica asked if he knew certain supervisors, if those supervisors were involved in the union or had been passing out union cards or had influenced him to change his vote. Tr. 41, 68, 74. Jimenez said no. Monica then asked if any union representative came to his house and if he knew any employees who were involved in a union or passing out cards. Tr. 41, 68. Jimenez replied that he knew the employees but would not disclose their names. Monica then asked if Jimenez had signed a card for the union; Jimenez admitted that he had and the interview concluded. Tr. 42. Jimenez later returned and asked for a copy of his agreement and tore it up. Tr. 42.

A few days later, Jimenez was called to meet with Monica a second time, this time in the conference room. Tr. 42. Monica told Jimenez that he did not believe him and wanted to give him a second chance to answer. Tr. 43. Monica then reiterated his questions from the previous week, repeatedly asking about the activities of supervisors Israel, Bonita and Janet. Tr. 43. Jimenez told him that they were just doing what management had told them to do, telling the workers not to vote for the union, that the union was bad. Tr. 44, 80. "And then he asked me why do you want to form a union." Tr. 43. Jimenez responded that the employees wanted better wages, benefits and more respect. Tr. 43. Monica spoke to Jimenez a third time about two weeks later when Monica gave him a subpoena. Tr. 44.

Monica testified he interviewed between 40 and 670 employees in connection with the objections investigation. Tr. 173. He denied that he asked Jimenez about his union activities or that he asked any employee about how he or other employees voted, about their union activity or about the activity of other employees. Tr. 173-4. Monica did not deny asking Jimenez why he wanted to form a union. Monica acknowledged a second interview with Jimenez but did not deny that he told Jimenez that he did not believe his account and offered no explanation why he questioned Jimenez the second time. Tr. 176.

Monica summarily denied making certain unlawful statements but was unable to recall specifics of his conversations with Jimenez. He stated that the conversations were about supervisors' activities of four supervisors and the potentially objectionable conduct of union representatives. Tr. 177-8. He confirmed that he inquired if union representatives visited unit employees at their homes. Tr. 177.

ARGUMENT

POINT ONE: THE RECORD SUPPORTS THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT RESPONDENT VIOLATED SECTION 8(A)(1) AND (3) OF THE ACT BY ANNOUNCING AND WITHHOLDING SYSTEM-WIDE INSURANCE PREMIUM REDUCTIONS AVAILABLE TO ALL EMPLOYEES EXCEPT THOSE ELIGIBLE TO VOTE IN A PENDING REPRESENTATION ELECTION.

The record established that following complaints, Respondent announced and implemented a reduction in health insurance premiums negotiated by its management company Health Bridge Management to be available to employees at the four facilities except those involved in a union representation campaign. Unit employees who learned of the announcement were told that management could not discuss the matter. Jeffrey Jimenez's supplementary testimony that even after the election, Administrator Senk told employees that Respondent could

not negotiate the matter because the parties were in a critical period, was uncontested.³ Respondent announced the improved benefits on March 5, two months after reduced benefits were implemented and four days before the union election.

A. Respondent's Announcement and Responses Violated Section 8(a)(1)

Respondent's failure to communicate that the withholding of benefits granted to non-union employees at its own and other facilities overseen by its management company was temporary and would be restored retroactively, gave unit employees the impression that they were deprived of the premium reductions solely because of the pending union campaign and that further benefits depended on negotiations.

An employer's statement that non-unionized workers would receive a benefit denied to employees in a petitioner for unit because of the union violates Section 8(a)(1) of the Act. See, *Noah's Bay Area Bagels*, 331 NLRB at 201 (employees denied benefits because it would "create a legal risk"); *Atlantic Forest Products Inc.*, 282 NLRB 855, 857 (1987) (statements suggesting "an immediate [wage] increase without a union but a delay for an indefinite period of negotiations for an uncertain increase with a union").

Respondent violated Section 8(a)(1) by issuing a memorandum explicitly limiting the benefit improvements to non-bargaining unit employees. By excluding classifications distinguished only by their eligibility to vote in the election the Employer's memo would lead employees –both in and out of the unit – to conclude that election-eligible employees were denied a benefit because of their protected activity.

The credited testimony that Administrator Senk told employees that the employer was unable to "negotiate" during the "critical period" directly linked the withholding of benefits to

³ Senk did not testify and Respondent's Acting Director of Nursing Steele testified only that while an attorney had answered an employee question prior to the election, no other manager *in her presence* had ever addressed questions by election-eligible employees about improvements they might want.

the employees' protected activity. The tamer account set forth in the stipulation and Nursing Director Steele's testimony that the Employer told inquiring employees that they were not permitted to discuss the effect of the changes on election-eligible employees is equally coercive. It is not what the employer actually told employees, but the reasonable implications of what the employer did say. See, *Noah's Bay Area Bagels*, 331 NLRB at 188. Unit employees here would reasonably conclude that their choice of union representation cost them improved benefits.

B. Disparately Withholding Insurance Premium Reductions Violates Section 8(a)(3) of the Act.

Granting system-wide benefits to unorganized employees while withholding them from employees because of a pending union representation proceeding violates Section 8(a)(3) of the Act. See, *Medical Center at Bowling Green*, 268 NLRB 985 (1984). An employer may lawfully temporarily withhold system-wide benefit improvements from unit employees only if the employer (1) informs employees that the sole purpose of the postponement is to avoid the appearance of influence with respect to the election, and (2) provides assurances that the benefits will be applied to them retroactively after the campaign, regardless of the results. *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000) (Employer violated Section 8(a)(3) by discriminatorily not restoring a health benefits plan for unit employees during the critical period preceding a representation election). Neither granting nor withholding a wage increase is illegal *per se*; an employer implementing changes in terms and conditions of employment during a pre-election period is obliged to act in the same manner as if the union and the election were not in the picture. *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29, n.1 (1967); *First Student, Inc.*, 2013 NLRB Lexis 58 (ALJD, February 4, 2012). An employer may avoid a finding of an unlawful grant or withholding of benefits if it:

[P]ostpone[s] such a wage or benefit adjustment so long as it "makes clear" to employees that the adjustment would occur whether or not they select a union and that the "sole

purpose” of the adjustment’s postponement is to avoid the appearance of influencing the election’s outcome.

KMST-TV, Channel 46, 302 NLRB 382, 382 (1991).

C. Respondent’s Reliance on *Exchange Parts* Does Not Privilege Its Conduct.

Respondent relies on *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964) in support of its contention that it was privileged to withhold improved benefits from unit employees to avoid the appearance of trying to influence the outcome of the election. RM 20. The facts and the law belie these contentions. Respondent’s assertion of scrupulous non-interference is belied by the evidence of Respondent’s abrupt change of course a week before the election, announcing to non-unit employees its willingness to resolve their complaints about reduced benefits while informing inquiring unit employees that it could not discuss the matter at that time.

Respondent’s asserted intent does not mitigate the coercive impact on its action on unit employees. All employees were disadvantaged by the initial premium increases. Only election eligible voters were denied the reduction.

Respondent’s legal argument turns *Exchange Parts* on its head. Respondent’s withholding from unit employees of benefits publicly granted to all other employees demonstrates the very evil the *Exchange Parts* Court decried: “The danger in well timed increase in benefits is the suggestion of a fist inside the velvet glove.” In the fifty years since, the Board has repeatedly held that the pernicious impact of employer favors applies to benefits withheld as to those granted. See, *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27 (1967); *Medical Center at Bowling Green*, 268 NLRB 985 (1984); *KMST-TV, Channel 46*, 302 NLRB 302 (1991); *Noah’s Bay Area Bagels, LLC*, 331 NLRB 188 (2000); *First Student, Inc.*, 2013 NLRB Lexis 58 (ALJD, February 4, 2012). The Board is urged to affirm the decision of the Administrative Law Judge.

POINT TWO: THE ADMINISTRATIVE LAW JUDGE PROPERLY FOUND THAT RESPONDENT, BY JANET LEWIS, INTERROGATED EMPLOYEE DONNA DUGGER IN VIOLATION OF SECTION 8(A)(1) OF THE ACT.

The uncontested record supports the finding of the Administrative Law Judge that unit manager Janet Lewis informed employee Donna Dugger that her name had come up at a management meeting and asked her if she were in favor of the union. The ALJ correctly applied the *Rossmore House* factors urged by Respondent.

In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board considers the identity of the questioner, the place and method of the interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. See, e.g. *New Vista Nursing and Rehabilitation*, 358 NLRB No. 55, slip op. at 9 (June 15, 2012). Accord, *Rossmore House*, 269 NLRB 1176, 1177-8 (1984). Application of these factors demonstrates the coercive impact of the interrogation.

The ALJ properly rejected Respondent's contention that the supervisor's friendly intent and the reported absence of discomfort by the employee negated the inference of coercion. That Lewis spoke to the employee privately and as a friend, and that Dugger may not have appeared uncomfortable does not resolve the question of coercion. In considering communications from an employer to employees, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. See, *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001). More importantly, inquiries from one close to the seat of authority will likely be taken with the utmost seriousness from employees dependent for their livelihood on their jobs. See, *Dixisteel Buildings, Inc.*, 186 NLRB 393, 402 (1970).

For, the coercive impact of the conduct of a person does not derive solely from the hostility of the speakers. Unless the context in which the coercive interrogation or warning of reprisal takes place makes it unlikely the employees would believe the

supervisor to be accurately relaying management's thinking, participation in union activities is likely to be chilled whether or not the supervisor is "friendly."

Pacific Southwest Airlines, 201 NLRB 647, 651 (1973). See, *Acme Bus Corp.*, 20 NLRB 458, 458 (1995) (neither friendly relationship between supervisor and employees nor purported sympathy with their protected activities diminishes the coerciveness of interrogation).

Further the record demonstrates that Lewis was not merely inquiring as a friend but took it upon herself to report the results of her investigation at the next management meeting. The background of the inquiry heightens its coercive impact: Lewis was among the supervisors distributing the Employer's campaign flyers and her report to Dugger that her name was mentioned at the management campaign meetings disclosed that management was monitoring employees' union sympathies. Finally, the Lewis's surprise at the report that Dugger was a union supporter and Dugger's subsequent denial makes it plain that she was not an open supporter.

The record established that Lewis was actively engaged in the anti-union effort, both distributing flyers and reporting to management on the union sympathies of unit employees. But even assuming Lewis had been supportive of employees' union activities and was trying to protect a friend from management's judgment, her questioning was still coercive as it communicated management's active monitoring of union sympathies of unit employees.

POINT THREE: THE ADMISITRATIVE LAW JDUGE PROPERLY FOUND THAT RESPONDENT BY ANSEL VAJAYAN INTERROGATED EMPLOYEE JUDITH DOLCINE.

Nursing Assistant Judith Dolcine testified that Ansel Vajayan, the Assistant Director of Nursing called her aside to hand her a vote no flyer and questioned her about her union activities. Vajayan asked if union representatives had visited her home, if she needed a union, and why she needed a union. Vijayan denied asking if Dolcine needed a union. Her remaining allegations

were undisputed; Vijayan did not deny that he had asked about visits to her home or inquired why she wanted a union.

Application of the *New Vista* factors supports a finding of coercive interrogation.. See, *New Vista Nursing and Rehabilitation*, 358 NLRB No. 55, slip op. at 9. Dolcine was summoned to speak with the Assistant Director of Nursing, a highly ranked nursing supervisor who had hired and overseen her initial training. Vijayan called her into an empty room; asked about her union beliefs, her past experience and sympathies, and about the activities of other supporters coming to her home. Vijayan's inquiry was neither casual nor collegial, but rather occurred in the context of the Employer's distribution of campaign literature hostile to the union.

Respondent excepts to the ALJ's credibility resolution on the basis that the ALJ understated Dolcine's limited English and forceful personality, but then appears to have withdrawn its exceptions in its Memorandum.⁴ Regardless, The ALJ's conclusions are supported by the record. Vijayan's account of the conversation is unpersuasive and inherently improbable. First, his suggestion that a nursing assistant, among the lowest ranks of the non-professional nursing staff, initiated a conversation with the administrator who managed the nursing supervisors, is implausible. Next, while he asserts his belief that he had a special rapport with Dolcine based on his training her when she was hired eight years previously, Dolcine denied that he had offered particular support or assistance. Finally, his claim that it was she who brought up the subject of union dues is equally implausible given that Vijayan was distributing flyers that highlighted the costs of dues to unit employees. It is far more likely that he would raise the subject to bolster the Employer's argument as set forth at meetings as well as in the flyer he was distributing, by drawing on Dolcine's experience with unions in her other job.

⁴ Respondent is "unable to take issue with the ALJ's credibility resolution favoring Dolcine over Vijayan." RM 6, n.1.

Vijayan's evasive responses that first denied and then did not recall whether the Employer urged employees to vote no, is a further basis to discredit his testimony. See *Big Ridge, Inc.*, 358 NLRB No. 114, slip op. at 12 (August 31, 2012) (evasive unwillingness to admit employer's documented anti-union stance). His denial and failure to recall are preposterous given his admissions that management had directed the circulation of literature that explicitly urged employees to vote no and had himself distributed such literature.

Dolcine's testimony is the more plausible. Her calm convection and her unemotional tone demonstrated no basis to conclude that she had any stake in the outcome of the hearing. That she was later discharged from Respondent, absent more, is insufficient to support an inference that she testified falsely. While Dolcine's mastery of the English language was imperfect, her accounts of her conversations with Vajayan did not vary and were largely confirmed by Vajayan's own testimony.

Based upon the foregoing, the General Counsel urges the Board to affirm the findings of the Administrative Law Judge that Respondent, by Ansel Vijayan, violated Section 8(a)(1) of the Act by asking Judith Dolcine if union representatives had visited her home, if she needed a union, and why she needed a union. See, *Sikorsky Support Service, Inc.*, 356 NLRB No 144, slip op at 6 and 7 (April 27, 2011) (Supervisors interrogated employees by asking their opinion on the union and why they had chosen to bring in a union).

POINT FOUR: THE ADMINISTRATIVE LAW JUDGE PROPERLY FOUND THAT RESPONDENT, BY ATTORNEY JAMES MONICA, INTERROGATED EMPLOYEE JEFFREY JIMENEZ IN VIOLATION OF SECTION 8(A)(1) OF THE ACT.

The Administrative Law Judge found that in the course of an objections investigation, Respondent's attorney James Monica questioned employee Jeffrey Jimenez about his protected activities and the activities of other employees. In addition to asking about supervisory involvement in card solicitation and union vote suppression, Monica asked Jimenez if he knew

any employees who were involved in a union or passing out cards, if Jimenez had signed a card for the union. Monica summoned him to a second meeting, advising Jimenez that he did not believe him, and repeated the questions he had asked the previous week, adding why do you want to form a union?

Respondent argues with no authority that “post election investigation by outside counsel inherently non-coercive.” RM 9. The Board’s case law has continuously found the contrary. In *Johnnie’s Poultry Co.*, the Board found an inherent danger of coercion in employer interviews of employees regarding Section 7 activities. 146 NLRB 770, 774 (1964). The Board balances employee Section 7 rights with the Employer’s legitimate need to verify claims of majority status or to prepare a defense in a pending legal action by authorizing such interviews subject to specific safeguards to minimize that coercive impact.⁵ An employer who transgresses the boundaries of these safeguards loses the benefits of the privilege. 146 NLRB at 775. Equally unavailing is Respondent’s argument that the employees’ apparent comfort in the course of the interview negated its coercive impact. The Board evaluates the objective tendency of the statements to coerce, rather than the employees’ subjective reactions. See, *Miller Electric Pump & Plumbing*, 334 NLRB at 825.

The Administrative Law Judge crediting of Jimenez over Monica was supported by the record. JD 7:42-3 to 8:5. Monica did not deny telling Jimenez he did not believe him and offered no explanation for calling him in for a second interview. Calling an employee who had ended their last encounter with tearing up the notice of rights, and beginning by saying he did not

⁵ The *Johnnie’s Poultry* safeguards require that the employer communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee’s subjective state of mind, or otherwise interfering with the statutory rights of employees. 146 NLRB at 775.

believe Jimenez's previous answers would reasonably tend to discourage employee support for a union.

Monica's testimony as to the questions asked was inexplicably vague and conclusory. It is unlikely that counsel, who had so carefully prepared four other witnesses for hearing, would not have carefully reviewed his actions in the meeting whose content was in dispute. His memory for what transpired was selective. He testified to the number of conversations, recalled clearly Jimenez' responses, his ease in the conversation, stray remarks Jimenez made about his wages, and his dismay about how employees made ends meet, but had limited recollection as to the questions he himself had asked. He admits he asked about union representatives visiting employees at their homes and attempts by the union to suppress the vote, but repeatedly stated he couldn't recall the other questions asked, adding he may have asked other questions exclusively directed at the conduct of supervisors. Tr. 177.

CONCLUSION

The record supporting the findings of the Administrative Law Judge that agents of Respondent Woodcrest Health Care Center made coercive statements to employees and withheld health insurance premium reductions because of their union activity, the Board is urged to find the allegations as alleged in the Amended Complaint and impose the recommended remedial order directing Respondent to cease and desist from the unlawful conduct; to implement the premium reductions unlawfully withheld from unit employees and to make them whole, to post a

remedial notice and grant such affirmative relief as is necessary to rectify the effects of the violations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M Greenfield', with a small '1/s' written above the first letter.

Marguerite R. Greenfield

Counsel for Acting General Counsel
National Labor Relations Board
Region 22

Dated this 10th day of June 2013.

CERTIFICATION OF SERVICE

This is to certify that copies of the foregoing Acting General Counsel's Answering Brief have been served upon the parties as follows:

Electronic filing

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