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

HEARTLAND–HAMPTON OF BAY CITY MI,
LLC d/b/a HEARTLAND HEALTH CARE
CENTER-HAMPTON,

Respondent

and Case 07–CA–091956

DISTRICT 2, UNITED STEEL, PAPER AND
FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL
UNION (USW), AFL–CIO

Donna M. Nixon, Esq.,
for the General Counsel.
Clifford H. Nelson Jr., Esq. and
Leigh E. Tyson, Esq.,
for the Respondent.
John G. Adam, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge.[1] This case was tried in Saginaw, Michigan, on March 20 and 21, 2013. Charging Party District 2, United Steel, Paper and

[1] Respondent filed a pretrial motion seeking to disqualify me from hearing this case based upon an invalid appointment. (R. Exh. 1.) The Acting General Counsel and Charging Party filed briefs in opposition to Respondent's motion. (GC Exh. 2; CP Exh. 1.) Respondent argued that any actions taken by this Board, including my appointment, lack authority because the court in *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281), found the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid. Thus, the Board lacks a quorum. For the same reasons, Respondent argued that the appointment of the Regional Director for Region 7 was invalid and his actions lacked authority. I rejected these contentions and denied Respondent's motion. The Board does not accept the decision in *Noel Canning*, in part, because it is the decision of a circuit court and there is a conflict among the circuits regarding this issue. *Belgrove Post Acute Care Center,* 359 NLRB No. 77, slip op. at fn. 1 (2013). Additionally, for the reasons stated in *Bloomingdale's Inc.,* 359 NLRB No. 113 (2013), Respondent's arguments are rejected.

Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO (Union), filed the charge on October 24, 2012, and filed an amended charge on December 18, 2012,[2] and the Acting General Counsel[3] issued the complaint on January 30, 2013. The complaint alleges that Heartland–Hampton of Bay City MI, LLC d/b/a Heartland Health Care Center–Hampton (Respondent) violated Section 8(a)(1) of the Act by: making statements of futility; threatening its employees with loss of its open door policy and/or benefits; creating an impression of surveillance; coercively interrogating its employees; and impliedly promising to remedy grievances.[4] (GC Exh. 1(e).) Respondent timely filed an answer denying the alleged violations in the complaint. (GC Exh. 1(g).) The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,[5] including my own observation of the demeanor of the witnesses, [6] and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company, operates a nursing home providing inpatient and outpatient medical care at its facility in Bay City, Michigan, where it derives gross revenues in excess of $100,000, and purchases and receives goods valued in excess of $5000 directly from points outside the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations and Management Structure

Respondent operates a 51-bed rehabilitation facility in Bay City, Michigan, providing mostly short-term skilled care. Respondent has 12 department heads, 13 supervisory nurses, and 70 to 80 total employees.

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[2] All dates are in 2012, unless otherwise indicated.

[3] For purposes of brevity, the Acting General Counsel is referenced herein as General Counsel.

[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "CP Exh." for Charging Party's Exhibit; "R. Br." for Respondent's Brief; "GC Br." for the Acting General Counsel's Brief; and "CP Br." for Charging Party's Brief.

[5] I make the following corrections to the transcript: : Tr. 63, L. 11: "11-609" should be "Rule 609"; Tr. 115, L. 2: "manager" should be "managers"; and Tr. 219, L. 4: "BY JUDGE ROSAS" should be "MR. ADAM."

[6] Although I have included citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

Janis Nowak is Respondent's administrator and she is the highest ranking official at Respondent's facility. (Tr. 151.) Tracie Stachowiak is Respondent's director of nursing. (Tr. 231.) Kelly Appold was Respondent's human resources director during the time period at issue; she is no longer employed by Respondent. (Tr. 279.) Deborah Schlosser is an employee relations consultant for HCR–ManorCare, Respondent's parent company. (Tr. 198.) Respondent admits, and I find, that Stachowiak, Appold, Nowak, and Schlosser are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(g).)

Tracie Gray and Whitney Sharrow were employed as certified nursing assistants by Respondent during the time period at issue in this case. (Tr. 21, 127.) Sharrow remains employed by Respondent. (Tr. 127). Gray is no longer employed by Respondent; her employment was terminated on October 17.[7] (R. Exh. 2; Tr. 21.)

Respondent has maintained a continuous employee communication (CEC) program for a number of years. (Tr. 157.) Under the CEC program, Respondent's management conducts meetings every 2 months with small groups of employees to discuss concerns. (Tr. 158.) Following these meetings, management develops action plans, tracking the concerns raised by the employees. (R. Exh. 8; Tr. 163.) The action plans are posted in Respondent's facility and discussed at subsequent meetings. (Tr. 165.) Respondent also maintains an open door policy for its employees. (Tr. 189.)

B. The Union's Campaign at Respondent's Facility

In August 2012, Tracey Gray contacted the Union about organizing some of Respondent's employees. (Tr. 22.) Gray received authorization cards from Bill Laney, a staff representative and organizing coordinator for the Union. (Tr. 23–24, 140.) Gray and other employees, including James Baranowski, distributed authorization cards and other union information at Respondent's facility. (Tr. 22, 277.) Gray kept notes regarding the organizing effort. (R. Exh. 4.) Laney also kept notes regarding his conversations with Gray; some of these notes specifically reference the conversations at issue here. (R. Exh. 5.)

The parties disagree about the extent of openness with which Gray initially conducted her union activity. Gray distributed authorization cards in the parking lot at Respondent's facility. (Tr. 78.) Although she did not act in complete secret, Gray and Baranowski testified that she was careful not to engage in such activities in the presence of Respondent's management. (Tr.

[7] Gray's discharge was not alleged as a violation of the Act by the General Counsel in the complaint. (GC Exh. 1(e).) Respondent elicited testimony and evidence surrounding Gray's termination as part of its theory that Gray was motivated by revenge to make the allegations at issue here. (R. Br. pp. 19–20; R. Exh. 2.) Although the Charging Party alleges that Gray's discharge violated the Act, I find it would be improper to rule on this. (CP Br. p. 9 fn. 1.) The General Counsel made a deliberate choice not to place the lawfulness of Gray's discharge at issue in this proceeding. Gray's discharge was raised by Respondent for the limited purpose of establishing revenge as Gray's motivation for making the allegations at issue here. Finding an unfair labor practice in these circumstances would be improper.

25, 277.) One of Respondent's witnesses testified that Gray was not an open union advocate.[8] (Tr. 221.)

Respondent's management became aware of the Union's organizing efforts by early September when Stachowiak received a call from an employee advising that there was some union activity at Respondent's facility. (Tr. 168–169.) Nowak then alerted Appold and the corporate human resources director about this activity. (Tr. 169.) Stachowiak also told Nowak that Gray had been a union steward at other facilities in the past. (Tr. 294.)[9]

In response HCR–ManorCare sent an employee relations consultant (Schlosser) to Respondent's facility to engage in an employee education campaign. (Tr. 198.) During the campaign, Respondent's managers were trained on how to approach employees and discuss Respondent's opinions regarding unionization. (Tr. 170, 237.)

Respondent's managers were provided a pamphlet entitled *Basic Guide to the NLRA*, a publication of the Board, to share with employees; portions of the pamphlet were highlighted. (R. Exh. 11; Tr. 212–213.) The highlighted portions of the pamphlet cover the following provisions of the Act: employees' right to refrain from union activity; union security (and employee dues payments); economic strikes; collective bargaining (duty to meet and confer and that a party is not required to agree to the proposals of the other party or to make concessions); employee presentation of grievances; election bar; and an employer's right to discharge employees for legitimate economic reasons. (R. Exh. 11.) Respondent's witnesses testified that they discussed only the highlighted portions of the pamphlet with employees. (Tr. 213, 282–283.) Schlosser asked most of Respondent's employees to watch a video entitled, *Little Card, Big Trouble,* during Respondent's educational campaign. (Tr. 223.)

In addition, Respondent distributed several letters to its employees setting forth Respondent's opinion that the employees should not select the Union as their representative. (GC Exhs. 3, 4, 5, 6; Tr. 171.) These letters were prepared by Respondent's corporate human resources department and signed by Nowak. (GC Exhs. 3, 4, 5, 6; Tr. 120.) The letters addressed what Respondent believes are the negative aspects of unionization, including: payment of union dues, assessments, and fines; union security and dues check-off; historical dues increases related to the Union; powers of union officers; and discipline of union members. (GC Exh. 3, 4, 5, and 6.) At least one of the letters urged Respondent's employees to "say 'NO' to the Steelworkers." (GC Exh. 6.) Respondent's managers met one-on-one with employees to discuss the content of these letters. (Tr. 190-191, 239–240.)

[8] Although Respondent's counsel attempted to elicit testimony that some of Gray's union activity was "open and notorious" because it was conducted near surveillance cameras in Respondent's facility, neither Respondent's employees nor managers were aware of the existence of such cameras. (Tr. 80, 221, 252.) Therefore, I do not credit Respondent's argument that Gray's conversations near the front door of Respondent's facility were readily observable by management or made her an open union advocate.

[9] Nowak claimed that she was not aware that Gray spearheaded the Union's organizing drive until the day Gray gave her testimony at the hearing. (Tr. 187.) Nowak's testimony was contradicted by that of Stachowiak, who testified that she told Nowak that Gray was engaged in organizing activity in early September. (Tr. 240, 241-242, 256.)

C. Gray's Conversation with Appold

On September 24, Gray had a conversation with Appold near the facility's time clock. (Tr. 29, 280.) During the conversation, Appold read information to Gray from a document she was holding in her hand. (Tr. 30, 281–282). This document was the *Basic Guide to the NLRA* and Appold testified that she read the highlighted portions to Gray verbatim. (Tr. 281–282.) During the conversation, Gray maintains that Appold told her that it wouldn't be a good idea to [have] a union. (Tr. 30.) Appold also allegedly stated that if Respondent's employees were to select a Union, ". . . we [the union] could come up with a contract and then . . . Heartland would disagree and they would just go back and forth and they wouldn't give in to anything."[10] (Tr. 30.)

Appold's testimony regarding this conversation was equally less than convincing. Appold could not remember exactly what she discussed with Gray, but testified that she reviewed all of the highlighted sections of the *Basic Guide to the NLRA* and read from it verbatim. (Tr. 282, 285.) Appold denied stating that if employees went on strike Respondent would bring people in and the employees would lose their jobs, Heartland wouldn't give in during contract negotiations, that it was futile to select a union, or that Respondent would never consent to union demands. (Tr. 285–286.)[11]

D. Gray's Conversation with Stachowiak

On September 25, Gray had a conversation with Stachowiak in Stachowiak's office. (Tr. 31, 232.) Stachowiak was aware of Gray's organizing activity at the time of this conversation. (Tr. 232, 242.) Stachowiak asked Gray if she had any concerns and why she wanted a union. (Tr. 32.) Gray then mentioned the discharge of another employee, which she perceived as unfair. (Tr. 32.) Stachowiak also stated that people told her that Gray was the one who started the union organizing effort. (Tr. 32–33.) Gray told Stachowiak that the people who told her this probably wanted a union too. (Tr. 33.) Stachowiak then turned the conversation to the perceived perils of unionization, including fines and plant closure. (Tr. 33.)

By way of example, Stachowiak stated that if an employee had previously been disciplined, and was then written up or in trouble again, she could not go to the administrator and save the employee's job if the employee had a union. (Tr. 33.) In addition, Stachowiak said that employees could not come in and talk to her without a third party because she would have to go

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[10] Gray's testimony on this conversation was disjointed and less than convincing. In addition to the testimony above, Gray testified that, ". . . she was telling me that it wouldn't be a good idea like for a union just—it's more about the residents because in case we went on strike or something, then they could bring in other people to take our jobs and that she didn't think it would be a good idea, that we could solve the problems ourselves, and that they just wanted money and just a number of things. . . ." (Tr. 30–31.) Gray did not mention this exchange in her own notes regarding the organizing drive and her testimony is not corroborated by Laney's notes, which state "this union thing—let's try to work things out; Heartland will fight this." (Internal quotation marks omitted.) (R Exhs. 4, 5.) Given Gray's use of qualifying language ("like" and "or something"), her less than clear testimony, and the conflict with what she told Laney, leave me unable to credit her account.

[11] I note Appold's testimony conflicts with the highlighted portions of the *Basic Guide to the NLRA*, which address replacement of economic strikers and that during collective bargaining neither party is required to agree to a proposal of the other party or to make concessions to the other party.

by the book. (Tr. 33.) She also said that she would be unable to change the employees' schedules because she would have to go by the book. (Tr. 33–34.)

Stachowiak testified that it was Gray who initiated this conversation. (Tr. 231.) According to Stachowiak, Gray, ". . . felt the need to tell me that she wasn't the only one involved in the union organizing, that the other CNAs had picked her because she had a louder voice and she had been involved in union activity in a previous position . . . at a different nursing home." (Tr. 232.) Gray also revealed that she had been a union steward another nursing home. (Tr. 232.) Stachowiak specifically denied that she told Gray that if a union came in she couldn't save her job or that Respondent would have to go by the book. (Tr. 233–234.) Stachowiak did not specifically deny, however, that she asked Gray why she wanted a union or that she told Gray that employees could not come and talk to her without a third party.[12]

E. Gray's Conversation with Schlosser

In September, Schlosser was present in Respondent's facility conducting the corporate education campaign. (Tr. 198.) She approached Gray and invited her to watch a video. (Tr. 36.) Gray and Sharrow viewed the 20-minute video in an empty patient room. (Tr. 37–38, 129, 199.) Schlosser used a talking points guide, which she emphasized was not a script, when showing the video. (Tr. 222.) According to the transcript of *Little Card, Big Trouble*, it reflects union organizing in an unflattering light, including depictions of union deceit and employee badgering. (R. Exh. 10.)

After the video was over, Schlosser asked the employees if they had any questions.[13] (Tr. 39, 130, 207.) Gray indicated strongly that she disagreed with the video. (Tr. 39, 130.) Gray again brought up the perceived wrongful termination of another employee. (Tr. 39, 130, 207–208.) Gray then mentioned a problem with former employee who started a rumor that Gray was involved in illegal activity. (Tr. 40, 131.) Schlosser said she would investigate these concerns. (Tr. 41, 132.) Schlosser testified that she asked Gray if Gray would like her to talk to the administrator about the concerns and that Gray indicated that she did. (Tr. 209.)

Schlosser did, in fact, bring at least one of Gray's concerns to the attention of Nowak. (Tr. 172, 183–184, 209.) Nowak then investigated Gray's concern by contacting the former facility administrator, the employee who had allegedly been spreading the rumor, and Stachowiak. (Tr. 173.) Nowak also told Gray she would investigate her concern. (Tr. 172–173.)

[12] I do not credit Stachowiak's testimony regarding this conversation because it is implausible that Gray would have revealed herself to be involved in union organizing activity to one of Respondent's managers. Nor is it plausible that Gray would have revealed that she was a union steward at another facility. Instead, I credit Gray's testimony about what transpired during her conversation with Stachowiak.

[13] Although Gray testified that Schlosser asked why the employees needed a union (Tr. 39), I do not credit this testimony. It was not corroborated by Sharrow, who I find to be a more credible witness for the reasons set forth more fully below. In fact, Sharrow testified that Schlosser did not ask her and Gray about how they felt about the Union. (Tr. 135.) Laney's notes of his conversations with Gray do not indicate that Schlosser asked why the employees needed a union. (R. Exh. 5.)

LEGAL STANDARDS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622.

B. 8(a)(1) Violations

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. See *Station Casinos, LLC,* 358 NLRB No. 153, slip op. at 18 (2012). The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its actions is irrelevant); *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House,* 269 NLRB 1176 (1984), enfd sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964): whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator was seeking information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. In applying the *Bourne* factors, the Board seeks to determine whether under all of the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center,* 330 NLRB 935, 941 (2000).

An employer creates an unlawful impression of surveillance when reasonable employees would assume that their activities have been monitored. *Stevens Creek Chrysler,* 353 NLRB 1294, 1295–1296 (2009). Where an employer tells employees that it knows about their union activities but fails to cite its information source, Section 8(a)(1) is violated because employees are left to speculate about how such information was obtained and might assume that surveillance occurred. Id. at 1296. On the other hand, the Board has held that such a statement

would not unlawfully create an impression of surveillance where it is clear that the employer learned about the activity from another employee. *Park 'N Fly,* 349 NLRB 132, 133 (2007); *Bridgestone Firestone South Carolina,* 350 NLRB 526, 527 (2007) (Informing employees that their coworkers have volunteered information about ongoing union activities does not create an impression of surveillance, particularly in the absence of evidence that management solicited that information). This is true even where the identities of the employees providing the information are not disclosed. *Bridgestone Firestone of South Carolina,* 350 NLRB at 527.

An employer violates the Act by threatening employees with loss of benefits if they select a union as their collective-bargaining representative. *Noah's Bay Area Bagels, LLC,* 331 NLRB 188 (2000). Moreover, threatening employees with loss of a loss of scheduling flexibility and a family atmosphere violate the Act. *Flagstaff Medical Center,* 357 NLRB No. 65, slip op. at 6 (2011); *NLRB v. Gissel Packing,* 395 U.S. 575, 618 (1969). A respondent further violates the Act in threatening to more strictly enforce its policies if employees support a union. *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 495 (1995).

Mere references to the possible negative outcomes of unionization do not deprive employer speech of the protections of Section 8(c) of the Act. *Uarco*, *Inc.,* 286 NLRB 55, 58 (1987). The question regarding futility often redounds to whether the employer's comments impart to employees that their wages and benefits would be in danger, not because of the uncertainties of the collective-bargaining process, but simply because they might select a union as their collective-bargaining representative. *Winkle Bus Co.,* 347 NLRB 1203 (2006). A statement that employees would never get a contract has been held violative of Section 8(a)(1). *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 512 (1995).

The Board has long held that soliciting employee grievances during a union organizing campaign contains an implied promise to remedy such complaints. *Associated Mills, Inc.,* 190 NLRB 113 (1971); *Swift Produce,* 203 NLRB 360 (1973). The fact that an employer's representative does not make a commitment to specifically take corrective action does not diminish the anticipation of a remedy for employee complaints. *Maple Grove Health Care Center,* 330 NLRB 775 (2000), citing *Capitol EMI Music,* 311 NLRB 997 (1993). In order for the solicitation of grievances to be unlawful, it is not necessary for a union to have filed a representational petition, but merely for there to be a union organizing campaign in progress. *Flamingo Las Vegas Operating Co., LLC,* 359 NLRB No. 98, slip op. at 13 (2013), citing *Curwood, Inc.,* 339 NLRB 1137, 1147–1148 (2003), enfd in pertinent part 397 F.3d 548, 553–554 (7th Cir. 2005).

DISCUSSION AND ANALYSIS

A. Credibility Analysis

My credibility findings are generally incorporated into the findings of fact set forth above. My observations, however, were that all of the witnesses appeared less than fully credible. Many of the witnesses lacked complete recall of the events at issue, equivocated in their testimony, appeared hostile at times, or gave improbable testimony. I generally credited the accounts which seemed most plausible.

On direct-examination, Gray's testimony regarding many of the violations alleged in the complaint was not particularly strong; she equivocated and gave unclear testimony. She sparred with Respondent's counsel and avoided directly answering questions on cross-examination. (Tr. 58–60; 79–81.) Also, although Gray prepared notes regarding her organizing efforts, these notes do not mention any of the exchanges at issue in this case. (R. Exh. 4.) To the extent her testimony was corroborated by Sharrow or Laney's notes, I have credited it. In addition, I have credited her testimony in instances where it was inherently more plausible than contradictory testimony.

I emphasize that my credibility analysis regarding Gray does not rely upon Respondent's attempts to impeach her through an alleged prior felony conviction. (Tr. 61–65.) Under Federal Rule of Evidence 609 a witness' character for truthfulness may be attacked by evidence of a criminal conviction in a civil case with evidence of a conviction of a crime punishable by imprisonment for more than 1 year, so long as the probative value of the evidence is not substantially outweighed by unfair prejudice. No method of proof is specified in the Rule. Respondent did not provide any public record supporting its position that Gray had been convicted of a felony and Gray did not admit to any such conviction on cross-examination.[14] As such, I find Respondent's efforts to imply that Gray had a prior felony conviction which might affect her credibility unavailing.

Similarly unavailing were Respondent's attempts to impeach Gray through her incomplete employment application. Although Gray did not list her entire employment history in her employment application, I do not find that this omission shows bias or a motivation to testify untruthfully. The completeness of Gray's employment application is clearly collateral to the issues in this case and, therefore, I did not rely upon this factor is assessing Gray's credibility as a witness.

Respondent's counsel also elicited a great deal of testimony regarding the events surrounding Gray's termination, including accusations of resident abuse made by Gray against a coworker and less than flattering statements made by Gray on Facebook regarding a coworker. (R. Exh. 12 (rejected); Tr. 50, 175–177, 268–274.) As stated above, this evidence was elicited in an effort to show that Gray acted out of vengeance in making the allegations at issue. I do not credit Respondent's attempts, as the Facebook statements were made after Gray was discharged and the allegations against a coworker were made after Gray was suspended pending discharge. Both of these events occurred in response to Gray's discharge, about which she was understandably upset. However, I do not find that Gray's actions in this regard prove that she made the allegations at issue here out of spite or vengeance. Indeed, her testimony regarding some of the allegations is corroborated by other witnesses and Laney's notes.

The testimony of Respondent's witnesses was not particularly believable. All attempted to maintain that Respondent did not mount a vigorous campaign against the Union's organizing

[14] Respondent's reliance on *U.S. v. Nevitt,* 563 F.2d 406 (9th Cir. 1977), is misplaced as the holding in that case was abrogated by the 1990 amendments to the Federal Rules of Evidence. *Fed.R.Evid. 609,* Advisory Committee's Note (1990); *U.S. v. Rowe,* 92 F.3d 928, 933 (9th Cir. 1996).

drive, instead styling it "pro-employee" or an educational effort. (Tr.185, 210.) It is well settled that any employer has a perfect right to oppose a union and the employer is free to communicate to its employees its general view about unionism or a particular union, so long as the communication does not contain any threat of reprisal or force or promise of benefit. See *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). Respondent's parent company sent a representative to train managers on opposing the union's appeal and to show *Little Card, Big Trouble* to its employees. Respondent also provided about 10 letters, signed by the administrator, to its employees arguing that the employees should not unionize. (GC Exhs. 3, 4, 5, 6; Tr. 171.) The witnesses' refusal to admit that Respondent sought to dissuade its employees from unionizing detracts from their credibility.

As for Sharrow, who was still employed by Respondent when she testified, I note that current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Advocate South Suburban Hospital,* 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries,* 316 NLRB 745 (1995), affd. mem. *NLRB v. Flexsteel Industries,* 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products,* 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Moreover, Sharrow's testimony was plausible with regard to the conversation she witnessed between Gray and Schlosser. Thus, I credit the testimony of Sharrow above that of other witnesses.

B. Appold's Conversation with Gray Did Not Amount to an Unlawful Statement of Futility

I have found the testimony of both Appold and Gray less than credible regarding their conversation in late September. For the reasons set forth above, I have been unable to credit the testimony of Gray regarding this conversation. The General Counsel bears the burden of presenting credible evidence to support the allegations in the complaint and I conclude that he has failed to do so. Therefore, I recommend that paragraph 7 of the complaint be dismissed.

C. Stachowiak's Statement to Gray Regarding the Loss of Respondent's Open Door Policy Did not Violate the Act

I have credited the testimony of Gray over that of Stachowiak regarding their conversation on September 25. It defies credulity that Gray would approach a supervisor and self-identify as a union supporter and former union steward. Instead, I find more plausible that Stachowiak both initiated the conversation and advised Gray that she knew Gray was involved in organizing activity.

The evidence establishes that Stachowiak threatened Gray with a loss of Respondent's open door policy. Gray's testimony was that employees would not be able to come in and talk to her without a third party. (Tr. 33.) I do not find this statement to be unlawful. It is well-settled that a statement that employees will not be able to interact individually with management after a union's certification is permissible, in that it "simply explicates one of the changes which occur between employers and employees when a statutory representative is selected." *Tri-Cast, Inc.,*

274 NLRB 377 (1985); see also *Dish Network Corp.,* 358 NLRB No. 29, slip op. at pp. 1–4 (Member Block, concurring).

Therefore, I find that Respondent did not violate the Act as to the allegation in paragraph 8(a) of the complaint that Stachowiak's statement concerned loss of Respondent's open door policy.

D. Stachowiak's Statement to Gray Regarding Stricter Enforcement of Employee Discipline and Scheduling Policies Violated the Act

As stated above, I have credited the testimony of Gray over that of Stachowiak. As such, I have found that Stachowiak told Gray that she would be unable to intervene to save an employee's job if the union were selected. The evidence further establishes that Stachowiak indicated that if Respondent's employees selected union representation, she would need to go "by the book" with regard to employee scheduling. I find that these statements violate the Act by linking stricter enforcement of Respondent's disciplinary policies and work procedures to employee selection of union representation.

Threatening stricter enforcement of work rules because employees may select union representation violates the Act. *Park N' Fly, Inc.,* 349 NLRB at 132; *Dish Network Corp.,* 358 NLRB No. 29, slip op. at 12 (2012) (The respondent violated the Act by threatening more strict enforcement of its dress code and absenteeism policies); *Onsite News*, 359 NLRB No. 99, slip op. at 1 fn. 3 (The Board adopted the judge's finding that the respondent violated the Act by threatening employees with stricter enforcement of work rules if they supported the union in an election). Moreover, threatening employees with loss of scheduling flexibility violates the Act. *Flagstaff Medical Center,* 357 NLRB No. 65, slip op. at 6 (2011).

Stachowiak statements to Gray clearly constitute a threat of more strict enforcement of Respondent's disciplinary policies and work procedures. Therefore, I find that Respondent violated the Act as to the allegation in paragraph 8(a) of the complaint regarding Stachowiak's statements concerning stricter enforcement of Respondent's disciplinary policies and work procedures.

E. Stachowiak's Conversation with Gray Did Not Create an Unlawful Impression of Surveillance

As stated previously, I have credited the testimony of Gray over that of Stachowiak regarding this conversation.[15] Nevertheless, Stachowiak's statements to Gray did not create an unlawful impression of surveillance. According to Gray, Stachowiak told her, "[P]eople came to her office and told her I was the one who got it [the union organizing campaign] started." (Tr. 32–33.) Gray responded that, "I told her that the people that came to her are probably ones who wanted it too." (Tr. 32.) It is clear from Gray's response to Stachowiak that Gray believed Stachowiak was referring to other employees and that it was these other employees who revealed Gray's union activities. This is significant because an employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily

[15] Despite Gray's testimony that Stachowiak asked her about her concerns and why she wanted a union, there are no allegations in the complaint regarding these statements and I do not pass on them.

provided. *Bridgestone Firestone South Carolina,* 350 NLRB at 527. The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer. North Hills Office Services,* 346 NLRB 1099, 1104 (2006) (emphasis in original). This is true even when the employer does not identify the particular employee who provided the information. See *Bridgestone Firestone South Carolina,* 350 NLRB at 527.

Nothing about Stachowiak's statement would have reasonably led Gray to believe that her union activities were under surveillance by Respondent. In fact, Gray's response to Stachowiak proves just the opposite; that Gray believed Stachowiak was told by other employees. I do not find that Stachowiak's statement to Gray created an unlawful impression of surveillance. Accordingly, I recommend that paragraph 8(b) of the complaint be dismissed.

F. Schlosser's Conversation with Gray Was Not an Unlawful Interrogation

The General Counsel has not established that Schlosser unlawfully interrogated Gray. Schlosser and Sharrow testified that Schlosser did not ask Gray about her union sympathies or why she felt Respondent's employees needed a Union after showing *Little Card, Big Trouble*. Gray's testimony on this point was not particularly convincing; she stated that, ". . . [S]he just asked me did—you know, what was, you know, like my concern, like why, you know, did we feel like we needed a union there." (Tr. 39.) I have credited the testimony of Sharrow above that of Gray and Schlosser on this point. Gray's own notes regarding the union organizing campaign do not mention this exchange. (R. Exh. 4.) Laney's notes do not mention that Schlosser asked Gray about why the employees felt they needed a union. (R. Exh. 5.) Although the General Counsel urges me to find that Schlosser's talking points support its theory, I cannot. (GC Br. p. 13; GC Exh. 8.) While it is true that Schlosser's talking points include the question, "Why should we even care if there was a union here?" the credited testimony establishes that Schlosser did not ask why the employees felt they needed a union. Thus, I cannot find that the General Counsel has met its burden in establishing that Schlosser interrogated Gray. I therefore recommend that the allegation in paragraph 9(a) of the complaint be dismissed.

G. Schlosser's Impliedly Promising to Remedy Grievances Violated the Act

Respondent was countering the union's organizing campaign by showing *Little Card, Big Trouble* to its employees, including Gray and Sharrow. At the conclusion of the video, Schlosser asked Gray and Sharrow if they had any questions. Gray then raised concerns, including a concern that another employee had spread a rumor about Gray engaging in illicit activities.

Settled Board precedent prohibits employers from soliciting grievances during union campaigns where the solicitation carries with it an implicit or explicit promise to remedy the grievances and "impress[es] upon employees that union representation [is] . . . [un]necessary." *Amptech, Inc*., 342 NLRB 1131, 1137 (2004), enfd. 165 Fed.Appx. 435 (6th Cir. 2006); *Traction Wholesale Center Co.*, 328 NLRB 1058, 1058–1059 (1999), enfd. 216 F.3d 92 (D.C. Cir. 2000). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. See *Amptech*, above, 342 NLRB at 1137. The inference that the employer will remedy grievances is "particularly compelling" when the solicitation

constitutes a significant deviation from the employer's existing practice of addressing employee complaints. See *Center Service System Div.*, 345 NLRB 729, 730 (2005), enfd. in relevant part 482 F.3d 425 (6th Cir. 2007); *Amptech, Inc.,* 342 NLRB at 1137.

In this case, Respondent's agent (Schlosser) asked a question which elicited a concern from Gray. In response to Gray's raising of this concern, Schlosser promised to investigate. Schlosser then raised Gray's concern with Nowak and Nowak conducted an investigation. This exchange took place in the midst of a meeting intended to dissuade employees form supporting the Union. Schlosser's actions in this regard amount to a thinly veiled attempt to remedy an employee grievance. As such, I find Respondent violated the Act as alleged in paragraph 9(b) of the complaint.

I reject Respondent's argument that it was entitled to solicit and remedy grievances from its employees as light of its past practice of doing so under its CEC program. (R. Br. p. 33 fn. 13.) The forum in which Schlosser's impliedly promised to remedy Gray's grievance was not a part of its CEC program, but rather a meeting meant to dissuade employees from unionizing. In addition, there is no evidence that an official from Respondent's parent corporation ever participated in the CEC program. Therefore, Schlosser's actions were not part of any past practice of soliciting and remedying employee grievances, but rather an unlawful implied promise to remedy an employee grievance in an effort to dissuade the employees from unionizing. As such, Respondent's actions violate the Act.[16]

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By impliedly promising to remedy grievances on behalf of employees in order to deter them from supporting the Union, Respondent violated Section 8(a)(1) of the Act.

[16] Respondent's reliance on *Yale New Haven Hospital,* 309 NLRB 363 (1992), in support of its argument is misplaced as that case is readily distinguishable from the instant case. In that case, the respondent sent a survey to its employees and formed employee committees at a time when the respondent may not have been aware of a union organizing drive. 309 NLRB at 365 fn. 5. Respondent here was clearly aware of the organizing drive at the time Schlosser spoke to Gray, as Schlosser was present at Respondent's facility in an effort to combat employee unionization. In addition, unlike the instant case, the respondent in *Yale New Haven Hospital* had formed committees and created action plans in the past in response to employee concerns. 309 NLRB at 365. In this case, Respondent had never shown a video like *Little Card, Big Trouble* to its employees and there is no evidence that Respondent had ever solicited or promised to remedy employee grievances outside of its CEC program in the past. Thus I reject Respondent's reliance on *Yale New Haven Hospital* in this case.

4. By threatening more strict enforcement of disciplinary rules and work procedures in order to deter employees from supporting the Union, Respondent violated Section 8(a)(1) of the Act.

5. By the conduct described in paragraphs 3 and 4, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

6. Respondent did not further violate the Act as alleged in the complaint.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Heartland–Hampton of Bay City, MI, LLC d/b/a Heartland Health Care Center–Hampton, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly promising to remedy grievances.

(b) Threatening more strict enforcement of its disciplinary rules and work procedures.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(d) Within 14 days after service by the Region, post at its facility in Bay City, Michigan, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where

[17] 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.

[18] 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."

notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 24, 2012.

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

Dated, Washington, D.C. July 18, 2013

_____
Melissa M. Olivero
Administrative Law Judge

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 impliedly promise to remedy grievances in order to discourage you from engaging in union or other protected, concerted activity.

WE WILL NOT threaten to more strictly enforce disciplinary rules or work procedures in order to discourage you from engaging in union or other protected, concerted activity.

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

HEARTLAND–HAMPTON OF BAY CITY, MI, LLC d/b/a HEARTLAND HEALTH CARE CENTER–HAMPTON

(Employer)

Dated _____ By _____

(Representative) (Title)

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

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.