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Kaiser Foundation and National Union of Healthcare Workers. Cases 31-CA-089178 and 31-CA-091298

September 17, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

On May 20, 2013, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent, Kaiser Foundation Hospitals, filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.²

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3(a).

“(a) Making coercive statements to employees about engaging in protected concerted activity.”

2. Delete Conclusion of Law 3(b) and renumber the subsequent conclusions accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Kaiser Foundation Hospitals, Harbor City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making coercive statements to employees about engaging in protected concerted activity;

(b) Threatening to discipline employees if the employees continue to engage in protected concerted activity; and

(c) Impliedly threatening to discharge employees if the employees continue to engage in protected concerted activity.

(d) 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) Within 14 days after service by the Region, post at its South Bay facility in Harbor City, California, copies of the attached notice marked “Appendix”³ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 6, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. September 17, 2013

Mark Gaston Pearce,

Chairman

¹ In the absence of exceptions, we adopt the judge's findings.

² We conform the judge's Conclusions of Law, recommended Order, and notice to his findings and to the Board's standard remedial language. Specifically, although the judge found that the Respondent made a coercive statement to an employee about engaging in protected concerted activity and properly included a reference to this finding in the notice, the judge inadvertently failed to include this violation among his Conclusions of Law and in the recommended Order. Additionally, although the judge did not find that the Respondent either unlawfully instructed employees not to engage in protected concerted activity or threatened to discipline employees because they engaged in protected concerted activity, he mistakenly included such violations in his Conclusions of Law, recommended Order, and notice.

³ 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.”

Harry I. Johnson, III, Member

Nancy Schiffer, Member

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

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

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 make coercive statements to you about engaging in protected concerted activity.

WE WILL NOT threaten to discipline you if you continue to engage in protected concerted activity.

WE WILL NOT impliedly threaten to discharge you if you continue to engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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Cecelia Valentine, Esq., for the Acting General Counsel.
Karen Rooney, Esq., of Los Angeles, California, and *Diana Casares Bell, Esq.*, of Pasadena, California, for the Respondent.
Florice Hoffman, Esq., of Orange, California, for the Union.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Los Angeles, California, on March 25 and 26, 2013. This case was tried following the issuance of an order consolidating cases, consolidated complaint, and notice of hearing (the complaint) by the Regional Director for Region 31 of the National Labor Relations Board (the Board) on December 27, 2012. The complaint was based on a

number of original and amended unfair labor practice charges, as captioned above, filed by National Union of Healthcare Workers (NUHW, the Union, or the Charging Party). It alleges that Kaiser Foundation Hospitals (the Respondent, the Employer, the Hospital, or Kaiser) has violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.¹

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the Acting General Counsel, counsel for the Union,² and counsel for the Respondent, and my observation of the demeanor of the witnesses,³ I now make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the Respondent's answer admits, and I find that at all times material herein, the Respondent has been a corporation engaged in the business of operating acute care hospitals in the State of California, including a hospital in Harbor City, California (the Hospital), where it also maintains an office and place of business. This is the only facility involved in this proceeding. Further, I find that during the 12-month period ending October 30, 2012, the Respondent, in conducting its business operations just described, derived gross revenues in excess of \$250,000; and during the same period of time, purchased and received at the Hospital located in Harbor City, California, goods valued in excess of \$5000 directly from suppliers located outside the State of California.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the Respondent's answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

¹ All pleadings reflect the complaint and answer as those documents were finally amended at the hearing. The General Counsel's formal documents (GC Exh. 1.) contain the charges, amended charges, and affidavits of service establishing the dates on which those charges and amended charges were filed with the Board and served on the Respondent, as alleged in the complaint.

² Counsel for the Union filed a statement in which she joined in the brief filed by counsel for the Acting General Counsel.

³ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

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III. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts and the Dispute

The Respondent's Harbor City facility is also known as the South Bay facility. At the time of the hearing, certain of the Respondent's nonsupervisory employees at the South Bay facility were members of a bargaining unit represented by Service Employees International Union, United Healthcare Workers-West (SEIU-UHW). Those represented employees included those employed in the Respondent's Environmental Services (EVS) Department. Accordingly, at all relevant time periods the SEIU-UHW has been the exclusive collective-bargaining representative for those nonsupervisory EVS Department employees. (See Stipulation of Facts, GC Exh. 2.)

I will take administrative notice that since some time in the recent past the National Union of Healthcare Workers (NUHW) has been seeking to represent the same unit of employees as is currently represented by the SEIU-UHW. To that end, the NUHW filed a representation petition with the agency in Case 32-RC-5775. It is perhaps an understatement to say that these two labor organizations have been engaged in an aggressive, hotly contested campaign to represent these employees. On February 11, 2013, the Regional Director for Region 32 issued an Order and notice of second election directing a mail ballot election with a number of named employers, one of whom is the Respondent, the NUHW, as the Petitioner, and the SEIU-UHW, as the Intervener, among the unit of employees mentioned above, which unit includes the Respondent's nonsupervisory EVS Department employees. (Un. Exh.1.) At the time of the hearing in this matter, that election was still pending.

Maria Bodkin (Bodkin) is an EVS Department employee at the Respondent's South Bay facility. She has been employed at that facility in that capacity for approximately 14 years. Bodkin's first language is Spanish, however, she testified in English. She declined the offer of having a Spanish language interpreter, indicating that she understands "almost everything" in English. Further, it was my observation when watching her testifying that she is fluent in the English language.

It is undisputed that while Bodkin was represented by SEIU-UHW at her place of employment, she was, in fact, a very strong, vocal supporter of the NUHW. Her support for the NUHW was well known among her fellow employees, management, and by the two respective labor organizations. She distributed to fellow employees petitions, pamphlets, and literature on behalf of the NUHW and orally attempted to garner support for that labor organization among her coworkers. In fact, her picture and name were prominently displayed on two pro-NUHW flyers distributed on the Respondent's South Bay campus and mailed to employees. (GC Exhs. 3 & 4.) It is also undisputed that Bodkin frequently spoke up at gatherings of employees and managers where she was critical of the management in the EVS Department, and where she raised such issues as a lack of cleaning supplies, inequitable work schedules, the awarding of overtime, and worker injuries alleged caused by excessive work.

The Respondent has out sourced the management of the EVS Department to a company known as Xanitos. The overall re-

sponsibility for the Respondent's EVS Department rests with Saro Tomasian, the managing director, support operations, who is an employee of the Respondent. Working under his direction is Susanne Corlett, environmental services assistant director, who is an employee of Xanitos. The Respondent's answer admits the supervisory status of both Tomasian and Corlett, as well as that of Heidi Greene, a human relations consultant employed by the Respondent.

Each morning, before the start of their work shift duties, the EVS Department housekeepers, approximately 15–20, and some of their supervisors attend a "huddle." These huddles are run by a supervisor, and are held in the combined area of the EVS office and a storeroom. They are intended for the supervisors to inform the assembled employees of developing issues, to discuss safety matters, matters of concern to the supervisors, and also matters of concern to the employees. Generally they last from 10 to 20 minutes, after which the employees begin their housekeeping duties.

The Respondent contends that Bodkin was frequently a disruptive influence at these huddles, raising issues only of personal concern to her, and/or matters that should not have been discussed in a group setting, sometimes having to do with other employees who could have raised these issues themselves. Allegedly, Bodkin had a private agenda, delayed the huddles with issues unrelated to the matters at hand, was disrespectful to the supervisors, and was loud and rude. It is the position of the Respondent that it's supervisors who subsequently spoke to Bodkin regarding her alleged disruptive behavior at the huddles were in no way intending to restrict any legitimate union or protected concerted activity, but merely to moderate her behavior so as to cause her to stop disrupting the huddles. Similarly, the Respondent contends that its supervisors attempted to counsel Bodkin for distributing petitions and materials on behalf of the NUHW in work areas of the facility. It denies any attempt to limit Bodkin's legitimate protected concerted or union activity, and denies that its solicitation/distribution rules were overbroad.

On the other hand, counsel for the Acting General Counsel and counsel for the Union allege that the Respondent's supervisors who counseled Bodkin regarding her comments at the huddles and her distribution of petitions and literature on behalf of the NUHW were unlawfully attempting to limit her legitimate protected concerted and union⁴ activity in violation of Section 8(a)(1) of the Act. Also, they allege that the Respondent's supervisors similarly violated the Act by orally stating an overbroad rule on solicitation and distribution. They suggest that the claim that Bodkin was disruptive at the huddles was merely a pretext for the Respondent's unlawful conduct.

B. Legal Analysis and Conclusions

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organization . . . and

⁴ In fact, the complaint does not specifically mention "union activity," but, rather, only the more generic "protected concerted activity," which would by definition include union activity. Concomitantly, the complaint does not allege a separate violation of Sec. 8(a)(3) of the Act, but only of Sec. 8(a)(1).

to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001); *Meyers Industries*, 268 NLRB 493, 497 (1984). An employer violates Section 8(a)(1) of the Act when it discharges an employee, or takes some other adverse employment action against her, for engaging in protected concerted activity. *Rinke Pontiac Co.*, 216 NLRB 239, 241, 242 (1975). It is axiomatic that an employer violates Section 8(a)(1) of the Act when it interferes with, restrains, or coerces employees for engaging in protected concerted activity.

The Board, with court approval, has construed the term “concerted activities” to include “those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries, Inc.*, 281 NLRB 882 (1986), *affd.* 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988); See *Mushroom Transportation Co., v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) (observing that “a conversation may constitute a concerted activity although it involves only a speaker and a listener” if “it was engaged in with the object of initiating or inducing or preparing for group action or . . . it had some relation to group action in the interest of employees”); See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board’s power to protect certain individual activities and citing as an example “the lone employee” who “intends to induce group activity”).

It is beyond question that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that communication between employees “for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities.” *Phoenix Transit Systems*, 337 NLRB 510 (2002); citing *Container Corporation of America*, 244 NLRB 318, 322 (1979).

Although the Respondent does not concede the matter, in my view there is no doubt that Bodkin was engaged in concerted activity at the Hospital. She did have an “agenda,” that being to support the NUHW in its organizing campaign, and to make the SEIU-UHW and the Hospital management look bad in the eyes of the employees. However, her activities in support of this agenda were both concerted and protected. When she spoke up at the daily huddles and at safety meetings and complained about working conditions such as a lack of cleaning supplies, or being forced to work too quickly and in an unsafe manner, or the inequitable distribution of overtime, she was speaking about matters that concerned both her and other members of the bargaining unit. Further, her distribution of flyers and other materials on behalf of the NUHW was clearly concerted, and, in fact, constituted the most basic form of union and protected concerted activity. Nevertheless, the question remains whether the conduct of the Respondent’s supervisors

towards Bodkin violated the Act, as an attempt to unlawfully interfere with, restrain, or coerce her in the exercise of legitimate protected concerted activity.

1. The June 2012 conversation between Susanne Corlett and Bodkin

Complaint paragraph 6 alleges that in the first or second week of June 2012, Susanne Corlett, in the Hospital EVS store room, instructed [Bodkin] not to engage in protected concerted activity. The facts concerning this allegation, as well as others in the complaint, are in dispute. In each instance, the dispute involves the words spoken by various supervisors and whether the version of the events as told by Bodkin or that version told by various supervisors is correct. Therefore, it is necessary for the undersigned to determine in each instance the credibility of the various witnesses to these conversations.

For the most part, I did not find Bodkin to be a credible witness. She seemed mainly focused on furthering her agenda on behalf of the NUHW, and less so on testifying truthfully. I believe that she exaggerated and embellished her testimony, at times to a ridiculous degree. She appeared to be following a script, describing statements that if true would obviously constitute blatant unfair labor practices, but which any knowledgeable supervisor would be highly unlikely to make. Further, it is important to note that while Bodkin was clearly on a campaign to assist the NUHW in its organizing efforts, the hearing revealed no evidence of any antiunion animus by the Respondent towards the NUHW. To the contrary, it appeared that the Respondent had remained neutral in the long standing conflict between the NUHW and the SEIU-UHW.

Bodkin testified about a particular employee “huddle,” which took place in the beginning of June 2012, and at which Susanne Corlett, environment services assistant director and an admitted supervisor, was the person who conducted the session. As noted above, these huddles were held for generally 10–20 minutes prior to the start of the EVS employees beginning their cleaning and housekeeping duties. They were designed to give management an opportunity to raise any issues of concern, to discuss safety, and also so that individual employees could raise their concerns. From time to time, Bodkin would raise issues of concern that she had. While various witnesses for the Respondent testified that Bodkin was frequently loud and rude at these sessions, the record is void of any probative evidence that would establish the degree of obnoxious behavior on the part of Bodkin as would serve to remove such conduct from the protections of the Act. For her part, Bodkin denied that she was ever rude and claimed that because the room where the huddles were held was very noisy, she had to speak in a raised voice in order to be heard.

At the meeting in question, Bodkin raised two issues of concern. She complained about inadequate cleaning supplies, in particular towels, and complained of management failing to follow contractual seniority on the overtime rotation list. Beyond question, these were matters related to employee terms and conditions of employment and constituted protected concerted activity.

Bodkin testified that following this meeting, Corlett indicated that she needed to talk with Bodkin and the two of them

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walked about 20 feet away where they proceeded to have a conversation. In this regard, it is very important to note that when asked on direct examination by counsel for the Acting General Counsel whether fellow employees were “close enough to hear,” Bodkin responded, “No, they are about 20 feet away from me.”

According to Bodkin, Corlett said, “Maria, why are you doing this? Don’t stick your face in this for all these people. You are going to get all of the battles. You are going to be by yourself at the end. Your co-workers are not going to, you know, support you.” Allegedly, Bodkin responded, “I am going to stand up for my-co-workers and I am ready for it.”

Corlett testified that she has chaired huddles where Bodkin was present. According to Corlett, at such meetings employees are frequently asked whether they have any questions, and it is not unusual for employees to bring up concerns that they may have. To such questions supervisors sometimes respond that they will look into the matter and get back to the employees with an answer. Corlett indicated that management is interested in the concerns raised by employees during the huddles, and it serves as an opportunity for management and employees to exchange information.

It was Corlett’s testimony that she has never instructed an employee not to speak up during a huddle, nor has she ever chastised an employee for speaking up during a huddle. She acknowledged that from time to time she has been present when Bodkin spoke up in a huddle. Specifically, she recalled Bodkin speaking on behalf of employees who might be too shy or timid to bring up a concern themselves. Further, Corlett recalled Bodkin raising issues related to inadequate supplies, such as towels. She characterized the concerns raised by Bodkin as “pretty good ideas or issues,” of the type that management would likely respond positively to. Other employees would also raise similar concerns. Corlett does not attend every huddle.

Corlett testified that she did not recall a huddle during which Bodkin raised a concern about the assignment of overtime hours to employees. Further, she did not recall ever pulling Bodkin aside after a huddle to talk with her about something that Bodkin had said at the huddle. When asked by the Respondent’s counsel whether she had made any of the statements attributed to her by Bodkin about not bringing certain matters up at huddles, or staying out of other people’s business, or ending up alone, or words to that effect, Corlett responded, “Absolutely not.” She then specifically denied each and every statement attributed to her by Bodkin. Corlett denied ever threatening Bodkin in any way in response to anything that Bodkin said, whether at a huddle or elsewhere. Also, she denied ever discussing union related activities with Bodkin.

I found Corlett to be a highly credible witness. She is a graduate of the United States Military Academy at West Point with a degree in psychology, and served in the army as a military police officer. She testified in a straight forward, no non-sense manner with clarity and certainty. Her testimony was reasonable and seemed more probable than not. Although an admitted supervisor of the Respondent, she is actually an employee of Xanitos, the company with which the Respondent has

contracted to provide the management services for the EVS Department. Thus, she is unaffected by the organizing efforts of the NUHW and/or the rivalry between that Union and the SEIU-UHW. However, the most significant reason for finding her credible is because, as will be noted at some length later in this decision, she testified candidly about certain alleged unfair labor practices committed by the Respondent through the statements of Saro Tomasian, her immediate supervisor. In this regard, she supported the complaint allegations as alleged by the Acting General Counsel. Such testimony was clearly adverse to the interests of the Respondent and to Tomasian, demonstrating her propensity to tell the truth, even when it is contrary to her personal best interests.

Besides Bodkin and Corlett, there were two other individuals who had something to say regarding the alleged coercive conversation. Noemi Maldonado, an employee in the EVS department, testified on behalf of the Acting General Counsel. Her primary language is Spanish and, so, she testified by means of a Spanish Language interpreter. I found her testimony confusing and somewhat contradictory. She testified that she has heard Bodkin complain at huddles about the lack of mops and towels, about employee schedules and overtime rotations, and about safety and performance issues, specifically that the housekeepers are not “robots.” She recalled an incident in May or June of 2012, where Susanne Corlett spoke with Bodkin about comments Bodkin had made during a huddle. At first she seemed to be saying that she heard the conversation, which would have been contrary to Bodkin’s testimony that no employees were close enough to overhear it. However, she then made it clear that she had merely been told later by Bodkin of the substance of the alleged conversation. According to the initial translation, Bodkin told her that Corlett had said that, “She [Bodkin] shouldn’t be facing the music, because in the end, she was going to end up alone.” Following an objection by counsel for the Acting General Counsel, the interpreter changed the translation to Maldonado testifying that Bodkin said that Corlett had told her [Bodkin] that, “She should stop facing the music on behalf of others because, in the end, she was going to stand alone.”

Later, during cross-examination, Maldonado acknowledged that during the huddle in question, Bodkin had only complained about inadequate mops and towels available for the housekeepers. According to Maldonado, Bodkin had also complained about the way work assignments were made, about the housekeepers not being robots, and about overtime, but these matters were raised by Bodkin at some huddles other than the one that allegedly precipitated the conversation between Corlett and Bodkin. Further, on cross-examination, Maldonado made it clear that she had not overheard the private conversation between Corlett and Bodkin, but only Bodkin’s version of that alleged conversation.

I do not give any probative weight to Maldonado’s testimony because it is confusing, somewhat contradictory, and mostly because Maldonado did not actually overhear the alleged conversation, but only Bodkin’s version.

The second employee to have something to say about the alleged conversation between Corlett and Bodkin was EVS de-

partment employee George Briggs. He testified on behalf of the Respondent and was generally hostile to Bodkin. However, during cross-examination, he testified that on one occasion he observed Corlett “pull[ing] Bodkin to the side” and telling her that when they have huddles, “can she please keep her comments to herself, and after the huddles come to [Corlett] and discuss it with [Corlett], not in front of the whole group . . . because what [Bodkin] did was rude and disrespectful.”

Once again, I have decided to give this testimony no probative weight. Briggs never indicates when this alleged conversation occurred, and, even more significant, his claim to have overheard the conversation is contrary to Bodkin’s testimony that no employees were close enough to have overheard the alleged conversation between Corlett and Bodkin in June of 2012. The conversation testified to by Briggs, assuming it occurred at all, may well have occurred at some totally different time, and the actions which precipitated it may have been totally different.

Accordingly, as I have found Corlett to be a much more credible witness than Bodkin, I have accepted her testimony that the conversation in question that Bodkin alleges took place in early June of 2012, did, in fact, not occur. The counsel for the Acting General Counsel has failed to meet her burden of proof to support this allegation by a preponderance of the evidence. Therefore, I shall recommend to the Board that complaint paragraph 6 be dismissed.

2. The August 23, 2012 conversation between Heidi Greene and Bodkin

Complaint paragraph 7(a) and (b) alleges that on about August 23, 2012, the Respondent by Heidi Greene orally stated an overbroad solicitation and/or distribution rule, and threatened to discipline [Bodkin] because of her exercise of Section 7 rights. Greene is an employee of the Respondent, an admitted supervisor, and a human resource consultant.

The Respondent has a written “On Premises Solicitation” policy, effective September 27, 2011. Section 5.1 to 5.5 of that policy describes what employees may and may not do on the Hospital property. (GC Exh. 5.) It is important to note that the Acting General Counsel has not alleged that this written policy is in anyway unlawful. Rather, the Acting General Counsel alleges that Greene, in a private conversation with Bodkin, deviated from that written policy and orally announced an overly broad solicitation and/or distribution rule.

This issue was apparently precipitated by a complaint from Pamela Watson, the SEIU-UHW contract specialist. According to Greene’s testimony, in August of 2012, she was contacted by Watson who reported that Bodkin had been observed distributing NUHW flyers in a working area of the Hospital. If true, this conduct would seem to be in violation of section 5.2 of the above cited policy, which section reads as follows: “Employees may not engage in distribution in working areas at any time. Employees may not engage in distribution in nonworking areas on working time.” It was clear from the testimony of Bodkin that Watson and other officials of the SEIU-UHW, the certified exclusive collective-bargaining representative of Bodkin’s bargaining unit, harbor some animosity towards Bodkin because of her support for the rival NUHW, which was seeking to replace

the SEIU-UHW as the exclusive collective-bargaining representative. Greene, as a human resource consultant, was obviously aware of the rivalry between the two labor organizations, the recent period of organizing activity, the first NLRB conducted election, the objections to the results of that election filed by the NUHW, and the fact that a second election had been scheduled.

It is undisputed that Greene contacted Bodkin, told her about the report that she had received, said that she would like to meet with her to discuss the incident and told Bodkin that she could bring a union representative with her. Of course, the union representative would have been a representative of the SEIU-UHW, the exclusive collective-bargaining representative of Bodkin’s bargaining unit. Because of the animosity between Bodkin and that union, she decided to meet with Greene without a union representative present.

The two women meet in Greene’s office on August 23, 2012. However, there is a dramatic difference in the two versions of the story as told by Greene and Bodkin regarding the events that occurred in Greene’s office. At Greene’s request, Bodkin signed a “declination of representative form.” (R. Exh. 3.) Greene informed Bodkin that the meeting was investigatory in nature and its purpose was not to discipline her. Although the language on the form indicates that the investigation may result in “corrective action,” Green testified that this was simply the standard and only form used when union representation is declined.

According to Greene, Bodkin acknowledged that she had been distributing flyers in a working/patient area of the Hospital, as had been alleged. Greene had with her the two flyers involved, which were highly critical of both the Hospital management as well as the SEIU-UHW. The flyers, which were in both English and Spanish, indicated support for the NUHW, and prominently displayed the photographs of a number of employees, one of whom was Bodkin. (GC Exhs. 2 and 3.)

Greene testified that she explained the “On Premises Solicitation” policy to Bodkin and asked her to sign a copy of the written policy to acknowledge receipt of it. This explanation included the provision, as found in section 5.2 of the policy, that “[e]mployees may not engage in distribution in working areas at any time[, and e]mployees may not engage in distribution in nonworking areas on working time.” (GC Exh. 5.) It seemed to Greene as if Bodkin had not previously been familiar with the policy. Bodkin and Greene read the policy together, and then Bodkin signed the document acknowledging that she understood it. (GC Exh. 5.) During the course of their discussion, Bodkin asked a number of questions about the policy, which questions Greene answered. According to Greene, she informed Bodkin that in the future Bodkin would need to comply with the policy in order to avoid corrective action. Greene testified that the meeting lasted 15–20 minutes and was congenial.

Bodkin’s version of this meeting was very different. According to Bodkin, she understood Greene’s explanation to mean that she and her coworkers were not to congregate anywhere on the Hospital campus at anytime. This allegedly included a “bench” outside of the Vermont Pavilion building, which bench is available for public use and where employees

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have traditionally sat to discuss all sorts of subjects, including those of a personal nature. Shocked by these instructions, Bodkin allegedly asked whether Greene was saying that she could not be with her coworkers after work, on a bench, or be any other place on the campus, including the sidewalk. Bodkin testified that Greene responded that she could not.

Allegedly, Bodkin was very surprised by Greene's statements, which seemed to contradict Bodkin's understanding of the Respondent's policy as a 14 year employee of the Hospital. Thereafter, she informed her fellow employees and the NUHW that Greene had told her that employees were not permitted to meet together on the "bench" or after work at other locations on the campus.

Greene testified that during her meeting with Bodkin she never instructed Bodkin that she could not talk to her coworkers at work; never told her that she could not solicit in connection with collective action; never stated a blanket rule that she could not solicit or distribute flyers before, during, or after work; never told her that she could not sit on the bench outside the Vermont Pavilion and talk with her coworkers; never told her that she could not talk with her coworkers on the sidewalk; and never told her that she could not engage or socialize with her peers. Further, Greene denied telling Bodkin that she could be disciplined if she passed out flyers again on campus.

Obviously, a credibility determination must be made in order to resolve the dispute regarding what was said in Greene's office on August 23, 2012. As I noted earlier in this decision and for the reasons previously stated, I did not find Bodkin to be a credible witness. I believe that in this instance as well she is not credible, having at best grossly exaggerated and embellished Greene's statements to her. Frankly, it strains credulity to believe that any human resource consultant would have made such overreaching and ridiculous statements to an employee, which would so obviously have been a violation of the Act. According to Bodkin, Greene was telling her that she was prohibited, not only from engaging in legitimate Section 7 activity, but also from having any social contact with fellow employees at any time and at any place on Hospital property. This is ridiculous and is totally implausible. It seems to be that Bodkin's testimony in this regard was given in an attempt to make the Respondent look as malevolent as possible so as to aid the NUHW in its organizing efforts.

On the other hand, Greene seemed reasonably credible. Her testimony was straight forward, and she did not appear to exaggerate or embellish, willingly admitting when she did not recall something. She is an experienced human resource consultant who logically would have been very unlikely to have made the statements attributed to her by Bodkin. Her testimony was reasonable, inherently plausible, and had the "ring of authenticity" to it. Further, she gave no indication that she was personally hostile to Bodkin or to the NUHW, or favored one union over the other. Also, no credible, probative evidence has been presented that the Respondent harbored antiunion animus towards the NUHW, or that the Respondent was anything other than neutral in the rival organizing campaigns of the SEIU-UHW and the NUHW.

Accordingly, I credit the testimony of Greene over that given by Bodkin regarding the statements made in Greene's office on August 23, 2012. I conclude that Greene did not orally state an overbroad solicitation and/or distribution rule, and did not threaten to discipline Bodkin based on the exercise of her Section 7 rights, as is alleged in the complaint. Counsel for the Acting General Counsel has failed to prove these allegations by a preponderance of the evidence. Therefore, I shall recommend to the Board that complaint paragraph 7(a) and (b) be dismissed.

3. The September 6, 2012 conversation between Saro Tomasian and Bodkin

Complaint paragraph 8 (a), (b), (c), and (d) alleges that on about September 6, 2012, Saro Tomasian, in a conversation with [Bodkin,] made coercive statements to her about engaging in protected concerted activity; threatened to discipline her if she continued to engage in protected concerted activity; impliedly threatened to discharge her if she continued to engage in protected concerted activity; and prohibited her from discussing her terms and conditions of employment. Once again the parties disagree as to what was said during this conversation. However, unlike the earlier disputed one-on-one conversations, there were 3 persons present for this conversation, namely Bodkin, Tomasian, and Susanne Corlett.

Tomasian, Manager of Support Operations and an admitted supervisor, was responsible for the EVS Department. He was very familiar with Bodkin, as over the years she had regularly communicated with him one on one about workplace concerns including the EVS employees' schedules, duties, and responsibilities. Tomasian testified that he had an open door policy and Bodkin took advantage of that policy to talk with Tomasian about work related issues that concerned her. According to Tomasian, he was receptive to her concerns and always indicated to her that he would follow up on the information that she had given him. It appears from the testimony of both Bodkin and Tomasian that they got along reasonably well, and were respectful towards each other during these one on one meetings.

Tomasian testified that in July and August of 2012, he heard from other supervisors and some employees that Bodkin was being rude and disruptive during huddles. According to Tomasian, he observed such behavior himself when he conducted a safety meeting for the EVS employees on August 15, 2012. The purpose for the meeting was to alert the employees to an increased rate of injury and to ask for their help in reducing it. At the meeting Bodkin appeared to blame the increased injury rate on the fact that the management team in the EVS Department had changed from Kaiser to Xanitos. Tomasian testified that Bodkin addressed him in a "real aggressive" and "loud" manner. Bodkin testified that in response to Tomasian's concerns about safety and request for suggestions on how things might be improved that she commented, "Just remember, we are not robots." This was apparently intended as a comment and/or suggestion that the housekeepers were being required to work too quickly, and needed to slow down.

In Tomasian's opinion, Bodkin's conduct and comments were unacceptable and were "really dragging the department

down.” However, I view Bodkin’s conduct as legitimate concerted activity, specifically her complaints that the employees were being required to work too quickly, which caused accidents to happen. Further, the evidence does not demonstrate that her words or actions towards Tomasian were so obnoxious or improper as to remove them from the protection of the Act.

According to Bodkin, in early September 2012, fellow EVS employee Rosa Ortiz complained to Bodkin about her work schedule, specifically excessive consecutive days worked. Further, Ortiz complained to Bodkin that she had raised the issue with supervisor Corlett, who was allegedly unresponsive to these concerns. Bodkin asked Ortiz for permission to raise the issue during a huddle, which permission Ortiz alleged gave. Bodkin testified that following her conversation with Ortiz, Bodkin raised the issue at a huddle that Corlett was directing. Ortiz was not present at this huddle. According to Bodkin, she specifically asked about Ortiz’ schedule, noting that Ortiz was scheduled to work too many days in a row. Corlett responded that the subject of Ortiz’ schedule would not be discussed during the huddle. However, regardless of Corlett’s refusal to discuss the matter, I believe that Bodkin was engaged in protected concerted activity when she raised the issue of a fellow employee allegedly being required to work too many consecutive days. Clearly this was related to the working conditions of the EVS department employees.

These were the events that precipitated Tomasian’s meeting with Bodkin. According to Bodkin, she was called into Tomasian’s office on September 6, 2012. Present in the office with Tomasian was supervisor Corlett. Bodkin testified that Tomasian started the meeting by saying that Bodkin was a good worker, but questioned why she was “causing hostility” in the department by her “comments.” He mentioned that he had received complaints about her comments. Specifically, he mentioned the comment that Bodkin had made at a huddle about the housekeepers not being “robots,” and the fact that she raised the issue of Rosa Ortiz’ schedule. Bodkin testified that Tomasian continued, “Rosa’s schedule is not your business. Rosa’s schedule is Rosa’s schedule. You [sic] not lead, you [sic] not leader By doing these comments, you are digging your own hole.”

According to Bodkin, Tomasian went on the say, “What am I going to answer to my boss when she asks me why Maria Bodkin causes so [sic] much problems in my department? I don’t know what to say to her.” Allegedly Tomasian continued, “Next comments that you make, I don’t care if it is big or little, positive or negative, I am going to take you to HR, Level 4,⁵ and it is up to HR [sic] giving you disciplinary—letting you keep your job or not.”

Bodkin testified that Tomasian ended the meeting by “look[ing] at Susanne Corlett,” and saying, “What we discuss here stays confidential,” to which Corlett allegedly replied, “Yes.” However, it is important to note that Bodkin did not

⁵ According to Bodkin, Level 4 discipline means the employee is ready for termination.

testify that a similar remark was directed to her.⁶

Susanne Corlett supports much of Bodkin’s testimony regarding the conversation in Tomasian’s office. During cross-examination by counsel for the Union, Corlett admitted that Tomasian told Bodkin that she was not supposed to speak about other employees’ concerns or on behalf of other employees at the huddles. He directed her to only talk about her own concerns. Further, she acknowledged that Tomasian told Bodkin not to “stir up the pot,” or “it would be addressed.”

Preliminarily, I will note that I did not find Tomasian to be a credible witness. Much of his testimony regarding the meeting of September 6, 2012, was elicited by means of leading questions from the Respondent’s counsel, which certainly makes his responses questionable. Further, the story that he tells regarding this meeting simply does not seem plausible. He testified that he had received numerous complaints from supervisors and employees about Bodkin being disruptive at huddles. However, he tries to minimize any references made to concerted conduct or to warning her not to engage in such conduct. He attempts to portray the meeting as simply a constructive counseling session designed to get Bodkin to modify her behavior and not be disruptive, aggressive, or rude, and to be a team player. He testified that his goal in meeting with Bodkin was to get her to respect management, and he asked her if she had any future concerns to “please bring them up to management directly.” Also, he acknowledged that he told Bodkin that her remarks “on behalf of other employees were negative and causing hostility.”

Tomasian testified that the matter of Bodkin raising the subject of Rosa Ortiz’ work schedule at a huddle was mentioned during their meeting, but he could not recall whether the subject of housekeepers not being “robots” as raised by Bodkin at a safety meeting was discussed on September 6. Further, he could not recall telling Bodkin that she was “digging [her] own grave,” and he could not recall telling her “not to stir the pot.” He mostly testified in a general way, becoming specific only when required to do so by the question. However, he did specifically deny threatening Bodkin with disciplinary action or discharge because of her conduct; denied saying that the next mistake she made, he would bring her to the Human Resource Department; denied that he prohibited her from helping co-workers with their employment problems; and denied asking her to keep their meeting confidential.

Yet, significantly, on cross-examination by counsel for the Union, Tomasian contradicted some of these denials. Clearly, his testimony was inconsistent. On cross-examination he admitted saying to Bodkin: “It’s not the first time, I’ve had other complaints. I’m not writing you up, but it has got to stop. I don’t want to hear inappropriate comments. I don’t want you talking about anything, but things about you. Don’t bring up issues that don’t concern you. Stop the hidden messages.”

Although I have previously found Bodkin generally not to be credible, in this instance I do find her testimony regarding the meeting in Tomasian’s office on September 6, 2012, to be

⁶ While counsel for the General Counsel’s brief (p. 14) indicates that Tomasian issued the same directive to Bodkin and references page 73 of the transcript, there is no such reference.

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truthful. It was inherently plausible, and considering the timing of the meeting, being precipitated by Bodkin's public comments regarding Rosa Ortiz' schedule and housekeepers not being robots, Bodkin's testimony was certainly more plausible than that of Tomasian.

Additionally, Corlett's testimony is more supportive of Bodkin than it is of Tomasian. I previously found Corlett to be credible, and in this instance even more so. She is testifying about matters that are contrary to Tomasian's and the Respondent's interests. While she is technically an employee of Xanitos, Corlett functions as a supervisor for the Respondent, and it is certainly in her best interest to stay on good terms with the Respondent as the entity with which Xanitos has its contract. Accordingly, Corlett's testimony regarding the meeting in question should be given significant weight.

Therefore, having credited the testimony of Bodkin and Corlett, I conclude that counsel for the Acting General Counsel has met her burden of proof and established by a preponderance of the evidence the allegations as set forth in complaint paragraph 8(a), (b), and (c). Tomasian's statements at the meeting of September 6, 2012, would reasonably have been coercive to Bodkin, as she was warned that any further protected concerted activity in the form of public complaints on behalf of bargaining unit employees regarding matters such as work schedules, the awarding of overtime, and safety concerns would not be tolerated. Further, I find that Tomasian's threat to take Bodkin before the human resource department was a clear threat to discipline her, and impliedly to discharge her, should she continue to engage in protected concerted activities. There is no legitimate question that Bodkin's comments made at huddles and safety meetings about employee work schedules, the awarding of overtime, and safety concerns involved wages, hours, and working conditions, and, thus, concerted activity. Further, while Bodkin's comments and actions may have upset some employees and supervisors, as I have indicated above, nothing she did was so obnoxious or improper for Bodkin to have forfeited the protection of the Act.

Accordingly, I find that the Respondent, through the statements made by Tomasian on September 6, 2012, interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, thereby violating Section 8(a)(1) of the Act, as alleged in complaint paragraphs 8(a), (b), and (c), and 9.

However, regarding the allegation in complaint paragraph 8(d), I find that counsel for the Acting General Counsel has failed to meet her burden of proof. There is insufficient evidence to show that on September 6, 2012, Tomasian prohibited Bodkin from discussing with others the statements made in his office. As I indicated above, while Tomasian specifically instructed Corlett to keep the matters discussed at the meeting "confidential," he did not make the same or similar admonition to Bodkin. Accordingly, I shall recommend to the Board that complaint paragraph 8(d) be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Kaiser Foundation Hospitals, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, National Union of Healthcare Workers, is a

labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

- (a) Instructing employees not to engage in protected concerted activity;
- (b) Threatening to discipline employees because they engaged in protected concerted activity;
- (c) Threatening to discipline employees if the employees continue to engage in protected concerted activity; and
- (d) Impliedly threatening to discharge employees if the employees continue to engage in protected concerted activity.

REMEDY

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

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email posting on an intranet or internet site, and/or other electric means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Kaiser Foundation Hospitals, its officers, agents, and representatives, shall

1. Cease and desist from
 - (a) Instructing employees not to engage in protected concerted activity;
 - (b) Threatening to discipline employees because they engaged in protected concerted activity;
 - (c) Threatening to discipline employees if the employees continue to engage in protected concerted activity; and
 - (d) Impliedly threatening to discharge employees if the employees continue to engage in protected concerted activity.
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its South Bay facility in Harbor City, California, copies of the attached notice marked "Appendix"⁸ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by the Respondent's

⁷ 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.

⁸ 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."

authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2012.

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

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

Dated at Washington, D.C. May 20, 2013

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

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves and with management, forming a union, and making common complaints about your wages, hours, and other terms and conditions of employment, including complaints regarding work schedules, the awarding of overtime, and safety concerns.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT instruct you not to engage in protected concerted activity.

WE WILL NOT make coercive statements to you about engaging in protected concerted activity.

WE WILL NOT threaten to discipline you because you engaged in protected concerted activity.

WE WILL NOT threaten to discipline you if you continue to

engage in protected concerted activity.

WE WILL NOT impliedly threaten to discharge you if you continue to engage in 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 Federal labor law.

KAISER FOUNDATION HOSPITALS