**The Avenue Care and Rehabilitation Center *and* SEIU District 1199, WV/KY/OH The Healthcare and Social Service Workers Union.** Case 08–CA–094941

January 24, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On October 17, 2013, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and the General Counsel filed an answering 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[1] and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Avenue Care and Rehabilitation Center, Warrensville Heights, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. January 24, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Catherine Modic, Esq.,* for the Acting General Counsel.
*Frederick Englehart, Esq.,* for the Respondent.
*Frank Hornick,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland, Ohio, on August 12, 2013. The SEIU District 1199, WV/KY/OH. The Healthcare and Social Service Workers Union (the Union) filed the charge on December 12, 2012; the first amended charge was filed on January 23, 2013; the second amended charge was filed on February 14, 2013; the third amended charge was filed on March 27, 2013; and the fourth amended charge was filed on May 16, 2013. The Acting General Counsel issued the complaint on May 29, 2013.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation with an office and place of business located in Warrensville Heights, Ohio, has been engaged in the operation of a long- and short-term rehabilitation facility. Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of $100,000 and purchases and receives products, goods,

[1] No exceptions were filed to the judge's dismissal of allegations that management officials violated Sec. 8(a)(1) by announcing changes to the break periods of its STNA employees, and by making statements to them that it would not bargain in good faith with the Union and that it was futile to select union representation.

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

The Respondent argues that in discrediting the testimony of its managerial witnesses, the judge improperly presumed the credibility of Taquitia McGee and Phondile Biyela's testimony because they are current employees. We disagree. The judge credited the testimony of McGee and Biyela based on their impressive demeanor, the consistency and certainty of their testimony, *and* their status as current employees. Further, to the extent that the judge relied on this last factor, it is well settled that the testimony of current employees that contradicts that of their supervisors is "particularly reliable because [the employees] are testifying adversely to their pecuniary interests." *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006), quoting *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). Thus, current employment status may serve as a "significant factor," among others, on which a judge may rely in resolving credibility issues. Id.

[3] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of their testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some but not all, of what the witness said. I note in this regard that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007).

and services valued in excess of $50,000 directly from points located outside the State of Ohio. The 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

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act in the following respects: on or about September 6, 2012, by Christopher Hope, interrogating employees about their union activities; on various dates in September and October 2012, the exact dates being unknown, by Christopher Hope and Annette Woodyard, interrogating employees about their union activities during employee meetings; on various dates in September and October 2012, by Christopher Hope, orally promulgating and maintaining a rule prohibiting its employees from discussing a union in the Respondent's facility; on various dates in September and October 2012, by Christopher Hope, threatening employees with discipline if they violated the above noted rule; in October 2012, by Annette Woodyard, coercively informing employees that, due to the Union, the Respondent would change its break policy by assigning specified break periods for employees and by requiring employees to sign in and out for breaks; and on or about October 9, 2012, by Shaul Flank, stating to employees the futility of selecting the Union as their bargaining representative and indicating that the Respondent would not bargain in good faith with the Union.

### The Procedural Issue

The Respondent's brief contends that the complaint in the instant case must be dismissed on the basis of a United States district court decision in *Hooks v. Kitsap Tenant Support Services,* 2013 WL 4094344 (W.D. Wash., August 13, 2013). In *Hooks,* the district court judge held that Regional Director Hooks lacked the authority to issue the underlying complaint in a 10(j) injunction proceeding because President Obama's recess appointments to the Board were invalid. The district court further held that the Regional Director's authority to issue a complaint could not derive from Acting General Counsel Solomon because Solomon's appointment under the Federal Vacancies Reform Act was invalid.

With regard to the first argument, I note that in June 2013, the Supreme Court granted a petition for certiorari in *Noel Canning v. NLRB*, 133 S. Ct. 2861 (2013),[4] a case involving the validity of President Obama's recess appointments to the NLRB. The Board has held that while this issue remains in litigation, and pending a definitive resolution, the Board will continue to fulfill its responsibilities under the Act. *Belgrove Post Acute Care Center*, 359 NLRB No. 77 fn. 1 (2013). Accordingly, I find no merit to the Respondent's argument that the complaint in the instant case is deficient because of the continuing litigation over the recess appointments to the Board. Nor do I find any merit to the Respondent's argument regarding the alleged lack of authority for the Acting General Counsel to issue the complaint in this matter under the Federal Vacancies Reform Act as the Board also addressed this argument in *Belgrove* and found it unpersuasive. I am, of course, bound to follow Board precedent unless and until it is reversed by the Supreme Court. *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964).

### Background

The Respondent operates a long- and short-term rehabilitation facility in Warrensville Heights, Ohio. During the material time period, Shaul Flank was one of the owners of the Respondent and the vice president of operations for Progressive Quality Care, the management company that operates the Respondent. In addition, Carl Holbrook was the Respondent's corporate director of operations; Christopher Hope was the Respondent's administrator; Shameeka Craig was the human resources payroll director; and Annette Woodyard was the assistant director of nursing.

In August 2012, the Union began an organizational campaign at the Respondent's facility. On September 5, 2012, one of the Union's organizers and several employees participated in a "March on the Boss" during which the Union sought voluntary recognition from Hope based upon what it claimed was majority support based on authorization cards. After discussing the issue with Flank, who was present at the facility that day, Hope declined to recognize the Union.

Thereafter, pursuant to a petition in Case 08–RC–088734, filed on September 5, 2012, the parties executed a stipulated election agreement and an election was held on October 12, 2012. The tally of ballots showed there were 33 votes for and 16 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results. Thereafter, the Employer filed an objection to the election and the Regional Director issued a report recommending overruling the objection. On February 12, 2013, the Board adopted the Regional Director's findings and recommendations and issued a certification of representative to the Union in the following appropriate unit:[5]

> All full-time and regular part-time time State Tested Nursing Assistants, Dietary Aides, Dietary Cooks, Housekeeping employees, Laundry employees, Restorative Aides, and Activities Aids employed by the Employer at its facility located at 4120 Interchange Corporate Center Road, Warrensville Heights, Ohio, but excluding all LPN nurses, RN nurses, PRN casual employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Thereafter, the Employer refused to bargain with the Union and is contesting the Board's certification.

### Whether the Respondent, Through Christopher Hope, Violated Section 8(a)(1) of the Act onSeptember 6, 2012 by Interrogating Employees.

Taquitia McGee, who is currently employed by the Respondent as a housekeeper, testified pursuant to a subpoena as a

[4] The underlying decision was reported at 705 F.3d 490 (D.C. Cir. 2013).

[5] I have taken administrative notice of the Board's unpublished decision in this case.

witness on behalf of the Acting General Counsel. McGee testified that she was an active supporter of the Union during the campaign. In this regard, McGee helped set up employee meetings, solicited authorization cards from other employees and was one of the employees present with a union organizer on September 5, 2012, when the Union demanded recognition from the Respondent. According to McGee, on September 6, near the end of her shift at 3 p.m., Hope and Shameeka Craig asked her to come to the human resources office. McGee accompanied them to Craig's office. When they arrived, Hope said that he had heard that McGee had been passing out union cards on company property. McGee replied that she did not know what he was talking about. Hope asked her if she was sure about that and then told her to keep it that way. Craig did not say anything during this brief meeting. McGee then left Craig's office.

Hope's testimony conflicts with that of McGee. Hope testified that on September 6, an employee reported to him that she had seen McGee in a hallway passing out flyers. He went to investigate and did not see McGee in the hallway, but did see her on the way back to his office. Hope asked McGee to come to the human resources office. Hope and McGee went into Craig's office. Hope testified that he did not know that Craig was in her office when they first entered, but that she was in fact present during the conversation he had with McGee. Hope testified that he asked McGee if she was passing out flyers. McGee replied that she was not and Hope responded "Okay, thank you" and McGee then left Craig's office. Craig did not say anything during this brief meeting. Hope denied saying anything about union cards.

Although Craig was called as a witness by the Respondent at the hearing, she was not asked any questions about this meeting between Hope and McGee.

I credit the testimony of McGee regarding this incident. I was impressed by her forthright demeanor and the fact that her testimony was detailed and consistent on both direct and cross-examination. As a current employee who testified against the interest of her employer, it is unlikely that her testimony is false. The Board has noted that when employees testify against the interest of their employer, they subject themselves to the possibilities of recrimination and the perils would even be greater if such testimony was false. *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (203). See also *Flexsteel Industries*, 316 NLRB 745 (1995); *Federal Stainless Sink Div.*, 197 NLRB 489, 491 (1972).

In contrast, Hope's testimony was somewhat vague and his demeanor while testifying was not as impressive as that of McGee's. I also note that while Craig testified on behalf of the Respondent at the hearing she was not asked any questions about this incident. Thus, Hope's testimony is uncorroborated.

The Board has held that the questioning of an employee violates Section 8(a)(1) of the Act if, under all the circumstances, the questions reasonably tend to restrain, coerce or interfere with Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). In *Scheid Electric*, 355 NLRB 160, 160 (2010), the Board held that the factors that may be considered in making a determination regarding an alleged unlawful interrogation are the identity of the questioner, the place and method of interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter.

In the instant case, the interrogation was carried out by Hope, the highest ranking management official at the facility. It was also conducted in the presence of another management official and took place in the human resources office. In addition the timing of the questioning suggests it was coercive, as it occurred the day after a union official, McGee and other employees demanded recognition from the Respondent on behalf of the Union. While McGee was a known union adherent, this did not privilege the Respondent to question her about whether she had been soliciting union authorization cards. In addition, when McGee denied knowing what Hope was talking about when he questioned her about soliciting cards, he advised her to keep it that way, thus implying that she should not solicit authorization cards on behalf of the Union. Under the circumstances, I find that Hope's interrogation of McGee on September 6, 2012, regarding whether she was soliciting employees to sign authorization cards, violated Section 8(a)(1) of the Act under the standards set forth above.

Whether the Respondent, through Christopher Hope, Violated Section 8(a)(1) of the Act at a Meeting Held in September or October 2012, by Interrogating Employees, by Orally Promulgating a Rule Prohibiting Employees From Discussing the Union at the Respondent's Facility and by Threatening Employees with Discipline if They Violated that Rule

McGee testified that she attended four meetings regarding the union campaign conducted by the Respondent during the period between the filing of the petition on September 5, and the election held on October 12. According to McGee, approximately 10 employees attended each of the meetings that she did.[6] McGee testified that at one of the meetings that she attended, Hope asked how the union came about and some employees answered his question. Hope then said that he did not want employees talking about the Union in the building and that if the employees did so and got caught that disciplinary action would be taken. Hope also made reference to the employee handbook in this regard, but McGee could not recall specifically what provision he referred to. On direct examination, McGee testified she could not recall at which of the meetings she attended that Hope made these statements. However, on cross-examination, McGee testified that neither Holbrook nor Flank were present at the meeting at which Hope made these statements. The record clearly establishes that Holbrook spoke only on the first day of meetings and that Flank spoke only on the last day of meetings. I find therefore that McGee's testimony was directed to the second or third day of meetings held by the Respondent regarding the union campaign.

According to the uncontroverted testimony of McGee and current employee Pamela Glover, employees regularly and

[6] The record establishes that the Respondent would hold essentially the same meeting three times in 1 day in order to reach all of the employees.

openly spoke to each other during the workday regarding their families, sports, and television shows and that they had never been told by a supervisor that these conversations could be subject to disciplinary action. The record does not contain any objective evidence that the Respondent maintained a no-solicitation rule at the facility during the material time. More specifically, there is no evidence that the employer maintained a rule prohibiting employees from speaking to each other during working time about nonwork related matters.

Hope denied asking employees how the union came about. Hope further testified that he had received instructions from counsel regarding what questions were appropriate to ask employees during the union campaign. According to Hope, he was advised by counsel that asking employees questions about their union activity could be a violation of the law.

Hope denied telling employees that they were not allowed to discuss the Union at the Respondent's facility. In contending that Hope's denial on this issue is credible, the Respondent relies, in part, on one of its campaign leaflets. (R. Exh. 3.) This document is dated September 27, 2012, and was distributed to employees after the meetings that were held on that date. It was also mailed to unit employees and posted on the bulletin board and at nurses' stations. The document states in relevant part:

> Q: Some of our coworkers are telling us not to talk to management or listen to anything management says. Are we not allowed to talk to you?"
>
> A: Yes, you are allowed to speak with management just as you allowed to speak with the union representatives. Typically unions do not want you to speak with management or pay any attention to what we say because they do not want you to hear our side of the unionization story. We are different. We urge you to listen all you can about the subject, listen to the union side and listen to our side and decide for yourself what to believe.

As I noted above, I find McGee generally to be a credible witness. Her testimony regarding the statements made by Hope at this meeting was consistent on both direct and cross-examination and her demeanor was forthright. In addition, McGee's testimony is consistent with her pretrial affidavit which the Respondent introduced in an attempt to impeach her testimony. In this connection, the affidavit states, in relevant part:

> At one of the meetings, Hope said that he knew that we were passing around union cards and that some employees were getting upset about that and they told him that they were going to quit if the Union got in the building. Hope said we could not be caught talking about the Union in the building, otherwise the disciplinary policy would be enforced. When he said that one of the employees asked the question about his statement. I do not presently recall who asked the question or what they asked specifically. He responded, "you need to read your handbook because it says you are not supposed to be having any other conversations other than if you are having a conversation with a resident." Hope asked the employees, "How did this come about. Why do you all feel you need a Union?" (R. Exh 1, pp. 9–10.)

With respect to the conflict in the testimony of McGee and Hope regarding the statements allegedly made at this meeting, I credit McGee's testimony.

I found Hope's denial of the statements attributed to him by McGee to be somewhat perfunctory and not credible. With respect to the Respondent's argument that Hope was advised by counsel not to question employees about their union activity, while I have no doubt that such advice was given, that does not necessarily mean it was followed and in this case I find that it was not.

I also do not find that the campaign literature discussed above establishes that Hope's testimony is credible. The mere fact that the Respondent generally urged employees to listen to both the union and management sides of the issues and make a decision, does not establish that Hope did not make the specific statements attributed to him regarding the right of employees to speak about the Union at the facility.

Based on the credited testimony of McGee, I find that at the second or third meeting she attended that was held by the Respondent in September or October 2012,[7] Hope asked the approximately 10 employees present how the Union came about. Considering all the circumstances, I find that this question constituted an unlawful interrogation and violates Section 8(a)(1) of the Act under the standards set forth in *Rossmore House*, supra, and *Scheid Electric*, supra. Hope is the highest management official at the facility on a daily basis and the question was put to employees at a meeting held by the Respondent in an attempt to convince them to vote against the Union. By asking the question to a group of employees, the inquiry was not directed to only known union adherents. Finally, the question is not an isolated one but rather occurred in the context of other unfair labor practices.

I also find, based on McGee's credited testimony, that at the same meeting Hope told employees that he did not want them talking about the Union in the building and that if they got caught doing so discipline could result. The uncontroverted testimony of McGee and Glover establishes that employees regularly and openly spoke about matters such as their families, sports, and television shows during working time without admonition. As noted above, there is no evidence in the record establishing that the Respondent maintained a rule prohibiting employees from speaking to each other regarding subjects not associated or connected with their work tasks during working time.

The oral rule promulgated by Hope completely bars any discussion of union activity by employees in the Respondent's facility. Thus, it prohibits discussions about union activity between employees at the Respondent's facility during nonworking time and is therefore overly broad and violative of Section 8(a)(1) of the Act. *Smithfield Packing*, 344 NLRB 1, 2 (2004); *Our Way, Inc*., 268 NLRB 394 (1983).

In addition, I note that an employer may lawfully prohibit employees from talking about union activity during working time, if that prohibition also extends to all other subjects not

[7] The record does not indicate the dates the second and third meetings were held.

associated or connected with their work tasks. It is clearly established, however, that an employer violates Section 8(a)(1) of the Act when employees are prohibited from discussing a union during working time, but are free to discuss other subjects unrelated to work, particularly when the prohibition was announced in response to the employees' activities during a union campaign. *Altercare of Wadsworth Center for Rehabilitation & Nursing Care*, 355 NLRB 565, 573 (2010); *Willamette Industries,* 306 NLRB 1010, 1017 (1992); *Emergency One, Inc*., 306 NLRB 800, 806 (1992); *Orval Kent Food Co.,* 278 NLRB 402, 407 (1986).

In the instant case, employees were free to discuss other subjects unrelated to work during working time prior to the union campaign, but with the advent of the union campaign were prohibited from discussing the Union at the facility.

On the basis of the foregoing, I find that by orally promulgating a rule prohibiting employees from discussing the Union at the Respondent's facility and threatening to enforce this rule through discipline, the Respondent violated Section 8(a)(1) of the Act.

Whether the Respondent, Through Assistant Director of Nursing Annette Woodyard, Violated Section 8(a)(1) of the Act in September or October 2012, by Interrogating Employees about Their Union Activity

Phindela Biyela, who is currently employed by the Respondent as a state tested nursing assistant (STNA), testified on behalf of the Acting General Counsel regarding this allegation. Annette Woodyard, the assistant director of nursing, is Biyela's direct supervisor. Biyela testified that she attended meetings held by the Respondent regarding the union campaign prior to the election at which Woodyard participated. These meetings were held in the "sunroom" at the Respondent's facility at 2:30 p.m. and approximately 15 employees would normally attend. Before the beginning of one of these meetings, Woodyard asked the assembled employees why they wanted the Union. When Woodyard asked this question, she was not reading from a script. According to Biyela, some of the employees responded to Woodyard's question.

Woodyard acknowledged that she participated in a series of meetings held by the Respondent during September and October regarding the union campaign. Woodyard also acknowledged that before the meetings began employees would engage in conversation with each other. When asked on direct examination if she ever joined those conversations, Woodyard first stated that she did not remember doing so. When asked specifically if, before the Respondent's formal presentation began, she ever asked employees why they wanted to bring a union into the Respondent's facility, she denied doing so. Woodyard further testified that she was advised by counsel that she was not to ask questions like that and that she followed that advice.

I credit the testimony of Biyela over that of Woodyard regarding this allegation. Biyela testified in a direct and forthright manner regarding this issue and her demeanor reflected certainty regarding this event. As a current employee testifying about a statement made by her direct supervisor, it is unlikely that her testimony is false. On the other hand, Woodyard's testimony was less detailed and her demeanor reflected a lack of certainty regarding her testimony on this issue.

In applying the standards set forth above in *Rossmore House*, supra, and *Scheid Electric*, supra, I note that Woodyard is the direct supervisor of the employees who were questioned about why they wanted union representation. The questioning took place immediately before a formal meeting at which Respondent was attempting to convince the employees to vote against the Union and occurred in the context of other unfair labor practices. Because the question was directed to a group of employees, it was not restricted to those who were known union activists. Accordingly, I find that in September or October, 2012, the Respondent, through Woodyard, violated Section 8(a)(1) of the Act by interrogating employees about their union activities.

Whether the Respondent, through Woodyard, Violated Section 8(a)(1) of the Act in October 2012, by Advising Employees that Because of the Union, the Respondent was Changing its Break Policy by Assigning Specified Break Periods and by Requiring Employees to Sign In and Out for Breaks

STNAs Glover and Biyela testified that prior to the October 12, 2012 election, they did not have specifically assigned break or lunch periods during their shifts. Both employees testified that they would take breaks and lunch when the workload permitted and would notify the supervisory nurse when they were going to take such a break. While Glover testified that prior to the election she did have to sign in and out for breaks (Tr. 44), Biyela testified that she did not have to sign in and out for breaks prior to the election. (Tr. 63.)

Glover testified that after the election, she had a brief conversation with Woodyard at the upper level nurses' station. According to Glover, Woodyard told her that STNAs would have assigned breaks because she did not want anybody going back to the Union saying that they did not get a break. Glover did not respond to Woodyard's statement.

Biyela testified that after the election she saw a note posted at the nurses' station indicating that as of that day, an employee would have to fill out a form reflecting the employee's name, the time the employee was leaving for break, and the time the employee returned.

McGee testified that shortly after the election, she was in the area of the lower level nurses' station when she overheard Woodyard call all the STNAs to the nurses' station. When the STNAs assembled, Woodyard told them that they would have to start signing in and out for breaks because she did not want anyone to report to the Union that they were not getting their breaks.

Woodyard testified that on October 15, 2012, she conducted an "in-service meeting" with STNAs that she supervised in order to discuss an issue involving employees working their scheduled shifts. According to Woodyard, she conducted this in-service meeting because she had noticed that some STNAs walked past her office toward the timeclock more than 15 minutes before the end of the shift at 3 p.m. Woodyard later determined that some STNAs was sitting in the breakroom until 3 p.m. and then punching out.

The record of the in-service meeting conducted by Woodyard on October 15, 2012 (R. Exh. 4, p. 1), was prepared by her and lists the following under "objectives":

> 1. Per policy—must remain in work areas for the shift schedule.
> 2. Allowable to punch in & do rounds up to 15 min. before start of shift.
> 3. If leaving work area before end of shift—must punch out. Not sit in break room until end of shift.

An in-service attendance record (R. Exh. 4, p. 2), reflects that Biyela was in attendance at the meeting held on October 15. (Tr. 84.) Finally, a portion of the Respondent's attendance and absentee policy from its handbook (R. Exh. 4, p. 3), states in relevant part:

> You are expected to be at your work station, in your work area and ready to work, at the start of your scheduled shift. You are expected to remain in your work area until the end of your scheduled shift and either you are relieved by your replacement for the next shift or your supervisor tells you that you may leave your work area at the end of your shift.

Woodyard testified that when she conducted the in-service meeting on October 15, she did not say anything about punching in and out for breaks. She further testified that she never mentioned anything to employees about changing the break policy.

I find that the Acting General Counsel has not produced sufficient credible evidence to sustain this allegation of the complaint. In the first instance, McGee testified that she overheard Woodyard tell STNAs that they would have to start signing in and out for breaks because she did not want anyone to report to the Union that they were not getting their breaks. As noted above, however, Glover admitted that she had to sign in and out for breaks prior to the election. While Biyela testified that she did not have to sign in and out for breaks prior to the election, as I will discuss later, I do not find Biyela's testimony regarding this complaint allegation to be reliable. If, as Glover states, STNAs were already signing in and out for breaks, McGee's testimony appears implausible. I do not believe that McGee, who was a bystander to the meeting and not a participant, accurately heard what Woodyard said.

Glover's testimony that Woodyard told her in a brief individual conversation that employees would have assigned break times because she did not want anyone going back to the Union saying they did not get a break, is uncorroborated and conflicts with what McGee claimed that she overheard Woodward say about the alleged change in break policy.

As noted above, Biyela testified that after the election she saw a note posted at the nurses' station indicating that, as of that date, employees had to fill out a form indicating their name, the time they went on break, and the time they returned. Biyela's testimony is refuted, however, by objective evidence which establishes that the in-service training she attended on October 15, and the document that was posted at the nurses' station memorializing that meeting (R. Exh. 4, p.1), did not deal with break periods at all, but rather dealt with the requirement of employees to work a scheduled shift. Accordingly, I do not find Biyela's testimony on this issue to be reliable.

Unlike the conflicting and unreliable accounts of what the Acting General Counsel's witnesses claimed they heard Woodyard say about changing the break policy or what they saw posted about it, Woodyard explained the in-service meeting that Biyela misconstrued and credibly denied that she made any statements to employees about changing the Respondent's break policy. I also note that there was no objective evidence produced by the Acting General Counsel to indicate there was, in fact, any change in the Respondent's break policy after the election. On the basis of the foregoing, I conclude that the Acting General Counsel has not sustained this allegation of the complaint and I shall dismiss it.

### Whether the Respondent, through Shaul Flank, Violated Section 8(a)(1) of the Act on October 10, 2012, by Advising Employees that it was Futile to Select the Union as Their Bargaining Representative by Indicating that the Respondent Would not Bargain in Good Faith

McGee testified that she attended one of the Respondent's final meetings a couple of days before the election at which Flank spoke to approximately 10 employees. According to McGee, Flank stated that the "Union couldn't make him do anything, he would have to agree to it." She further testified that Flank stated that "they could drag it out for a year . . . if they put in the paperwork, we will have another election and they could vote the Union out the building." (Tr. 19.) On cross-examination, however, when asked if Flank said anything about how long negotiations might take, McGee testified that she did not recall.

Flank testified he was present at the last series of meetings held by the Respondent during the union campaign on October 10. The Respondent conducted three separate meetings that day in order to reach all of the employees and Flank spoke at each one. He further testified that he read a speech prepared by counsel (R. Exh. 6), at each meeting. According to Flank, he did not deviate from the script of the speech. He further testified that while he took some questions from the employees he could not recall the specific questions. He denied, however, telling employees that he would stall negotiations for a year or that it would be futile for employees to have a union. Flick acknowledged telling employees that voting for the union could be risky and that neither the Respondent nor the Union could guarantee employees anything through collective bargaining.

I find the testimony of both McGee and Flank to have deficiencies regarding this issue. While McGee testified on direct examination about how "they" could drag it out for a year, apparently making an implicit reference to the Respondent intentionally prolonging negotiations, on cross-examination, she specifically testified that she did not recall Flank saying anything about how long negotiations may take. I therefore cannot credit this aspect of her testimony because of the inconsistency between her direct and cross-examination testimony on this important point. I credit McGee to the extent that I find that Flank said another election could be held and the union voted out, but I do not find that such a statement was linked to negotiations. I also credit her testimony that Flank stated the

Union could not make him do anything, but rather he would have to agree to it, as such a statement is generally consistent with the text of the speech given by Shaul.

Flank's recollection of what he said on October 10 was not precise, but rather was somewhat vague and generalized. While he testified that he read the speech verbatim, he admitted that he took questions from employees, but did not recall what the questions were. Thus, while the text of the speech does contain statements regarding the negotiation process, it does not contain anything about the process of voting the union out. I do not believe that McGee would invent her testimony regarding Flank saying something about the process of voting the Union out and I note that Flank's testimony does not contain a specific denial of that statement. Thus, I find that the topic of having another election held and the Union voted out was addressed by Flank pursuant to a question asked by an employee, after he had given his prepared speech.

On the basis of the foregoing, I find that on October 10 Flank stated that another election could be held and the Union voted out. He also stated that the Union could not make him do anything, but rather he would have to agree to it. I find there is no credible evidence linking Flank's statement that another election could be held and the Union voted out to the Respondent prolonging negotiations for a year. Thus, I find that his brief statement that another election could be held and the Union voted out, does not violate Section 8(a)(1) of the Act. Since it is true that, under certain circumstances, another election could be held and the Union voted out, the statement that Flank made is protected by Section 8(c) of the Act. I also find that Flank's statement that the Union could not make him do anything, but rather he would have to agree to it, is also protected by Section 8(c) of the Act in that it does not contain a threat or promise of benefit. Accordingly, on the basis of the foregoing I shall dismiss this allegation of the complaint.

## CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) Interrogating employees about their union activities.

(b) Orally promulgating and maintaining a rule prohibiting employees from discussing a union at any time at the Respondent's facility.

(c) Threatening employees with discipline if they violated the orally promulgated rule prohibiting employees from discussing a union at any time at the Respondent's facility.

2. The above unfair labor practices affect commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

3. The Respondent has not otherwise violated the Act.

## 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[8]

## ORDER

The Respondent, The Avenue Care and Rehabilitation Center, Warrensville Heights, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities on behalf of SEIU District 1199, WV/KY/OH, The Healthcare and Social Service Workers Union, or any other labor organization.

(b) Orally promulgating and maintaining a rule prohibiting employees from discussing a union at any time at the Respondent's facility.

(c) Threatening employees with discipline if they violated the orally promulgated rule prohibiting employees from discussing union activities at any time at the Respondent's facility.

(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 facility in Warrensville Heights, Ohio, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 8, 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, 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 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.

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[8] 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.

[9] 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."

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

Dated, Washington, D.C. October 17, 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.

WE WILL NOT interrogate employees about their union activities on behalf of SEIU District 1199, WV/KY/OH, The Healthcare and Social Service Workers Union, or any other labor organization.

WE WILL NOT orally promulgate and maintain a rule prohibiting employees from discussing a union at any time at our facility.

WE WILL NOT threaten employees with discipline if they discuss a union at any time at our facility.

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.

THE AVENUE CARE AND REHABILITATION CENTER