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

<b>Our Lady of the Resurrection Medical Center,</b>	)	
	)	
Employer,	)	
and	)	Case No. 13-RC-22035
	)	
<b>AFSCME Council 31, American Federation of</b>	)	
<b>State, County and Municipal Employees,</b>	)	
<b>AFL-CIO,</b>	)	
	)	
Petitioner.	)	

**PETITIONER'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO HEARING OFFICER'S REPORT  
AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION**

**Overview**

Pursuant to a representation petition filed on May 18, 2011 by AFSCME Council 31, American Federation of State, County and Municipal Employees, AFL-CIO (Union), and a stipulated election agreement approved on June 1, 2011, an election was conducted by Region 13 of the Board on June 29 and 30, 2011, in a unit of nurses employed by the Employer, Our Lady of the Resurrection Medical Center. The vote was 159 to 98 against union representation. The Union filed timely objections to conduct of the election and conduct affecting the results of the election. A hearing was held on the objections on November 14, 15 and 16, 2011. On February 28, 2011, the Hearing Officer issued his Report and Recommendations on Objections to Election (HOR), in which he recommended that Petitioner's Objections to the election be overruled and that a Certification of Results of Election issue.

Although the Hearing Officer found that some of the allegations in the Objections were proven, he incorrectly considered each Objection only in isolation, rather than cumulatively, resulting in his incorrectly finding that the conduct shown was insufficient to warrant setting aside the election. The Hearing Officer erred in failing to find that other allegations of objectionable conduct were shown. The Hearing Officer incorrectly found that evidence of interrogation of nurses by agents of the Employer, including physicians whom the Hearing Officer found to be acting as agents of the Employer, was insufficient to establish objectionable conduct based on his findings that the witnesses who testified with respect to such conduct were Union supporters.

In this case, the evidence showed that objectionable conduct occurred, and that the number, nature, severity and circumstances of the objectionable conduct justifies setting aside the election. The objections include interrogation of nurses by supervisors and by physicians acting as agents of the Employer; threats by physicians acting as agents of the Employer that the hospital would close in the event the nurses voted to unionize; supervisors removing Union literature from break room bulletin boards; agents of the Employer, including supervisors and security guards, telling nurses that they cannot talk about the Union and distribute Union literature on non-work time in non-work areas and non-patient-care areas of the hospital; Employer surveillance of Union activity; Employer threats of changes to terms and conditions of employment in the event of unionization; and Employer solicitation of grievances. An election should be set aside where the number, nature, severity, and circumstances of conduct constituting unfair labor practices and objectionable conduct, considered together, destroy the laboratory conditions of the election. *VJNH, Inc.*, 328 NLRB 87, 104 (1999). Here, the evidence showed that conduct constituting violations of Section 8(a)(1) of the Act and

objectionable conduct, taken together, made a fair and free election impossible. Accordingly, the election should be set aside.

### **Objectionable conduct**

The Union filed 15 Objections. A hearing was held with respect to 13 of the Objections, Objections 1 through 3 and 6 through 15. The Union excepts to the Hearing Officer's Recommendation insofar as he found that Objections 1, 2, 3, 6, 7, 8, 10, and 11 should be dismissed. Those Objections were based on the following:

- Objection 1: Employer surveillance of Union activity.
- Objection 2: Employer interrogation by supervisors and managers.
- Objection 3: Employer threats of adverse changes in terms and conditions of employment.
- Objection 6: Employer removal of Union literature from employee break rooms.
- Objection 7: Employer prohibition on discussing the Union in non-work areas and non-patient-care areas of the hospital.
- Objection 8: Employer solicitation of grievances.
- Objection 10: Physicians acting as agents of the Employer interrogating nurses as to their Union support.
- Objection 11: Physicians acting as agents of the Employer threatening nurses that the hospital would close if they voted to unionize.

For the following reasons, the evidence showed that such Objections were proven and that the objectionable conduct involved warrants setting aside the election.

## **Objection 1: Employer surveillance of Union activity**

### **Surveillance by security guards**

Nurse Maggie Nielsen and Union organizers Doug Woodson and Laura Drake all testified to incidents of Employer surveillance of Union activity. One incident occurred on about June 14, 2011, shortly after 11:00 am. The Union had set up an information table outside the hospital on the public sidewalk. Tr. 414-15. Maggie Nielsen testified that a female security guard came out of the hospital main entrance and came close to the table, looked at those at the table, shook her head, got on her walkie talkie, and then went back in the hospital. Then, a hospital security car came and parked in front of the hospital in view of nurses leaving the hospital and in view of the Union table. Nielsen testified that she saw the security guard sitting in the driver's seat, from which position the guard had a clear view of the front of the hospital and the Union table. Tr. 415-17. Then, Union Senior Organizer Doug Woodson walked over and took a photo of the security car, after which the car drove away. Tr. 417.

Senior Organizer Laura Drake also testified that a female security guard came out of the front entrance of the hospital and came close to the Union table, stood there and watched them, got on her walkie talkie, and then walked back in the hospital. She then observed the same guard sitting in a security car in front of the hospital. Drake testified that Doug Woodson then walked up to the car and took a picture, after which the car drove away. Tr. 449-51. Drake testified that she observed "the woman" in the vehicle. Tr. 453. Drake testified that such Union tables were set up about a dozen times in June in the weeks prior to the election. Tr. 449.

Doug Woodson testified that a female security guard came out of the front of the hospital, looked at the table, shook her head, walked back toward the hospital, got on a walkie talkie, and

went back in the hospital. Tr. 463. About 15 minutes later she pulled up in front of the hospital in a hospital security vehicle. Tr. 464. Woodson observed the same security guard driving the car. Tr. 464. He walked over and took photos of the vehicle, and the vehicle soon thereafter drove away. Tr. 464-5. Woodson testified that between the middle of June and the election the Union set up tables in front of the hospital about ten times. Tr. 462.

A female security guard, Sharron Collier, testified that on June 14 she had been dispatched to check on activity in front of the hospital and saw that the Union had set up a table and was passing out sandwiches. She also testified that on no other occasion did she see a Union table in front of the hospital. Tr. 591. Collier testified that her normal post is the Emergency Department and that she normally works in the interior of the hospital. Tr. 597-8. Security guard Derrick Smith testified that he drove the security vehicle on June 14. He also testified that, although he sat in the security car in front of the hospital for about five minutes, he did not notice a Union table set up in front of the hospital. Tr. 614. He testified further that he was not aware that there was a union organizing campaign among nurses at the hospital, that he never heard about the union organizing campaign, and that he never saw nurses wearing union buttons or handing out leaflets at the hospital. Tr. 614-15.

An employer may not do something out of the ordinary to give employees the impression that it is engaging in surveillance of their protected activities. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007); *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). An employer also acts unlawfully when, by words or conduct, it gives the impression to employees that it is watching or spying on their union activity. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). An employer violates Section 10(a)(1) of the Act by creating the impression of surveillance of Union activity even

where the activity is on or near the Employer property where there is no evidence that the employer had any reasonable basis for concern about damage to its property. *The Smithfield Packing Company, Inc.*, 344 NLRB 1 (2004)

The Hearing Officer incorrectly found that the evidence failed to establish that either of the security guards engaged in conduct that is out of the ordinary. All three Union witnesses testified that they saw a female security guard come out of the hospital and close to the Union table, get on her walkie talkie, go back in the hospital, and then return a few minutes later in a security vehicle and sit in front of the hospital in the vehicle within view of the front entrance to the hospital and the Union table. Neither of the security guards testified that either of them or any security guard normally patrols in a security vehicle in front of the hospital. Collier testified that she is normally stationed in the Emergency Department. Moreover, Collier also testified that on no other occasion did she see a Union table in front of the hospital. Tr. 591. Security guard Smith testified that he did not observe the Union table on June 14, that he on no occasion saw a Union table set up in front of the hospital, and that he was completely unaware that there was a Union organizing drive among the nurses at the hospital. Tr. 614-15. Yet, both Woodson and Drake testified that the Union set up tables in front of the hospital ten or twelve times in the month of June prior to the election. Tr. 449, 462. The Hearing Officer found that it is not unusual for a guard to inspect the Employer's premises and to park in front of the Employer's facility. (HOR, p. 5) However, such findings are not supported by any evidence in this case. Neither guard testified that they usually inspected in front of the hospital or sat in a vehicle in front of the hospital. Rather, the evidence showed that the Employer's security guard came out of the hospital first on foot and then in a vehicle for the purpose of conducting surveillance, and for the purpose of giving the impression that surveillance was being

conducted, with respect to nurse union organizing activity. The Hearing Officer therefore erred in finding that the surveillance allegation with respect to the June 14 security guard surveillance did not constitute objectionable conduct. HOR at pp. 2-5.

### **Surveillance by Employer Vice President Fitzmaurice**

Dennis Fitzmaurice is Vice President of Professional Services of Resurrection Health Care. Tr. 541-2. Laura Drake testified that on about June 24, 2011, the Union had an information table set up outside the hospital and had pizza available for nurses. A man in a suit walked up and asked for pizza. Drake testified that a nurse present at the table, Erica Velez, then told her that the man was Dennis Fitzmaurice (whom Drake knew to be a hospital management official), and Drake relayed such information to Woodson. Woodson then told Fitzmaurice that what he was doing was surveillance, to which Fitzmaurice responded, you're awfully argumentative. Woodson then took a photo of Fitzmaurice. At that point, Fitzmaurice walked away from Woodson and approached nurse Ted May, an Emergency Room nurse, put his arm around May, and said, how are you doing, how are things going, before leaving. Tr. 451-2. Drake testified that May and nurse Erica Velez had been standing at the table and talking with her and the other Union organizers when Fitzmaurice approached May. Tr. 452-3.

Woodson testified that at about 6:30 pm on June 24 while he was at the Union information table, he saw Laura Drake talking with two nurses, Ted May and Erica Velez, when a man in a suit walked up and asked loudly for pizza. Woodson testified that Drake responded that the pizza was for nurses. Woodson testified that he then noticed that Drake looked agitated and he went over to her and Drake told him that the man was Dennis Fitzmaurice, whereupon Woodson told Fitzmaurice that what he was doing was surveillance. Fitzmaurice responded, you're awfully argumentative.

Woodson repeated, what you're doing is surveillance, and asked him to leave. When Fitzmaurice did not leave, Woodson took a photo of him. Tr. 466-7.

As discussed above, an employer may not do something out of the ordinary to give employees the impression that it is engaging in surveillance of their protected activities. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007); *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). Here, Woodson and Drake testified that management official Fitzmaurice came up to the Union table while Drake was in conversation with two nurses, Ted May and Erica Velez. After Woodson asked Fitzmaurice to leave, Fitzmaurice did not immediately do so, but rather told Woodson he was argumentative and refused to leave. He then went over and put his arm around May, while May was engaged in conversation with a Union organizer, and began talking with him. The Hearing Officer found that Fitzmaurice's actions were not out of the ordinary and therefore did not constitute objectionable surveillance. However, the evidence did in fact show that Fitzmaurice engaged in objectionable surveillance and gave the impression that he was engaging in surveillance. He did not merely stop by the Union table to ask for pizza. He made clear to the nurses present, by putting his arm around Ted May, that he was observing them speaking with Union organizers. Accordingly, the Hearing Officer erred in finding that the evidence did not show that Fitzmaurice's actions constituted objectionable surveillance. HOR, pp. 5-6.

#### **Surveillance and giving the impression of surveillance by supervisor Chillis**

Laura Buenrostro, a staff nurse who is the bariatric coordinator for the bariatric program (Tr. 372), testified that about ten days before the election she had a conversation with her supervisor, Director of Surgical Services Sherry Chillis (Tr. 373). After Buenrostro told Chillis that a bariatric meeting had been cancelled, Chillis stated to her, "good, because she was supposed to spy on people

about the union.” Tr. 377-8. Buenrostro reported such conversation at the time to two other nurses, Bonnie Nolan and Shirley Cruz. Tr. 378-9. Chillis did not testify.

An employer acts unlawfully when, by words or conduct, it gives the impression to employees that it is watching or spying on their union activity. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Even though Chillis did not testify, and thus did not dispute that she made the statements testified to by Buenrostro, the Hearing Officer found that Buenrostro was unable to provide any context for the statement and that there is no evidence that Chillis actually spied on anyone. However, Buenrostro did provide context. She clearly testified that the conversation occurred in the context of Buenrostro telling Chillis that a bariatric meeting they had both been planning to attend had been cancelled. Chillis’s statement clearly gave the impression that she was engaging in surveillance. The Hearing Officer therefore erred in finding that the surveillance allegation with respect to Chillis did not constitute objectionable conduct. HOR, pp. 6-7.

**Surveillance and giving the impression of surveillance by Employer official Pankau**

Staff Nurse Kathy Haff testified that in June 2011 prior to the election Betsy Pankau came up to her and said to her that she “heard this was the Union floor,” told her that she had heard that there was a Union rally coming up, and asked her the location of such Union rally. Haff testified that Pankau was a hospital Director who also was Nursing Supervisor on weekends. Tr. 162-3. Pankau is the Employer’s Director of Performance Improvement. Pet. Ex. 25. In such capacity, she attended an OLR Medical Executive Committee meeting on June 22, 2011 with physicians and top Employer management officials and management officials of OLR’s parent corporation, Resurrection Health Care. The Employer’s response to the Union’s petition and the NLRB nurse election were discussed at such meeting. Pet. Ex. 1, pp. 21-3; Pet. Ex. 25; Tr. 526-7. Such meeting was attended by

physician members of the Medical Executive Committee and by John Walton, Group Executive Vice President for Resurrection Health Care responsible for hospital operations; Alaine Repa, Director of Risk Management for Resurrection Health Care; Ginnell Mallett, Director of Medical Staff for OLR; and OLR employees Nancy Velez, OLR Coordinator of Medical Staff Services; Marilyn Guzzetta, OLR Director of Physician Relations; and Betsy Pankau. Pet. Ex. 25; Tr. 526-7.

A person is an agent of an employer under Board law if employees would reasonably believe that the individual was reflecting company policy and speaking and acting for management. *Loudon Steel, Inc.*, 340 NLRB 307, 311 (2003); *Community Cash Stores*, 238 NLRB 265 (1978). The actions of individuals are attributable to the employer where the individuals are held out as a conduit for transmitting information from management to employees. *Mar-Jam Supply Co.*, 337 NLRB 337 (2001). Pankau, as a top OLR official, was clearly an agent of the Employer.

Pankau did not testify at the hearing.

As discussed above, an employer acts unlawfully when, by words or conduct, it gives the impression to employees that it is watching or spying on their union activity. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). The evidence showed that Pankau asked Haff whether this was the Union floor and also asked her the location of a Union rally. Such statement was clearly intended to give the impression of Employer surveillance of Union activity and support. The Hearing Officer discussed the allegation regarding Pankau's conduct constituting surveillance only in a footnote. HOR, p. 8, fn.6. The Hearing Officer found that Pankau did not engage in surveillance and did not give the impression of surveillance. The Hearing Officer found that, according to Buenrostro, Pankau stated that she was asking about the rally in order to give the information to a nurse. HOR, p. 8. The Hearing Officer also found that the evidence did not show that Pankau was a statutory

supervisor. HOR, p. 8. However, the evidence showed that Pankau was a top management official of the Employer who attended a meeting at which high level management officials discussed the Union petition and the NLRB election and was an agent of the Employer under Section 2(13) of the Act. It is not a logical conclusion from the evidence that Pankau, a high-level management official, was asking whether this was the Union floor and for information about the details of a Union rally to assist a nurse in getting more information about the Union. The Hearing Officer erred in failing to find that the Pankau surveillance evidence constituted objectionable conduct.

The evidence thus established multiple incidents of Employer surveillance, and acts intended to give the impression of surveillance, of employee Union activity. Such surveillance was violative of Section 8(a)(1) of the Act and constituted objectionable conduct that affected the results of the election.

## **Objection 2: Employer interrogation by supervisors and managers**

### **Interrogation by Employer official Pankau**

Staff Nurse Kathy Haff testified that in June 2011 Betsy Pankau said to her that she “heard this was the Union floor” and asked her the location of a union rally. Tr. 162-3. Pankau did not testify.

The standard for determining whether an interrogation is coercive is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Sikorsky Support Service, Inc.*, 356 NLRB No. 144 (2011); *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002). A speaker’s purported innocent intent in conducting the interrogation or questioning is not a defense. *Correctional Medical Services, Inc.*,

356 NLRB No. 48 (2010); *The Smithfield Packing Company, Inc.*, 344 NLRB 1, 2 (2004). The actual effect on employees also is not considered. *Scripps Health*, 347 NLRB 52 (2006); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). Coercive interrogation is violative of Section 8(a)(1) of the Act. *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002).

The Hearing Officer found that the Pankau conversation did not constitute objectionable conduct because Haff was an open Union supporter, because Pankau told Haff that she was seeking information on the rally in order to pass it on to a nurse, and because the evidence did not establish that Pankau is a statutory supervisor. HOR, pp. 7-8. However, as discussed in connection with Objection 1 above, the evidence showed that Pankau, who acts as Nursing Supervisor on weekends, is the Employer's Director of Performance Improvement, and that in such capacity she attended a June meeting of the OLR Medical Executive Committee with other top Employer and Resurrection Health Care officials for the purpose of discussing the Employer's response to the nurse organizing campaign and the NLRB election. As discussed in connection with Objection 1 above, Pankau was an agent of the Employer under Section 2(13) of the Act. The evidence showed that Pankau questioned Haff whether this was the Union floor and about the details of a Union rally. Such evidence demonstrated unlawful interrogation and objectionable conduct. The Hearing Officer erred in finding that the Pankau interrogation did not constitute objectionable conduct.

#### **Interrogation by supervisor Chillis**

Laura Buenrostro testified that about five to seven days before the election, her supervisor, Director of Surgical Services Sherry Chillis, said to her regarding Union literature Buenrostro had put in the break room, "I saw the purple paper, and I had just put up a purple flyer, and she said I saw the purple paper, and I said yes. And she said, I have to ask you what's it to you, ... And then she

said to me, well as a personal favor to me I want you to keep your opinions about the union to yourself. ... I was kind of shocked that she said that.” Tr. 379-80. Buenrostro reported such conversation, prior to the election, to three other nurses, Bonnie Nolan, Shirley Cruz, and Diane \_\_\_\_\_. Tr. 380-1. Chillis did not testify.

Employer interrogation of employees as to why they support the union and what they think the union can do for them is unlawful. *Wiers International Trucks, Inc.*, 353 NLRB No. 48 (2008). The Hearing Officer did not discuss the Chillis conversation in connection with Objection 2. HOR, pp. 7-8. However, the evidence established that Chillis clearly informed Buenrostro that she knew that Buenrostro had put Union literature out in the break room and questioned her “what’s it to you.” Such evidence established that Chillis engaged in unlawful interrogation and objectionable conduct, and the Hearing Officer erred in failing so to find.

The evidence thus established multiple incidents of coercive interrogation of nurses by supervisors and agents of the Employer. Such interrogation was violative of Section 8(a)(1) of the Act and constituted objectionable conduct that affected the results of the election.

**Objection 3: Employer threats of adverse changes in terms and conditions of employment**

Maggie Nielsen, ER nurse, testified to statements made by OLR CEO Martin Judd at an employee forum conducted by the Employer and attended by nurses on June 13, 2011. Tr. 412. Three or four nurses were in attendance. Tr. 413. At the meeting, Judd stated that if a union was voted in, nurses would not be able to talk with their managers any more about time off. He specifically stated that foreign nurses would not be able to speak with their managers to arrange to take extended leaves to go home to their countries to visit their families. Tr. 414. Nielsen testified

that prior to June 2011 some nurses had taken lengthy vacations to go to their homes in other countries. Tr. 414. Marieta Macatangay testified that prior to the election, in 2010, she had taken a month-long vacation go to the Philippines. Tr. 351.

An employer's prediction of potential negative actions the employer might take with respect to employee terms and conditions of employment as a result of unionization "must be based on objective fact *and* address consequences beyond an employer's control." *DHL Express, Inc.*, 355 NLRB No. 224 (2010). *See also Wiers International Trucks, Inc.*, 353 NLRB No. 48 (2008). Moreover, with respect to an employer's prediction of such negative consequences of unionization, "there is 'no significant difference'" whether an employer "stated that he 'would not' or 'might not' retain the flexibility" to continue a past practice favorable to employees. *DHL Express, Inc.*, 355 NLRB No. 224 (2010). An employer's threats of adverse changes in terms and conditions of employment in the event of unionization is violative of Section 8(a)(1) of the Act. *DHL Express, Inc.*, 355 NLRB No. 224.

The Hearing Officer credited Nielsen's testimony over Judd's, whose testimony he found to be hazy. However, the Hearing Officer found that it was not objectionable for Judd to tell nurses that policies might change under a union contract. The testimony, however, showed that Judd specifically threatened that foreign nurses, who in the past had taken extended vacations to visit family in their home countries, would no longer be able to do so. The Hearing Officer erred in failing to find such conduct objectionable. HOR, pp. 8-10. The evidence established that the Employer, through its CEO, threatened adverse changes in terms and conditions of employment in the event of unionization of the nurses. Such conduct was violative of Section 8(a)(1) and constituted objectionable conduct.

## **Objection 6: Employer removal of Union literature from employee break rooms**

### **Removal of Union literature by supervisor Chillis**

Laura Buenrostro, a staff nurse who is the bariatric coordinator for the bariatric program (Tr. 372), testified that she had occasion to go in the women's lounge, or break room, in the surgical area on a daily basis in June 2011. She testified that non-work related literature and material, including Avon books and cookie order sheets, is posted on the bulletin boards and placed on tables in the lounge. Tr. 374-5. She testified that in June prior to the election she put Union literature in the break room both on the bulletin board and on a table. Tr. 375. Buenrostro testified to a conversation she had with her supervisor, Director of Surgical Services Sherry Chillis, about two to three weeks before the election. Chillis informed Buenrosro that she had been instructed by upper administration to remove all Union literature from the break room. Tr. 375-6, 385. Immediately subsequent to such conversation, Buenrostro observed that Union literature she had posted in the break room was immediately removed. Tr. 376, 383-4. The other non-work related materials remained in the break room. Tr. 376. Buenrostro reported her conversation with Chillis to a couple other OR nurses, Bonnie Nolan and Sirley Cruz. Tr. 376-7.

As discussed above in connection with Objection 1, Buenrostro also testified that Chillis said to her regarding Union literature Buenrostro had put in the break room, "I saw the purple paper, and I had just put up a purple flyer, and she said I saw the purple paper, and I said yes. And she said, I have to ask you what's it to you, ... And then she said to me, well as a personal favor to me I want you to keep your opinions about the union to yourself. ... I was kind of shocked that she said that." Tr. 379-80 Chillis did not testify.

A hospital employer acts unlawfully when it prohibits solicitation and distribution of union literature in areas of the hospital that are not immediate patient-care areas absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). Restrictions on solicitation or distribution of literature on non-working time and in non-working areas and non-immediate patient-care areas are presumptively invalid. *Metro Mayaguez, Inc.*, 355 NLRB No. 215 (2010); *Brockton Hospital*, 333 NLRB 1367 (2001). An employer also acts unlawfully when it prohibits union-related speech but allows other non-work-related speech. *Scripps Health*, 347 NLRB 52 (2006); *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). An employer violates Section 8(a)(1) by prohibiting union-related speech and by applying a no-solicitation rule with respect to Union literature and speech in a disparate manner. *Loudon Steel, Inc.*, 340 NLRB 307.

The Hearing Officer found that the objection was not proven as to Chillis because Buenrostro did not see Chillis remove Union literature from the break room. However, Buenrostro testified to two conversations she had with Chillis regarding Union literature, one in which Chillis told her that she had been instructed by upper administration to remove Union literature from the break room, and one in which Chillis told Buenrostro that she saw the purple (Union) flyer Buenrostro had put in the break room and asked Buenrostro to keep her opinions about the Union to herself. Buenrostro testified that immediately after Chillis told her that she was instructed to remove Union literature from the break room the Union flyers Buenrostro had placed in the break room disappeared. The evidence clearly established that Chillis removed Union literature from the break room, and the Hearing Officer's finding that the evidence was insufficient to establish such fact was erroneous. HOR at 10-12.

### **Removal of Union literature by supervisor Albelo**

Maggie Nielsen, ER nurse, testified to actions by her supervisor, Emergency Department Nurse Manager Betty Albelo. Tr. 411-12. Nielsen testified that there are bulletin boards in the ER break room. Tr.418. Non-work related materials, including flyers about baby showers, gift wrapping services, apartments, cars, and party invitations, are routinely posted on the bulletin boards. Tr. 418-9. Nielsen testified that on June 28, 2011, the day before the election, she posted a Union-related flyer on the bulletin board. Tr. 419. She then observed her supervisor Betty Albelo come into the break room, look at the flyer Nielsen had posted, take it off of the bulletin board, state "oh this union garbage," and take it with her. Tr. 419-20. Other non-work related materials remained posted on the bulletin board at such time. Tr. 420. Albelo did not testify.

The Hearing Officer credited Nielsen's testimony and found that Albelo did remove Union literature from the ER break room. However, he found that such incident was too isolated to constitute objectionable conduct. HOR at 11-12. The Hearing Officer erred in dismissing such Objection. Instead, the objectionable conduct should have been considered together with the other objectionable conduct established. The objectionable conduct viewed together warrants a finding that such conduct affected the results of the election.

The evidence thus showed that the Employer, through supervisors, removed Union literature from break rooms while leaving other non-work related materials posted in the break rooms undisturbed. The Employer by such conduct violated Section 8(a)(1) of the Act and engaged in objectionable conduct that affected the results of the election.

**Objection 7: Employer prohibition on discussing Union in non-work areas and non-patient-care areas of the hospital**

**Security guard restricting leafleting on pedestrian bridge**

Kathy Haff, Staff Nurse, testified that about two weeks prior to the election, she and another nurse, Anna Pedrosa, were on an overpass pedestrian bridge running over the street that separates the hospital from a parking garage and that connects the parking garage to the hospital. The nurses were on non-work time and were distributing Union literature to nurses during a shift change between day and evening shift, when hospital security guard Sharron came out and told them that they could not be on the carpeted area of the bridge. The entire bridge, other than a small portion near the parking garage, is carpeted. Tr. 137-140. The bridge is a public area that is not a work area and is not a patient care area. Tr. 193-4. Haff testified that the security guard then got on the in-house phone and reported that “They’re on the carpet. You need to come up here. They’re on the carpet.” Tr. 171, 192. Haff relayed the incident to three or four other nurses. Tr. 192.

An employer may not lawfully prohibit the discussion of unionization at work where it does not prohibit the discussion of non-work-related topics generally. *Scripps Health*, 347 NLRB 52 (2006); *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). In considering whether communications from an employer to its employees violates the Act, the Board applies an objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Scripps Health*, 347 NLRB 52; *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). Restrictions on solicitation or distribution of literature on non-working time and in non-working areas and non-immediate patient-care areas are presumptively invalid. *Metro Mayaguez, Inc.*, 355 NLRB No. 215 (2010); *Brockton*

*Hospital*, 333 NLRB 1367 (2001). Prohibitions on only union-related speech is violative of Section 8(a)(1) of the Act. *Loudon Steel, Inc.*, 340 NLRB 307.

The Hearing Officer credited Haff's testimony but nonetheless found the conduct not objectionable. He found that there was evidence that the Union set up information tables outside the hospital, that Buenrostro testified that she placed Union flyers in a break room, and that Haff testified that she handed out flyers on other occasions. HOR, pp. 12-14. However, the Union information tables were set up on a public sidewalk in front of the hospital. As discussed above, a security guard and a hospital executive conducted surveillance on such tables. As discussed above, the Union literature posted in the OR break room by Buenrostro was removed by Director of Surgical Services Chillis and Union literature posted in the ER break room was removed by ER Nurse Manager Albelo. Moreover, nurses who go to or from the hospital through the pedestrian bridge, rather than through the front door of the hospital, would not pass by the Union tables on the public sidewalk in front of the hospital. The actions of the security guard in telling Haff and Pedrosa that they could not leaflet on the carpeted area of the bridge, a non-work area and non-patient-care area outside of the hospital, on their non-work time, was clearly unlawful and constituted objectionable conduct. The Hearing Officer erred in failing so to find.

#### **Chillis restricting talking about the Union**

Laura Buenrostro testified that about five to seven days before the election, her supervisor, Director of Surgical Services Sherry Chillis, said to her regarding Union literature Buenrostro had put in the break room, "I saw the purple paper, and I had just put up a purple flyer, and she said I saw the purple paper, and I said yes. And she said, I have to ask you what's it to you, ... And then she said to me, well as a personal favor to me I want you to keep your opinions about the union to

yourself. ... I was kind of shocked that she said that.” Tr. 379-80. Buenrostro reported such conversation, prior to the election, to three other nurses, Bonnie Nolan, Shirley Cruz, and Diane \_\_\_\_\_. Tr. 380-1. Chillis did not testify.

The Hearing Officer credited Buenrostro’s testimony and found that Chiilis’s comments would objectively have had the effect of interfering with an employee’s right to engage in union activity. HOR, p. 14. However, he found that the incident was isolated and that while Chillis’s comment may have been coercive it is not likely that it caused Buenrostro to fear her. HOR, p. 15. He therefore found that such conduct did not constitute objectionable conduct. HOR, p. 15. Under the proper standard, however, which is an objective one, Chillis’s statements clearly constituted objectionable conduct. The Hearing Officer erred in failing so to find.

#### **Albelo restricting open Union supporter from being in break room**

Maggie Nielsen, ER nurse, testified to actions by her supervisor, ER Nurse Manager Betty Albelo. Tr. 411-12. Nielsen testified that on June 29, the first day of the election, she was in the ER break room on non-work time at about 9:00 am speaking to one other nurse. Nielsen testified that Albelo came in, “saw that I was there and kind of did a jump,” and asked if Nielsen had found someone to replace her that evening when Nielsen planned to be an election observer. Shortly thereafter, Albelo told Nielsen to leave the break room. Tr. 421.

The Hearing Officer found that because Nielsen testified that she and the other nurse were talking about subjects other than the Union while in the break room that the evidence failed to show that Albelo’s telling Nielsen to leave the break room was objectionable conduct. However, Nielsen was one of the Union’s election observers, Albelo was aware of that since she questioned Nielsen as to whether she had found someone to work her shift while she served as an observer, and Albelo

then told Nielsen to leave the break room. In such circumstances, the evidence showed that Albelo's directions to Nielsen to leave the break room constituted objectionable conduct. The Hearing Officer erred in failing so to find.

The evidence thus established multiple incidents of agents of the Employer prohibiting and interfering with nurses' actions in discussing the Union in non-work areas and non-patient-care areas of the hospital. The evidence showed that such actions were violative of Section 8(a)(1) of the Act and constituted objectionable conduct that affected the results of the election.

#### **Objection 8: Employer solicitation of grievances**

##### **Solicitation of grievances from ICU nurses by CEO Martin Judd**

Isabelle Ngala, who was a staff nurse in ICU at OLR at the time of the election (Tr. 197-8), testified that in June 2011 prior to the election Dr. Hussein informed the ICU nurses that he had arranged a meeting for the nurses to talk with CEO Martin Judd. Tr. 200. Ngala was one of about 20 nurses from ICU who attended the meeting with Judd and Vice President of Nursing Maryanne Bajgrowicz. Tr. 201. Ngala testified that Judd heard the nurses' complaints about the ICU manager and their complaints about staffing, scheduling and the manager's being harsh with the nurses and their request that the manager be replaced. Ngala testified that Judd responded that "he has heard our complaints and he will make a change. But he was asking us that those changes could not be made if we bring the Union in the hospital." Tr. 202. Ngala testified that: "He said that I've heard your complaint, and I promise you I'll make the changes. If you give me a chance, I'll make the changes, but I cannot make those changes if you let the Union come to the hospital." Tr. 222.

Judd was evasive in his testimony about the meeting with the ICU nurses. When asked how many nurses were present, he said: "I don't recall the count, speculating maybe ten." Tr. 555. He testified that he did not recall how many nurses were there and that there may have been more than ten nurses present. Tr. 559. Although he said that the meeting lasted 30 to 45 minutes, he could recall only that the nurses complained about their supervisor and that he said that he would work to get the supervisor better communication skills. Tr. 554-7. When asked if he said anything about the Union at the meeting, he said: "I don't recall." Tr. 557.

Ngala testified that, prior to the election, Judd approached her individually on a separate occasion at the hospital while she was waiting for her boyfriend to pick her up to go to a concert after work. She testified that Judd approached her and told her "to believe him that he was going to take care of me. That he would make the change that he promised us. That was, basically, firing our manager, and for us to give him a chance to make those changes." Tr. 204. Judd testified that he did not recall anything about such conversation other than that Ngala said she was waiting for a ride and going to a concert. Tr. 559.

An employer violates Section 8(a)(1) when it solicits, and promises to remedy, employee grievances as part of an effort to discourage union activity. Moreover, the promise to remedy grievances need not be explicit to constitute a violation. *Wiers International Trucks, Inc.*, 353 NLRB No. 48 (2008); *Reliance Electric*, 191 NLRB 44, 46 (1971). "There is a compelling inference that [the employer] is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Reliance Electric*, 191 NLRB 44, 46. Moreover, that the management officials who hear the grievances "phrased their replies to some of the complaints

in such circumspect terms as undertaking to 'look into' or 'review' them, or even a refusal to commit [the employer] to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions." *Reliance Electric*, 191 NLRB 44, 46.

The Hearing Officer found that there was no evidence that solicitation of grievances took place at the meeting between Judd and the ICU nurses. However, Judd was evasive in his testimony and remembered little of the meeting. Ngala specifically testified that Judd promised to make the change that the nurses wanted but told them that they had to give him time and that he would not be able to make the change if a Union came in. Judd repeated his comments to Ngala in a separate conversation in the hospital lobby. Judd did not deny that he did so but rather said that he did not recall the entire conversation. The evidence clearly showed that Judd invited the ICU nurses to convey their complaints and informed the ICU nurses that he would address their concerns if they voted against the Union. Such conduct was objectionable, and the Hearing Officer erred in finding otherwise. HOR, pp. 16-19.

#### **Solicitation of grievances through employee satisfaction survey**

OLR Human Resources Director Ivy McKinley testified that the Employer announced to employees at employee forums held prior to the election in June 2011 that an employee survey was available and that employees were encouraged to complete the survey. A notice to employees dated June 13, 2011 and informing the employees of the survey was distributed by email. The notice was also posted on a stand near one of the main elevators. Tr. 489-90. McKinley testified that the survey was made available to employees on June 13. Tr. 510. An Ipad was raffled off at OLR in connection

with the survey. Tr. 506. The survey was called an “Employee Satisfaction Survey” and questioned employees as to their level of satisfaction with their jobs and work environment. Pet. Ex. 18.

The fact that the employee survey was made available to employees at other Resurrection Health Care hospitals does not alter the fact that the survey was initiated two weeks prior to the election. The evidence showed that Resurrection Health Care joined with the Employer in the Employer’s election campaign, as evidenced by the presence of top Resurrection management at the Medical Executive Committee meetings held in June to discuss the Employer’s response to the Union petition and involvement of Resurrection management in retaining the management consultant for the Employer’s campaign. Tr. 519-20. The survey was timed to coincide with the Employer’s employee forums. As discussed above, the forum attended by Maggie Nielsen at which Judd told nurses that with a Union foreign nurses would not be able to arrange with their managers to take long vacations occurred on June 13, the same day the employee survey was announced. The survey solicited nurses’ grievances on the eve of the election. Moreover, an Ipad was raffled off in connection with the survey. Employee raffles held outside the period 24 hours prior to an election are unlawful if they involve promises or grants of benefit that would improperly affect employee free choice or if they allow the employer to identify employees who might or might not be sympathetic, and thus learn where to direct additional pressure or campaign efforts. *BFI Waste Systems*, 334 NLRB 934, 934-5 (2001); *Atlantic Limousine*, 331 NLRB 1025, 1030, fn. 13 (2000). The evidence showed that the employee survey constituted objectionable solicitation of grievances. The Hearing Officer erred in finding otherwise. HOR, pp. 19-20.

The evidence thus established that the Employer engaged in solicitation of grievances involving numerous ICU nurses, through the meeting with Judd, and involving all nurses, through

the employee survey. Such conduct was violative of Section 8(a)(1) of the Act and constituted objectionable conduct.

**Objections 10 and 11: Physicians acting as agents of the Employer interrogating nurses as to their Union support (Objection 10) and Physicians acting as agents of the Employer threatening nurses that the hospital would close if the Union won the election (Objection 11)**

**Agency status of the doctors**

The evidence showed that the Employer enlisted physicians on its medical staff, particularly members of the Medical Executive Committee, to use their professional relationships with nurses to get out the Employer's vote no message, and that some physicians, acting as agents of the Employer, interrogated nurses regarding their Union support (Objection 10) and threatened nurses that the hospital would close in the event the Union won the election (Objection 11).

Martin Judd is Executive Vice President and CEO of OLR. Tr. 517. Judd testified that a June 1, 2011 meeting of the OLR Medical Executive Committee was called by Dr. Shirish Shah, chair of the Medical Executive Committee, and by Judd himself to discuss the NLRB election Tr. 519. The Medical Executive Committee includes doctors and hospital management. Regular meetings of the Medical Executive Committee are held and attended by the officers and members of the Medical Executive Committee, and Employer officials, including the Chief Executive Officer, the Vice President of Patient Care Services, and the chief nursing officer. Tr. 16, 47, 69. The President of the Medical Staff is chair of the Medical Executive Committee. Tr. 47-8. In May and June 2011 Dr. Shirish Shah was President of the OLR Medical Staff and chair of the OLR Medical Executive Committee. Tr. 17, 68-9.

Judd testified that he made the arrangements for management consultant John Baird to attend the June 1 meeting of the Medical Executive Committee. Tr. 519. Baird is a management consultant hired by Resurrection Health Care, OLR's parent corporation, to help the hospital in the election campaign. Tr. 519-20. Judd testified that in attendance at the Medical Executive Committee meeting of June 1 in addition to the physicians were members of his management team, including Dennis Fitzmaurice, Vice President of Professional Services; Ivy McKinley, Director of Human Resources; Maryanne Bajgrowicz, Vice President of Nursing, and members of Resurrection Health Care management, including Paul Skiem, Senior Vice President for Human Resources. Tr. 520-1. Judd testified that the June 1 meeting was held for the purpose of Baird's making a presentation to the doctors about the union election. Tr. 521.

Judd was repeatedly evasive when asked whether he encouraged doctors to tell nurses that they thought a union would not be good for the nurses at the hospital. Tr. 523-4. He was repeatedly evasive when asked what was discussed at the meetings of the Medical Executive Committee in June and what discussions he had with doctors in June about the NLRB election. Tr. 527-9. However, in a letter dated June 1, 2011, from CEO Martin Judd to the OLR Medical Staff, Judd stated that: "Nurses respect very highly the opinions of the physicians with whom they work, and my hope is that you feel free to share your thoughts and experiences with them and that you will encourage them to vote "NO" against representation by AFSCME." Pet. Ex. 1, 2; Tr. 522. A meeting of the Medical Executive Committee attended by doctors and hospital management and at which the election was discussed was also held on June 22. Tr. 526; Pet. Ex. 25. Such meeting was attended by John Walton, Group Executive Vice President for Resurrection Health Care responsible for hospital operations; Alaine Repa, Director of Risk Management for Resurrection Health Care; Ginnell

Mallett, Director of Medical Staff for OLR; and OLR employees Nancy Velez, OLR Coordinator of Medical Staff Services; Marilyn Guzzetta, OLR Director of Physician Relations; and Betsy Pankau, Director of Performance Improvement. Pet. Ex. 25; Tr. 526-7.

Dr. Vishnu Chundi is a physician on staff with the Employer and, in May and June 2011, was a member of the OLR Medical Executive Committee and was Incoming Vice President of the Medical Staff. Tr. 14-15. He testified that he attended the meeting of the Medical Executive Committee on June 1, 2011, at which OLR CEO Martin Judd was present and at which John Baird, a management consultant, gave a presentation about the NLRB election. Tr. 20-1; Pet. Ex. 1. Dr. Chundi testified that at the meeting on June 1, the management consultant told the doctors that the Employer did not want the nurses to be represented by a union. Tr. 24.

Dr. Chundi wrote the majority of a letter to “all Our Lady of the Resurrection Medical Center Registered Nurses” from “Joseph D’Silva, incoming President, OLR Medical Staff” and “Vishnu Chundi, incoming Vice President OLR Medical Staff” dated June 21, 2011. Dr. D’Silva is and in May and June 2011 was President elect of the OLR Medical Staff, and a member of the Medical Executive Committee. Tr. 127-8. Dr. D’Silva has been a member of the OLR Board of Directors for six years. Tr. 128-9. The letter from Drs. Chundi and D’Silva to nurses urged the nurses to vote “no” in the NLRB election, and referenced an attached petition signed by 34 OLR physicians urging the nurses to vote “no.” Pet. Ex. 3. Dr. Chundi testified that the Employer’s management consultant gave him a draft letter and that he revised it in consultation with OLR CEO Martin Judd and Vice President Dennis Fitzmaurice. Tr. 27-8, 59-60. Fitzmaurice testified that John Baird emailed him a draft of the letter and that he forwarded Baird’s email and the draft letter to Dr. Chundi. Tr. 543-4; Pet. Ex. 4 (email from Fitzmaurice to Chundi regarding the contents of the letter). Dr. Chundi’s

understanding was that the Employer would arrange for distribution of the letter to nurses. Tr. 29-30; Pet. Ex. 4. Ivy McKinley testified that a hospital manager mailed Drs. Chundi and D'Silva's letter to all nurses in June. Tr. 498-500. The mailing of the letter was the subject of email communication among top Resurrection Health Care and OLR officials. Tr. 499-501; Pet. Ex. 22, 23, 24. The doctors' vote-no letter and petition were mailed by the Employer to all nurses on the Excelsior list at their home addresses. Compare Pet. Ex. 5 and Pet. Ex. 24. Judd testified that he had discussions about the Dr. Chundi and D'Silva letter before it was sent to nurses and that the letter was mailed to nurses by the Employer. Tr. 529-30.

The Hearing Officer found that it was not necessary to pass on the issue of whether physicians are agents of the Employer within the meaning of Section 2(13) of the Act because he found that the physicians' conduct was not objectionable. However, he found that if such conduct were found to be objectionable, he would find that the physicians are agents of the Employer. HOR, p. 33.

**Objection 10: Physicians acting as agents of the Employer interrogating nurses as to their Union support**

**Dr. Shah**

Dr. Shah testified that he is at the hospital "Twenty-four seven, every day." Tr. 85. He testified that he sees patients in cardiology and on the floors throughout the hospital. Tr. 86-7. Even though Dr. Shah, as chair of the OLR medical staff and President of the Medical Executive Committee, together with CEO Judd, called the June 1 and June 22 meetings of the Medical Executive Committee to discuss the Employer's response to the Union petition (Tr. 519; Pet. Ex. 1,

Pet. Ex. 25), and even though Dr. Shah signed the doctor petition urging nurses to vote "No," Dr. Shah denied having any opinion about whether nurses should vote for a union and denied talking to any nurses in June about the election. Thus, Dr. Shah testified as follows:

Q. You thought that the Union was a bad idea for the hospital, is that right?

A. No I never said that.

Q. You never said that you thought the Union was a bad idea for the hospital?

A. No.

Q. Did you think it was a good idea?

A. I have no opinion.

Q. You had no opinion whatsoever about whether the nurses should or should not vote for a Union?

A. No, because it didn't affect the medical staff, so --

Q. So did you think it was important to talk to the nurses about how they should vote in the election?

A. No it was not my business, no.

Tr. 77. He testified further:

Q. Okay. So it's your testimony you didn't talk to any nurses at all in the month of June about the Union and the Union election?

A. I have not talked to any nurses that I can recall in the month of June at Our Lady of the Resurrection.

Tr. 81.

Nurse Isabelle Ngala testified to a conversation in which she participated in June prior to the election with Dr. Shah in the ICU. Two other nurses, Hyfa Occurri and Grace Troy, were present during the conversation. Tr. 199, 204-5, 206-7. Ngala testified that Dr. Shah told Hyfa and Grace how much the Union would take out of their paychecks every pay period, and then: "So he sat down and he asked Grace and Hyfa whether they were going to vote for the Union." Tr. 204-5. After Ngala challenged him, Dr. Shah turned to her and said: "We're not even going to question which way your vote is going." Tr. 205.

The standard for determining whether an interrogation is coercive is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Sikorsky Support Service, Inc.*, 356 NLRB No. 144 (2011); *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002). Employer interrogation of employees as to why they support the union and what they think the union can do for them is unlawful. *Wiers International Trucks, Inc.*, 353 NLRB No. 48 (2008).

The Hearing Officer found that Ngala was testifying about the interrogation of two other nurses who did not testify themselves, and that, because Occurri and Troy did not testify themselves to corroborate Ngala, he was not crediting her testimony with respect to Dr. Shah's questioning of Occurri and Troy. Tr. 73-91; HOR, p. 28. Ngala testified, however, that she was present and part of the conversation. As the Hearing Officer found, Dr. Shah was evasive and not credible. He denied having any opinion on the election or talking to any nurses at all about the election and claimed that he did not even read the OLR physicians' Vote No petition when he signed it. HOR, p. 28. It is not surprising that the nurses willing to testify at an NLRB hearing would be those who are open union supporters and that others, who may have been effectively intimidated, would be afraid to testify.

Ngala's testimony was first-hand and not hearsay and the fact that the other two nurses did not testify is not a basis to discredit her testimony. The Hearing Officer erred in failing to find that Dr. Shah's questioning of Occurri and Troy, in Ngala's presence, regarding whether they were going to vote for the Union constituted objectionable conduct.

Marieta Macatangay, a nurse on the telemetry unit at OLR (Tr. 340-2), testified that in June 2011 prior to the election she had a conversation with Dr. Shah at the nurses station on 3 South, the telemetry unit. She testified that nurse Amelita Bedural was present. She testified that Dr. Shah interrogated her about her Union support. Thus, she testified that Dr. Shah "asked who is with the union" three times over. Tr. 343. She testified that he said some additional words that she did not hear. Tr. 343-4. She testified that she relayed the conversation to about 10 to 20 other nurses including Rachelle Vardon, Maud San Juan, Evelyn Daoang, Redempta Gudani, Ofelia Cruz, Anna Igoy, Gladys Villasin, Mig Borda, Adrian Ong, Justyna Milan, Editha Malunay, Aquila Jolipa, Eric Ramirez, Janet Konkel, Aura Harris, Catie Weisenburger, Angelica Herrera, Mary Espanola, Eden Sobrepena, and others. Tr. 344. 358, 359. She testified that she told all of them that Dr. Shah asked her if she was with the Union. Tr. 344. She testified that "I was just talking to everybody because I was so nervous." Tr. 358. She testified that "In a way I am" intimidated by the conversation with Dr. Shah. Tr. 354. Moreover, Macatangay reported the incident to the Employer's Human Resources Director IvyMcKinley in writing at the time of the event. Macatangay signed and sent a letter dated June 16, 2011 to McKinley reporting that Dr. Shah had interrogated her about her Union support. Tr. 345; Pet. Ex. 12. The letter states: "I am writing to lodge a formal complaint under Resurrection's anti-harassment policy against Dr. Shirish Shah for his widespread and aggressive interrogation of nurses regarding their opinion regarding organization. Dr. Shah has

interrogated many nurses in the past few weeks. Early last week, on either June 6 or 7, he approached me – on work time – at the nurses’ station on 3S, with other employees present, and asked me directly who supported the union. He then repeatedly asked “really?” to me when I told him I supported the union.” Pet. Ex. 12.

In response, the Employer, on about June 21, 2011, distributed a leaflet to nurses. The leaflet was entitled: “Stop the Harassment” and stated that, “Last week, 3 members of AFSCME’s organizing committee made a formal complaint that they have been ‘harassed’ by some physicians who oppose the union.” Tr. 495-6, Pet. Exs. 9, 21.

Amelita Bedural, a staff nurse in telemetry (Tr. 243-4), testified that in June 2011 prior to the election she witnessed a conversation at a nursing station between Dr. Shah and Marietta Macatangay, a nurse who was an open union supporter. Tr. 244- 5. She testified that “Dr. Shah said so you’re for the Union. And she said yes I am. And he said really? She said yes I am. And he said do you know that this is a community hospital and the hospital will shut down? Do you want that if the Union is in?” Tr. 245.

The Hearing Officer credited the testimony of Macatangay and Bedural with respect to Dr. Shah’s questioning Macatangay regarding whether she supported the Union. HOR, p. 28. However, the Hearing Officer found that Dr. Shah’s questioning of Macatangay was not objectionable based on his finding that Dr. Shah’s questions could not have affected Macatangay’s vote since she was an open Union supporter. The Hearing Officer did not discuss the evidence showing that the facts regarding Dr. Shah’s interrogation of Macatangay regarding her Union support were disseminated to about 20 other nurses. The Hearing Officer erred in failing to find Dr. Shah’s interrogation of Macatangay to be objectionable conduct.

**Dr. Chundi**

Dr. Chundi testified that he spoke to "more than ten and less than 50" nurses about the Union election in June before the election, and that he urged such nurses to vote no in the election. Tr. 34-5. He testified that he goes throughout the hospital and comes in contact with a "significant number" of the nurses on the day shift. Tr. 41. He testified that prior to the election he spoke about the Union with nurses on the day shift ICU, 4 North and 4 South, and 3 North and 3 South. He testified that there are about 30 to 40 nurses who work on such units on the day shift. Tr. 42-3. Dr. Chundi testified that in his conversations with nurses: "in a general way, I'd say, are you going to vote for the union or not and they'd say yes or no and I'd go, okay." Tr. 36. He subsequently testified that "if they had a little button on, we'd go, you're voting for the union, what do you think is going to come out of it." Tr. 50.

Amelita Bedural testified that she had a conversation at work in June 2011 prior to the election with Dr. Chundi. Dr. Chundi "asked me what was I voting, and I said I'm not sure yet." Another nurse was present during the conversation. Tr. 247-8. Bedural testified that she wore a Union sticker on one occasion, but was not wearing it when Dr. Chundi questioned her. Tr. 253.

The Hearing Officer credited Bedural with regard to her testimony that Dr. Chundi asked her how she was voting. HOR, p. 29. The Hearing Officer found, however, that Dr. Chundi's questioning of Bedural was not objectionable conduct. Although he found that there was not much evidence that Bedural was an open Union supporter, he found that she wore a Union pin on one occasion and that the incident did not sound intimidating. HOR, p. 30. However, such finding ignores the fact that Dr. Chundi admitted questioning 30 to 40 nurses about their Union support and

improperly discounts Bedural's testimony, which the Hearing Officer found credible, solely because she admitted to wearing a Union sticker on one occasion.

**Dr. Habib**

Dr. Fadi Habib was a member of the Medical Executive Committee in June 2011. Tr. 18; Pet. Ex. 1, p. 3; Pet. Ex. 25. Nurse Aura Harris testified that within two weeks prior to the election Dr. Habib questioned her about her Union support. Tr. 261- 3. She testified that: "He wanted to know why I was supporting the Union, and I told him I was supporting my fellow nurses. And he asked if everyone in the ER was a yes. ... He also said so, is this where it started?" Tr. 263.

The Hearing Officer credited Harris regarding her testimony that Dr. Habib questioned her about why she was supporting the Union, whether everyone in the ER was a yes, and whether the ER was where it started. HOR, p. 29. The Hearing Officer found that the questioning of Aura Harris by Dr. Habib sought information that could have been intimidating to an employee, but that there was no evidence that other employees were similarly questioned by Dr. Habib or that Harris told other nurses about the incident, and therefore that the incident was not enough to affect the results of the election. HOR, pp. 30-1. The Hearing Officer did not consider Dr. Habib's conduct together with any of the other objectionable conduct, but rather considered it only separately. Dr. Habib's actions were violative of Section 8(a)(1) of the Act, and, viewed together with the other evidence of objectionable conduct, constituted objectionable conduct warranting setting aside the election.

**Dr. Bordo**

Dr. David Bordo, the Medical Director of Emergency Medicine, and head of the Emergency Room, is and in May and June 2011 was a member of the Medical Executive Committee. Tr. 18-19, 117; Pet. Ex. 1, p. 3; Pet. Ex. 25. Dr. Bordo is employed by the Employer. Tr. 117. Joanna

Wegrzynowicz, who was a staff nurse in the ER at OLR at the time of the election in June 2011 (Tr. 309-10), testified that in the first couple of weeks of June 2011 she had a conversation in the ER with Dr. Bordo. Tr. 312-13. She testified that Dr. Bordo asked her whether and how she was going to vote in the upcoming election for the union. Tr. 312-13. Other nurses were in the area at the time of the conversation. Tr. 312. She also testified that she told three other nurses, including Cindy Loy, about the conversation. Tr. 313-14. She testified that she told multiple people on multiple occasions about the conversation. Tr. 316-17. She testified that she thought it “was not his place” and “none of his business” to ask her how she would vote. Tr. 317-18.

Cindy Loy, a nurse in the ER at OLR (Tr. 325), testified that Joanna Wegrzynowicz told her in June prior to the election that Dr. Bordo had asked her how she was going to vote. Tr. 327-8. Loy testified that a couple of other nurses asked her “if I had talked to Joanna about this.” Tr. 328. She testified she discussed what Joanna had reported regarding Dr. Bordo with two other ER nurses, Maggie Nielsen and Sharon Rouette. Tr. 328.

Maggie Nielsen testified that Joanna told her, prior to the election, that Dr. Bordo had asked her how she was going to vote in the election. Tr. 422.

The Hearing Officer credited Joanna Wegrzynowicz’s testimony that Dr. Bordo questioned her about how she would vote in the NLRB election. HOR, p. 29. The Hearing Officer found, however, that since Wegrzynowicz testified that she was out of town during the election, the incident could not have affected the results of the election. He also found that although Wegrzynowicz testified that she told two to three other nurses about the incident, the impact of hearing about such conduct second hand is not as strong as being personally interrogated. HOR, p. 30. The Hearing Officer incorrectly failed to consider Dr. Bordo’s conduct, which was violative of Section 8(a)(1),

in combination with the other incidents of physician interrogation of nurses, and the dissemination with respect to such incidents. Dr. Bordo's conduct, viewed in combination with the other objectionable conduct, warranted setting aside the election.

**Dr. Fishman**

Dr. David Fishman was a member of the Medical Executive Committee in June 2011. Tr. 19; Pet. Ex. 1, p. 3; Pet. Ex. 25. Cindy Loy testified that in June prior to the election she witnessed Dr. Fishman pointing to a Yes union button worn by ER nurse Sharon Rouette and "asking her I can't believe you're actually supporting this." Tr. 332-3. She testified that the conversation took place at the nurses' station in the ER and that a lot of nurses were around. Tr. 332-3. Loy testified that she relayed the conversation to three to five other nurses. Tr. 333-4.

The Hearing Officer did not discuss Loy's testimony with regard to Dr. Fishman. Dr. Fishman did not testify. Loy heard the conversation first-hand. The Hearing Officer erred in failing to find Dr. Fishman's statements to Sharon Rouette in Cindy Loy's presence to be objectionable conduct.

As discussed above, the standard for determining whether an interrogation is coercive is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Sikorsky Support Service, Inc.*, 356 NLRB No. 144 (2011); *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002). Employer interrogation of employees as to why they support the union and what they think the union can do for them is unlawful. *Wiers International Trucks, Inc.*, 353 NLRB No. 48 (2008). Coercive interrogation is violative of Section 8(a)(1) of the Act. *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002).

Here, the evidence established multiple incidents of interrogation of nurses regarding how they were going to vote and whether and why they supported the Union by physicians acting as agents of the Employer. Such physicians included Dr. Shah, Dr. Chundi, Dr. Habib, Dr. Bordo and Dr. Fishman. The evidence also established dissemination of such incidents of interrogation. The acts of interrogation were violative of Section 8(a)(1) and, viewed together, constituted objectionable conduct affecting the results of the election.

**Objection 11: Physicians acting as agents of the Employer threatening nurses that the hospital would close if the Union won the election**

**Dr. Shah**

Nurse Kathy Haff testified that in early June 2011, Dr. Shah confronted another nurse, Justyna Milan, and her at work and stated that “the hospital can’t afford this. The hospital’s going to close.” Tr. 141-2. Haff testified that it was shift change and at least three to four nurses were present at the time. Tr. 143. Haff and Milan submitted a letter to HR Director Ivy McKinley dated June 15, 2011 informing her that Dr. Shah had threatened that if the nurses voted for AFSCME the hospital would close. Pet. Ex. 8; Tr. 150-151. In such letter, Haff stated that Dr. Shah “has been very aggressively campaigning against the union on work time and in patient care areas. For the past few weeks he has been interrogating staff nurses about whether they support the union. ...We also want you to be aware that Dr. Shah is threatening that if we vote to organize with AFSCME, the hospital will have to close.” Pet. Ex. 8. Such letter was delivered to both Ivy McKinley and Martin Judd. Tr. 445-7. McKinley acknowledged receiving the letter, and discussing the letter with Martin Judd, in June prior to the election. Tr. 490, 492. Haff testified with respect to what she heard Dr. Shah

say at the time: "He said that the hospital was going to close. That the budget didn't allow ...." Tr. 177. She testified that Dr. Shah "said that us forming a Union would financially make the hospital close." Tr. 178.

Although the Hearing Officer found that Haff generally had a thorough understanding of the matters she testified to (HOR, p. 31), and although he found Dr. Shah generally not credible (HOR, p. 28), he did not credit Haff's testimony that Dr. Shah threatened that the hospital would close if the nurses voted to unionize. Since Dr. Shah was not a credible witness, denying completely that he ever spoke to any nurse about the Union (Tr. 73-81), Haff's testimony was unrebutted. Moreover, Haff and another nurse, Milan, sent a letter to Ivy McKinley shortly after the conversation took place, and such letter informed McKinley that Dr. Shah had threatened nurses that if they voted to unionize the hospital would close. The Hearing Officer thus erred in failing to find that Dr. Shah threatened nurses, including Kathy Haff, that the hospital would close if they voted to unionize.

#### **Dr. Chundi**

Aura Harris, a staff nurse in the Emergency Room (Tr. 256), testified that in June 2011 about a week before the election, she was going by the nurses' station on 3 South taking a BiPAP machine for one of her patients who was sent from the ER to that floor. Tr. 258. She testified that Dr. Chundi was at the nurses' station and that as she passed she heard him say: "If the Union is allowed to come in, the hospital will close." Tr. 259-60, 277-8. Harris testified that hearing the statement "stopped me in my tracks." Tr. 277. She testified that: "It got my attention to have me turn and stop and continue to see who had said that." Tr. 279. She testified that: "I know Dr. Chundi's voice very well, and that's why I stopped to verify that it was his voice and he was the one that said that." Tr. 279-80. She did not see which other nurses were present, but she did relay what she heard to another nurse.

Tr. 261. Harris reported Dr. Chundi's statement in writing to HR Director Ivy McKinley in a June 26, 2011 letter. Pet. Ex. 11; Tr. 264-5. In such letter, Harris reported that: "On June 22 at about 3:30pm, I walked by Dr. Chundi on 3S. I was wearing an AFSCME pin. As I walked by, he said "if the union wins, the hospital will close." Pet. Ex. 11.

Nurse Marieta Macatangay testified that Harris told her at the time that Dr. Chundi had said that the hospital will close if the Union wins. Tr. 350. She testified that she and two other nurses, Angelica Herrera and Janet Konkel, were at the nurses station and that Harris yelled, "did you hear what he just said?" and said that Dr. Chundi had said "That the place will close if the union will win." Tr. 362-3.

The Hearing Officer found that Harris's testimony that Dr. Chundi threatened that the hospital would close if the Union comes in should not be credited because she heard the comment in passing. However, such finding ignores Harris's testimony that "It got my attention to have me turn and stop and continue to see who had said that" (Tr. 279) and that "I know Dr. Chundi's voice very well, and that's why I stopped to verify that it was his voice and he was the one that said that." Tr. 279-80. Moreover, Harris and Macatangay both testified that Harris told Macatangay of what she had heard shortly thereafter, and Harris reported Dr. Chundi's threat in a letter to Ivy McKinley on June 22. The Hearing Officer thus erred in failing to find that Dr. Chundi threatened nurses, including Aura Harris, that if the nurses voted to unionize the hospital would close.

Threats of plant closure in the context of an election campaign are unlawful. *Wiers International Trucks, Inc.*, 353 NLRB No. 48. In allowing doctors to campaign against unionization of the hospital employees by threatening hospital closure, where the doctors through the admission of patients have the power to effect a decline in services at the hospital, a hospital is responsible for

the interrogations and threats made by the doctors. *De Queen General Hospital*, 264 NLRB 480 (1982). In the case of threats of a plant closure, the evidence of effective retraction or disavowal must be clearly established. *Atlas Microfilming*, 267 NLRB 682 (1983). Here, as the Hearing Officer found, the Employer did not disavow that the physicians were speaking for the Employer. HOR, p. 34.

The evidence thus established that physicians acting as agents of the Employer threatened nurses that the hospital would close in the event of unionization. Such conduct was in violation of Section 8(a)(1) of the Act and constituted objectionable conduct.

**The objectionable conduct, viewed cumulatively, affected the results of the election**

The Board has found that: “A violation of Section 8(a)(1) found to have occurred during the critical election period is, a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is ‘virtually impossible to conclude that [the violation] could have affected the results of the election.’ *Enola Super Thrift*, 233 NLRB 409, 409 (1977). .... In determining whether the unlawful conduct is de minimis, the Board considers the number of incidents, their severity, the extent of dissemination, the size of the unit, and other relevant factors.” *Airstream, Inc.*, 304 NLRB 151, 152 (1991). Conduct which is violative of Section 8(a)(1) has been found to warrant the setting aside of an election “‘because the test of conduct which may interfere with the ‘laboratory conditions’ for an election is considerably more restrictive than the test on conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).’ *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).” *Longview Fibre Paper and Packaging, Inc.*, 356 NLRB No. 108 (2011). In *Enola Super Thrift*, the Board found that coercive statements warranted setting aside an election in

a unit of 24 employees, where the vote was 7 for and 16 against union representation with 1 challenged ballot, where the Board found that the coercive statements were directed to 2 employees in the unit. In so finding, the Board found that: “We have long held that statements made during election campaigns can reasonably be expected to have been disseminated and discussed among the employees.” 233 NLRB at 409.

Where multiple incidents of objectionable conduct are involved, the objections should be considered not only separately but also cumulatively. See *VJNH, Inc.*, 328 NLRB 87, 104 [“In this case the number, nature, severity, and circumstance of the conduct constituting unfair labor practices and objections are more than sufficient to justify setting aside the election. When considered together, their potential effect on the laboratory conditions is indisputable.”]

Here, the evidence established multiple incidents of Employer surveillance of Union activity, Employer interrogation by supervisors and managers, Employer threats of adverse changes with respect to vacation scheduling, Employer removal of Union literature from employee break rooms, Employer prohibition on discussing the Union in non-work areas and non-patient-care areas of the hospital on non-work time, Employer solicitation of grievances, and interrogation and threats of hospital closure by physicians acting as agents of the Employer. Such conduct was all violative of Section 8(a)(1) of the Act and was not de minimis. Such conduct thus warrants setting aside the election. *Enola Super Thrift*, 233 NLRB 409. Moreover, the Hearing Officer incorrectly considered each objection only in isolation and, where he found that the evidence supported the objection, found the conduct in question insufficient to have affected the results of the election. The Hearing Officer at no point in his Report considered the objections evidence as a whole or cumulatively. When the

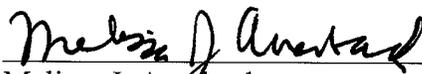
evidence is viewed as a whole, it is clear that the Employer engaged in conduct that affected the results of the election and warrants setting aside the election and the direction of a new election.

**Conclusion**

For the foregoing reasons, the Employer engaged in conduct that affected the results of the election. The election should therefore be set aside and a new election should be ordered.

Respectfully submitted,

CORNFIELD AND FELDMAN

By:   
Melissa J. Auerbach

Attorneys for Petitioner

Dated: March 20, 2012

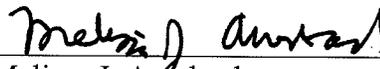
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**CERTIFICATE OF SERVICE**

Melissa J. Auerbach, an attorney, hereby certifies that on March 20, 2012, she caused the foregoing **Petitioner's Brief in Support of Exceptions to Hearing Officer's Report and Recommendations on Objections to Election** to be served upon the following by email attachment to the addresses shown below.

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