

1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center and 1199 SEIU United Healthcare Workers East, New Jersey Region. Cases 22–CA–029599, 22–CA–029628, and 22–CA–029868

September 26, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On November 21, 2011, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party Union each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge’s rulings, findings,² and conclusions,³ as modified below, and to adopt the recommended Order.

¹ The Respondent filed a motion to stay proceedings, arguing that the Board lacks the necessary quorum to decide this case on the grounds that the President’s recess appointments of Members Block and Griffin to the Board were invalid. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB 161 (2012), we deny the motion.

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has attempted to undermine the judge’s credibility findings by noting that he referred to Avian Jerboa, a minor witness for the Acting General Counsel, as a male when she was female. However, Jarbo testified on the 4th day of a 19-day trial, and her testimony was brief. The judge’s gender mistake in later drafting his decision from a lengthy record was unfortunate but minor. The Respondent also emphasizes that Rita Onyeike, at the hearing, identified the woman who confronted her on September 12, 2010, concerning the union scrub she was wearing at work as the Respondent’s director of nursing, Inez Konjoh, but gave a physical description that did not fit Konjoh. The transcript indicates, however, that even the Respondent’s own counsel understood that Onyeike had simply mistaken the Respondent’s administrator, Doreen Illis, for Konjoh at the time of the incident. This was a plausible mistake, as Onyeike had not previously met either woman.

³ The judge found that the Respondent unlawfully issued employee Sheena Claudio a written warning on September 20 for a medication administration error. However, based on the record evidence that, during the same time period, the Respondent warned another employee for a similar error, we find that the Respondent established that it would have disciplined Claudio even in the absence of her union activity, and we accordingly reverse the judge’s finding. See *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

This case arises from a union organizing campaign among the Respondent’s nursing employees at its Somerset, New Jersey nursing home. The Union won a Board-conducted representation election held on September 2, 2010, and was later certified by the Board as the unit employees’ collective-bargaining representative. As found by the judge, both before and after the election, the Respondent committed a variety of serious unfair labor practices, including disciplining and discharging four union supporters, accelerating the resignation of another union supporter, eliminating the work hours of five per diem employees, interrogating employees about their union sympathies, and soliciting and promising to remedy employees’ grievances if they refrained from supporting the Union. We agree with virtually all of the judge’s findings for the reasons he gives, as modified below.

1. *The Respondent’s Antiunion Animus.* Based on the record as a whole, the judge found that the Respondent’s animus toward the Union was “beyond question.” The record fully supports the judge’s finding. The Respondent manifested its antiunion animus in various ways, including through its repeated unlawful interrogations of employees, unlawful solicitations of grievances, disparate and inconsistent treatment of known union supporters, and a number of its managers’ additional statements and actions. We find it unnecessary, however, to rely on the judge’s comments that the Respondent’s animus was also established by its “aggressive campaign” against the Union and by its having “urge[d employees] to vote against the Union,” as the balance of record still easily supports his finding.

2. *Discipline for Attendance Infractions.* On September 13, just 11 days after the election, the Respondent issued written warnings to prounion employees Jillian Jacques, Shannon Napolitano, and Sheena Claudio for excessive lateness. Each warning charged the employee with having been late on multiple occasions since January 1. In addition, the Respondent gave Jacques and Claudio separate written warnings for unexcused absences. We agree with the judge that all of those warnings were unlawful.

The Respondent claims that the written warnings issued to Jacques, Napolitano, and Claudio resulted from a lawful decision made by Administrator Doreen Illis and Director of Nursing Inez Konjoh in August—when they first assumed their respective posts—to more strictly enforce attendance requirements because of excessive infractions. That claim cannot withstand scrutiny.

As found by the judge, the evidence establishes that the Respondent targeted union supporters for more strict enforcement of its attendance policy. Unit Manager and

admitted Supervisor Jackie Southgate testified that, prior to the organizing campaign and election, no discipline was issued for lateness. Employees calling in late for work were simply referred to a charge nurse. During the critical period before the election, however, Director of Nursing Konjoh told Southgate that a union meeting was being held that day and that, if Jacques arrived or called in late, Jacques should be directed to Konjoh. If there were any doubt about the reason for that change in procedure, Konjoh removed it after the election when she explained to Southgate that “they would be obviously looking at the people who they believed to be union organizers closely and if they were given a reason to write them up they would write them up.” Against this backdrop, we have little trouble affirming the judge’s findings that the written warnings issued to Jacques, Napolitano, and Claudio for lateness were unlawful.⁴

Similarly, we affirm the judge’s findings that the Respondent unlawfully disciplined Jacques and Claudio for absenteeism. Jacques received a written warning for being absent three times within 60 days, all three times on days before a nonworking day. Claudio received a written warning for being absent three times in 90 days, twice on days before a nonworking day. When Claudio questioned Director of Nursing Konjoh whether the Respondent had a rule prohibiting the use of sick days adjacent to nonworking days, Konjoh told her the rule was in the Respondent’s employee handbook. In fact, the handbook contained no such rule. Moreover, when Claudio complained to Unit Manager Southgate about the warnings, Southgate told her to “be careful because you already know what’s going to happen. What they’re trying to do. Just be careful and don’t be late. . . . Don’t give them a reason.” Last, the Respondent’s unlawful motive is further revealed by its more lenient treatment of another employee, who received only a “documented verbal” warning for four absences in 60 days, twice on days before a nonworking day. All of that evidence fully supports the judge’s findings that the Respondent’s discipline of Jacques and Claudio for absenteeism was unlawful.

3. *The Discipline and Discharge of Jacques.* The judge found that the performance related disciplinary notices given to Jacques after the election, her suspen-

⁴ In their own defense, each discriminatee said she had not previously been disciplined for lateness, and that her “late” arrivals were due to personal circumstances that were known to the Respondent and treated as acceptable. The Respondent introduced lateness warnings purportedly issued to four other employees at the same time, but—unlike all of the attendance warnings issued the discriminatees—only one of those is signed and indicates that it was actually given to the employee. We therefore give that evidence little weight.

sion on February 10, 2011, and her discharge the following day were unlawful. We agree.

Jacques was a senior nurse at Somerset, having worked on the evening shift for 11 years. On many occasions during the 2 years preceding her discharge, the Respondent had selected Jacques to serve as a charge nurse, an acknowledgment of her experience and expertise.⁵ The Respondent, however, took a decidedly different view of Jacques after the election.

On September 28, the Respondent gave Jacques a first written warning for failing to document the postfall and postadmission status of two patients. Jacques pointed out and Konjoh confirmed that another nurse, Patty Beck, had been responsible for one of those incidents. Konjoh, however, “forgot” to discipline Beck.

On November 1, Jacques received a written warning for not fully completing an incident report while she was acting as a charge nurse. Jacques had left a message for Konjoh the morning after the incident, informing her that the night aide involved had left the facility without giving Jacques her own written statement, but that Jacques would obtain it (which she did). Jacques explained that she had not completed the incident report in other respects because the incident occurred late at night and she was very busy that night. On October 21, by contrast, Beck received only a verbal warning for failing to complete incident reports in the same way as Jacques for two separate incidents. The credited record also shows that prior to the election the Respondent did not discipline nurses for failing to fully complete incident reports.

On February 10, 2011, Jacques received a disciplinary notice and suspension for three additional documentation infractions. The disciplinary notice also cited the (unlawful) “lateness/pattern of absenteeism” notices Jacques had received the previous September. The Respondent discharged Jacques the next day based on that notice.

As stated, we agree with the judge’s finding that the Respondent’s discipline and discharge of Jacques was unlawful. Initially, we observe that the Respondent’s scrutiny of Jacques followed Konjoh’s postelection admission to Unit Manager Southgate, described above, that the Respondent would be closely monitoring suspected union organizers and writing them up. Also following the election, Administrator Illis specifically instructed employee Mohamed Bockarie, whom Illis had

⁵ Charge nurses received orders for treatments and for medications from physicians, transcribed those orders onto written physician order sheets, called the pharmacy for prescribed medications, scheduled appointments and tests for the residents, and sometimes acted as supervisors on the evening shifts. Management witness confirmed that charge nurses were “high performers” and “dependable” nurses “you have confidence in,” and that not just “any nurse” would be made a charge nurse.

brought in from another facility to be her spy, to look for documentation errors committed by Jacques. The Respondent's discipline and discharge of Jacques followed in turn.⁶

The Respondent's unlawful motivation is also shown by its departure from its own disciplinary policy. Management witnesses confirmed that, under that policy, attendance discipline and performance discipline were segregated, and that discipline in one track did not affect discipline in the other. In Jacques' case, however, the disciplinary notice that triggered her suspension and discharge cited both Jacques' attendance notice from the previous September and the performance infractions described above.

Finally, we observe that the Respondent continued to assign Jacques to work as a charge nurse up until her discharge. We find it implausible that the Respondent would continue to confer such responsibility on Jacques if the Respondent truly believed her performance had deteriorated to a point warranting her discharge.⁷

For all of the above reasons, we affirm the judge's finding that the Respondent's discipline and discharge of Jacques was unlawfully motivated by her union activity, and that the Respondent has not shown that it would have taken the same action in the absence of that activity.⁸

5. Reduction in Hours for Per Diems. The credited testimony also fully supports the judge's finding that the Respondent unlawfully reduced the work hours of five

⁶ We recognize that Jacques' discharge on February 10, 2011, came more than 5 months after the election. We do not find that lapse of time significant, however. The Respondent's unlawful discipline of Jacques commenced within weeks of the election. That it was thereafter interspersed over the succeeding months reflects, as Director of Nursing Konjoh acknowledged to Unit Manager Southgate, that Jacques "was being very careful to follow all the rules and regulations; being very careful so that she wouldn't get written up."

⁷ The Respondent emphasizes that Jacques had also received a warning for improper pain assessment in December 2009. That incident occurred more than a year before Jacques' discharge, however, and the Respondent did not even cite it as a basis for terminating her in February 2011. We therefore give it no weight.

⁸ The Respondent introduced evidence of performance related discipline for 17 other LPNs during the same timeframe. However, the Respondent's imposition of oral, first written, second written, and final warnings appears to have been arbitrary and inconsistent. Moreover, it is clear from the record that other LPNs who committed errors that were similar to or worse than those committed by the discriminatees during the same timeframe were not discharged.

certified nursing assistants (CNAs) whom it employed on a per diem basis. In particular, Konjoh told Southgate not to call per diems to work without her permission, explaining to her that in a second election per diem employees would need a minimum number of work hours to be eligible to vote. Whether the Respondent targeted the named per diem CNAs because it believed that each of them supported the Union or targeted all per diem CNAs on the assumption that most or all supported the Union—both inferences are strongly supported by the record here—its motivation was unlawful. See, e.g., *Evenflow Transportation*, 358 NLRB 695, 697–698 (2012); *Delchamps, Inc.*, 330 NLRB 1310, 1315 (2000).⁹

6. Reinstatement. The Respondent contends that even if the discharges of Napolitano, Wells, Claudio, and Jacques were unlawful, we should not order their reinstatement, because their performance errors create a "serious risk" to residents' health and safety. In certain limited circumstances, the Board has recognized that its customary reinstatement remedy is not appropriate,¹⁰ but this is not one of those cases. Here, with one exception,¹¹ the Respondent did not even allege that the discriminatees committed any misconduct other than the

⁹ Although the Respondent contends that it reduced the CNA discriminatees' and other CNAs' work hours for legitimate business reasons, it actually hired additional per diem CNAs during the same period. The Respondent also emphasizes that it offered two of the discriminatees full-time or regular part-time positions, which they declined. The judge found, however, that the Respondent knew those two individuals had other jobs or personal situations that would preclude their accepting those offers. Finally, although the Respondent claimed that three of the CNA discriminatees were insufficiently "flexible" in their hours available for work, the record shows that it employed other per diems and even licensed practical nurses (who were paid significantly more than CNAs) in many of the same time slots the discriminatees had formerly worked.

¹⁰ See, e.g., *Hawaii Tribune-Herald*, 356 NLRB 661 (2011) (discussing denial of reinstatement remedy (1) when employer, after unlawfully discharging employee, has discovered pre-discharge misconduct that would warrant discharge or (2) when employee has engaged in such serious postdischarge misconduct that employee is "unfit for further service"), *enfd.* 677 F.3d 1241 (D.C. Cir. 2012).

¹¹ After Wells' discharge, Illis found that Wells had forwarded to her home email address a number of September messages concerning the events leading up to her termination. Illis testified that this violated company policy and that, if she had discovered it earlier, Wells would have been discharged for it. The judge correctly gave this issue no weight in determining whether Wells' discharge was unlawful and left it to compliance. In any case, given the credited record, which indicates that the only emails forwarded by Wells related to her discipline over scheduling issues and therefore contained no confidential patient information, it seems highly unlikely that the Respondent would have discharged Wells for this "misconduct," even under its confidentiality policy.

infractions for which they were disciplined. Having found virtually all of that discipline unlawful, there is no basis for denying the discriminatees reinstatement and, of course, backpay to remedy the Respondent's unfair labor practices.¹²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, Bound Brook, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Saulo Santiago and Michael Silverstein, Esqs., for the Acting General Counsel.

Jay W. Kiesewetter and Steve W. Likens, Esqs. (Kiesewetter Wise Kaplan Prather, PLC), of Memphis, Tennessee, for the Respondent.

Ellen Dichner, Esq. (Gladstein, Reif & Meginniss, LLP), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on various charges and amended charges filed by 1199 SEIU United Healthcare Workers East, New Jersey Region (the Union), a

¹² Following issuance of the judge's decision, the Acting General Counsel obtained an order for the interim reinstatement of Napolitano and Claudio from the United States District Court for the District of New Jersey under Sec. 10(j) of the Act. The court declined, however, to reinstate Jacques and Wells. It is well established that 10(j) rulings are not binding on the Board because the issues litigated in an injunction proceeding are different from the issues litigated before the Board. *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1287-1288 (D.C. Cir. 1993); *Dorsey Trailers*, 327 NLRB 835 fn. 2 (1999), enf. granted in relevant part 233 F.3d 831 (4th Cir. 2000). Where reinstatement is sought in a 10(j) proceeding, the court must determine whether that remedy is appropriate, applying the standard for interim injunctive relief under the Act, before the Board has made its own determination on either the merits of the unfair labor practice proceeding or the appropriate remedy. That standard for injunctive relief encompasses concerns that are simply irrelevant to the Board's determination of a proper remedy. Conversely, under Sec. 10(c) of the Act, the Board is directed to take "such affirmative action . . . as will effectuate the policies of [the] Act." Moreover, where the Board concludes that the respondent has acted unlawfully, it must determine the proper remedy "with full weight given to the fact that the respondent's unlawful conduct has been solidly established." *Coronet Foods*, supra at 1287. The Supreme Court has recognized that "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." See *NLRB v. Strong*, 393 U.S. 357, 359 (1969) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)). The Board's reinstatement and backpay remedy here will make Wells and Jacques whole. Finally, the District Court's discretion in awarding relief in a 10(j) proceeding is constrained by standards established under that provision; in contrast, Congress' grant of remedial authority to the Board "is a broad one." *Id.*

second order consolidating cases and amended consolidated complaint was issued on April 6, 2011, against 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center (the Respondent, the Employer, or Somerset Valley).¹

The complaint, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (a) interrogating its employees about their union membership and (b) soliciting its employees' complaints and grievances, thereby promising its employees increased benefits and terms and conditions of employment if they refrained from union organizational activities.

The complaint also alleges that the Respondent unlawfully issued written warnings to employees Sheena Claudio, Jillian Jacques, Shannon Napolitano, and Valarie Wells. It is also alleged that the Respondent discharged Claudio, Jacques, Napolitano, Wells, and Lynette Tyler. It is further alleged that the Respondent reduced the hours of per diem employees including Daisi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs because of their union activities.

The Respondent's answer denied the material allegations of the complaint and asserted an affirmative defense that the complaint was barred by Section 10(b) of the Act.² A hearing was held on 19 days between April 27 and June 28, 2011, in Newark, New Jersey.³

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a corporation, having an office and place of business in Bound Brook, New Jersey, has been engaged in the business of operating a nursing home and rehabilitation center providing health care and related services. During the past 12 months, the Respondent derived gross revenues in excess of \$100,000 and received at its Bound Brook facility, goods and services valued in excess of \$50,000 directly from suppliers located outside New Jersey. 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 has been a health care institution within the meaning of Section 2(14) of the Act.

¹ The docket entries are as follows: Case 22-CA-029599; charge filed on August 31, 2010; first amended charge filed on September 10. Case 22-CA-029628; charge filed on September 22; first amended charge filed on September 30; second amended charge filed on October 22, third amended charge filed on October 26; fourth amended charge filed on February 8, 2011; fifth amended charge filed on February 16; Case 22-CA-029868 filed on March 1, 2011.

² No evidence was adduced concerning this affirmative defense. Accordingly, it is dismissed.

³ Following the close of the hearing, certain subpoenaed documents were received in evidence as CP Exh. 12.

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The Respondent's answer denied the labor organization status of the Union. On August 26, 2011, the Union was certified by the Board in a representation proceeding involving this facility. Accordingly, I find that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Ownership and hierarchy of the Respondent

In the fall of 2006, the facility at issue was purchased and began to be operated by Healthbridge Management, Inc., CareOne Management, Inc. which also owns and operates other skilled nursing and rehabilitation centers. This facility, Somerset Valley, has 32 patient rooms occupied by a maximum of 64 patients, also called residents. It is subject to New Jersey and Federal Department of Health regulations.

The Employer employs about 75 bargaining unit employees. The number of employees scheduled to work at any given time depends on the number of patients residing at the facility, called the "census."

Jason Hutchens, the regional director of operations for CareOne, has overall responsibility for the operation of the facility. The top official at the facility itself is the administrator. CareOne's first administrator was Carolyn Allen, who was replaced by Elizabeth Heedles 2 years' later, in December 2008. Doreen Illis replaced Heedles on August 3, 2010.

The nursing department is the most important area in the facility because it is directly involved with patient care. The facility has had several directors of nursing. Rebecca McCarthy was the director of nursing under Administrator Heedles. McCarthy was replaced by Christiana Enworum, and then Eileen Meyer, who began work in the spring of 2009. Kamala Kovacs was the next director of nursing, who was then replaced by Inez Konjoh on August 16, 2010. Jacqueline Engram, the vice president of clinical operations, who replaced Konjoh in January 2011, stated that Konjoh was transferred due to poor and "inconsistent performance" in clinical meetings, completing investigations in a timely manner, and her overall management of employees. She stated that these performance issues began in November 2010.

The Respondent employs three categories of nurses: registered nurses (RNs), licensed practical nurses (LPNs), and certified nurses' aides (CNAs). The RNs and LPNs administer medicine to the patients during a medication pass (med pass), and administer treatments to the residents, such as applying bandages and lotions to their skin. The CNAs assist the residents with activities of daily living, such as distributing food to them, feeding them, cleaning them, and helping them walk.

The Employer also employs supervisory nurses who act as "unit managers" and supervisors. There are also nonsupervisory charge nurses who act as the "link between the floor nurse and the physician," whose duties include receiving orders for treatments and medications from physicians and transcribing those

orders onto written order sheets,⁴ calling the pharmacy for medications, and scheduling appointments and tests for the patients. When a charge nurse is not on duty, the supervisory nurse acts as the charge nurse.

The facility operates during three shifts: 7 a.m. to 3 p.m. (day shift), 3 to 11 p.m. (evening shift), and 11 p.m. to 7 a.m. (night shift).

The nursing staff is categorized in four ways: full time, where the nurse is scheduled to work 40 hours per week and the nurse receives benefits; part time with benefits, where the nurses are scheduled to work at least 24 hours per week; part time without benefits, where the nurses do not have to work a minimum number of hours; and per diem, where the nurse works on an "as needed" basis without a regular schedule. Per diem employees earn about \$2 more per hour than the part-time employees, but do not receive benefits. All nurses receive additional pay, called a shift premium, for working at night and on weekends.

2. Employees' interest in the Union

In about June 2010, Nurse Sheena Claudio, who worked full time on the day shift, was told by Administrator Elizabeth Heedles that the Employer was reducing the hours of work of the employees and was also changing their schedules. The new changes were to be effective August 1, 2010. Heedles offered her work on the night shift. Claudio refused that assignment because she worked the night shift on another job. Heedles then offered her work as a per diem.

Nurse Shannon Napolitano had worked on the day shift, but also worked double shifts 2 days per week and every other weekend. She was also told by Heedles that her schedule would be changed to a 5-day per week schedule. Napolitano told her that she had an agreement with the Respondent to work double shifts and weekends because her home was 1 hour away from the facility. Heedles told her that that arrangement "does not matter" and her new schedule was designed to meet "the needs of the building." Nurse Jillian Jacques worked a full-time evening shift and was told by Heedles that her hours would be changed to part time. Jacques asked whether the change was "legal." Unit Manager Jacquie Southgate, who worked a full time, Monday to Friday shift for 10 years, was told by Heedles that she would be working every other weekend.

The above employees spoke among themselves and with others, including supervisors, concerning the proposed changes and Heedles' abrupt manner in announcing them. Certain workers called the Employer's telephone "hotline" and advised them of the issue. Jacques called Vice President of Human Resources Andrea Lee, who told her that she was aware of, but surprised at the changes and promised to "look into it."

⁴ The information is first written onto the physician order sheet (POS) and then onto medication administration record (MAR) and treatment administration record (TAR) sheets, to be discussed below.

Lee visited the facility in about June 2010 and met with about 10 nurses. At the meeting, Claudio showed her the 30-day notice of changes in schedules distributed by Heedles, adding that the employees were “upset” at the changes. Lee responded that she was “unaware” of the extent of the changes although she knew that some minor changes would be made. Lee promised the workers to look into the matter and advise them, but she never did.

Claudio testified that after she did not hear from Lee, she learned the phone number of the Union. She then spoke to her coworkers in the employees’ break room and at the nurses’ station about the need for a union and she then contacted the Union and spoke to Brian Walsh, its organizer.

Claudio and Napolitano met with Walsh in late June 2010 and explained their disagreement with the Respondent’s schedule changes. They gave him a petition which was distributed by Claudio, Napolitano, and Jacques, and signed by the workers at the facility. The petition set forth their support for the Union. Walsh was told how many employees worked at the Respondent.

Claudio and Napolitano testified that upon their return to the facility after that meeting they advised their coworkers and admitted statutory supervisor and manager, Mary Apgar, and Jacqueline Southgate, who became a statutory supervisor in August 2010, wound nurse Irene D’Ovidio, and Zoraydee (Heidi) Neer, the MDS coordinator who works with Mary Apgar, what had occurred. They did not know if anyone advised Administrator Heedles or Director of Nursing Kovacs that the workers were pursuing union representation. Apgar, Southgate, and D’Ovidio told Claudio, “[O]k, you got to do it; it’s unfair what’s going on,” and asked her to keep them updated. There was a sentiment among the people Claudio spoke to that Heedles should be discharged.

Claudio stated that she distributed seven or eight authorization cards at work and she told Manager Apgar, and Southgate, Neer, and D’Ovidio that she was doing so. She also collected about 20 cards at work which had been solicited by her and others. Napolitano stated that she distributed and received about 20 cards in the break room, near the nurses’ station and at the nurses’ carts.

Southgate testified that she spoke to Napolitano on a daily basis, and also had conversations with Claudio, Wells, and others at the facility regarding contacting a union to represent them. However, when she became the supervisory unit manager in August 2010, she told those nurses that she could not speak to them about the Union, and she did not.

Jacques spoke to her coworkers about the Union, and distributed about 20 union cards to them while at work. Some of the cards were returned to her at work. A Union YouTube video was made at her home, on which employees including Claudio, Jacques, Tyler, and Wells spoke in favor of the Union.

Another meeting was held at which Wash asked for a list of employees. Napolitano obtained a list from Sheena Orazco who worked in the business office. Orazco, the receptionist and

payroll benefits coordinator, testified that she did not give Napolitano a written list of all employees because she did not have access to such information. Rather, Orazco orally gave her the names of workers “off the top of [her] head.”

Claudio testified, at first, that she spoke to “mostly everyone” about the union meetings, but later amended that testimony to state that she spoke to six to eight workers. Claudio, Napolitano, and Jacques were the “most active” supporters of the Union, speaking to their coworkers at the nurses’ station, by text message and cell phone, and in the break room.

Three or four union meetings were held in a diner, and others were held at employees’ homes. Napolitano estimated that she attended about 12 union meetings before the election. Claudio stated that since she and Napolitano were the day-shift workers who were most interested in the Union, they spoke to about 10 employees on that shift about the union meetings.

Claudio and Napolitano wore, and according to Napolitano’s estimate, about 25 to 30 employees also wore a “respect-1199” purple sticker on their scrub top for 1 day during the entire time they worked that day that summer before the election. Claudio stated that Apgar and Southgate saw her wearing the sticker.

The Union filed a petition for an election on July 22, 2010. It was brought to the Board’s office by Jacques, Napolitano, and Walsh. Napolitano sent a text message to Apgar and Southgate that day telling them that she was going to file the petition. Southgate testified that Napolitano and Claudio told her that they filed the petition.

About 2 weeks before the election, the Union distributed a brochure entitled “At Somerset We’re voting Yes for 1199 SEIU.” It contained individual photographs of 35 employees including Claudio, Jacques, Napolitano, and Wells. Next to each picture was a one-sentence statement of support for the Union. The Union also distributed a wristband, hat, and a scrub top which is a shirt worn by medical personnel. All three items were purple and bore the union logo.

Jason Hutchens, CareOne’s regional director of operations, and Administrator Illis testified that, before the election, they viewed the union brochure containing the photographs of 35 employees, including Claudio, Jacques, Napolitano, and Wells, with their statements of support for the Union. Hutchens commented to Illis that he was surprised that all of the facility’s employees were not in the brochure. He also told Illis that he had viewed the YouTube video produced by the Union in which employees of the Respondent voiced their support for the Union. Illis told him that she did not want to look at the video because she did not want to see that the staff was so unhappy that they believed that they needed a union.

The election was held on September 2, 2010, in a unit essentially of regular part-time and per diem nonprofessional employees including licensed practical nurses and certified nursing assistants.

Of about 60 eligible employees, 38 voted for the Union, 28 voted against it, and there were 5 challenged ballots. A hearing on the Employer’s objections to the election was held in October and November 2010. Certain objections were withdrawn by

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the Employer. On January 19, 2011, the hearing officer overruled all of the remaining Employer's objections. The Employer appealed, and on August 26, 2011, the Board affirmed the hearing officer's report and certified the Union. 357 NLRB 736.

3. The Employer's actions following its receipt of the petition

Hutchens testified that he was "surprised" when he learned that a petition had been filed on July 22 because the facility had a high patient census and "good performance" which were apparently "masking issues" there.

On July 28, Heedles distributed a notice to all employees which stated, in part:

The decision [whether this Union is going to represent some of the staff who work in our Center] is a very serious one. It could change our relationship and the way we deal with one another.

The fact this petition has been filed is very disappointing. I think it would be a mistake to bring in a union here at our Center. I believe a union could do things that interfere with our business and our lives. The way I see it, having a union here is not in the best interest of our Company or the staff who work here.

Due to the serious consequences that could occur if a union is voted in, we hope everyone will take the time to learn the true facts before making a final decision about this important issue. I am confident that when you have all of the facts and understand the whole story, you will agree that we do not need a union here at Somerset Valley Rehabilitation & Nursing Center.

In the meantime, we need to continue to work together and remain focused on providing the very best services we can to our residents and fulfilling our mission to our community.

4. The State survey and changes in the Employer's administration

The New Jersey Department of Health conducts annual surveys to ensure that facilities such as the Respondent are in compliance with State and Federal regulations concerned with patient care. There is a "window period" within which the survey may take place 2 to 4 months before or after the last survey.

During the survey, the surveyors examine each aspect of the facility's operation, focusing on patient care and nursing practices. The surveyors make rounds with the staff, speak to patients, families, and staff members, and check the patient charts and records of medication and treatment administration.

During the December 2009 State survey, the facility received two "G" ratings for pain assessment. The surveyors did not believe that a patient's pain was adequately controlled by the nurse assigned to her care. The facility corrected the deficiencies within a couple of weeks after receiving the report, and submitted a written plan of correction in late December 2009.

The New Jersey Department of Health accepted the plan as written and conducted a resurvey in January 2010.

Hutchens testified that it was "common" for a facility to be cited for deficiencies in a survey. He was not aware of a monetary penalty being imposed as a result of the 2009 survey.

Hutchens stated that in order to prepare for the recertification survey scheduled for the following year, January 2010, CareOne brought in Jessica Arroyo, its regional nursing clinical resource consultant, and Jacqueline Engram, the corporate vice president of clinical operations to assist in the preparation and to ensure that the facility met the minimum requirements to remain in compliance with State and Federal regulations, and with the plan of correction.

The recertification survey was done on January 11, 2010, which found that the Respondent was in substantial compliance, but it was recommended that it receive a \$200-per-day penalty for 27 days. Hutchens did not know if the Employer paid the penalty.

Hutchens stated that in the months following the resurvey there was "increased scrutiny" of the nursing department, including a greater oversight of the activities of the director of nursing and the nurses, and a greater level of accountability was assigned by the administrator and the director of nursing to the nursing staff. He learned from Heedles, Engram, and Andrea Lee during this time that scheduling the nursing staff for work was a concern, and that the management of the facility was also a concern which he was "struggling to correct." For example, Lee reported to him that when she visited the facility in the spring of 2010, the employees complained that their schedules were being changed.

Heedles had been the administrator at the facility since December 2008. On August 3, 2010, only 1-1/2 weeks after the petition was filed, she was replaced by Doreen Illis. Hutchens testified that he had "concerns" with Heedles' administrative abilities. He stated that in the spring and summer of 2009, there were issues concerning scheduling and staffing, and that she was "struggling" to staff and schedule the Center. He further noted that the "data didn't make sense" in that the staff to resident ratios did not "match up at times." Nevertheless, he transferred Heedles to the Holmdel facility, a center with double the number of beds because it was a "stable" facility with an experienced director of nursing and staff, and was a much easier facility to operate. Hutchens was also concerned that the Employer did poorly on its last annual survey which was conducted in December 2009.

In June or July 2010, Hutchens decided that Heedles could not handle the work of director of nursing, and nursing services were not improving at an appropriate rate. Accordingly, he decided to transfer Heedles in early August to the Holmdel facility, and replaced her with Illis who had been at Holmdel and impressed him as having 8 years of excellent service there. Director of Nursing Kovacs was also dismissed and Arroyo, the CareOne regional nurse, was brought in to prepare for the next survey expected in December 2010.

Then in mid-August 2010, Konjoh was brought in as director of nursing and Southgate was made unit manager. Southgate was employed for 18 years at the facility. She started as a CNA and then an LPN, and then was a supervisor in August 2008, and then became a unit manager in August 2010. As unit manager, she supervises the CNAs, ensuring that patient care was being delivered correctly, and the supervisors reported to her. Southgate reported to the director of nursing.

Similarly, Hutchens terminated Director of Nursing Kamala Kovacs in mid-August 2010, replacing her with Inez Konjoh, who began work at the facility on August 16. Konjoh testified that she was hired to get the Employer "back in shape." Konjoh was referring to the poor survey reports the prior year.

5. The Respondent's meetings

a. Meetings with employees

Hutchens stated that at meetings with employees beginning in late July or early August 2010, after the petition was filed, employees complained to him about the proposed change in schedule due to occur on August 1, 2010. The new schedule announced by Heedles was not implemented, and the old schedule was retained.

The purpose of the meetings, according to Hutchens, was to provide information concerning union organizing. He held meetings on 3 separate days with small groups of employees. On each date, he held seven meetings so that each employee on each shift could attend. The meetings took about 20 to 30 minutes.

The first meeting was in late July or early August, at which Lee was also present, and during which a videotape was shown which demonstrated that employees did not need the Union.

The second meeting, in the first week in August, and the third meeting, in about mid-August, were also attended by Illis. According to Hutchens, none of the employees spoke at the first two meetings. According to Napolitano, in one of the meetings, Hutchens announced that he had "heard your complaints" and he transferred Heedles to the Holmdel facility and brought Illis, the administrator there, to this location.

Hutchens testified that at the last meeting he announced that the purpose of the meeting was to apologize to the staff for issues that he missed, saying that he thought he rectified the problems by bringing in a new administrator and director of nursing, but apparently he had not. He outlined the extant issues as low morale in the facility; turnover in the position of director of nursing which resulted in a lack of consistency; Heedles' poor management and lack of tact in announcing schedule changes; the staffing and scheduling problems which left the facility short of staff; and stress in the facility due to the number of surveys by regulators. Hutchens stated that his presentation was interrupted by the employees who said that he was not seeing the "entire picture here." They related that the "real issues" were the lack of supplies, and treatment by management, and they asked him what he was going to do about it. Hutchens replied that "there is nothing I could do currently to rectify those things."

According to Napolitano, at that meeting when employees complained, Hutchens said that he "had no idea that these things were going on. I can't make immediate changes at this moment because it is illegal, but if we give them a chance they would try to show us."

In that meeting, Claudio testified that Hutchens said that management wanted the employees to give them a "chance to fix it." Claudio also quoted Illis as saying that she did not want to work with a union facility. Claudio attempted to explain to Hutchens the workers' reason for seeking representation, saying that they believed that they had nowhere to go; they contacted "corporate" but no one responded so they reached out to the Union. Hutchens offered to have his and Illis' cell phone numbers posted so that the workers could contact them if they had any problems. Illis denied that Hutchens or she asked employees for a chance to fix things without a union.

Jacques testified that at one meeting, Illis said that she wanted to "get a feel on what made us want to introduce a union into" the Respondent, and wanted "to try and help fix things." She said she asked her superiors whether, in being transferred to the facility, she would be held "responsible" if the Union was successful in organizing the center, and they said, "[N]o." She added that she would "feel offended if [the Union] came in. It would be like a slap in the face to [me] if the union was brought in there." Illis denied making those comments.

Unit secretary/CNA Lynette Tyler, and Napolitano testified that at the meeting with Hutchens, he said that he was "very disappointed" that the employees sought union representation, explaining that he believed that the facility was one of his "better run" buildings. He was quoted as saying that "I was not aware but I would do whatever I could to remedy the problem." He asked what problems they had. Tyler responded that her job was "very overwhelming" in that several people were giving her orders as to her work responsibilities, and she had trouble leaving work on time to care for her disabled child. She testified that she took orders from all the supervisors, performing work for the dietary manager and social workers.

Annie Stubbs testified that at one of the meetings, she complained that garbage bags were kept in an office where the staff did not have access to them when the office was locked. Hutchens told Illis to take care of the matter, and indeed, according to Stubbs, the following morning, Illis distributed garbage bags to "everyone." Hutchens denied that he asked Stubbs if she had any complaints about her job. He stated that she raised this matter voluntarily.

Tyler, whose job consisted of assisting the nursing staff in preparing admission and discharge records and making outside appointments for the patients, testified also that about 1 week after Illis became employed at the facility, she told Illis that her job was overwhelming. Illis asked her for a list of her responsibilities, and that, although she could make no promises, she would see "what changes she could adjust." Illis asked Tyler why the employees wanted a union. She replied, "[W]hy not?" Illis responded that she did not believe a union was needed,

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adding that the facility she previously worked in was not a union shop, and that she did not believe that the Union “would work for us.”

Tyler stated that 1 week later, a duty that she had since May, recording the weights of patients, was removed by the dietary manager. At about the same time as her duties were reduced, Illis approached Tyler and asked what she thought about the meetings being held by management concerning the Union. Tyler replied that they were “informative.” Illis then asked, “[W]here are you in terms of voting? Do you know if you were going to vote for the Union or not?” Tyler replied that she was unsure, was “sitting on the fence,” and that she was gathering information from the Union and management at the meetings in order to make an informed decision. Illis replied that “you do not need a union. Do you know how the rest of your co-workers were voting?” Tyler answered that she did not know. Illis then asked her “can you convince them to vote no?” Tyler responded that she had only been employed for 9 months while her coworkers had worked there for decades, and they could be expected to make their own decision. Illis told her to “find out and ask who was going to vote yes and no. Question employees about how they were going to vote.”

Illis denied asking Tyler about her or her coworkers’ interest in the Union. She testified that Tyler was a “marginal employee” who was “argumentative at times, abrupt and aggressive occasionally, who would roll her eyes and walk away when being addressed.”

Stubbs stated that after one of the employer meetings, Director of Nursing Konjoh approached her and asked what she thought of the Union. Stubbs replied that she did not know, and Konjoh said that she knew Stubbs had a union at her other job, “but we don’t want one here.” Konjoh denied making those comments.

Claudio stated that about 1 or 2 weeks before the election, Konjoh approached her and asked if they could speak in the supply room. She told Claudio that she had been speaking to “everyone, I just didn’t get a chance to talk to you yet.” Konjoh asked Claudio, “[H]ow did I feel people were going to vote?” Claudio replied that she did not know how her coworkers would vote. Konjoh said she worked at a facility prior to this one at which she was a staff nurse and was in favor of the union then. Konjoh asked her to think about it, and “just give [her] a chance and vote no.”

CNA Avian Jarbo who works on the evening shift, testified that about 2 weeks before the election, Jessica Arroyo, the CareOne regional nursing clinical resource consultant, asked him to substitute for a nurse who called out for the following day.⁵ Jarbo replied that he could not work a morning shift. One week later, Arroyo approached him and asked, “[A]m I going to get a ‘no’ vote from you?” Jarbo replied that he was not certain because he had the day off on election day and was not sure that he would vote at all. Arroyo said that he must vote because if he did not vote, his absence would be counted as an

“automatic yes vote.” Jarbo expressed disbelief at that remark. Arroyo did not testify.

Hutchens conceded that the Respondent ran a “vote no” campaign, urging the employees to vote against unionization. He denied saying anything to employees regarding their pay being reduced, and denied telling them that he would provide improved benefits and terms and conditions of employment if they refrained from engaging in union activities. He also denied asking the workers to tell him their complaints, or saying that he was present to fix their problems or remedy their grievances. He did admit saying, however, that he could not make any promises and could not rectify any problems “under the current situation.”

Hutchens stated that in addition to the meetings held by him, he spoke to nurses at the nursing station and Lee held more than three meetings with the workers between the date the petition was filed and the election.

Konjoh stated that during a conversation with Jacques and other employees before the election, she was asked what she did that weekend, and the discussion involved church attendance and the Union. Konjoh conceded saying, “I pray to God that . . . there will be no union or something to that effect” and Jacques responded that “your prayers will not be answered.”

Konjoh stated that Chris Foglio, the chief executive officer of CareOne met with the employees before the election and spoke about ways in which the Employer was trying to bring programs that would help the workers, such as affordable housing and tuition reimbursement. Konjoh knew that Lynette Tyler wanted to return to school and Konjoh mentioned the tuition plan to her.

Illis testified that when she arrived at the facility she spoke with employees in order to educate them that as to why she believed that the Employer was a good place to work without a union. One purpose of such conversation was to persuade them to vote “no” in the election, but also to get to know them, and to learn whether the workers were aware of the benefits of working for the Employer. She stated that she may have told the employees that she would only address their issues if there was no union.

b. Meetings with management personnel

Pat Fleming, a labor relations advisor who works with the Respondent’s law firm, was at the facility 4 days per week from the time the petition was filed to the election. Hutchens attended three or four meetings in August with Fleming and the Respondent’s department heads, at which they “polled the managers,” reading the names of each voter from the *Excelsior* list, and asking each employee’s manager whether she believed that that employee would vote for or against the Union in the upcoming election.

Hutchens stated that some of the supervisors knew their employees well and therefore were “in a position to know which way employees felt about the union. . . .” Indeed, Fleming and Hutchens pressed the managers as to why they believed an employee would vote one way or another. Hutchens stated that the managers were supposed to get “accurate information”

⁵ “Calling out” means that an employee called the facility to report that she would not be at work that day.

concerning the people they supervised, and “if they don’t know those employees, they should know them certainly.” Illis testified that Fleming instructed them regarding how to speak to the workers about the Union.

Illis stated that one of the purposes of the meetings was that the managers could report any information about the Union that they may have heard. Also if the managers were distributing information to the employees that day, they could ask questions about such information at the meeting.

Unit manager and then supervisor, Southgate, attended the meetings with Hutchens, the management staff, Illis, Konjoh, Apgar, Glen Zeller, and Ozvaldo Carpio, all of them admitted statutory supervisors. Southgate stated that Fleming told her to listen to what the employees were speaking about in the night shift, and if they were discussing union activities, she was to report to him what they said. Fleming also told them that they should try to make employees aware of the disadvantages of having a union represent them. He spoke to the managers about the “negative consequences” of unionization at other facilities; that unions would make promises and not fulfill them.

Fleming asked the managers to try to speak to the workers to “try to feel them out; how they stood” concerning the Union, but that they should not put “undue pressure” on them. In this regard, Fleming advised them what they could and could not say to the workers.

However, Southgate testified that, as the election became closer in time, there was “less concern” about how carefully they spoke to the workers, and they were assigned individual employees to talk to. She stated that each unit employee was discussed. She recalled Fleming speaking about Napolitano, and that it was believed that she was a “union organizer” and that it would make “no sense” to convince her to vote “no” because it was expected that she would vote in favor of the Union. Fleming also said that it was believed that Claudio was “very pro-union.” Konjoh opined that she was not certain how Lynette Tyler would vote; that she was “going back and forth” but that she would speak to Tyler. Fleming noted that Stubbs’ other job was with a unionized employer. He also said that he believed that Jacques would vote for the Union.

Konjoh conceded that the Respondent attempted to persuade employees to vote against the Union through leaflets distributed to the workers, and also admitted being told when she arrived at the facility that the Employer wanted to remain “union free.”

Southgate testified that, at a managers’ meeting after the election, Illis announced that the Employer would contest the election results and that she was “very disappointed in the outcome,” adding that it was a “reflection upon her personally.” She also stated that she did not want to work in a union facility.

Illis first testified that, after the election, she did not tell the workers that she felt “betrayed” by them because the Union won the election. However, she then testified that she told them that she was “disappointed” and she may have said that she felt betrayed at the election results.

6. The discipline and discharges

a. The alleged accelerated resignation or termination of Lynette Tyler

On September 9, 2010, only 7 days after the election, Tyler gave Illis a letter, advising that as of September 22 she would be resigning in order to pursue a nursing program. The letter was in conformance with the handbook requirement that employees submit their notice of resignation 2 weeks in advance of their last workday.

Illis told her that she did not have to continue to work until September 22, but that she could leave immediately, and she did so. Tyler was paid for the 2 weeks that she had intended to remain at work.⁶ In the personnel action form completed on September 9, Illis wrote “not eligible for rehire—resigned with bad attitude toward company.”

Prior to her resignation, Tyler had announced to Illis and Konjoh that she wanted to return to school to obtain a nursing license. Illis and Konjoh encouraged Tyler to remain employed at the facility, citing a tuition reimbursement policy. Tyler testified that prior to the election, Illis was friendly and that they spoke frequently, however, after the election she found Illis to be distant and “cold” at a time that the work environment was “very, very hostile.”

Konjoh testified that Tyler advised her of her family situation and that Konjoh adjusted her schedule to permit her to arrive at work a little later than usual, or even allow her to bring her daughter to work. Konjoh denied that Tyler told her that she did not like the work environment or Illis’ attitude or demeanor. Konjoh stated that she spoke very frequently to Tyler about events occurring in the facility and the “whole atmosphere.” Konjoh told her that she hoped that “things would change and that I’m there for them; if they need me they can feel free to come into my office and talk to me.”

The Acting General Counsel alleges that the Respondent acted unlawfully in accelerating Tyler’s resignation date. Illis testified that it was her regular practice to have people leave the facility after they resigned rather than work during their notice period. In this regard, the Respondent received resignations from Supervisor Koottiyaniyil and Food Service Director Hoskins in January and April 2011, respectively. Although both workers gave 2-week notices of their resignations, they were told that they could leave the facility immediately and were paid for the notice period.

Illis testified that when Tyler announced that she was resigning, she and Konjoh attempted to persuade Tyler to remain with the Employer. Illis denied asking Tyler what problems she had with her job, and further denied any knowledge of Tyler’s union activities.

⁶ Illis testified that due to a bookkeeping error, Tyler was not paid, in full, until months later. It is not alleged that the failure to pay Tyler in a timely manner was unlawful.

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b. Attendance issues

As will be noted below, prior to the election, employees who were late called the office and told the person answering the phone that they would be late. They were told to get to work as soon as possible, and they were not generally disciplined for lateness or absenteeism, although the employee handbook provided that employees must arrive at work on time. The handbook also provided that “the Center must be able to depend on you to report to work regularly and on time. You are expected to work your full scheduled work day unless otherwise agreed upon in advance between you and your Supervisors. If you anticipate a need for time off, you should advise your Supervisor as soon as possible.” It also provides that “all non-exempt employees must clock in prior to their scheduled start time.”

Illis noted that, upon her arrival at the facility in early August, she observed that the facility experienced excessive absenteeism, but she apparently did not authorize the issuance of discipline for such misconduct until after the election. She testified that she identified absenteeism and lateness as “contributors” to the staffing issues present in the clinical areas, and she addressed those issues. Thus, in mid-September, following the election, she did an attendance assessment of all the employees and gave that information to Konjoh who issued discipline to the “most serious offenders.” Although Illis had the managers decide who was to receive the discipline and the level of discipline, she participated in meetings where discipline was issued. The most serious offenders included Claudio, Jacques, and Napolitano, the three union leaders.

Konjoh testified that she did not choose to investigate Napolitano’s attendance record alone. Rather, Illis “ran all the tardiness that were in the computer.” Indeed, Konjoh was told by her supervisors that a common practice had been that employees would just “show up” at the facility, with the supervisors unaware of when they were coming to work. Konjoh stated that, despite the fact that she was told that this was a common practice, she decided to issue discipline anyway. She added that she did not investigate whether, prior to her arrival at the facility, employees had been disciplined for lateness or absenteeism.

With respect to discipline for lateness and absenteeism, Konjoh stated that when she began work at the Respondent in August 2010, she decided to give all employees a “clean slate,” otherwise most employees would have been discharged. Accordingly, she stated that she did not look at employee records predating August 2010. However, she also stated that she disciplined employees for lateness and poor attendance based on their records from January 2010. For example, as will be seen below, Napolitano’s warning stated that her 93 latenesses since January 1, 2010, was excessive and unacceptable.

In addition to the discipline given to Claudio, Jacques, and Napolitano, the Respondent issued verbal warnings, first written warnings and final warnings to other employees for excessive lateness and absenteeism beginning after the election in September.⁷

⁷ Those employees were Beatrice Beauvoir, Lusette Ceus, Soledad

i. Sheena Claudio

Claudio testified that prior to the election on September 2, if she expected to be only a few minutes late to work, she would not call in. If she expected to be more than 15 to 20 minutes, late she would call the facility and tell the supervisor. The supervisor would ask how late she expected to be and would say “okay.” Prior to the election, Claudio received no discipline for lateness that she was aware of, and she was not spoken to about her lateness by any supervisor.

Supervisor Southgate testified, similar to Claudio, that prior to the election, the nurses simply called in that they would be late. The nurse answering the call would ask when they would arrive, and no discipline would be issued concerning the matter. Southgate testified that following the election, however, she was told by Konjoh that she should no longer accept calls from late employees, and that she should direct them to Konjoh.

On September 13, 2010, following the election, Claudio was given a first written warning for “pattern absenteeism” with the warning stating that “Sheena has called out sick 3 times within the last 90 days . . . two have been prior to a day not scheduled.” Claudio stated that she was not aware that she could not call in sick before or after a day off. She further noted that she was not warned after the first call out on June 21. The employee handbook contains no reference to calling out on a day before or after a scheduled day off.

The same day, September 13, Claudio received a second written warning for lateness which stated that she had been late 64 times since January 1, 2010, and that within the last 30 days she was late 16 times. “This is excessive and requires immediate improvement.” Claudio’s response was that she called and notified the supervisor when she expected to be more than 15 minutes late.

Claudio complained to Southgate that she had received two warnings for lateness when she had never been disciplined before for that reason. Southgate told her to “be careful because you already know what’s going to happen. What they’re trying to do. Just be careful and don’t be late and just do what you have to do. Don’t give them a reason.”

ii. Jillian Jacques

On September 13, 2010, Jacques was given a “second written warning” by Illis and Konjoh for “pattern absenteeism.” It stated that Jacques “called out 3 times within the last 60 days. Each occurrence was the day after an unscheduled day off therefore extending her period of time off.” At the meeting regarding the warning, Jacques told the two officials that the discipline was “unfair,” that she was sick on the days she was absent, and that they “were just waiting for her to call out and counting the days.” Jacques testified that, prior to September 13, she had not been spoken to by any manager about a “pattern of absence.”

Again on September 13, 2010, Jacques was given a first written warning which stated that she “has been late 109 times

Guillaume, Dominique Joseph, Novelete May, Patsy Benimadho, and Cassandra Burke.

since January 1, 2010. Within the last 30 days (August 5 to September 5) she was late 11 times. This is excessive and requires immediate improvement.”

Jacques explained that she was late because she had to arrange for nursing care at home for her mother who is disabled, and that she had advised previous director of nursing, Meyer, about it. Meyer told her to “improve on it.” Jacques stated that after that conversation with Meyer she continued to be late, but was not disciplined or even spoken to about her lateness, until Illis’ warning of September 13, 2010.

Southgate stated that on one occasion, Konjoh told her that she was aware that a union meeting was held on that day and that if Jacques came in late or called to report that she would be late, the call should be directed to Konjoh. Normally, said Southgate, the charge nurse handled such calls.

Illis offered to change Jacques’ work shift so that she could come to work on time, but Jacques declined, saying that she could not work another shift.

iii. Shannon Napolitano

Napolitano testified to the same practice as Claudio and Jacques concerning lateness, noting that, prior to the election, she was not disciplined for lateness, and no one spoke to her about her latenesses.

On September 13, 2010, Konjoh issued a first written warning to Napolitano, which stated that she “has been late 93 times since January 1, 2010, and 9 times within the last 30 days (August 13 to September 13). This is excessive and unacceptable. Her attendance needs immediate improvement or may result in termination upon the next episode of lateness.” A three-page dossier of single-spaced punch in and out times was attached to the warning. When she was given the warning, Napolitano told Konjoh that everyone at the facility was aware that she arrived at 7 a.m. instead of her start time of 6:45 a.m. because she lived 1 hour from the facility. Illis testified that she offered to carpool with Napolitano but she refused.

As noted above, Claudio, Jacques, and Napolitano were issued warnings for absences and latenesses on September 13, only 11 days after the election. Eight other employees were also issued warnings for attendance issues on September 13 and 14. In addition, a “punch detail report” for Gladys Amaka Agu for the period July 1, 2010, to September 30, 2010, was received in evidence. The report bore a handwritten note from Illis which stated, “Gladys, you were late 34 out of 37 shifts. Why?” No evidence of any discipline issued to Agu was offered in evidence.

c. Performance issues

Illis testified that when she arrived at the facility on August 3, 2010, she observed its operations and assessed its performance. She found that the operation was “chaotic and needed a lot of improvement.” She noted that the clinical areas were very disorganized and lacked strong leadership. She found irregularities in scheduling leading to chaotic staffing patterns in which employees did not know if they were working or scheduled to work. She was also concerned whether the facility would be ready for its annual survey, expected in December 2010, about 1 year after the last survey which resulted in two “G” level deficiencies, depicting actual harm to patients.

Illis did not believe that the facility was ready to be surveyed. She noted that no systems were in place to manage clinical information, no audits or reviews of medical records were being performed, and nursing leadership had to be strengthened. The person primarily responsible for performing these tasks was Inez Konjoh, the new director of nursing, who was assisted by CareOne regional nurse, Jessica Arroyo, and CareOne official Engram.

Director of Nursing Konjoh found similar disorganization in the Respondent’s operation within the first 3 to 4 weeks of her beginning employment at the facility in mid-August 2010. She found many problem areas: problems with patient care and improper documentation of patient care procedures, complaints from patients, families, and employees, staffing issues such as employees who arrived at work but were not on the work schedule, and employees scheduled to work but were not registered on the computer system to work.

Konjoh was also aware that the window was open for a new survey, so that she had to prepare the facility for that procedure. Konjoh believed that she had to address these issues immediately. In doing so she began auditing records and charts and implementing measures to “get us through the survey.”

i. Increased scrutiny of employee performance

I find that the evidence does not support the reasons for the increased scrutiny of the employees’ performance or the tightening of procedures which had been lax before the election. Rather, the evidence supports a finding that the Employer took the major steps that it did in response to the Union’s winning the election on September 2.

Thus, the Respondent took no affirmative steps relating to changes in its administration or increased oversight of the employees’ performance immediately following the results of the survey in December 2009. Thus, Illis was not appointed as the new administrator of the facility until, August 2010, 8 months after the December 2009 survey which, according to the Respondent, resulted in serious deficiencies.

Although there may have been heightened reviews of the MAR and TAR records from August 2010, even greater scrutiny was made following the September 2 election. There were undoubtedly reviews of such records before the election, but the evidence supports a finding that they were not as rigorous. Moreover, even if there were reviews before the election, it was only after the election that discipline began to be regularly and consistently issued for the mistakes found on those records.

In addition, CareOne had close oversight over Somerset Valley’s operations through its ability to view the Smartlinx data concerning the facility’s census and employment of personnel. Also, Hutchens, its regional director, visited the facility 1-full day per week from January 2010 until Heedles left in August. During his visits he met with the administrator, made rounds with her or the director of nursing, spoke to the workers, patients, families, and physicians, viewed the kitchen operation, and had communications meetings with the staff. Other CareOne personnel who were involved in reimbursement issues, rehabilitation, marketing, human resources, and clinical services also visited the facility on a weekly basis during that period of time.

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It is inconceivable, given the strict oversight of the facility by CareOne, the frequent visits by Hutchens and other specialists in the areas the Respondent cites as being critically deficient, that Hutchens' attention would have been brought to bear on the allegedly worsening situation for the first time in the spring of 2010, when he allegedly demanded increased accountability and performance improvements from Heedles and Meyers. This timing coincides with the employees' interest in the Union which began in late June. Accordingly, it is clear that no definitive, consistent disciplinary actions were taken in the period prior to the September 2, 2010 election. Indeed, Hutchens testified that he was surprised, when on July 22, the petition was filed since he believed that the facility had "good performance" and a high patient census. If Hutchens believed that prior to July 22 the facility's performance was good, what caused the drastic change in monitoring of employee performance and the start of the imposition of discipline and discharges within weeks of the election? The answer is that the timing of such employee monitoring and disciplinary measures coincided with the Union's election victory.

The Respondent's witnesses, primarily Illis and Konjoh, denied that any disciplinary actions were taken against the employees because of their activities in support of the Union, and also denied any knowledge of their union activities, except in those cases where they saw the union flyer. They also knew that Jacques and Napolitano were the Union's election observers, but nevertheless stated that their service as observers did not affect their decisions to discipline the two workers.

The records reviewed by Konjoh included the MAR and TAR sheets. The medication administration record (MAR) and the medications are kept on the nurse's cart. There are three carts for each of the three working shifts. The MAR contains the name and amount of medication to be given to each patient. That information comes from the physician's order. The physician writes an order for medications noting the name of the medication, the dose, and the number of days, and times per day the medication is to be given. The nurse who does the admission order prepares a physician's order sheet (POS), and transcribes that information onto the MAR, writing the medications on the MAR that the patient arrived with from another facility or home. Thereafter, if the physician writes additional orders for medication, the supervisory nurse, the charge nurse, the night nurse, or the floor nurse writes the order onto the MAR. The nurses on shifts thereafter are responsible to administer the medication to the patient as set forth on the MAR. The nurse initials the MAR in the box for the day to indicate that she administered the medication ordered. If the box is not initialed, that means that the medication was not administered during that shift. If the nurse administers the medication but does not initial the box, that is considered a medication error because nurses on later shifts will not know if the medication was actually administered.

The treatment administration record (TAR) is a record of the treatments given the patient such as applying salve or ointment, changing bandages, and treating a wound. The nurse is responsible to complete each treatment when scheduled. If a bandage

is applied, it is the practice for the nurse to write her initials and the date the treatment was performed right on the bandage so that later nurses can see when the bandage was placed. The TAR book is maintained at the nurses' station.

Konjoh began her review by examining the records of new patients who were just admitted to the facility, their admissions records, physical assessments done by the floor nurse, and the documentation of patient care for the new patients. Konjoh stated that she reviewed the MAR and TAR records at the time the patient is admitted, adding that other than at that time, she did not review those records unless she received a complaint from a patient, or there was an issue that required her to review those documents, where, for example, the patient says that he did not receive his medication or received the incorrect medication.

It also appears that the MAR and TAR sheets were reviewed by officials of CareOne after the election. Jacqueline Engram, the vice president of clinical operations for CareOne in New Jersey, visited the Employer once to three times per month between September, after the election, and December 2010. Her assistant, Jessica Arroyo, visited the facility each day in August during the union campaign, and was present for "clinical oversight" in support of the new director of nursing. Her job consisted of performing medical record audits, ensuring that the MAR and TAR sheets were done correctly. Arroyo reported to Engram weekly concerning "overall clinical concerns" and what she found when making rounds. Konjoh testified that when she arrived at the facility, she was assisted by Arroyo who audited the charts of the existing patients while she (Konjoh) performed that function for the new patients. Engram and Konjoh stated that such work was done in preparation for the survey.

Konjoh stated that she found omissions and errors in the charts that she audited and issued discipline based on her findings. Konjoh testified that discipline, and not just "fixing the problem" was the preferred course of conduct because the employee must be held accountable so that she would not make the same mistake again.

As will be seen below, following the election, discipline was issued based on errors in completion of the MAR and TAR records. The Acting General Counsel argues that, prior to the election, those records were not scrutinized as carefully as they were after the election, and that any errors in those records were not the subject of discipline. That argument is supported by the evidence. Thus, 11-year employee Jacques testified that reviews of past MAR records did not occur "too often." She stated that such a practice was not routine, but that it would take place only if an incident occurred where the date and nature of a particular treatment had to be determined. However, Jacques stated that after the election, she saw Illis and Konjoh behind the nurses' station where the TAR records are kept, reviewing and "combing through everything" in the TAR book "all the time."

Claudio testified that before the election, the Respondent's supervisor did not "really" review her administration of medications as set forth on the MAR or the TAR books. In fact,

according to Claudio, supervisors checked the MAR only once or twice per month. Supervisor Southgate testified that before the election there was no set schedule for reviews of MAR records. Rather, such reviews were done periodically as needed, about once per week, by the unit manager, the director of nursing, and the assistant director of nursing.

However, if a State survey was upcoming, or if a particular issue was raised, reviews were made more often. Southgate added that before the survey, the nurses are reminded to be “extra diligent” in their practices with in-service sessions being held to reinforce their training. Southgate conceded that, prior to the 2009 survey, there was a “closer review” of MAR, TAR, and admission records at the start of the window period before the survey. However, she stated that, prior to the 2009 survey, if the Employer’s reviewers found that certain MAR records were not initialed they, including Southgate, simply told the nurses to fill in the missing information, and that those nurses would “generally not be disciplined” for the missing information in the MAR and TAR records.

However, according to Southgate, after the election, MAR records were reviewed at least once per day, occasionally by her, but usually by Konjoh. Southgate testified that she knew that Konjoh was reviewing the MAR and TAR records because she saw her at the medication cart at the nurses’ station reviewing those records, or occasionally she took them into her office. Southgate added that she saw Konjoh review the MAR records more frequently on the first shift to which Napolitano was assigned, and the second shift, to which Claudio was assigned. Southgate stated that she (Southgate) reviewed the MAR and TAR sheets with about the same frequency, once or twice per week, before and after the election, but after the election she reviewed them more often.

I recognize that Konjoh testified that she does not look at the MAR or TAR records any more closely for some nurses than for others, but this is contradicted by Supervisor Southgate’s credible testimony that following the election, Konjoh spoke to her regarding disciplining employees. She said that “they would be obviously looking at the people who they believed to be union organizers . . . actively involved in trying to get a union in . . . closely and if they were given a reason to write them up they would write them up.” However, according to Konjoh, she had a “lot of respect” for Jacques, that Jacques “was being very careful to follow all the rules and regulations; being very careful so that she wouldn’t get written up”; and accordingly, Konjoh had not issued discipline to Jacques. Konjoh did not tell Southgate that she was looking for something to write Jacques up for, but implied that such was not the case, using words “to the effect that if she was given an excuse to discipline her she would do so.”

Such testimony establishes that Konjoh was, indeed, looking at the union organizers more closely and if she found a reason to issue discipline to them, she would.

Further evidence may be seen in employee Mohamed Bockarie’s testimony, that on his first day of work at the facility, he was asked to look for errors . . . in their notes, in their charting, the MARs and TARs” committed by people on a list which bore the names of Jillian, Shannie, Jackie, and Avian.

I credit Bockarie over Illis’ denials that she asked him to look for employee errors. She asked him to transfer to the facility from Holmdel where he worked with her for 1 year. Her admission that, on Bockarie’s first day on the job at Somerset Valley, she thanked him for “being in my life,” establishes that she held him in high, personal regard, and was a person she could trust. This trust manifested itself in her asking him to look for errors committed by employees who were involved in the Union’s successful campaign.

ii. Shannon Napolitano

Napolitano was employed from March 2009 to September 2010 as an LPN. She testified that she was told by Southgate that “there is a lot of stuff going on in the building that was making her sick to her stomach,” but that she could not elaborate.

On September 17, 2010, Napolitano was administering medications to her patients. Patsy, a recreation department employee, was in a patient’s room when Napolitano gave the patient her medication. Napolitano left the room and Patsy told her that the patient wanted to see Konjoh. Konjoh visited the patient and then showed Napolitano a pink pill, zinc oxide, a vitamin supplement, and told her that the patient was not supposed to be given that medication. Napolitano testified that she did not recall whether she gave the patient a pink pill, but waited until she swallowed all the medication she gave her.

Two hours later, Konjoh called Napolitano into her office in which Illis was present. Konjoh told Napolitano that she gave the patient a zinc oxide pill that she was not supposed to receive. Konjoh told her that the patient advised her sometime before the incident that Napolitano was the only nurse who gave her the pink pill, and that she (Konjoh) told her that the next time she was given the pill she should not ingest it, but rather should hold it and show it to Konjoh.

Konjoh showed Napolitano the MAR for the prior and current month, August and September. The zinc pill was not listed on the September MAR. However, the August MAR showed that that medication was discontinued on August 24. However, Napolitano administered it on August 25 and 30. Other nurses also improperly gave the patient the zinc pill after it was discontinued.

Jacques testified that if the medication is supposed to be given on only a certain day, the nurse writing the order in the MAR is responsible to “box out” or “box off” the date by drawing a box or line around the date to highlight it. Jacques also stated that if a medication is discontinued, any nurse can remove the medication from the medication cart and bring it to the medication room or write “dc” for “discontinued” on the medication label itself or on the box on the MAR. However, usually the charge nurse, but occasionally the floor nurse receives the order to discontinue the medication.

Jacqueline Engram, the director of nursing who replaced Konjoh, and who formerly was the vice president of clinical operations for CareOne facilities in New Jersey, testified that if a medication is discontinued it should be removed from the medication cart. She stated that that was the responsibility of the nurse who received the order discontinuing the medication, the nurse who administers the medication, or the night nurse

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who reviews the medications. She stated that as the director of nursing, if she was told by a patient that she was receiving a discontinued medication, she would check the cart to see if the medication is still there, then check the MAR to verify that the medication was discontinued and investigate the matter. She would not leave the discontinued medication in the cart, and if she became aware that it had been discontinued, she would remove the medication herself.

Ingram's professional opinion is in stark contrast to Konjoh's actions. After Konjoh became aware that Napolitano was administering medication improperly she took no steps to remove the medication from the cart or advise Napolitano of that fact. Rather, she permitted Napolitano to give the discontinued pill to the patient, notwithstanding, according to her own testimony, that since Konjoh did not know what the pink pill was, it may not have been a relatively harmless zinc medication, but "could have been a pill that was more potent . . . than zinc."

Konjoh also told Napolitano that she made two additional errors: she documented an incorrect pulse oxygen level by noting that the level was 0 percent, a level which would have meant that the patient was deceased. Napolitano answered that she reviews her entries on the MAR at the end of her shift and she would have caught the error. Konjoh replied that if a State survey was done at that time it would have been recorded as a nursing error. Napolitano testified that prior to a survey, all the nurses are told to review their entries on the MAR and TAR sheets to ensure that there were no mistakes and no missing initials, and she would have done so.

Ingram testified that some nurses, at the end of their shifts, review the entries they made on the MAR and TAR in order to ensure that they made all the appropriate entries, and if they noticed that they failed to initial a medication or treatment, they would initial the appropriate box. Further, Southgate testified that nurses would routinely complete their entries in the TAR at the end of their shift.

The final error complained of by Konjoh was that Napolitano did a pain assessment for a patient at the start of the shift whereas it should have been done at the end of the shift. Napolitano protested that in the past year, she did the pain assessment at the start of the shift during the last State survey, and she did so when Corporate Nurse Jessica Arroyo watched her, and her practice in that regard was deemed acceptable. In order to prove her point that pain assessment must be done at the end of the shift, Konjoh invited three nurses into the meeting. However, all the nurses agreed with Napolitano, telling Konjoh that pain assessment should be done at the start of the shift.

Konjoh asked Napolitano to leave and then called her back and presented her with a letter of termination. It said, in part:

The reason for this termination is your failure to perform essential nursing duties to provide proper patient care, including, but not necessarily limited to, your failure to properly document the oxygen saturation level for a resident, your failure to properly administer medication to a resident, and your failure to properly verify and administer the correct medication to a resident resulting in the administration of incorrect medication to a resident. As you are aware, you are already on

a final warning related to your failure to provide proper patient care.

The letter was supplemented by a note signed by Illis, Konjoh, and Napolitano, in which Napolitano agreed to the truth of the following facts: (a) that she gave a patient the wrong medication on at least four occasions, and that the medication was discontinued on August 23, 2010; (b) medication was left with the patient at the bedside and she did not witness the patient take the medications appropriately, and as a result, the patient gave the medication to Konjoh; and (c) she documented the oxygen saturation level at 0 percent which was incorrect.

It must be noted that part of the discipline included in the supplemental note was that Napolitano left the medication at the bedside and did not witness the patient take the medication. However, inasmuch as Napolitano was not supposed to have given the discontinued medication to the patient, it seems that Konjoh was overreaching in disciplining her for failing to ensure that the patient swallowed the unprescribed medicine.

The day after Napolitano was fired, Supervisor Southgate confided in Claudio that Napolitano had been "set up." Southgate warned Claudio that she did not hear that from her, but that she should "think about what happened."

Konjoh testified that if a medication is discontinued, the nurse is asked to remove the medicine from the cart. She stated that she did not remove the zinc pill from the cart because she did not look at the cart. Rather, she examined the MAR and saw that since no zinc pill was ordered, she left it at that and did "not think to look into the drawer because there was nothing on the MAR that said to me that the patient was on a pink pill." She noted that no harm was done to the patient for taking the nonordered zinc pill.

It must be noted that three other nurses, Claudio, Carol Chambers, and Henrietta Lezauba also signed the MAR that they gave the zinc pill to the patient after that medication had been discontinued. When Konjoh asked them about their alleged misconduct, all three stated that they did not administer the medication but had erroneously signed that they had. Although Konjoh did not personally believe their denials, she "had to go by what the employees said," and did not discipline them.

Napolitano was the Union's observer at the election 15 days before, which fact was known to Illis at the time of her discharge.

iii. Sheena Claudio

Claudio was employed for the Respondent from January 2010 to October 2010 as an LPN. On September 20, she received a written warning for administering aspirin to a patient on 2 consecutive days whereas the order called for it to be administered every other day. Claudio's response was that the person who wrote the order, usually the evening nurse, should have "blocked off" on the MAR sheet those days on which the medications should not be given so that she would know not to have given the medication on consecutive days. Another nurse, Doreen Dande, also improperly administered the medication to the same patient on 2 consecutive days and was issued similar discipline.

On October 1, Claudio received a written notice and a 2-day suspension for failing to document patient status on three separate patients: for a patient who fell; a patient who had been admitted and she failed to provide an admission note; and did not provide documentation during the first 5 days of the admission. Other errors that Konjoh noted were that Claudio provided treatment to a patient without an order, and did not write an order for a skin tear treatment, although the treatment was given. Claudio responded that she had completed the admission note.

It must be noted, only 4 days before, employee Sandy Mootosamy received only a first written warning on September 27, 2010, for virtually the same misconduct: she failed to document a status postfall for 2 days, failed to do a postadmission documentation on another patient, and failed to document vital signs on notes.⁸

Claudio testified that she kept a "personal sheet" of her TAR treatments on which she recorded the patient's name and the treatments she administered during her shift. Konjoh testified that such practice is a violation of the Health Insurance Portability and Accountability Act (HIPPA) privacy law if that paper left the facility.

Claudio testified that on October 7, she performed all the TAR treatments assigned to her, but forgot to initial in the TAR that any of the treatments were performed. She stated that it was her practice to note the TAR treatments that she had done on her personal sheet and then, at the end of the day, write in the TAR book that she had performed those treatments. On that day she worked the day shift at the facility and then went to her other job.

She returned to the Respondent's facility at 11 p.m. that evening, intending to initial in the TAR book all the treatments she administered. She was admitted by Supervisor Janet Mathias. Claudio told her she forgot something and she went to the nursing station and began writing in the TARS book. Janet asked her what she was doing and Claudio said she forgot to sign the TAR book. Matthias said, "[O]kay," and left the area. Illis and Matthias then approached Claudio and asked her what she was doing. Claudio explained that she forgot to sign the TAR book. Illis said that she could not do that because doing so is "forgery." Illis replied that she was not on duty and not working so she could not sign the book, and doing so would "put your license at risk." Illis told her to leave the facility and she did so. Claudio denied raising her voice to Illis or using profanity. Claudio testified that prior to the election she occasionally completed the entries in the TAR book the day after the treatments were administered.

Claudio was suspended pending an investigation. Konjoh testified that it is improper and a violation of State and Federal guidelines, to fill in the MAR or TAR record at the end of the day. Rather, those records must be signed immediately upon administering the medication or giving the treatment. Konjoh explained that if the nurse does not immediately sign that she gave the medication, the facility or another nurse does not know if it was given, and another nurse may give the same medication to the patient, resulting in an overdose.

According to Konjoh, the nurse must initial the MAR and TAR books immediately after the medication is administered or the treatment is given. However, the nurse may make a "late entry" in the appropriate box if the medication or treatment was actually given. She noted that when Claudio failed to initial any of the TAR boxes she could not go back after her shift ended and do so. One reason was that there was no evidence that she performed all the treatments. Konjoh testified that she investigated the matter, checked some of the dressings that Claudio said she applied and found no initials on those dressings. Nevertheless, Claudio's termination letter did not state that she was being terminated for failing to perform the treatments. It mentioned only that she failed to properly initial the TAR.

By letter dated October 21, Claudio was terminated for her "inappropriate and/or unprofessional conduct including, but not necessarily limited to, your failure to complete required clinical documentation. As you are aware, you have received prior discipline, including a suspension and final warning on October 4, 2010, for such performance related issues." Illis testified that Claudio was fired for returning to the facility to sign the TAR sheets. She was not aware of Claudio's union activities.

Nurse Napolitano testified that nurses routinely fill in the MAR and TAR boxes with their initials after their shifts, and that practice was well known to Supervisors Apgar, Southgate, and the directors of nursing. She did not believe that nurses were disciplined for not initialing their records during their shift. Nevertheless, Napolitano conceded that it is important for the nurse to initial the record so that there is documentation that the patient received the medication or treatment ordered. She also conceded that it is a nursing error for a nurse to fail to initial the records before she left the building.

Nurse Jacques testified that nurses should fill out and complete the TAR before they leave the facility at the end of their shift. If not, there is no record that the treatments were given, which is an important part of the nurse's responsibility.

Southgate testified that nurses are supposed to complete their entries on the TAR sheets during the shift that they are assigned, however, usually they do so at the end of their shift. She further stated that, prior to the election, it was "not uncommon" for nurses to complete their TAR entries the day after the treatments had been administered, and that she did so without being disciplined. Further, she stated that even after the election many nurses completed their TAR entries the following day but were not disciplined for doing so. However, she did not know which, if any manager, was aware of such alleged misconduct. She called this an ongoing problem and was the subject of in-service training sessions. The night-shift nurses were supposed to have checked the MAR and TAR sheets to ensure that the nurses had signed the sheets appropriately. Indeed, the plan of correction imposed by the surveyors in the spring of 2010 following the 2009 survey included a requirement that the night shift check the completion of the MAR and TAR on a daily basis. However, Konjoh was not aware of that requirement, and did not enforce it.

Director of Nursing Engram testified that a nurse must sign the MAR and TAR sheets at the time the medication is administered or the treatment performed, but as noted above, also stated that the nurse may review those records at the end of her

⁸ R. Exh. 92.

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shift for completion and initial any box that was left empty if the medication had been given and the treatment administered.

Southgate also testified that, prior to the election, she was occasionally told by a patient that he did not receive a medication. She checked the MAR sheet, and if a box was not filled in, she asked the nurse if she administered the medication. If she did not, she told the nurse to give the patient the medication. If the nurse said that she did administer the medication, she simply told the nurse to initial the box to document that she gave the dose to the patient. She did not discipline the nurse for not initialing the box. Two cases she cited in this respect involved nurses Bockarie and Dande. Southgate did not know whether management personnel were aware of Dande's error but she stated that she told Konjoh that Bockarie had not given medications and had not given a treatment to patients. Her memory was not precise concerning further details of that incident concerning Bockarie.

Konjoh testified that Dande charted that she gave vitamin B to a patient when she had not. The medical error was investigated by the assistant director of nursing and the investigation's results were given to Konjoh.

iv. Jillian Jacques

Jacques worked at Somerset Valley for 11 years as an LPN. On September 28, 2010, she was given a first written warning for failing to document the postfall and postadmission status of two patients. Later, Jacques told Konjoh that Patty Beck, and not she, was the nurse involved in one of the incidents. Konjoh checked the schedule and agreed. Although Konjoh testified that Beck should have been disciplined for this misconduct, and that she had intended to discipline her, she forgot to do so.

As set forth above, Bockarie testified that on October 25, Illis told him to look for errors committed by Jacques in her charting and MAR and TAR sheets.

On November 1, 2010, Jacques received a written warning from Southgate who told her that Konjoh told her to issue it. The notice charged Jacques with not fully completing incident reports in that statements therein were unclear and that signatures, interventions, the CNA statement, and the supervisor's review were missing. Jacques testified that the CNA was supposed to have prepared a written statement but did not. Jacques stated that she called Konjoh the next morning and left her a message that she (Jacques) prepared the incident report but the CNA's statement was not attached because she had left the building, but that Jacques would have the CNA prepare her statement. Jacques conceded that she (Jacques) had not completed her report because it was late at night and she was very busy that night.

Southgate stated that she believed that Konjoh was being "very picky" about the way in which incident reports were completed by the nurses, and believed that she was being "unfair" in disciplining employees for the way in which they filled out the reports. She stated that, following the election, some, but not all employees who made errors in their incident reports were disciplined, adding that if Konjoh said that they should be disciplined they were. She could not recall which specific em-

ployees were disciplined. Southgate gave in-service sessions to the nurses concerning the completion of incident reports.

Southgate testified that prior to the election, she did not know of anyone who was disciplined for not fully completing her incident report. Indeed, Engram, the vice president of clinical operations and later, director of nursing at Somerset Valley, stated that if a nurse failed to complete an admission report or an incident report due to being interrupted, and had failed to finish the report that day, she would ask the nurse to complete it the next day and add a note that it was being done the following day for "lack of documentation the prior day."

Southgate stated that Konjoh showed her the errors that Patty Beck, Doreen Dande, Jacques, and Bockarie made in their incident reports. Jacques was disciplined, and Beck received discipline in late October 2010, but she did not believe that Bockarie was disciplined for his mistake. Konjoh told Southgate not to discipline Dande—that she would "take care of it."

Jacques stated that in November or December 2010, Konjoh told her and other nurses that "if you don't do it the union won't be able to save you. You'll lose your job and the union won't be able to protect you. You should know that because, Jillian, you are a union delegate." Jacques denied that she was a delegate and Konjoh said, "[O]h yes you are. We all know you are." Jacques again denied that role and Konjoh said, "Oh, yeah." Konjoh denied making those statements.

On February 10, 2011, Jacques received discipline for failing to transcribe a medication order accurately. She wrote "ASA" (aspirin) on the MAR whereas she should have written "enteric coated ASA," the medication ordered by the physician. It was also noted that she did not write the medication on the MAR. The discipline also stated that on February 2, she failed to complete the required documentation for her shift. Her explanation was that, as the charge nurse, she was extremely busy that day, her work was delayed because the fax machines were not working, but she conceded that she could have called Illis or Konjoh to report that problem.

Jacques was suspended by Southgate while the incident concerning the administration of the wrong aspirin was being investigated. Jacques said there was nothing to investigate, admitting that she made the error because she was very busy admitting five patients, and she asked why the 24-hour chart check done by the night nurse did not pick up the error. According to Jacques, those nurses go through every chart and look at the physician order sheet and see if the physician wrote new orders and then check the MAR or TAR to ensure that the order was executed. Southgate said that the two night nurses did not catch the error. Southgate also told her that she did not chart a patient's day two of a status postfall. If a patient falls, the nurse is supposed to chart the patient, meaning check and document the status of the patient for 3 consecutive days. Jacques said that she would not dispute that error but was very busy and distracted.

Illis wrote the description of the issue on the February 9, 2011 notice of disciplinary action discharging Jacques. It stated that "on February 7, 2011, you failed to transcribe a med order accurately. You transcribed ASA on the POS when it should

have been enteric coated ASA as ordered by the MD. You also failed to . . . the medication to the MAR. Additionally, on February 2, 2011, you were the primary nurse and failed to complete the required documentation for your shift. Specifically, . . . JG was not documented on. Additionally, on the same resident there was no post fall note as required.” Jacques commented that she was extremely busy that evening with five admissions with confused patients. She agreed that she may have overlooked documenting a postfall patient.

Director of Nursing Engram stated that the reasons for the discharge were contained in audits done by Assistant Director of Nursing Francia Dominique as part of her duties. Engram denied asking Dominique to “find information” so that she could issue discipline to her. Engram also testified that administering regular aspirin to a patient who is supposed to receive enteric coated aspirin may be harmful if given “over a period of time” to a patient with a history of stomach bleeding since enteric aspirin has a coating which protects the stomach lining. She did not know if this patient had such a history. She stated that Jacques could have asked the unit manager or a maintenance person for help with the fax machine. However, she did not need a fax machine to properly transcribe the order on the MAR.

Engram stated that she, Illis, and the human resources department decided to discharge Jacques. They met with Jacques and told her that she was discharged. Engram stated that she had no personal knowledge of whether Jacques supported the Union or engaged in union activities.

Konjoh and Illis testified that the Employer has checks in place to ensure that patient records and charts are accurate and complete. One of these checks is a 24-hour chart check, performed on the 11 p.m. to 7 a.m. night shift, during which the orders received in the past 24 hours are examined. The purpose of those checks is to prevent medication and transcription errors.

Engram testified that such checks include the night nurse looking at the chart for a new admission, checking the medication that the patient came with from his prior institution, and examining the physician’s order sheet and the MAR to ensure that the patient’s medications are correctly recorded onto the MAR. Engram stated that it would be “expected” that Jacques’ error of not writing the order correctly on the MAR would have been caught in the 24-hour check, but was not certain that anyone was disciplined for not catching Jacques’ error. The plan of correction imposed by the surveyors in the spring of 2010 following the 2009 survey included a requirement that the night shift check the completion of the MAR and TAR on a daily basis. However, Konjoh was not aware of that requirement and did not enforce it.

Significantly, other nurses received less discipline for committing similar errors. For example, nurse Doreen Dande was issued only a written warning on September 17, 2010, for failing to properly administer medication. She administered regular aspirin for 2 days when enteric coated aspirin should have been given every other day—the same error committed by Jacques. Dande’s disciplinary record in this regard illustrates the disparate treatment accorded to Jacques. Thus, following the September 17 discipline, Dande received another written warning on

November 8 for failing to notify the physician or family of a wound, and also did not initial the treatment administered or complete documentation related to the wound. On November 23, Dande received a first written warning for failing to timely change a patient’s colostomy appliance, saying that she was too busy, and on November 26, she received a second written notice for failing to administer medication to a patient. On February 12 and 13, 2011, Dande received a notice for stating in the TAR that she administered treatments but she did not. Upon receiving the last notices, Dande resigned.

In addition, on November 29, 2010, LPN Conteh Salaimatu received only a documented verbal notice for failing to transcribe a physician’s telephonic order onto the POS or MAR. Salaimatu was ordered to receive training in transcribing phone orders appropriately.

Further, on March 4, 2010, Michelle Moore received a written notice for not reporting clinically significant changes in a patient’s status and also did not report a patient’s fall. On June 3, 2010, Moore left medication at a patient’s bedside table and did not check his bed/chair alarm. She also did not place a bed/chair alarm for another patient. On December 23, 2010, Moore received a written notice for a medication error; failing to transcribe an order; failing to write a discharge order; failing to transcribe an order for medication in the physician’s order sheet. Lastly, she received a final warning on February 9, 2011, for failing to document treatment for a dressing, and failing to date the dressing. These several warnings for misconduct similar to that committed by Jacques, did not result in Moore being discharged for them.

On September 10, 2010, Patty Beck received a written warning for documenting that the patient had medication patches on her back when the patches had been removed the day before. On September 28, Beck received a verbal notice for failing to complete an admission chart for a patient. On October 21, she received another verbal warning for two incidents of failing to properly complete incident paperwork inasmuch as the CNA statements were missing and there were “blanks on forms.” On February 15, 2011, Beck received a final warning for failing to properly change a dressing although she documented that the dressing was changed according to the order.

Konjoh testified that she did not require the night shift to check the completion of MAR and TAR records, notwithstanding that the plan of correction imposed by the surveyors in the spring of 2010 following the 2009 survey included a requirement that the night shift check the completion of the MAR and TAR on a daily basis. Konjoh stated that she was not aware of that requirement. Konjoh stated that when she saw a blank box on a MAR or TAR sheet she asked the nurse whether the medication or treatment was given, and the reason for the blank box. She then took the action called for. Thus, if the medication or treatment was given and the nurse failed to complete the box indicating that she took that action, Konjoh would issue discipline. If the medication or treatment was given, and 1 day elapsed without the nurse signing the appropriate box, the nurse could sign a “late entry” that day or the next day, if the medication or treatment was actually given.

Southgate testified that following the election, Konjoh spoke to her regarding disciplining employees. She said that “they

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would be obviously looking at the people who they believed to be union organizers closely and if they were given a reason to write them up they would write them up.” And that there were employees “believed to be actively involved in trying to get a union in.” However, according to Konjoh, she had a “lot of respect” for Jacques, that Jacques “was being very careful to follow all the rules and regulations; being very careful so that she wouldn’t get written up,” and accordingly, Konjoh had not issued discipline to Jacques. Konjoh did not tell Southgate that she was looking for something to write Jacques up for, but implied that such was the case, using words “to the effect that if she was given an excuse to discipline her she would do so.”

Mohamed Bockarie stated that on October 25, when he began work on the day shift, after being solicited by Illis to transfer to Somerset Valley, he received a text message from Illis which said, “[T]hank you for being in my life.” On his first day at work, Illis asked him to interview employees, “look for errors” committed by people on a list which bore the names of Jillian, Shannie, Jackie, and Avian. Bockarie stated that Illis asked him to look for errors “in their notes, in their charting, the MARs and TARs.” Illis denied asking Bockarie to do any of these things.

Bockarie met with Illis in her office, sometimes for 30 to 60 minutes, and texted Illis very frequently from October and November. The nature of the text messages were “what’s going on in the building, and who are not doing well, who are not in her favor. . . .” He told Illis that the employees did not like her. Their in-person meetings included suggestions to improve the Respondent, who to “get rid of,” his advice that the staff was not in her favor and wanted the Union. Illis conceded that she knew of no other employee who she texted with or met with as much as Bockarie.

Illis testified that she spoke with Bockarie in her office in October and November 2010 about two or three times per week for about 15 minutes at each session. In their text messages, Bockarie, responding to her requests, told her what was going on in the building, they spoke about patients who were admitted or discharged, the availability of supplies, employees who treated him nicely and those who were not helpful to him. He also told Illis that the workers did not like her, and that if there was another election, the Employer would lose it. She denied asking him who she should discharge and did not give him any reason that she would discharge anyone.

Bockarie stated that during these meetings, Illis asked him whether he believed that the workers would vote for the Union in another election, or would they vote for “her?” Bockarie advised her that the staff did not like her and would not vote for “her.” Bockarie told her that the focus of the facility should be on patient care, but the focus was “really on the union issue.” Illis responded that she was working on improving patient care, and that it would take time, but that she “just want to get over this union issue.” Illis denied saying these things.

Bockarie stated that he made copies of documents containing medication errors. He asked Francia Dominique, the acting director of nursing, whether she was looking for errors. Francia replied that she was given a job and she is doing it. From De-

ember 2010 and thereafter, Bockarie made copies of the documents and gave them to Illis. Bockarie saw Francia copying MAR and TAR sheets and when she was asked why she was copying them, she said that they were not signed. Bockarie conceded that occasionally patient records are copied so that they can be sent with the patient to another facility or to home, and also when employees are disciplined.

Bockarie stated that when the Union held a meeting at a local hotel, Illis asked him to take time off and “go there to witness” and observe “who is attending.” He refused, saying that he had to work, but apparently went to the meeting anyway. Illis denied asking him to do that.

v. Valerie Wells

Valerie Wells worked as a CNA for 10 to 12 years, during which, for about 7 years, she worked part time as the staffing coordinator. She then became the full-time staff coordinator in January 2010. She also helped on the nursing floor while working as the staff coordinator.

Wells signed a card for the Union. She stated that before and after the petition was filed, she spoke with Claudio, Napolitano, and Jacques occasionally at work concerning the union campaign. Those conversations took place in the office she shared with D’Ovidio. She appeared in the union flyer seen by Hutchens and Illis before the election, and in the YouTube video seen by Hutchens. She also attended union meetings held prior to the election.

While working as the staff coordinator, she reported first to Director of Nursing Kovacs, and occasionally Administrator Heedles, and then to Illis and Konjoh.

In 2003, CareOne began using a computer program called Schedule Optimizer/Smartlinx, and in the fall of 2006, Somerset Valley implemented the system. The program is a timeclock system used for scheduling, labor analysis, forecasting, and payroll purposes. When the schedule of an employee is entered into the Smartlinx system, the employee cannot punch in or out unless the schedule is current and reflects that the worker is due to punch in or out at that time. The Respondent keeps track of the employees’ shifts in which they are scheduled to work and their days off. It is connected to the timeclock which employees use when they enter and leave work. Others who had access to this system were the facility administrator, the director of nursing, CareOne officials, the human resources department, and the business manager.

The staffing coordinator is responsible for ensuring that the facility is appropriately staffed, schedules are up to date, and if an employee calls out she has to fill the position. John Kokorus, the CareOne director of work force management and the person in overall charge of the Smartlinx program, stated that he did not know if Wells attended training for the program, which was voluntary and not mandatory. He stated that when an employee calls out, the staffing coordinator calls a per diem employee and places that worker on the work schedule. If an employee calls out when the coordinator is not on duty, the supervisor makes the replacement, but the staffing coordinator must reconcile the system thereafter by updating the system to show that the new employee replaced the worker who called out.

Wells generated a monthly master schedule and daily assignment sheets. She put the assignment sheets in a staffing book which she kept in her office until the end of the day when she placed it at the nurses' station. She also submitted a census report to CareOne, the administrator and the director of nursing, setting forth the daily census number and the number of nurses and aides who were scheduled to work, and who actually worked that day. CareOne official Hutchens received the daily census report.

Wells stated that prior to Illis becoming the new administrator, she utilized the same schedule that the director of nursing created and, for each of the following weeks, she kept the same employees on the same schedule. Depending on the census of patients she would adjust the number of employees scheduled on any particular day. She stated that if the census was 60 patients she tried to have at least five or six CNAs on duty. If there were fewer patients, she would cancel the shift of an employee. Prior to the arrival of Illis, she used a table which showed that for a certain census, she would need to schedule a certain number of workers. Illis did not want her to use that table.

Wells stated that if a nurse called out during Wells' working hours, Monday to Friday, 6:30 a.m. to 3 p.m., she would attempt to find a replacement by calling employees who are scheduled to work that day or asking an employee who was already at work. She would first call the per diem and part-time workers as suggested by Director of Nursing Rebecca McCarthy.

Wells also stated that she maintained a "cheat sheet" with the knowledge of Director of Nursing Meyers. She used it as a "guide" to where additional staff was needed, and notes as to who she called to replace employees who called out.

Regarding the per diem employees, Wells stated that, when she generated a monthly schedule, most per diems worked every other weekend so she "automatically planted" them in that schedule. She did the same for the part-time employees.

Wells stated that, prior to the election, she received no discipline for her work performance as a staff coordinator under any administrator or director of nursing. Moreover, she stated that prior to the election, while under the supervision of Illis and Konjoh, neither of them referred to any problems with her performance as a staff coordinator, but she did admit to making certain mistakes in her work while under their supervision.

Illis testified that after she arrived at the facility in early August 2010, she learned that the problems with scheduling were caused by Wells using an Excel spreadsheet to prepare a manually created daily attendance and master schedule. Konjoh testified that many errors in scheduling and staffing were caused by Wells' use of four or five different schedules of paperwork which resulted in errors. Konjoh stated that she had many meetings with Wells which did not result in an improvement in her performance, and that Wells did not request more training in the use of Smartlinx.

Illis testified that Wells should have been using the Schedule Optimizer/Smartlinx program to prepare the schedules. Illis stated that she told Wells in August that she (Illis) was "fluent" in Smartlinx and was available to help her. Wells sought her help regarding one issue in which the schedule had to be manu-

ally adjusted for the hours worked by an employee who did not work a full 8-hour shift.

Illis stated that in August, despite the fact that Wells was not keeping the Smartlinx data current and accurate, she did not issue discipline to her for certain discrepancies between the schedule (which stated whether the employee was due to be on duty) and the actual fact (that the employee actually punched in and/or worked), or for her failure to use Smartlinx. The reason that discipline was not issued was that Illis believed that by "daily constant communication her behavior would be modified to what I wanted." Nevertheless, according to Illis, Wells' performance did not improve and the schedules remained "chaotic."

Wells was on vacation on the day of the election but returned to vote. On the day she returned from vacation, September 7, Illis and Konjoh met with her at about 10 or 10:30 a.m. and went over a list of six "discrepancies" between the manually typed schedule for September 6 and that entered in Smartlinx.

Wells stated that she did not dispute that the six mistakes were made, and that she was asked not to use her "cheat sheet." Wells testified that she told Illis and Konjoh that she did not know how to input into Smartlinx that an employee worked for a one-half shift. After the meeting, Illis showed her how to perform that function. The main objection to Wells' work at that time was that certain employees were listed on a typed work schedule but not entered into the Smartlinx program. In other words, Smartlinx was not "updated" or "reconciled" to reflect the changes in the schedule. Similarly, other employees were inputted into Smartlinx but not listed on the typed schedule, and yet others worked a shift but were not on the Smartlinx program. Wells stated that prior to her leaving for vacation, Illis did not mention that she wanted Wells to keep the information on Smartlinx up to date. Rather, Illis made that a requirement after Wells returned from vacation on September 7.

Illis testified that the September 7 meeting was not disciplinary in nature. Rather, the purpose of that session was to point out the many inaccuracies and discrepancies which took place during the prior weekend, to let Wells know Illis' expectations so that Wells' performance would improve, and to "change her behavior" as to how she operated and maintained the schedule.

It must be noted that these "reconciliations" concerning discrepancies concerned events that occurred in the weekend before Wells returned from vacation. Significantly, Illis testified that reconciliations for discrepancies that occur on the weekend should be inputted by Monday at 10 or 10:30 a.m. Accordingly, the meeting on September 7 took place at a time when Wells should have been permitted to input those reconciliations, but instead, she was being disciplined at that premature meeting for not yet doing so.

At the September 7 meeting, Wells explained that the work she was assigned to do was very time consuming and she had also been performing work as a CNA. "Sometime before" September 7, Illis told her to focus on the scheduling and not to perform CNA work.

A plan of correction containing a list of eight items of specific instructions of work to be done, was given to Wells at that meeting. Illis asked how long it would take to complete that list and Wells said, "[M]aybe by Friday," September 10. Illis testi-

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fied that Wells said that she did not need additional training and that she fully understood everything that was expected of her.

On the day of the meeting, September 7, an employee complained to Wells that she was in the Smartlinx program which authorized her to punch in, but her name was not on the written schedule. Wells told her “sorry, many things are going on; once I get my angel wings and my halo there will be no more mistakes.” Illis, who heard the comment, told her to “get rid of the attitude.” Wells responded that she had no attitude, but believed that she was being “picked on for little things that weren’t a problem in the past due to this campaigning election that we are going through or went through.” Illis denied that her treatment of Wells was related to the election, adding that she (Illis) had “time and time again” addressed errors that Wells had made.

Illis stated that she knew that Wells knew how to perform the tasks required on Smartlinx but she was just “not changing her behavior and being attentive to details.”

On September 9, Illis asked Wells to manually adjust an employee’s work hours on a shift, and Wells asked her how that was done, as she did not “clearly know how to perform that task.” On that day or the next, Illis showed her how to perform that job.

By September 13, Wells had not completed the work on the September 7 list. That day, she, Illis and Konjoh spent a few hours completing the work, by inputting each employee’s schedule into the system. Konjoh testified that their work corrected the master schedule, and was current when they finished the task. Illis stated that after this work was done, she spoke with Wells about the issues she was concerned about. Illis stated that Wells acted like she did not care and was “very nonchalant” that they had just spent over 2 hours doing the work that she asked Wells to do more than 1 week before. Accordingly, Illis decided to issue discipline to Wells to make her understand that this is “serious.”

On the same day, September 15, Wells received a first written warning for certain mistakes in inputting certain changes to employees’ schedules. Her response was that she was not trained completely in performing those tasks. In response, Illis wrote that Wells has the ability to do these tasks but that this was an issue of “laziness and lack of attention to detail.” Illis stated that up until that point, Wells had not requested training on Smartlinx.

On September 15, Wells was given a second written warning for failing to give Konjoh a daily schedule and not giving her certain changes on September 14 made to the schedule for the working shifts of September 15, as was directed at the meeting of September 7. Illis wrote that Wells said that she forgot to do so. Wells agreed that she forgot, stating that she was busy trying to get the staffing records done, but also stated that she believed that she had placed a copy of the daily schedule with the daily attendance sheet which was kept at the nurses’ station in plain sight.

On September 20, Wells received a third written notice for “continuing to have issues with scheduling staff and removing them from Optimizer when cancelled or removed.” Attached was a sheet of six “multiple issues” in which Wells failed to

have adjusted the schedule or put items in Smartlinx. At hearing, Wells offered explanations of each of the six items. One of the items for which Wells was disciplined that day included the allegedly improper listing of CNA Guerline for the 7 a.m. to 3 p.m. shift. Wells protested that Guerline should not have been listed on that shift, but should have been listed for the 3 to 11 p.m., the shift she always worked. Konjoh answered that Guerline was in Smartlinx for the 7 a.m. to 3 p.m. shift and could not punch in. Wells stated that she properly placed Guerline on the daily attendance sheet for the correct 3 to 11 p.m. shift, and in looking at the Smartlinx program on her computer, found that Illis had deleted Guerline’s 3 to 11 p.m. shift and changed it to the 7 a.m. to 3 p.m. shift. Konjoh said that she would speak to Illis about the matter, but the discipline remained.

Wells stated that the following day, September 21, Konjoh went over the list with Wells, explaining that employees were not inputted into Smartlinx, the daily attendance sheet was not provided or updated, and told her that she was fired. Wells testified that she had made mistakes in performing some of her duties on Smartlinx. Konjoh testified that after the September 20 meeting, Wells’ performance did not improve inasmuch as there continued to be errors in scheduling, although she could not recall any specifics.

Wells’ termination letter of September 21 stated that she was being discharged for her “failure to meet expected performance standards. . . . You have been counseled as to the expectations in managing the staffing schedule, and you have been given warnings, including a final warning, but your performance has remained substandard.” Konjoh and Illis denied knowing of Wells’ union activities prior to her discharge.

Following her discharge, Illis found numerous emails that Wells sent to her home email address from September 16 to 21, 2010. The emails consisted of copies of staff schedules, instructions from Heedles in July 2010, and instructions from Illis and Konjoh in September 2010. Illis stated that Wells had no permission to send those emails, and that such conduct violates company policy and is a terminable offense for which, if known to Illis while she was employed, would have caused her to terminate Wells.⁹

7. The reduction in hours of the per diem employees

Prior to the election, per diem employees were scheduled to work a regular schedule, on weekends, having specific days and hours of work being scheduled by staff coordinator Wells.

Illis and CareOne official Hutchens testified that per diem employees, who are paid \$2 per hour more than full-time and part-time employees, should be used on an “as needed” basis. Because of their higher rate of pay, they should not be placed on a regular work schedule, but rather should work to cover “last minute call outs” just for that day, and as a “last resort.” Hutchens testified that in looking at the Smartlinx schedule he knew that per diems were regularly scheduled to work, which

⁹ Inasmuch as this issue was not fully litigated, it will be left to decided in a compliance proceeding.

was “wrong.” Southgate testified that administrator Heedles told her that she did not like the use of per diem workers and was trying to reduce the amount of overtime in the facility.

Another reason for favoring regular full-time and part-time employees for the weekend work that per diems performed was that there would be greater consistency and continuity of care, with the regularly scheduled workers knowing their patients and the patients’ needs better since they were at the facility more often than once every other weekend.

Nevertheless, despite the fact that Hutchens, and the facility’s administrators and directors of nursing had access to the schedules of employees, which listed their per diem status, apparently no correction was made to this longstanding practice until after the election.

The election agreement executed on August 9, 2010, provided that in order to be eligible to vote, per diem employees must have worked an average of at least 4 hours per week during the 13 weeks preceding August 7, 2010 eligibility date. On September 9, the Employer filed objections to the election, arguing that a new election be held.

Southgate stated that 1 week after the election, Konjoh told her that she was not to use any per diem employee without “clearing it with her.” She added that a couple of weeks after the election, Konjoh told her that the Employer was contesting the election and if another election was held, the per diem employee would have to work a certain number of hours in order to be eligible to vote in the next election. Therefore, said Konjoh, Southgate should not call per diems to work on a regular basis. Southgate stated that, following that conversation, she called only one per diem employee, Stubbs, to replace a worker who called out. When she told Konjoh that she called Stubbs to work, Konjoh told her that she should not have called her to work, but did not say why. Konjoh denied telling Southgate that she should not have called Stubbs to work.

The Acting General Counsel argues that Konjoh’s tying the issue of hiring per diem workers to another election may provide proof of an unlawful motive in the Respondent’s reduction of hours of the per diem workers who were employed at the time of the election and voted therein. However, Konjoh testified that she told Southgate not to use per diem employees to fill a shift unless she cleared it with her because she wanted to use full timers first. She denied telling Southgate not to use per diems because she did not want them to have enough hours to vote in a new election.

Following Wells’ discharge on September 21, her replacement advised Illis that there were many per diems who had not worked for a long time, at least 60 days. Illis removed them from the system and put them on “inactive” status meaning that they were no longer employees of the Employer because they had no “active” hours of work. Illis did not know the union status of those per diem workers. The staff coordinator, and not Illis, constructed the list of per diem employees who were removed from the system.

Illis conceded that after she arrived at the facility in early August, additional per diem employees were hired. She stated that the Employer was not cutting back on per diems’ hours of work. Rather, it was hiring those per diems who had the flexibility to work multiple days and multiple shifts, and those who

were able to report to work on short notice. She noted that a per diem is called to work when the Employer has an available opening, not when they call the Respondent and say that they are available to work.

a. Daysi Aguilar

Aguilar began work in October 2005 as a CNA in the evening shift, working every other weekend from the time of her hire until September 2009. At some time she requested and received permission to work on Sundays from 3 to 8 p.m. instead of the regular 3 to 11 p.m. shift because of her need to be home with her daughter. That request was accommodated and another nurse worked the remaining 3 hours of her shift.

Aguilar attended two union meetings and signed a card for the Union and returned it to Claudio in the Respondent’s cafeteria. When she voted in the election on September 2, she saw Jacques holding up a flyer. She sought to greet Jacques but Jacques backed away, shunning her greeting and waving her away. Aguilar noticed Konjoh standing nearby. Later that day, Konjoh asked Aguilar if she could stay after her shift ended and work that afternoon. Aguilar said that she could not. Konjoh denied seeing any interaction between Aguilar and Jacques on the day of the election, and in any event Konjoh testified that the sign that Jacques was holding said, “it’s time to go” which was alerting employees to vote. Konjoh noted that the Employer’s observer was holding a sign bearing the same message.

Aguilar worked her regular schedule the following weekend, September 11. The following Monday, Konjoh called her and asked for her position and days of work. Aguilar replied that she was a per diem who works every other weekend. Konjoh replied that a per diem does not work every other weekend. Rather, a per diem works 1 weekend per month. Aguilar agreed and said that she would let Konjoh know which weekend she was available. In a note to Konjoh dated September 14, Aguilar wrote that she could work on the weekend of September 25 or the weekend of October 9.

Aguilar stated that on September 24, she asked Konjoh if she was needed for the weekend of September 25 and Konjoh said that she was not. Aguilar made a similar call regarding the weekend of October 9 and she was told by Konjoh that she was not needed, and that if she was needed she would be called. Konjoh admitted receiving a call from Aguilar after the election regarding her availability to work. However, Aguilar asked to work on a specific weekend and Konjoh could not schedule her for that weekend.

Illis testified that Aguilar was removed from the system for not having active hours. She did not know of any union activities engaged in by Aguilar.

b. Gertrudis Rodriguez-Arias

Arias worked from May 2007 to September, 13, 2010, as a part-time CNA. Beginning in November 2009 she began work as a per diem employee because of a health-related issue with her child. As a per diem, she worked flexible hours on the day shift every Monday and every other weekend, averaging 32 hours biweekly. She signed a card for the Union solicited by

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Napolitano in a patient's room.¹⁰ She appeared on the Union's flyer, and in the Union's video.

On August 26, 2010, Arias was offered a full-time job but rejected it.

Arias stated that she worked on September 13, 2010. She was scheduled to work thereafter on September 18, 19, and 20. When she reported to work on September 18, her timecard punch was not accepted. A charge nurse told her that her name was not on the work schedule. That nurse called Konjoh who said that she knew that Arias was not on the schedule and could go home. Her name was also omitted from the schedule for September 19 and 20.

About 2 weeks later, Arias called Konjoh and asked if she could come to work. Konjoh said that she needed Arias but she (Arias) did not have a "steady schedule" so she would call when she needed Arias to work. Arias complained that she had worked for 3-1/2 years and had always been on the schedule. Konjoh offered her a position in the evening or night shifts, but Arias refused because she had to work the day shift due to her personal situation.

Receptionist and payroll benefits coordinator Orozco testified that Arias called, asking why she was not working the hours she worked before. Orozco replied that since she was a per diem worker, presumably the Respondent did not then have the hours to give her as a per diem worker. Orozco called Konjoh who said that she offered Arias a full-time position which Arias said she could not take at the time. Arias confirmed to Orozco that she was given that offer. Orozco advised her to speak to Konjoh, and that the Employer would call her when it had the hours to offer her.

Illis testified that Arias was removed for not having active hours.

c. Dominique Joseph

Joseph began work in 2007 as a CNA per diem worker who worked every other weekend. She was hired to work on the 3 to 11 p.m. shift, but actually worked 4 to 11:15 p.m. She has a full-time job elsewhere where she is a member of the Union. She learned from Jacques that the Union sought to represent the Respondent's employees, and spoke about the Union to other workers.

Joseph stated that prior to being introduced to Corporate Human Resources Official Andrea Lee at a meeting, she mistakenly believed that Lee was affiliated with the Union, and Joseph began to speak in favor of the Union to her. At one of the meetings, when Hutchens told the workers that the Union would take a lot of money from them, Joseph replied that she only works 13 hours every 2 weeks, and that was too little money for the Union to take a lot of money from her. Hutchens asked her if she would vote in the election, and Joseph said that she was uncertain.

Joseph testified that about 1 week after the election, she was supposed to report for work on September 11, 2010. Her car

was not working and she called Konjoh on September 10 and told her that she could not come to work and that she should be taken off the schedule. Konjoh told her she would do so, and that Joseph should call when her car was fixed.

Two weeks later, Joseph reported to work but the timeclock did not accept her punch. She noted that her name was not on the assignment sheet for that night. She then spoke to Illis who told her that her name was not on the schedule for that day or the next, and that she should call Konjoh the next day, Monday. It had been Joseph's practice to call just before reporting to work to make certain that her name was on the schedule.

Thereafter, Joseph called Konjoh a number of times but did not receive a call back from her or anyone from the Respondent. Joseph denied telling anyone that she was available for different hours since she already had a full-time job elsewhere. Konjoh denied receiving any voice mails from Joseph asking her to return her calls.

Illis testified that Joseph was removed from the system for not having active hours.

d. Rita Onyeike

Rita Onyeike worked as a CNA since July 2010, performing a double shift, working both the day shift and the night shift on weekends only. She is employed full time for another employer.

By memo to Staff Coordinator Wells and Konjoh dated September 9, Illis stated that she had some concerns about Onyeike's schedule and status. Her concerns were that Onyeike "does not have rotations set up," does not work enough hours to be considered "part time benefits eligible," and following her hire on July 22, 2010, she was "no call-no show" on August 21. Illis recommended that Onyeike's status be changed to per diem effective immediately, and asked that, if both agree with her suggestion, that they call Onyeike to discuss the matter. Wells denied being told by Illis to speak to Onyeike about a possible change to per diem status, and Onyeike was changed from a part-time benefits eligible workers to a per diem worker. Illis testified that Onyeike was changed from a part-time benefit eligible worker to a per diem employee.

After the election, on September 12, 2010, Onyeike wore the purple union scrub top to work on her night-shift tour of duty. Onyeike testified that at the end of her shift, in the morning of September 13, she asked Staffing Coordinator Valerie Wells for a document. Konjoh, who was in the area at the time, asked Onyeike for her name. Onyeike identified herself and Konjoh introduced herself as the director of nursing. Konjoh asked her to leave the facility. Onyeike asked for a reason. Konjoh told her to leave or she would "call the cops." Onyeike asked what she did, and Konjoh demanded that she leave. Onyeike left the area and attempted to punch out. Konjoh followed her, telling her that she could not punch out. Onyeike protested that if she did not punch out she would not be paid for the shift she just worked. Konjoh refused to permit Onyeike to punch out. Onyeike asked what she did wrong, but Konjoh insisted that "you are leaving here right now." Onyeike told her to call the police because she would not leave until she punched out.

¹⁰ Her pretrial affidavit which states that she signed the card at a coworker's house does not fatally harm her credibility.

Finally, Konjoh told Onyeike to punch out, which she did, and left. Konjoh followed her, saying, “[Y]ou only come here when we call you and if you come here don’t come with that scrub.”

Konjoh stated that the dress code for CNAs is a yellow scrub top and white pants. She testified that on September 13, she was told by the night supervisor that Onyeike was out of uniform and was asked by Illis to issue discipline. Konjoh was not told that if she saw CNAs wearing union purple scrubs she should send them home.

Southgate stated that during the election campaign, Illis told her and other supervisors that they would not permit any employee to wear a union scrub top in the facility, and that employees wearing such a garment should be sent home. Illis denied giving such an instruction to the managers. Rather, she testified that if an employee was out of uniform they should address the problem, not necessarily send them home. Indeed, CNAs Maria Granda and Avian Jarbo received documented verbal warnings on September 9, 2010, and January 27, 2011, respectively, for violating the dress code.

A letter dated September 13 was sent to Onyeike, signed by Illis, Konjoh, and Wells, which stated that “in reviewing your schedule you have not met the requirements for the Part Time Benefits Eligible position” because she had only worked four shifts from the date of her hire, and was available for work only every other weekend. The letter advised that she must work more than 24 hours to be a part-time benefits eligible employee. The letter concluded that “effective today your status will be changed to per diem” with an increase in pay from \$11.10 per hour to the per diem rate of \$12 per hour. Konjoh testified that she did not know why Onyeike was not offered the status of part time without benefits since an employee could work less than 24 hours and receive such status.

A review of Onyeike’s work records, however, indicates that she worked more than four shifts since her hire. Thus, she worked on July 27, 28, and 31, and August 1 while being given orientation training. She also worked a regular shift on August 7, 8, and 28, a double shift on September 4, and a regular shift on September 11 and 12.

Also on the same day, September 13, a documented verbal notice for a violation of the dress code was signed by Konjoh relating to Onyeike. It states “employee was out of uniform, had purple t-shirt on. Uniform dress code is yellow top and white pants.” Onyeike denied seeing that document.

The following day, September 14, Onyeike phoned Illis and asked if the September 13 letter was related to her confrontation with Konjoh. Illis said, yes, “[Y]ou should have known if you are wearing an 1199 scrub, we would look at you as part of the union.” Onyeike asked if the issue related to the Union and Illis said, “[Y]es, it was written on the scrub.” Onyeike looked at the scrub and apparently for the first time realized it was a union scrub, asking Illis if that was why Konjoh asked her to leave the facility. Illis said that was the reason.

Onyeike testified that the following weekend, September 18, before her usual weekend shift, she was called by the night supervisor and told that Konjoh said she should not come to work because of a low census. Onyeike replied that since she began work the census has been low. In fact, Onyeike testified that the census has remained the same during the entire time of

her employment. On the next Saturday night, September 25, Onyeike received the same call giving the same reason why she should not report to work, this time the supervisor said that she had been taken off the schedule pursuant to Konjoh’s orders. Konjoh denied authorizing anyone to tell Onyeike that she was not being called because the census was low.

No record of the census for the weekend of September 19 was received in evidence. However, on the weekends of October 2 and 9, the census was 59 and 56, respectively.

Onyeike has not worked for the Respondent since September 14. She stated that in January 2011, she called the Employer and asked the staffing coordinator to be reinstated on the schedule since she had not worked for 3 months. The coordinator said, “[O]h, sure, we need people tonight” and said that she would call back. She did not call Onyeike back.

e. Annie Stubbs

Stubbs was employed as a per diem CNA since May 2009. Her picture was on the union flyer. She worked on the weekends and occasionally during the week.

As set forth above, Stubbs complained at a meeting with Hutchens and other employees that garbage bags were not made available to the staff. Illis denied that Hutchens told her that Stubbs had made such a complaint. Rather, she stated that Hutchens told her to look into the supplies issue and make sure the staff had what they needed. She did so and arranged that employees had access to the bags. Illis did not know of any union activities engaged in by Stubbs. According to Stubbs, after the meeting, Director of Nursing Konjoh approached her and asked what she thought of the Union. Stubbs replied that she did not know, and Konjoh said that she knew Stubbs had a union at her other job, “but we don’t want one here.” Konjoh denied making those comments. In his meeting with the managers, Fleming noted that Stubbs worked for a unionized employer.

Staff coordinator Wells stated that Stubbs was on the schedule for every other weekend. Wells told her what days of the week extra workers were needed, and Stubbs advised her which days she was available. Wells also called her if an employee called out, and she was utilized to replace that worker.

Stubbs testified that she worked her usual day shift on September 19, 2010, and was asked the following day by staffing coordinator Valerie Wells to work on certain nights. Stubbs called to tell Wells that she was interested and was told that Wells was no longer employed. She left a message with Konjoh who did not return her call. On Friday, September 24, Konjoh left a message asking whether she could work that weekend. Ten minutes later, Stubbs called and was told that another employee already accepted the assignment. Stubbs told her that she was available to work at night depending on her availability. Konjoh said that she was not on the schedule for the following weekend.

Thereafter, Stubbs did not receive a call asking her to work, and she was not on the work schedule. She stated that, in the past, she worked a regular day shift on the weekends, and did not have to call in to see if she was on the work schedule.

Illis testified that Stubbs was offered a change in position from per diem to part time in early September, and she refused

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the offer. She wanted to remain as a per diem worker and was removed from the system for not having active hours.

f. The Replacement of the per diem employees with other per diem workers

It is apparent that inasmuch as the five per diem employees were terminated, their shifts had to be replaced by other workers.

LPN Mohamed Bockarie worked at CareOne at Holmdel, New Jersey, from 2009 to October 24, 2010. Bockarie testified that while working at Holmdel he was asked to call Illis, who told him to transfer to Somerset Valley because the Employer lost a union election and she needed more employees to work there and “be on their side . . . in favor of them, not in favor of the union” at a “re-election.” Illis asked if he knew who else would like to transfer. He named three Holmdel employees, Abdul Mansaray, Irene Donker, and Elzira. Illis asked him to speak to them about transferring, and he did. They eventually transferred to Somerset Valley.

Bockarie stated that Illis told him that, normally, a transfer takes 30 to 45 days but that she would “speed it up,” and in fact he was transferred in less than 2 weeks. Illis said that he could select any shift he wanted because he would “be her eyes . . . to monitor stuff in the building.”

Illis conceded that she may have told Bockarie that she could accelerate his transfer from Holmdel faster than was usually the case because there were open positions there and that she was looking forward to working with someone she had previously worked with. Nevertheless, she stated that she did not do anything to make Bockarie’s transfer proceed at a faster pace.

The evidence also establishes that the Respondent replaced the five per diem employees above with other per diem workers who it transferred from CareOne’s Holmdel facility. As noted above, Bockarie, who transferred from Holmdel to Somerset Valley, testified that he was told by Illis that she needed more workers to transfer so that they would vote for the Employer in another election, and he recommended Mansaray and two others.

Accordingly, it appears that, based on Bockarie’s testimony, Illis preferred to hire per diem employees who she believed would support the Employer’s re-election effort rather than retain the per diem employees who were employed at the facility during the Union’s successful campaign.

While it is true that certain of the dismissed per diem workers were offered part-time jobs at the facility, or a full-time job, or a change in shift, the question is whether those positions were offered in good faith. The offerees were working per diem on weekends because they had other, full-time jobs or because of their personal situations, and the fact that, at least one of them, Stubbs, worked at a full-time job was known to the Respondent. Thus, there was testimony that Pat Fleming, the Respondent’s labor relations adviser, announced at a management meeting that he knew that Stubbs worked at another job.

Analysis and Discussion

I. CREDIBILITY

As set forth in this decision, I have credited the testimony of the employees where it conflicts with the testimony of the Respondent’s witnesses. As a group, the employees testified in a straightforward, confident, consistent manner with respect to conversations and events which must have made an indelible mark on their memories. Those discussions occurred during heightened tension in the facility due to the Union’s organizing drive, the participation therein by many employees, several of whom became leaders of the campaign, and, on the other hand, the Respondent’s attempts to encourage them to vote against union representation.

I also credit the testimony of Southgate, an 18-year employee who became a statutory supervisor in August 2010. Southgate attended management meetings with Fleming and other managers and was a person in whom the Respondent’s officials, including Illis and Konjoh confided.

Illis’ testimony was contradicted by that of her superior, Hutchens. Thus, Hutchens testified that when Illis was hired to become the administrator she “was aware of everything” including the union petition having been filed “before she got there.” However, Illis testified that before she accepted the position she was not told that the Union filed a petition, and that she first learned that a union campaign was underway when she arrived at the facility on August 3. It is hard to believe that the Respondent would not have made Illis aware that a union campaign was ongoing for nearly 2 weeks when it asked her to transfer to Somerset Valley. As the administrator in charge of the facility she certainly should have, and was indeed, advised as confirmed by Hutchens before she arrived at the facility that she faced the challenge of a union election.

Hutchens’ testimony, too, in certain respects is less than credible. His statement that the employees pictured and who were quoted in a union booklet as being in support of the Union in fact “did not support the Union” defies credulity. Hutchens based his belief that although they may have wanted the Union when they were quoted, they may have changed their minds later based on the season in which he believed the photos were taken.¹¹

Konjoh’s exaggeration, at hearing, of the reasons for Claudio’s termination harms her credibility. Thus, Konjoh testified that Claudio had not performed certain of the treatments listed in the TAR sheet, but no mention of such serious misconduct was made in her termination letter.

¹¹ In assessing Hutchens’ credibility I have not taken into consideration the fact that certain subpoenaed documents were not available at the time of his examination. After the documents were received by the Acting General Counsel and the Union, Hutchens could have been recalled to testify concerning them.

II. THE VIOLATIONS OF SECTION 8(A)(1) OF THE ACT

A. The Interrogations of Employees

The complaint alleges that in August 2010, the Respondent interrogated its employees about their union membership, sympathies, and/or activities.

I credit the following employees' testimony concerning their being asked by supervisors and officials of the Respondent about how they or their coworkers would vote. Their testimony is supported by the Employer's admitted efforts, led by its labor relations advisor Pat Fleming, to identify where the employees' union sympathies lie. Thus, according to official Hutchens, Fleming asked the managers how the employees under their supervision were expected to vote, reading their names from the *Excelsior* list. Indeed, Hutchens asked the managers for reasons why they believed an employee would vote one way or another, and he stated that the managers were expected to get "accurate information" concerning their charges—"if they don't know those employees, they should know them certainly." Supervisor Southgate quoted Fleming as telling them to "feel out" the workers to see "where they stood."

It is clear that the managers followed the instructions of Fleming and questioned the employees regarding their union sympathies, as set forth below.

I credit Claudio's testimony that Konjoh asked her, "[H]ow did I feel people were going to vote?" When Claudio replied that she did not know how her coworkers would vote, Konjoh asked her to give her a chance and vote "no." This instance of interrogation by the Director of Nursing Konjoh constituted questioning of an employee regarding her belief as to the union sympathies of her coworkers, and as such constitutes illegal interrogation.

I credit the un rebutted testimony of CNA Avian Jarbo who stated that shortly before the election, CareOne nursing official, Jessica Arroyo, asked Jarbo whether she was "going to get a 'no' vote from you?" Jarbo replied that he was not certain. Inasmuch as Arroyo was present at the facility every day during the campaign and the Respondent was urging employees to vote "no" in its literature, I find that this statement was made. The questioning of Jarbo was by a high respondent official and was a direct inquiry as to how he intended to vote. As such it constitutes illegal interrogation.

I also credit Stubbs' testimony that Konjoh asked her what she thought of the Union. Stubbs replied that she did not know, and Konjoh said that she knew Stubbs had a union at her other job, "but we don't want one here." The question concerning Stubbs' feelings about the Union constituted illegal interrogation.

I credit Lynette Tyler's testimony that Illis asked her what she thought about the meetings being held by management concerning the Union. Tyler replied that they were "informative." Illis then asked her, "[W]here are you in terms of voting? Do you know if you were going to vote for the Union or not?" Tyler replied that she was unsure, was "sitting on the fence," and that she was gathering information from the Union and management at the meetings in order to make an informed decision. Illis replied that "you do not need a union. Do you know how the rest of your co-workers were voting?" Tyler answered

that she did not know. Illis then asked her, "[C]an you convince them to vote no?" Tyler responded that she had only been employed for 9 months while her coworkers had worked there for decades and they could be expected to make their own decision. Illis told her to "find out and ask who was going to vote yes and no. Question employees about how they were going to vote." Here again, the questioning by the highest ranking official in the facility, Administrator Illis, constituted illegal interrogation.

The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Relevant factors include whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation.

Given the totality of the circumstance here, I conclude that the questioning set forth above reasonably tended to coerce employees in the exercise of their Section 7 rights. The questioners included Illis and Konjoh, the two highest ranking officials at the facility, as well as corporate officials Hutchens and Arroyo. No assurances were made to the employees concerning the questioning, and the questions asked directly inquired as to the employees' union sympathies, an improper inquiry by supervisory personnel. *Sunrise Senior Living, Inc.*, 344 NLRB 1246, 1254 (2005).

I accordingly find that the Respondent unlawfully interrogated its employees in violation of Section 8(a)(1) of the Act.

B. The Solicitations of Employees' Complaints and Grievances and Promises of Increased Benefits and Improved Terms and Conditions of Employment

The complaint alleges that by soliciting employee complaints and grievances, the Respondent promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activities.

The employees' interest in the Union began as a result of Administrator Heedles' advising them in private meetings that their schedules would be changed, effective August 1, 2010. They complained to CareOne officials, and Human Resources Executive Andrea Lee visited the facility in June and heard about the schedule changes. Nevertheless, the new scheduling remained in place until after the petition was filed in late July, and Illis replaced Heedles as the new administrator.

Thus, following the filing of the petition, Illis, in about mid-August directed that the schedule changes directed by Heedles 2 months earlier be withdrawn, and the prior schedule remain in effect.

The Respondent's officials told the workers at various meetings that they were not aware of the extent of employee unhappiness at working conditions at the facility. Hutchens and Illis were quoted as having said that they would try to "fix" things. I cannot credit the denials of Hutchens and Illis. He and Illis clearly "fixed" the employees' grievance regarding Heedles' schedule changes.

In addition, I credit Lynette Tyler's testimony that shortly after Illis began work at the facility she was told by Tyler that her job was "overwhelming." Illis asked her to prepare a list of her

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duties and told her that although she could not make promises, she would see what “changes she could adjust.” About 1 week later, one of her tasks, recording the weights of patients, was removed.

At a meeting of employees, Annie Stubbs complained to Hutchens that garbage bags which the workers needed to maintain the sanitary conditions in the facility were kept locked in an office and inaccessible to the employees until the office was opened in the morning. Hutchens immediately instructed Illis to ensure that the bags were available at all times, and Illis did so.

The Board has held that, “in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances.” *Uarco Inc.*, 216 NLRB 1, 2 (1974). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances.” *Center Service System Division*, 345 NLRB 729, 730 (2005). Here, by advising the employees that they would attempt to “fix” or “adjust” the grievances they had, Illis and Hutchens solicited their grievances, promised to resolve them, and did resolve them.

I accordingly find and conclude that the Respondent solicited employee grievances, promised to remedy them, and did remedy them in violation of Section 8(a)(1) of the Act.

III. THE VIOLATIONS OF SECTION 8(a)(3) OF THE ACT

A. Legal Standard

The question of whether the Respondent’s discipline and discharges of its employees and its reduction of the hours of the per diem employees were unlawful is governed by *Wright Line*, 251 NLRB 1083 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the actions taken. He must show union activity by the employees involved, employer knowledge of such activity, and union animus by the Respondent.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged the employees even in the absence of their union activity. To establish this affirmative defense “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken even in the absence of the protected activity.” *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). “The issue is, thus, not simply whether the employer ‘could have’ disciplined the employee, but whether it ‘would have’ done so, regardless of his union activities.” *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

Accordingly, the Respondent may present a good reason for discharge, but unless it can prove that it would have discharged the worker absent her union activities, the Respondent has not established its defense. If the General Counsel presents a strong prima facie showing of discrimination, the Respondent’s burden is “substantial.” *Vemco, Inc.*, 304 NLRB 911, 912 (1991). “The policy and protection provided by the Act does not allow

the employer to substitute ‘good’ reasons for ‘real’ reasons when the purpose of the discharge is to retaliate for an employee’s concerted activities. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question; rather it “must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.” *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 fn. 17 (2007).

A careful examination of the Respondent’s record of disciplining other employees for the same offense must be made. Differences in treatment of employees who committed the same or similar offenses is an important factor to be considered in evaluating the Respondent’s defense. The presence of disparate treatment toward the discharges indicates a discriminatory motive. *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006). “To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity.” *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004).

B. Special Considerations Applicable to Medical Care Facilities

In *St. John’s Community Services-New Jersey*, 355 NLRB 414, 423–424 (2010), the Board found that the respondent unlawfully more strictly enforced its medication administration policy upon its employees and discharged them pursuant to a stricter enforcement of such policy because of its employees’ union activities. The considerations applied to medical care facilities set forth in that case are also applicable here:

I do not question the legitimacy of the Respondent’s need to enforce its medication administration policy. The absolute importance that the Respondent attaches to its policy is not at issue. Similarly, the gravity of the harm to the [patient] because of such an error is also not at issue. The issue here concerns how the Respondent dealt with its employees who committed medication errors.

As the Board stated in *Schrock Cabinet, Co.*, 339 NLRB 182, 183–184 (2003), my finding that the employees’ discipline and discharges violated the Act

[d]oes not alter or undermine an employer’s authority to implement or enforce work rules. Nor does it cast doubt on an employer’s ability to *more strictly enforce* its work rules. (Emphasis in original) An employer’s more stringent enforcement of its work rules will not constitute a violation of the Act unless it is a consequence of employee participation in protected activity. The existence of protected activity alone, however, does not foreclose an employer from more strictly enforcing its work rules, even where the employer previously tolerated infractions of those rules A violation of the Act will be found, however, where—as in this case—an employer

more strictly enforces a work rule in response to protected activity.

The question that must be answered is not whether the employees involved committed errors in their work, or even if they were serious or terminable offenses, but whether the Respondent would have disciplined and discharged them even in the absence of their union activities. As will be described below, I conclude that the Respondent disciplined and discharged employees for errors because of the Union being selected as the employees' representative in the September 2 election. Immediately thereafter, the Respondent began disciplining and discharging employees for errors that would not have merited such treatment prior to the election.

C. The Union Activities of Claudio, Jacques, and Napolitano and the Respondent's Animus

Claudio, Jacques, and Napolitano were the three leading union advocates at Somerset Valley. Claudio spoke to other employees about the need for union representation and contacted the Union and arranged meetings between organizer Walsh and the workers. She and Napolitano met with Walsh. They and Jacques distributed a union petition among the workers and spoke with Supervisor Apgar and also to Southgate who became a supervisor in August about the process. Claudio, Jacques, and Napolitano distributed union cards at work and collected them there. They appeared in the Union's brochure which was seen by Hutchens and Illis before the election. In addition, Claudio and Jacques appeared in the Union's YouTube video which was seen by Hutchens before the election. Jacques and Napolitano served as the Union's election observers.

As set forth above, Supervisor Southgate recalled labor relations adviser Fleming telling the managers that Napolitano was a "union organizer" and that Claudio was "very pro-union."

Accordingly, I find that Claudio, Jacques, and Napolitano engaged in activities in support of the Union and that their union activities were well known to the Respondent.

The Respondent's animus toward the Union is beyond question. After the petition was filed, it waged an aggressive campaign designed to encourage employees to vote against union representation. Its officials met with employees both at meetings and individually to urge them to vote against the Union in the election. In addition, as set forth above, the Respondent conducted illegal interrogations of employees and unlawfully solicited and resolved employees' grievances.

D. The Discipline for Attendance

On September 13, only 11 days after the election, the Respondent issued two written warnings to Jacques, two written warnings to Claudio, and a first written warning to Napolitano for attendance issues. They had not received written discipline prior to the election for their deplorable attendance records.

The evidence strongly supports a finding that the Respondent's policy toward employee lateness and absence from work became more strict after the Union won the election. Thus, as set forth above, Supervisor Southgate credibly testified that, following the election, she was told by Konjoh that she should

no longer accept calls from late employees, and that she should direct them to Konjoh.

Although Illis stated that she became aware of excessive absenteeism among employees when she began work on August 3, no action was taken against anyone for 6 weeks, not until shortly after the election. A finding may properly be made that, in doing so, the Respondent sought to retaliate against employees for the Union's election victory. This finding is supported by Illis' concession that she told the workers that she was "disappointed" in the election results, and may have said that she felt betrayed at those results. Her disappointment and betrayal manifested itself in her postelection examination of the lateness records and decision to issue discipline to the "worst offenders" who happened to include Jacques, Claudio, and Napolitano.

Certainly, Illis could have reviewed the attendance records immediately after beginning work at the facility on August 3. Indeed, as mentioned above, she became aware of excessive absenteeism after her arrival at the facility. But, nevertheless, waited until the results of the election. Certainly, if she was attempting, in issuing discipline, to correct the employees' misconduct and improve their attendance, the most appropriate time to issue discipline was as soon as she became aware that employees were excessively late and absent.

The issuance of multiple disciplinary notices to the three leading union advocates on the same day for attendance issues sent a clear message to the Union's supporters. The fact that Konjoh, in deciding to whom the discipline should be issued, did not investigate whether, in the past, employees were disciplined for such matters, and that she was told that discipline for such misconduct was not a "common practice," evidenced a desire to pursue such discipline without regard to the past history of the facility. Further, the fact that Konjoh decided who to discipline does not minimize Illis' involvement in the process because they both discussed the discipline and obviously Illis knew which employees would be disciplined.

Moreover, although Konjoh testified that, when she began work at the facility, she decided to give employees a "clean slate" and did not look at their attendance records before August 2010, she nevertheless, she disciplined employees for lateness and absences based on their records from January 2010. For example, on September 13, Claudio was written up for being late 64 times since January 1, 2010, Jacques received discipline for being late 109 times since January 1, 2010, and Napolitano, for being late 93 times since January 1, 2010.

The inconsistency in Konjoh's approach to disciplining the three union leaders, in considering past lateness although she wanted to give them a "clean slate" is evidence of an unlawful motive. Indeed, Supervisor Southgate told Claudio to "be careful and don't be late. . . . Don't give them a reason."

The Respondent offered evidence that other employees were also issued discipline for absences and latenesses.¹² However, all of those disciplines, except for a final written warning issued to Jennifer McCauley in February 2010 for excessive absences, were issued after the election. Accordingly, no history of con-

¹² There was no showing that Gladys Amaka Agu, who was late 34 out of 37 shifts, was issued discipline by Illis, who simply asked why she was late so often.

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sistent application of discipline predating the election, or even predating the filing of the petition, was presented. This is so notwithstanding that excessive latenesses and absences were common at the facility prior to the election with virtually no discipline being imposed.

I accordingly find and conclude that the Acting General Counsel has made a prima facie showing that the Respondent's issuance of discipline to Claudio, Jacques, and Napolitano by more strictly enforcing its attendance policies was motivated by their union activities, and that the Respondent has not proven that it would have issued discipline to the three workers in the absence of their union activities. *Wright Line*, above.

E. Discipline for Performance Issues

1. Initial observations

Many of the errors and mistakes in documentation were discovered as a result of an increased scrutiny of the MAR and TAR books. As will be seen below, following the election, discipline was issued based on errors in completion of the MAR and TAR records.

It appears that those records were not scrutinized as carefully before the election as they were after the election, and that any errors in those records found prior to the election were rarely the subject of discipline. For example, the Respondent offered in evidence numerous examples of discipline given to employees after the election for performance issues, but could only present three instances of discipline prior to the election. Even as to them, the maximum discipline issued was a written warning.

Thus, on February 1, 2010, Beatrice Beaviour was issued a verbal warning for not recording weights of patients. On March 10, 2010, Jerry Santos was issued a verbal warning for not re-ordering a medication in a timely manner. On March 10, 2010, Michelle Moore was issued a verbal warning for not reporting significant changes to a patient, and on June 10, she was given a written warning for failing to check a bed alarm, failing to ensure that a bed alarm was in place, and leaving medication at a patient's bedside.

Accordingly, as set forth above, the question is not whether the Respondent could have issued discipline to the Claudio, Jacques, and Napolitano. The proper inquiry is whether the Respondent would have done so in the absence of their protected conduct. The evidence supports a finding that even assuming that the Respondent would have issued discipline to the three union leaders, it would not have discharged them in the absence of their union activities.

Although the MAR and TAR sheets completed on a particular day should have been reviewed by the 11 p.m. to 7 a.m. nurse, that procedure, mandated by the Plan of Correction following the September 2009 survey was not followed.

The procedure following the election was that, according to the credited testimony of Supervisor Southgate, she saw Illis and Konjoh behind the nurse's station where they "kept reviewing and combing through everything all the time." Indeed, as again testified by Southgate, Konjoh told her that they would be looking at the union organizers and if given a reason to write

them up, she would do so. In addition, as credibly testified by 11-year employee Jacques, reviews of those records by employer officials were not regularly done before the election, but only took place if an incident was brought to their attention.

Further evidence of increased scrutiny is apparent from Bockarie's credited testimony, that on his first day of work at the facility, he was asked by Illis to look for errors . . . in their notes, in their charting, the MARs and TARs, committed by people on a list which included Jacques.

The Respondent's witnesses testified that any increased examination of the MAR and TAR books were due to the upcoming, expected state survey. The last survey was performed in December 2009, and even assuming that a new survey would occur within a 4-month window as early as September 2010, there was no showing that errors in past presurvey audits resulted in discipline to any employees.

2. Sheena Claudio

Claudio, a leader in the Union's campaign, was employed by the Respondent for 9 months. The first disciplinary warning for performance issues was issued to her on September 20 and then on September 27. On October 21, she was discharged.

The warning on September 20 was for administering aspirin to a patient on 2 consecutive days whereas the order required it to be administered every other day. As set forth above, the Respondent had a practice whereby the night shift was supposed to have reviewed the charts each night to ensure that the medications ordered were given.

Although nurse Dande was issued the same discipline for committing the same error, it is apparent that the night-shift nurse should have noticed that two nurses were improperly administering medication to a patient. Although the night nurse's failure to do so does not minimize the error committed by Claudio, there is no showing that the night nurse was disciplined for failing to perform the 24-hour check. As set forth above, that check was required in the plan of correction, but Konjoh claimed not to be aware of that requirement.

Claudio received a written notice and a 2-day suspension on October 1 for failing to document patient status for three patients, as set forth above, failing to write an admission note, and failing to document a patient for 5 days after his admission.

However, employee Mootosamy received only a first written warning for failing to document a status postfall for 2 days and failing to do a postadmission documentation on another patient, and failing to document vital signs on her notes. In this case, the misconduct of both Claudio and Mootosamy was substantially similar to provide a comparison of the discipline given both employees. Clearly, the discipline issued to Claudio, particularly a 2-day suspension was far in excess of that given to Mootosamy for virtually identical misconduct.

In addition, the evidence supports a finding that documentation issues were a longstanding concern of the Respondent. It dealt with them, prior to the election, primarily with in-service training sessions.

Claudio was terminated on October 8, 5 weeks after the election, for failing to document her TAR treatments. As set forth

above, she kept a record of the treatments she administered but forgot to initial them in the TAR book.

Although nurses Jacques and Napolitano testified that nurses should complete the TAR entries before the end of their shift, and before they leave the building, Southgate stated that it was “not uncommon” for nurses to complete such entries the day after the treatments had been administered. She stated that she did so without discipline being issued, but was not aware if any Respondent official or supervisor was aware that she did so.

Konjoh attempted to embellish the reason for terminating Claudio by testifying that Claudio had not done certain of the treatments she claimed she performed. Nevertheless, the letter of termination did not mention that as a reason for the discharge. Such an effort by Konjoh tends to undermine the Respondent’s defense to her discharge.

The question that must be answered is whether Claudio would have been disciplined or discharged for the misconduct she committed. The above evidence indicates that she would not have been. Thus, Mootosamy was treated more leniently than Claudio for committing essentially the same errors. Further, Supervisor Southgate stated that she has completed entries after her shift has been completed, and even the day following the administration of treatment. Here, Claudio attempted to do the same as soon as possible following the end of her shift but was prevented from doing so.

I accordingly find and conclude that the Respondent has not proven that it would have disciplined and discharged Claudio in the absence of her union activities. *Wright Line*, above.

3. Jillian Jacques

Jacques, a long-term, 11-year employee, was a leader in the Union’s campaign and its election observer. She received discipline for not fully completing incident reports due to the CNA’s report not being included in hers, and for failing to transcribe a medication order accurately.

Prior to the election, these errors would have been remedied with in-service training. Even after the election, as set forth above, other nurses received less discipline for committing similar errors.

Further, the fact that Jacques was disciplined for these errors must be viewed in light of Bockarie’s credited testimony that Illis told him to look for errors committed by Jacques in her charting and MAR and TAR sheets. In addition, Konjoh told Southgate, as set forth above, that the Respondent would be looking at the union organizers closely and if they had a reason to write them up they would do so, but that Jacques was being very careful, and had so far avoided discipline.

I accordingly find and conclude that the Respondent has not proven that it would have disciplined and discharged Jacques in the absence of her union activities. *Wright Line*, above.

4. Shannon Napolitano

Napolitano was discharged only 2 weeks after the election, at which she was the Union’s observer. There is no dispute that she administered a zinc pill to a patient which had been discontinued. However, the circumstances concerning that event put in question the motivation behind the discharge.

Thus, Konjoh was aware that Napolitano was administering a discontinued medication but did not advise her not to do so

until after the patient held the pill given to her and presented it to Konjoh. Further, Konjoh’s replacement, Engram, testified that proper nursing procedure required any nurse, including the director of nursing, who was aware of such an error, to remove the medication from the cart. Instead, Konjoh permitted Napolitano to again administer the medication after being advised that she was doing so.

Further, as set forth above, three other nurses also administered the same discontinued medication and were not disciplined. Although they initialed the box in the MAR sheet indicating that they had administered the zinc pill, they told Konjoh that they did not give the patient the pill and erroneously signed the MAR. Although she stated that she did not believe them, she excused their two errors—their alleged administration of the discontinued medication and their falsifying the MAR. Konjoh’s lenient treatment of the three other nurses stands in stark contrast to her treatment of Napolitano.

Konjoh’s discipline of Napolitano for two additional errors—documenting an incorrect pulse oxygen level by noting that the level was 0-percent differs from the treatment a nurse would have received before the election: simply correcting an obvious error in documentation.

I accordingly find and conclude that the Respondent has not proven that it would have disciplined and discharged Napolitano in the absence of her union activities. *Wright Line*, above.

5. Valerie Wells

The complaint alleges that the Respondent unlawfully issued written warnings to Wells on September 15, 16, and 20, 2010, and discharged her on September 21.

Wells spoke to her coworkers and Supervisors Apgar and Southgate regarding the Union and appeared in the union flyer seen by Hutchens and Illis before the election. In this regard, Illis’ denial of knowledge of Wells’ union interest or activities cannot be credited.

Wells served as staffing coordinator for about 5 years under various administrators and directors of nursing, yet she was not disciplined for her work during such time.

As set forth above, her first discipline, on September 7 occurred only 5 days after the election. Thus, the September 7 discipline took place on the day Wells returned from vacation, and involved occurrences which took place the prior weekend. Ordinarily she would have been given until the morning of September 7 to reconcile any differences in the schedule with the actual attendance of employees that weekend. However, she was called into a meeting at the precise time that she was expected to make those reconciliations, and disciplined for not making them.

Wells received a first and second written warning on September 15, a third written warning on September 20 and was discharged on September 21. It is important to note that although Illis claimed to have spoken to Wells numerous times in August about her performance, there is no written record of such conversations.

Although Illis certainly could have disciplined Wells for errors in her work performance prior to the election she did not do so, but took the opportunity to discipline her repeatedly and in short order for errors after the election. As set forth above,

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Wells gave reasonable explanations for certain of the items complained of, including that Illis improperly scheduled Guerline for a shift.

The question which must be answered is whether the Respondent would have discharged Wells in the absence of her union activities. Wells performed her job without discipline for 5 years before the election, and CareOne official Hutchens was able to access Smartlinx and Wells' work and did not inquire into any problems he may have seen. It was only after the election that Illis brought Wells' errors to her attention and issued discipline. These factors lead me to conclude that the Respondent would not have disciplined and discharged Wells in the absence of her union activities.

*F. The Accelerated Resignation Date of
Lynette Tyler*

The complaint alleges that the Respondent unlawfully terminated Tyler on September 9, 2010.

As set forth above, Tyler resigned her position 1 week after the election, giving 2 weeks notice that she would be leaving her job on September 22. Illis told her to leave immediately and paid Tyler for the 2-week notice period. The Acting General Counsel alleges that the Respondent unlawfully accelerated her departure date.

As set forth above, Tyler appeared in the Union's YouTube video supporting the Union, and was unlawfully interrogated by Illis about her union sympathies. She conceded that Illis asked her to remain employed by the Respondent and not quit. But that was 2 weeks before the election, and apparently Illis sought to obtain her vote in the election. Although Tyler gave an equivocal answer to Illis' question as to why do you need a union, saying, "why not," nevertheless, according to Southgate, it was believed that, prior to the election, Tyler was "going back and forth." Indeed, in answer to Illis' question as to how she would vote, Tyler said that she was not certain.

Following the election, the Respondent sought to remove Tyler as quickly as possible and accelerated her resignation or discharged her when she gave 2 weeks notice of quit. Illis wrote on her personnel action form "not eligible for rehire—resigned with bad attitude toward company" which differs markedly from her alleged efforts to retain her as an employee before the election. I cannot credit Illis' testimony that when Tyler announced that she was resigning, she and Konjoh attempted to persuade Tyler to remain with the Employer. It is unlikely that Illis would have done so in view of her notation, above, concerning her ineligibility for rehire and her bad attitude. Rather, the evidence supports a finding that prior to the election, Tyler was encouraged to remain employed because the Employer hoped to persuade this uncertain voter to vote against the Union.

Based on the above, I find and conclude that the Respondent's accelerated resignation of Tyler was undertaken to remove her from the Respondent's premises because of her union activities. See *Gelita USA Inc.*, 352 NLRB 406, 415 (2008), where the employer, in advance of an election and after unlawfully interrogating an employee, accelerated his departure date.

The evidence that Illis accelerated the departure date of two supervisors in January and April 2011, does not support a finding that the Respondent would have followed the same procedure prior to Tyler's resignation, or with nonsupervisors.

G. The Per Diem Employees

The complaint alleges that since on or about September 18, 2010, the Respondent unlawfully reduced the hours of per diem employees, including Daysi Aguilar, Annie Stubbs, Gertrudis Rodriguez, Dominique Joseph, and Rita Onyeike.

The union activities of the per diem employees are set forth above.

As set forth above, Southgate credibly testified that Konjoh told her that the Respondent was asking for another election and if that occurred, per diem employees must have worked a minimum number of hours in order to be eligible to vote in the new election.

Nevertheless, it was also required, in the first election, that the per diem employees work a certain number of hours in order to be eligible to vote. The difference in what actually happened after the election, however, is that those per diem employees who were eligible to vote were prevented from working, thereby ensuring that they would not be eligible to vote in the new election. This marked difference in attitude toward the per diem employees must have been because they voted in the election which was won by the Union.

Thus, within 2 or 3 weeks after the election, per diem workers Aguilar, Arias, Joseph, and Stubbs were all removed from the schedule which they worked on a regular, weekend or every other weekend basis for a period of time: Aguilar since 2005, Arias since November 2009, Joseph since 2007, Onyeike since July 2010, and Stubbs since May 2009.

They were removed for not having "active hours." That term was not explained at hearing. Nevertheless, their hours had been deemed sufficient to permit them to vote in the election only weeks before.

The Respondent's defense that per diem employees should not have been given a regular schedule is undermined by the fact that CareOne official Hutchens possessed knowledge, through his access to Smartlinx that they had been working pursuant to a regular schedule. He did not protest that fact and nothing was done to remove them until after the election.

In addition, the Respondent's reasons for terminating its per diem employees is undermined by Bockarie's credited testimony that Illis told him that she sought to hire employees who would vote in the Respondent's favor in a new election and asked for names of people he could recommend. Mansaray, a per diem, was included in the list, and he eventually was hired. Accordingly, the Respondent hired at least one per diem employee at the same time that it was removing its own experienced per diems. The Respondent argues that per diem workers were needed, but on an "as-needed" basis. Nevertheless, these employees had been working a regular schedule without change until after the election.

I accordingly find and conclude that the hours of the per diem employees would not have been reduced in the absence of their union activities. *Wright Line*, above.

CONCLUSIONS OF LAW

1. By interrogating its employees about their union membership, sympathies, and/or activities, the Respondent violated Section 8(a)(1) of the Act.

2. By soliciting employee complaints and grievances, the Respondent promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activities, in violation of Section 8(a)(1) of the Act.

3. By issuing a written warning to employee Shannon Napolitano on about September 13, 2010, and by terminating Napolitano on about September 17, 2010, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By issuing two written warnings to employee Jillian Jacques on about September 13, 2010, and by issuing a written warning to Jacques on about November 5, 2010, and by suspending Jacques on about February 9, 2011, and by discharging Jacques on about February 10, 2011, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By issuing two written warnings to employee Sheena Claudio on about September 14, 2010, and by issuing a written warning to Claudio on about September 20, 2010, and by issuing a written warning to Claudio on about September 27, 2010, and by terminating Claudio on about October 21, 2010, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By issuing a written warning to employee Valerie Wells on about September 15, 2010, and by issuing a written warning to Wells on about September 16, 2010, and by issuing a written warning to Wells on about September 20, 2010, and by terminating Wells on about September 9, 2010, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. By accelerating the resignation date of its employee Lynette Tyler on about September 9, 2010, the Respondent violated Section 8(a)(1) and (3) of the Act.

8. By reducing the hours of per diem employees, including Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs, the Respondent violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and shall make them whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, above, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful warnings issued to the employees who received warnings and to their suspensions and discharges, and to notify them in writing that this has been done and that such adverse actions will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, Bound Brook, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, sympathies, and/or activities.

(b) Soliciting employee complaints and grievances, thereby promising its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activities.

(c) Issuing written warnings to employees because of their union membership, sympathies, and/or activities.

(d) Suspending, discharging, or otherwise discriminating against any employee for supporting 1199 SEIU United Healthcare Workers East, New Jersey Region, or any other labor organization.

(e) Accelerating the resignation dates of employees because of their union membership, sympathies, and/or activities.

(f) Reducing the hours of per diem employees, because of their union membership, sympathies, and/or activities.

¹³ 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.

SOMERSET VALLEY REHABILITATION & NURSING CENTER

(g) 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 from the date of the Board's Order, offer Sheena Claudio, Jillian Jacques, Shannon Napolitano, and Valarie Wells full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Sheena Claudio, Jillian Jacques, Shannon Napolitano, and Valarie Wells, Lynette Tyler, Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful employment actions taken against the employees named above, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Bound Brook, New Jersey facility, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 August 1, 2010.

¹⁴ 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."

(f) 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.

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 question you about your union membership, sympathies, and/or activities.

WE WILL NOT solicit your complaints and grievances, thereby promising you increased benefits and improved terms and conditions of employment if you refrain from union organizational activities.

WE WILL NOT issue written warnings to you because of your union membership, sympathies, and/or activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against you for supporting 1199 SEIU United Healthcare Workers East, New Jersey Region, or any other labor organization.

WE WILL NOT accelerate your resignation date because of your union membership, sympathies, and/or activities.

WE WILL NOT reduce the hours of employees, including per diem employees because of your union membership, sympathies, and/or activities.

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.

WE WILL within 14 days from the date of the Board's Order, offer Sheena Claudio, Jillian Jacques, Shannon Napolitano, and Valarie Wells full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees Sheena Claudio, Jillian Jacques, Shannon Napolitano, and Valarie Wells, Lynette Tyler, Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions taken against the employees named above, and within 3 days thereafter notify them in writing that this has

been done and that the unlawful employment actions will not be used against them in any way.

1621 ROUTE 22 WEST OPERATING CO., LLC D/B/A
SOMERSET VALLEY REHABILITATION AND NURSING
CENTER