JD-64-15
Fishkill, NY

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

WINGATE OF DUTCHESS, INC.

and

Cases 03-CA-140576
03-CA-145659

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

WINGATE OF DUTCHESS, INC.
Employer

and

Case 03-RC-137858

1199 SEIU UNITED HEALTHCARE
WORKERS EAST
Petitioner

John Grunert, Charles Guzak, and *Alicia Pender, Esqs.,*
for the General Counsel.
Eve I. Klein, Eric W. Rudin, and *Katelynn Gray, Esqs.,*
for the Respondent.
Amelia K. Tuminaro, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Albany, New York on June 10-12, June 15-19, and June 22- 25, 2015. 1199 SEIU United Healthcare Workers East (the Union) filed the charge in Case 03-CA-140567 on November 10, 2014; [1] an amended charge on December 4, 2014; and a second amended charge on January 14, 2015. The Union filed the charge in Case 03-CA-145659 on February 4, 2015. On March 31, 2015, the General Counsel issued an order consolidating cases, consolidated complaint and notice of

[1] All dates are in 2014 unless otherwise indicated.

hearing. On April 17, 2015, the General Counsel issued an amended consolidated complaint and notice of hearing (the complaint). The Respondent filed a timely answer to the allegations of the complaint.

In an order directing hearing on objections and order further consolidating cases and notice of hearing that issued on April 17, 2015, the Acting Regional Director for Region 3 consolidated objections filed by the Union in Case 03-RC-137858 with the amended consolidated complaint in this matter. The order indicates that certain objections raised issues that are coextensive with allegations in the amended consolidated complaint. On October 1, 2014, the Union filed a petition seeking to represent certified nursing aides (CNAs), licensed practical nurses (LPNs), and unit aides employed by the Respondent at its Fishkill, New York facility (the Dutchess facility). Pursuant to a stipulated election agreement approved by the Regional Director on October 15, 2014, a secret ballot election was conducted on November 12, 2014, among the employees among the employees in the following described appropriate bargaining unit:

> All full-time, regular part-time time, and per diem[2] certified nursing aides, licensed practical nurses, unit aides and unit secretaries employed by the Employer at its Fishkill, New York facility; but excluding guards, confidential employees, professional employees and supervisors as defined in the Act, and all other employees.

The tally of ballots prepared after the election revealed that of approximately 140 eligible voters, 130 cast ballots, of which 60 were cast for Union, 64 were cast against the Union and there were 6 challenged ballots. After the tally of ballots issued, the parties entered into a stipulation in which they agreed that the challenges to two ballots should be sustained . As a result, the four remaining challenges were no longer determinative and the Union did not receive a majority of the valid votes counted, plus challenged ballots. On November 19, 2014, the Union filed objections to the election. As noted above, the Union's objections were consolidated for hearing with the complaint.

As amended,[3] the complaint alleges that the Respondent has committed numerous violations of Section 8(a)(1) of the Act at its Dutchess facility including: interrogating employees about their support for the Union; stating that a union was never going to come into the Dutchess facility; telling employees that they could not engage in union activity at the Dutchess facility and should expect harassment for doing so; engaging in unlawful surveillance of employees; calling the police for alleged trespass; suggesting in-house day care would be offered; suggesting a 401(k) match would be offered; telling employees that union activity was incompatible with

[2] Eligible to vote were all employees in the unit who had worked an average of 4 or hours or more per week during the 13 weeks immediately preceding the eligibility date for the election. The eligibility date was October 11, 2014.

[3] At the hearing I granted the General Counsel's motion to add additional allegations to the complaint, paragraphs VI (h) and (i), VII (g) and XVII (b) and (c) (GC Exh. 51). I also granted the General Counsel's motion to withdraw paragraph VII (d). On August 10, 2015, I granted the General Counsel's motion to withdraw paragraphs VI (f), VII (f), and X (b) of the complaint because the evidence was insufficient to support those allegations.

employment with the Respondent; soliciting grievances from employees; threatening employees with discipline because of their union activity; unlawfully threatening employees with a loss of benefits; unlawfully telling employees that their hours would be reduced if they selected the Union and threatening employees that it would never sign a collective-bargaining agreement with the Union.

The complaint additionally alleges that the Respondent implemented a perfect attendance bonus; changed employees' pay period; and granted employees a wage increase in violation of Section 8(a)(3) and (1) of the Act. Finally, the complaint alleges that the Respondent issued a written verbal counseling to Sandra Stewart in September 2014, suspended her on October 4, 2014, and discharged her on October 24, 2014, because of her union activities in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel contends in the complaint that the unfair labor practices committed by the Respondent are serious and pervasive and warrant the issuance of a bargaining order pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).[4]

On the entire record[5], including my observation of the demeanor of the witnesses[6], and after considering the briefs filed by the General Counsel, the Respondent, and Union,[7] I make the following

[4] On May 22, 2015, the Regional Director for Region 3, on behalf of the National Labor Relations Board (the Board), filed a petition for an injunction under Section 10(j) of the Act regarding the allegations in the complaint in the United States District Court for the Southern District of New York in Case 15 CV 3983 (GC Exh. 23). On May 29, 2015, Judge Vincent Bricetti declined to grant the injunctive relief requested in the petition. Judge Bricetti noted, however, that the petition remained pending. (GC Exhs. 24 and 25). Since a 10(j) petition is pending I have expedited the decision in this case to the extent possible pursuant to the provisions of Section 102.94 (a) of the Board's Rules and Regulations.

[5] The transcript in this case is lengthy (2,121 pp.). There are a number of errors in the transcript, most of which are minor or can be correctly interpreted in context (i.e. attributing statements made by the Respondent's counsel, Ms. Klein, to the Union's counsel, Ms.Tuminaro). With respect to minor errors, I note that p. 1662 of the transcript at LL.10 and 11 attributes a statement to me that I have no recollection of making and does not make any sense in context. With respect to the Respondent's unopposed motion to correct p. 1186 of the transcript, I grant the motion and order that the transcript be corrected in the manner set forth in the motion.

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

[7] In its brief, the Union withdraws Objections 4, 5, 10, 11, 13, 15, 16, 18, 19, 20, 21 and 22. I approve the withdrawal of those objections. Accordingly, I will make a determination regarding the remaining Objections, 1, 2, 3, 6, 7, 8, 9, 12, 14, 17, 23, and 24

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Fishkill, New York where it is engaged in the operation of a nursing home. Annually, the Respondent in conducting its business operations, derives gross revenues in excess of $100,000 and purchases and receives at its Fishkill, New York facility, goods valued in excess of $5000 directly from points outside the State of New York. The Respondent admits and I find that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a healthcare institution within the meaning of Section 2(14) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Wingate Healthcare, Inc. (Wingate) owns and operates 19 skilled nursing facilities in Massachusetts and New York and employs approximately 3,400 employees. The three facilities in New York are: Wingate of Beacon, located in in Beacon, New York; Wingate of Ulster located in Highland, New York; and Wingate of Dutchess[8] located in Fishkill, New York. All three facilities are located in the Hudson Valley region of New York. The Ulster and Dutchess facilities are located approximately 25 miles from each other, and the Dutchess facility is located 7 to 10 miles from the Beacon facility

At the material time, Scott Schuster was the owner and president of Wingate; Kim Ianiro was the vice president of human resources; Edward Blake was the vice president and the regional director of operations for New York; Tamilyn Levin was the chief financial officer and Judy Lima was the vice president of finance. All of these individuals were located at Wingate's headquarters in Needham, Massachusetts.

Approximately 160 individuals are employed at Wingate of Dutchess and provide care to approximately 160 residents. During the material time, Clayton Harbby was the administrator of the Dutchess facility, Ann Nelson was the director of nursing services, and Allison Frank was the assistant director of nursing services. The Dutchess facility has four major units, each of which is supervised by unit manager. Locust Grove is supervised by Diane McDonald; Boscobel is supervised by Martha Lewis; Vanderbilt is supervised by Stacy Tucholski; and Roosevelt is supervised by Patty D'Amicantonio. The Dutchess facility operates on a 24-hour basis with the following shifts: 7 a.m to 3 p.m; 3 p.m to 11:00 p.m; and 11 p.m to 7 a.m.

The Union filed a petition for an election with the Board in Case 03-RC-130608 on behalf of employees at Wingate's Ulster facility on June 12, 2014. Pursuant to a stipulated election agreement approved on June 26, 2014, an election was held on July 24, 2014, in a unit

[8] Wingate of Dutchess, Inc. (Dutchess) is wholly owned by Wingate Healthcare, Inc. (Wingate). For ease of reference both entities will be referred to, at times, collectively as the Respondent, although there is no allegation in the complaint that the two entities constitute a single employer.

composed of all full-time, regular part-time and per diem CNAs, LPNs and unit secretaries, in which a majority of the ballots cast were for the Union. The Employer filed no objections to the election and at the time of the hearing the parties were engaged in collective-bargaining regarding that unit.

In June 2014, after filing of the Union's petition at the Ulster facility, the Ulster administrator called Harbby, the Dutchess administrator, and advised him of the filing of the petition and told him that she had not been aware that there was union activity at the Ulster facility prior to the filing of the petition. In June, Harbby also received a phone call from Wingate's regional vice president, Edward Blake, who asked Harbby to determine whether there were any volunteers among the employees at the Dutchess facility who would be willing to speak to the staff at Ulster regarding their sentiments about a union. Harbby then asked a member of the staff to help him identify employees who previously had worked at union facilities and may be willing to talk about their experience at the Ulster facility. In July 2014, Blake also informed Harbby that union representatives were present at shift changes at the Ulster facility. Blake instructed Harbby that he should have management available at each change of shift to monitor activity outside of the building and to make sure that individuals were not trespassing on the Respondent's property. Blake also instructed Nelson in July 2014 that if union representatives were to trespass on the Respondent's property, supervisors were to ask them to leave and that they could call the police if the union representatives did not leave.

The Commencement of Union Activity at the Dutchess Facility and Related Complaint Allegations

Facts

At the time of the hearing General Counsel witness Georgann Allen was employed as a CNA at the Dutchess facility and had worked there for approximately 16 years. Allen testified that in late June or early July 2014, Harbby asked her to come to his office to speak to him.[9] No one else was present during the conversation. Harbby told Allen that the Union was being formed at Wingate of Ulster and he wanted her to go to that facility on speak on behalf of Wingate of Dutchess. Harbby stated that he wanted her to talk about Wingate being a good company and that a union would not be good for Wingate because it would limit the company from doing its best with their employees. Allen told Harbby that she would think about it and let him know whether she would be willing to speak at Ulster, but she did not think she was the perfect candidate. Allen also mentioned that she was supposed to have received her annual wage increase on her anniversary date in December 2013 but had not yet received it. Harbby said that it had probably been overlooked. At the end of the meeting Harbby asked Allen to think about speaking at Ulster and get back to him.

[9] Based on the record as a whole, I find that this meeting occurred sometime between Monday, June 30, 2014, and Thursday, July 3. The uncontradicted testimony of current employee Heather Lucas establishes that she voluntarily spoke to the employees at the Ulster facility on July 18, 2014. Thus, I have considered Allen's credible testimony regarding events occurring before Dutchess employees spoke at Ulster in relation to that date.

Allen testified that approximately a week later she was called to another meeting in Harbby's office.[10] A social worker and the recreation supervisor were present for this meeting. Allen testified that Harbby appeared to be reading from an email and said that if "we" went to speak to the employees that Ulster there would be "prompters" there to help them. Harbby asked the individuals present if they could share their experience about working at the Dutchess facility and that Wingate did not need a union. Allen stated that she did not know if she wanted to do that. Harbby said she would get paid for mileage and she would be "reimbursed" if she took the day off. Harbby again asked Allen to think about it and get back to him. Allen replied that the employees at the Dutchess facility felt that they were "in the same boat as the people at Ulster." Allen said that she had not yet received her raise[11] and that she could not afford the health insurance. Allen told Harbby that people did not think he was a fair administrator and that she did not think she could go and speak on behalf of Wingate at the Ulster facility. Harbby responded by telling Allen that "we do not need a union and a union would not get in here." Harbby also stated that he would "sleep in his building day and night before he would let anyone come in and take over his house." Harbby also again asked Allen to think about speaking at Ulster.[12]

When Allen returned to her unit after meeting with Harbby, employees Belinda Newkirk, Sandra Stewart, Michelle Angot, and Abigail Bopela asked her why she was called into Harbby's office. Allen told them that she was asked to go and speak on behalf of Wingate at the Ulster facility because the employees there were trying to get a union to represent them. When Allen was asked if she was going to go by the other employees, she replied that she did not think so.

According to the credited testimony of Stewart and Allen, at that point, the above-named employees began discussing that employees at Dutchess received paychecks that were short and that they could not afford the health insurance. In addition, they discussed that they did not feel that they had job security and that no one was listening to them when they had problems.[13] Stewart asked what they could they do about it and Allen stated that they could call

[10] I find that this meeting occurred during the week beginning Monday, July 7. 2014.

[11] On July 18, 2014 Allen received her annual wage increase retroactively. It was attributed to the pay period from June 29, 2014 to July 12, 2014. (GC Exh. 33.)

[12] Harbby admitted that he had asked Allen and four other employees to speak at Ulster. He testified that the four other employees volunteered to go but Allen declined. He testified that while Allen initially said she would think about it she later told him that she would not participate. I credit Allen's testimony over that of Harbby to the extent it conflicts. Allen's testimony was much more detailed and her demeanor while testifying regarding this issue demonstrated certainty. In addition, as a current employee who testified against the interest of the Respondent, it is unlikely that her testimony is false. The Board has noted that when employees testify in a manner which contradicts statements by their supervisors, it is likely to be particularly reliable, since such witnesses are testifying adversely to their own economic interest. *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24 fn. 2 (2014); *Bloomington-Normal Seating Co.,* 339 NLRB 191, 193 (2003). See also *Flexisteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996); *Federal Stainless Sink Division*, 197 NLRB 490, 491 (1972).

[13] Stewart testified that shortly before her discussion with the other employees about starting a union, Harbby had a brief meeting with some of the CNAs and LPNs at the nurses' station on the Locust Grove unit. Harbby stated that there was union activity at the Ulster facility and discussed some of the reasons he thought it had started. Harbby said that he did not want a union in his facility.

the Union and try to get it in at the Dutchess facility. Approximately 2 days later, after Stewart obtained the Union's phone number through Google, Stewart called the Union in Allen's presence while on a break at work. A union representative took Stewart's name and number and said that someone from the Union would contact her shortly.

The next day Union Representative Lori Massara contacted Stewart by phone. Massara asked Steward why she wanted to bring a union into the Dutchess facility. Stewart told her that she had heard that the Ulster facility was in the process of being organized and that they had the same problems at Dutchess that Ulster had, and that she felt the only way this could be corrected was by organizing a union at the Dutchess facility. Massara asked Steward to circulate a list among employees and let them know that they were signing an application for the Union to represent them. Stewart then began to circulate a petition at the Dutchess facility. At the top of the document Stewart put "Party List," but when Stewart spoke to employees she told them that the list was to show support for bringing a union into the Dutchess facility. Stewart testified that she gave the document the title of "Party List" so that the Respondent would not recognize it as a union petition if anyone in management observed it. Stewart obtained approximately 35 signatures on the petition and submitted it to the Union by fax.

Allen testified that on the Monday following her second meeting with Harbby,[14] Nelson asked her if she had thought about going to speak at the Ulster facility. Allen replied that she had thought about it and was not going to go, as she felt that the employees at the Dutchess facility "were in the same boat" as the employees at the Ulster facility. Nelson replied, "okay" and asked Allen if she wanted her to tell Harbby that she did not wish to speak.[15] Allen replied that she would tell Harbby herself. Later that morning Allen informed Harbby that she would not speak at Ulster because she felt the employees at Dutchess "were in the same boat" as employees at Ulster. Harbby replied "That's fine."

On July 23, 2014, Harbby and Nelson held "round-the-clock" meetings with employees. The Respondent had a prior practice of holding these meetings, which take place once a month and occur on every shift. Channel Kelly testified on behalf of the General Counsel regarding the meeting she attended on July 23, 2014. At the time of hearing, Kelly had been employed as a CNA at the Dutchess facility for approximately 5 years.[16] Kelly was also employed by another employer whose employees were represented by 1199 SEIU. According to Kelly, the meeting she attended began about 2:30 p.m. and lasted 30 to 45 minutes. Harbby, Nelson and Jodi Englehart, from the Respondent's human resources department, were present along with approximately 10 employees. Nelson asked if anyone present had been in a union. Kelly raised her hand and stated that she was a member of 1199 SEIU. Harbby asked her what the Union had done for her. Kelly responded that the Union had helped her with child care and had education and pension programs. Harbby replied by saying, "It sounded good." Harbby then stated that he

[14] I find that this conversation occurred on Monday, July 14, 2014.

[15] Nelson testified that in July 2014 she heard that Allen would be speaking at Ulster and asked her when she was going and Allen replied that she was not going to speak. Although it is undisputed that Nelson asked Allen about speaking at Ulster, to the extent there is a difference in their testimony, I credit Allen as I found her to be a more reliable witness.

[16] Kelly was discharged in late July 2014, but was reinstated in November 2014, pursuant to a settlement.

wanted the employees "to tell him what their concerns were so he could write it down and give it to the owner of Wingate so he can address it." Harbby also stated that the Respondent was going to change the current policy of paying employees every 2 weeks and return to its previous practice of paying employees on a weekly basis.[17] Harbby also stated that he was not in favor of the Union organizing the Dutchess facility.

General Counsel witness Belinda Newkirk also testified that she attended a meeting held by Harbby and Nelson on July 23 with approximately 10 employees. At the time of hearing, Newkirk was employed as a CNA at the Dutchess facility. Newkirk had worked at the Dutchess facility since June 20, 2012, as a CNA and prior to that she had worked in housekeeping at Dutchess since 2007. According to Newkirk, Harbby stated that at Ulster there had been approximately 70 cards signed and that the administrator did not know anything about the cards being signed. Harbby added that if the Union won the election at Ulster there would be layoffs and cutbacks. Harbby stated that employees at Dutchess did not need a union. He indicated that his door was open and that if there were any problems, employees could come to him. Harbby also stated that he would be "damned if he [would] see a union come into his facility tell him what to do with his employees." Harbby added that he told his wife that "he would stay at the hotel and sleep night and day to make sure that there was no union coming into his facility." [18]

On July 25, 2014, Massara met with Allen and Stewart at a restaurant in Fishkill, New York and discussed the process of organizing the Dutchess facility. Massara gave them authorization cards and told them that the cards were for application for membership in the Union. Massara also explained the NLRB election process and stated that if the majority of the employees supported the Union they would be able to bargain a contract with the Respondent. Both Stewart (GC Exh. 22-1) and Allen (GC Exh. 22-57) signed authorization cards at that meeting. Massara also gave Stewart and Allen blank authorization cards to give to other employees who may be interested in supporting the Union. Stewart reported to work after the meeting and began to solicit employees to sign cards in support of the Union. Allen and Belinda Newkirk also solicited cards from employees at the Dutchess facility. Employees also signed authorization cards at weekly meetings the Union held at a motel in Fishkill, New York. By early

[17] In February 2014 the Respondent had changed its long-standing practice of paying employees on a weekly basis and began to issue paychecks on a biweekly basis.

[18] Harbby testified that he conducted two round the clock meetings on July 23, 2014, to discuss the "rumors" that were going around the Dutchess facility regarding what was happening with the Union at the Ulster facility. Harbby admitted that he asked employees who attended the meetings if they had any experience with unions and that Kelly spoke at the first meeting. He denied, however that he stated that at either meeting that he would be damned if the Union would come into the facility or that he would sleep at the hotel in order to make sure that the Union did not come into the Dutchess facility. Nelson testified she was present at both meetings and did not hear Harbby make the statements attributed to him by Newkirk. To the extent their testimony conflicts, I credit Kelly and Newkirk over Harbby and Nelson. The testimony of Newkirk and Kelly was more detailed and their demeanor while testifying about these events evinced certainty. In addition, both Kelly and Newkirk were current employees of the Respondent at the time of the hearing and had no economic stake in the proceeding. Finally, since according to Allen's credited testimony, Harbby told her that he would sleep in the building before he would let a union come in and take over his facility, I find that it is likely he would have made a similar statement to employees at the round the clock meetings.

September, 2014, the Union had obtained 97 signed authorization cards from the employees at the Dutchess facility.

Stewart testified that in late July 2014, Nelson spoke to her at the Locust Grove nurses' station at approximately 9:15 a.m. Nelson told Stewart that "I heard you are doing union activities in my building, and I do not want it in here. I do not care what you do outside, but I do not want it in my building." Stewart replied, "Can you prove it." Nelson stated that she could because she had one of the "yellow cards."[19] According to Stewart, Nelson did not say anything further to her at that time. Later that day, Stewart was making a patient's bed when Harbby spoke to her. Stewart testified that she was crying because she was scared by her conversation with Nelson. When Harbby asked her why she was upset, Stewart replied that she did not like Nelson "threatening" her. Harbby replied, "You are the one putting yourself out there." When Stewart asked him how that was so, Harbby replied, "Look at what you are wearing." Stewart testified that she was wearing a yellow scrub bottom, a floral top with yellow and white and she had a purple streak in her hair. Stewart replied that she always wore a yellow uniform. Harbby then asked her about her hair. Stewart replied, "That is me. I always change my hairstyle." Harbby then told her that those were the Union's colors. [20] Harbby then stated Stewart needed to educate herself before she started "this union thing." Stewart replied that she was educated and that she had been a teacher in Jamaica and that she would become more educated about the Union. When Stewart began to tell him something about her family, Harbby replied he did not want to talk about personal matters, but just wanted to let Stewart know "what you guys are getting into."

Newkirk testified that in August 2014, Nelson asked her to come out of a resident's room. When Newkirk came out of the patient's room Nelson told her that someone had come to her and told Nelson that Newkirk was pressuring them into signing a union card. Newkirk replied that she had not done so. Nelson told Newkirk not to pressure employees to sign cards According to Newkirk, Nelson also stated that "Whatever I do with the Union is up to me, but not in her building." Nelson also replied that she could get in trouble for talking to Newkirk about the Union.

Nelson testified that in late July 2014, RN Nancy Maylath reported to her that Stewart had solicited Maylath to sign an authorization card while Maylath was in a patient's room. Maylath reported this to Nelson but asked her not to indicate that she had reported this activity to her.[21] Nelson testified that she met with Stewart at the Locust Grove nurses' station and told her that "someone" had reported to her that she was soliciting cards in patient's rooms and instructed her not to do so.[22] According to Nelson, Stewart told Nelson that she had no proof of this. Nelson

[19] The Union's authorization cards are printed on yellow paper.

[20] Steward testified she did not know until then that yellow and purple are the colors are associated with the Union.

[21] Maylath testified at the hearing and corroborated Nelson's testimony regarding her report to Nelson of Stewart's solicitation of her to sign an authorization card in a patient care area.

[22] The Respondent's handbook, (R. Exh. 3, p.52), contains the following rule regarding employee solicitations:

> Employees are prohibited from soliciting other employees on behalf of any organization, charity or other cause during working time and in direct resident care areas or resident

replied that this was the report that was made to her and that if Stewart had not done this, she apologized but she wanted the patients to receive the care that they were there for. Nelson told Stewart that she could not solicit employees to sign cards on the floor when they were working. Nelson specifically denied telling Stewart that she did not want her to solicit authorization cards "in her building."

Nelson also testified that in August 2014, she had received a report from Coleen Gattuso, an LPN, that while Gattuso was passing out medications to residents, Newkirk solicited her to sign an authorization card. Cattuso asked Nelson whether she could speak to Newkirk but not let Newkirk know that she had made the complaint. Nelson testified that she then spoke to Newkirk and told her that she had received a complaint that Newkirk was asking employees to sign authorization cards while they were engaged in patient care. Nelson told Newkirk that she would like her to stop asking employees on the floor while they were taking care of residents to sign cards. Nelson specifically denied telling Newkirk that she should not engage in union activity "in the building."

Harbby testified that Stewart asked to speak to him on July 29 while she was making a resident's bed. According to Harbby, Stewart told him that Nelson had been "harassing" her. When Harbby asked what kind of harassment, Stewart told him that Nelson had instructed her to stay focused on her work while she was taking care of residents. Harbby said that he agreed with Nelson that she should stay focused on the work and whatever else was going on could go on at other times, but not while she was doing her job. He specifically denied telling Stewart that she should expect harassment for being a union supporter or that she could not solicit employees regarding the Union on nonwork-time.

I credit the testimony of Nelson over that of Stewart and Newkirk regarding what Nelson told both employees regarding the manner in which they could solicit in the Respondent's facility. Nelson's testimony was detailed and complete and was corroborated, in part, by that of Maylath. I also find it inherently plausible. The record as a whole establishes that the great majority of the Union's authorization cards were solicited at the Dutchess facility and that the Respondent knew of such solicitation almost from its start on July 25, 2014. Under these circumstances, it seems improbable that Nelson issued instructions to employees that they would not be permitted to solicit other employees to sign cards "in the building." I find that Stewart and Newkirk misunderstood the instructions that Nelson gave them regarding the fact that they were not permitted to solicit other employees while they were on working time. However, with regard to Harbby's conversation with Stewart on July 29, after she had spoken to Nelson, I credit Stewart's testimony. With regard to this conversation, Stewart's testimony was far more detailed than Harbby's rather perfunctory description. In addition, Harbby did not specifically deny

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lounges when residents are present. Working time means the time either the solicitor or the person being solicited is on working time. Working time does not include breaks, meal periods or the time before and after work.

making reference to the fact that Stewart's uniform and hair color reflected colors that are commonly known to be the associated with the Union,

Analysis

Paragraph VI(a) of the complaint alleges that Respondent, by Harbby, about mid July 2014, on two occasions, recruited an employee to campaign against the Union. Paragraphs VI(b) and VI(c) of the complaint allege in July 2014 that Harbby suggested to employees to that a union would never come into the Dutchess facility. The complaint further alleges that by such conduct the Respondent violated Section 8(a)(1) of the Act.

As set forth in detail above, in July 2014, Harbby, on two occasions specifically requested Allen to go to the Ulster facility before the election that was scheduled to be held there on July 24, and speak in support of Wingate and tell employees that the employees at Ulster did not need a union. In *Allegheny Ludlum Corp*., 333 NLRB 734, 740 (2001), the Board held that an employer may not lawfully solicit individual employees to appear in a campaign videotape opposing the union. The Board found that "a direct request that employees appear in an antiunion videotape would put the employees in the position in which they reasonably would feel pressured to make an observable choice that demonstrates their support for or rejection of the union." Id. I find that there is no real difference between requesting an individual employee to appear in an antiunion videotape and requesting an individual employee to speak in person to a group of employees in support of an employer's position in a union organizing campaign. I do not agree with the Respondent's contention that the fact that Allen was requested to speak in favor of Wingate during the campaign at the Ulster facility rather than the Dutchess facility, where the Union had not yet begun to actively campaign, distinguishes the instant case from *Allegheny Ludlum.* This is particularly so since, in the second conversation between Harvey and Allen regarding the subject, Allen told Harbby that the employees at Dutchess felt that they were, "in the same boat" as the employees at Ulster and Harbby replied that the Dutchess facility did not need the Union, that the Union would not "get in here" and that he would "sleep in his building day and night before he would let anyone come in and take over his house." The circumstances make it clear that the Respondent was concerned about the Union attempting to also organize the Dutchess facility and had identified Allen as a well-respected employee who could assist it in portraying Wingate in a positive light. Accordingly, I find that by requesting Allen to speak in support of Wingate during its campaign against the Union at the Ulster facility, the Respondent placed Allen in position of declaring her union sympathies in violation of Section 8(a)(1) of the Act.

Harbby's statements to Allen that the Union would not get into the Respondent's Dutchess facility and that he would "sleep in his building day and night" before he would let the Union come into his facility, and the similar statements that he made to approximately 10 employees at the meeting that Newkirk attended on July 23, violate also Section 8(a)(1) of the Act in that they suggest to employees that efforts to obtain union representation will be futile. In *Money Radio*, 297 NLRB 698, 702 (1990), the Board found that a statement by the employer's managing partner that he would "sooner die them that let the union in" violated Section 8(a)(1) of the Act. In so finding, the Board noted that it has long held "that an employer may not with impunity simply and baldly tell employees in a variety of ways that their efforts to obtain union

representation will be futile. Such statements may be reasonably expected to chill employees' rights to exercise their Section 7 rights to organize and therefore violate Section 8(a)(1) of the Act."

Paragraph VII (a) alleges that the Respondent, by Nelson, asked an employee if she would campaign against the Union and paragraph VII(b) alleges that in mid-July 2014, Nelson asked an employee why she would not campaign against the Union in violation of Section 8(a)(1) of the Act.

As set forth above, based on Allen's credited testimony, after Allen's second meeting with Harbby regarding her speaking to employees at the Ulster facility on behalf of Wingate, Nelson asked Allen if she had thought about going to speak at the Ulster facility. Allen replied that she had thought about it and was not going to go as employees at the Dutchess facility "were in the same boat as the employees at the Ulster facility."

In *Intertape Polymer Corp*., 360 NLRB No. 114, slip op. at 1 (2014), the Board noted that, based upon its decisions in *Phillips 66 (Sweeny Refinery)*, 360 NLRB No.26, slip op. at 5 (2014) and *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom *NLRB v.* Hotel *Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985), it considers the following factors in determining whether questioning an employee regarding their union sympathy is unlawful:

1. Whether there is a history of employer hostility to or discrimination against protected activity;
2. the nature of the information sought;
3. the identity of the questioner;
4. the place and method of interrogation;
5. the truthfulness of the employee's reply.

As set forth above, and as will be further discussed later in this decision, the record in this case clearly establishes that the Respondent was hostile to the Union's attempt to organize its employees at the Dutchess facility. The nature of the information sought by Nelson's inquiry of Allen was to find out if Allen was going to acquiesce in the Respondent's unlawful solicitation of her to speak on Wingate's behalf during its campaign against the Union at the Ulster facility. Nelson is the highest ranking manager on the Respondent' s nursing staff at the Dutchess facility. These factors all support a finding that the question Nelson directed toward Allen was coercive. These factors outweigh the fact that Nelson made the inquiry in a hallway of facility rather than in her office and that Allen truthfully replied to the question. Accordingly, I find that Nelson's questioning of Allen regarding whether she was going to speak at the Ulster facility violated Section 8(a)(1) of the Act as alleged in paragraph VII(a) of the complaint. Since there is no evidence to support the allegation in paragraph VII (b) that Nelson asked an employee why she would not campaign against the Union, I shall dismiss that complaint allegation.

Paragraph VI(d) alleges that the Respondent, through Harbby, about July 23, 2014, at meetings with employees, interrogated employees about their support for the Union in violation of Section 8(a)(1) of the Act.

As set forth above, it is undisputed that at two meetings held on July 23, 2014, Harbby asked the employees present at the meeting if anyone had been in a union. According to the credited testimony of Kelly, when she indicated that she was a member of the Union, Harbby asked her what the Union had done for her. According to Kelly's credited testimony, at this meeting Harbby stated that he was not in favor of the Union organizing the Dutchess facility.

Applying the standard in *Intertape Polymer Corp*., I find that Harbby's questioning of employees was coercive and violates Section 8(a)(1) of the Act. In reaching this conclusion, I note that the Respondent has demonstrated animus toward the union activities of its employees and that the question, by its very nature, sought to determine the union sympathies of the assembled employees. Harbby is the highest ranking management official at the Dutchess facility. The question was asked to a group of employees in a meeting in which Harbby indicated his opposition to the Union. I find that these factors outweigh the fact that Harbby's question elicited a truthful response from Kelly in which she admitted her support for the Union

The complaint alleges in paragraph VII(c) that about July 29, 2014, Nelson told an employee that she did not want "union activity in the building" in violation of Section 8(a)(1) of the Act. Paragraph VII(e) alleges that in August 2014, Nelson, on two occasions, told employees there would be no union solicitation or distribution in the building, in violation of Section 8(a)(1) of the Act.

The complaint does not allege that the Respondent's no-solicitation rule is facially invalid, rather the General Counsel alleges that Nelson made statements unlawfully prohibiting employees from engaging in union solicitation in the Dutchess facility. Based on Nelson's credited testimony, I find that she did not instruct employees that they could not engage in union activity in the Respondent's Dutchess facility. Rather, Nelson told both Stewart and Newkirk that they could not solicit other employees to sign authorization cards while they were engaged in patient care. In *Our Way, Inc*. 268 NLRB 394, 395 (1983), the Board held that rules prohibiting solicitation during working time are presumptively lawful. Since Nelson merely instructed employees to refrain from engaging in soliciting employees to sign authorization cards while they were working, in accordance with the Respondent's lawful no-solicitation rule, I shall dismiss these allegations of the complaint.

Paragraph VI(e) alleges that the Respondent, through Harbby, about July 29, 2014, suggested to an employee that she should expect harassment because of her support for the Union.

As set forth in detail above, on July 29, 2014, when Stewart told Harbby that she felt that Nelson's conversation with her earlier that day regarding her solicitation of union authorization cards was "threatening," Harbby replied that Stewart was the "one putting yourself out there." Harbby then referred to the yellow clothing that Stewart was wearing and the purple streak in her hair, which he informed her were colors associated with the Union. Harbby also told Stewart that he wanted her to know what she was getting into. As I have found above, Nelson's instructions to Stewart regarding her solicitation of cards earlier in the day were lawful. However, I find that Harbby's statements to Stewart on July 29 violate Section 8(a)(1).

In *Brown Transport Corp*., 394 NLRB 969, 972-973 (1989), the Board found that the supervisor's statement that if the employer's home office found out that an employee supported the union "it could be made rough" on him, constituted a threat of unspecified reprisals in violation of Section 8(a)(1) of the Act. I find that Harbby's statements reflecting that Stewart was putting herself out there with the Union and that he wanted to let her know what she was getting into similarly constitutes a threat of unspecified reprisals for engaging in union activity in violation of Section 8(a)(1) of the Act.

Union Activity at the Respondent's Dutchess Facility During Shift Changes and Related Complaint Allegations

Facts

The Respondent's Dutchess facility is located at 3 Summit Court in Fishkill, New York. The Dutchess facility is located at the end of Summit Court and has parking in front of the facility and on the right and left sides. (GC Exh. 8; R. Exh. 71A.) Summit Court intersects State Route 52 and there is a stoplight located at the intersection. Based on the scale set forth in GC Exh. 8, the length of Summit Court from the intersection of Route 52 to the parking lot at the Dutchess facility is approximately 400 feet. Summit Court has a median strip near its intersection with Route 52 on which several trees are located. There is also a sign indicating "Wingate at Dutchess" located in the median close to State Route 52. As one heads toward the Dutchess facility on Summit Court, on the right-hand side is an office building located at 2 Summit Court, which is shown as Rosicki Rosicki & Associates, P.C. on GC Exh. 8. There is an entrance from Summit Court to a parking lot at 2 Summit Court. On the left-hand side of Summit Court as one approaches the Dutchess facility, there is a building located at 1 Summit Court, which also has an entrance to a parking lot at that building from Summit Court. To reach the Dutchess facility at 3 Summit Court or the building at 2 Summit Court, one must drive down Summit Court. The parking lot at 1 Summit Court can be reached by entering it either from Summit Court or from another road that enters into the parking lot.

The Respondent, Wingate of Dutchess, Inc., does not own the property located at 3 Summit Court, but rather is a tenant. At the hearing, the Respondent introduced, without objection, an affidavit that was executed by Michael Benjamin on June 22, 2015, (R. Exh. 71 pp. 1-2). According to Benjamin's affidavit, he is the general counsel and executive vice president of Wingate Healthcare, Inc. and is also the general counsel of Wingate of Dutchess, Inc. Benjamin's affidavit indicates that on February 28, 2006, Wingate of Dutchess, Inc. entered into a "sale leaseback financing arrangement" with NHP Dutchess, LLC (NHP) "wherein a skilled nursing facility located at 3 Summit Court, Fishkill, NY, was sold to NHP by an affiliate of [Wingate of Dutchess, Inc]. and simultaneously leased by [Wingate of Dutchess, Inc.] under a long term Master Lease with NHP dated February 28, 2006." The master lease is included in R. Exh. 71. The master lease includes a "Fourth Amendment to Master Lease," dated July 16, 2012, (R Exh. 71, Bates numbers 646-654). According to schedule 1 of the fourth amendment to the master lease, since July 16, 2012, the owner and landlord of the Wingate at Dutchess, Inc. facility is Nationwide Health Properties, LLC, a Delaware limited liability company and a successor in interest to Nationwide Health Properties, Inc., a Maryland corporation, and NHP Dutchess, LLC, a Delaware limited liability company (R. Exh. 71, Bates number 654).

A diagram of the property leased by Respondent Wingate of Dutchess, Inc. is contained in the record as the last page of R. Exh. 71 and a larger version of the diagram is included as R. Exh. 71A. The leased property includes the Dutchess facility and the parking lot immediately surrounding the Dutchess facility and Summit Court itself. It does not include the area of "Lot 1" (1 Summit Court) and "Lot 2" (2 Summit Court). (R. Exh. 71A). The lease contains an "Access Easement To Benefit Lots 1 & 2" (R.Exh. 71, A-6, Bates number 605.)

There is no evidence regarding a posting on the Respondent's leased premises at the Dutchess facility regarding solicitation or the distribution of literature by nonemployees. However, the Respondent's handbook (R. Exh. 3, p. 52) states : "Non-employees are strictly prohibited from engaging in any form of solicitation or distribution of literature on facility property at all times."

August 8

On the morning of August 8, 2014, Massara and Robin Ringwood, another union representative, drove into the parking lot of 2 Summit Court (the Rosicki Rosicki & Associates building) from Summit Court and were met by Stewart who entered their car at approximately 6:20 a.m. Shortly thereafter Nelson was informed that a suspicious car was parked in the parking lot of 2 Summit Court and approached the car with Supervisor Patty D'Amicantonio.[23] After Nelson determined that Massara and Ringwood were union representatives, she informed them that they had trespassed on Summit Court to get into the parking lot at 2 Summit Court and asked that they leave. According to the credited testimony of Massara, D'Amicantonio said, "We need no union here. We do not want union people here." (Tr. 74.) Massara and Ringwood took photographs of Nelson and D'Amicantonio while they were standing outside the car (GC Exhs. 9-14.) D'Amicantonio then took pictures of the car in which Massara, Ringwood and Stewart were sitting.

When the union representatives did not leave after Nelson had requested them to do so, she called the Fishkill police. Nelson informed the officer she spoke to that union representatives had accessed the Respondent's property to get to the parking lot that they were located in and that she had asked them to leave but they had not left. Nelson asked for police assistance in removing the union representatives. By the time the police arrived the union representatives had left the area.

[23] Massara, Ringwood, and Nelson testified regarding this matter. D'Amicantonio did not testify at the hearing. While many of the salient facts regarding this incident are undisputed, the testimony of the two union representatives and Nelson conflict regarding whether Stewart was present in the car with the union representatives. The mutually corroborative testimony of Massara and Ringwood indicate that Stewart was present. Nelson testified that Stewart was not present but that an unidentified black male was present in the back seat of car. Nelson's testimony is refuted by a timeline of events the Respondent created regarding Stewart's actions during the period from August 8, 2014, to the date of her suspension October 3, 2014 (CP Exh. 16). This timeline clearly indicates that Nelson witnessed Stewart meeting with two union representatives in the parking lot on August 8, 2014. Accordingly, I credit the testimony of Massara and Ringwood that Stewart was present on this occasion.

August 13

On August 13, 2014, Union Representatives Massara and Sharone Brown were present with employees Marcella Burns, Georgann Allen, Aniya Williams, and Belinda Newkirk during a shift change. [24] These individuals gathered at approximately 6:45 a.m. and were located in the parking lot of the Rosicki Rosicki building (2 Summit Court) near the entrance to that parking lot from Summit Court.

Respondent's unit manager, Martha Lewis, and night supervisor, Theresa Venturini, approached the union representatives. Lewis told the union representatives that they were not permitted to be in that location since they had used Summit Court to access the parking lot they were standing in. The union representatives responded that they were on public property and were allowed to be there. Lewis called Nelson who directed her to call the police. Lewis then contacted the police and informed them that union representatives were trespassing on the Respondent's property.

According to the credited testimony of Burns, Lewis took a photograph of Burns and the other individuals who were present in the parking lot at 2 Summit Court. Burns then took two photographs of Lewis. Lewis asked Burns what she was doing there and Burns responded, "I am standing with the Union." Lewis then told Burns "You know you are not supposed to be out here." Lewis also told Burns that she knew that the Respondent was a nonunion facility and that if she did not like it, she could find different job.[25]

D'Amicantonio joined Lewis during the time that the union representatives and employees were present during the shift change. According to the credited testimony of Allen, D'Amicantonio took some photographs of the group and then told Allen "Georgeann, you should be grateful you have a job." D'Amicantonio then entered the Rosicki Rosicki building and an individual came out with her and asked the union representatives and employees not to stand so that the employees who work in his building could not get through.[26]

Shortly thereafter two Fishkill police officers arrived at the entrance to the parking lot at 2 Summit Court that the union representatives and employees were gathered. One of the officers told them that he was not sure where the property lines were but he asked the union

[24] During the union campaign, the union representatives and employee supporters would gather outside of the Dutchess facility during shift changes in order to demonstrate support for the Union.

[25] Lewis denied speaking to Burns on this occasion. I credit Burns testimony over that of Lewis. Burns testimony was detailed and her demeanor reflected certainty regarding this conversation. Massara also corroborated Burns testimony that Lewis asked why Burns she was standing there. In addition, Burns was a current employee of the Respondent at the time of hearing and thus it is unlikely that her testimony was false.

[26] I credit Allen's testimony that D'Amicantonio retrieved an unidentified individual from the Rosicki Rosicki building to ask the union representatives and employees to stand away from the entrance to the parking lot. I find Allen's testimony to be more reliable than that of Massara who testified that Nelson retrieved the manager of the building to make such a request. No other witnesses to testify regarding this incident placed Nelson there. I also note that there is no evidence that the employees and union agents present at the shift change were in any manner blocking the entrance to the parking lot of the Rosicki Rosicki building at 2 Summit Court..

representatives and employees to move down to the end of Summit Court near Route 52. All of the individuals present complied with the police officer's request and stood at the entrance of Summit Court and Route 52 for a brief period before the shift change ended.

August 20

According to the uncontradicted testimony of Ringwood and Massara, on August 20, Massara, Ringwood, Brown, and Stewart participated in a shift change and were standing in the in the median located in the middle of Summit Court, near the intersection of Summit Court and Route 52. No one from the Respondent's supervisory staff spoke to the union representatives and Stewart that day, but an officer from the Fishkill Police Department arrived and told them that the Respondent had called the police to the scene. The police officers asked the union representatives and Stewart not to stand in the median but to stand on either side of Summit Court and they complied. There was no evidence presented to establish that the presence of the union representatives and Stewart in the median of Summit Court caused any traffic impediments on that date.

A police report from the Fishkill Police Department dated August 20, 2014, establishes that Harbby contacted the Fishkill police department at 3:32 p.m. and reported that protesters were on "Wingate" property and refused to move to another area. At 3:56 p.m. Officer Jennifer Brandt indicated in her report that "Protesters left the area." (GC Exh. 52.)

September 17

On September 17, 2014, Stewart was present at a shift change with Union Representatives Massara and Brown. All three individuals were standing at the intersection of Summit Court at Route 52 at about 6:45 a.m. As clearly demonstrated by a video taken by Brown (GC Exh. 21A), Harbby parked his car on Summit Court facing Route 52. At that location, the exit lane on Summit Court is two lanes wide and the video shows a car easily passing Harbby's parked car as it drives toward Route 52. Harbby approached Stewart Brown, and Massara and told them that they needed to get off of his property. Massaro asked Harbby for a "receipt" and asked him if he paid for the property. Harbby then acknowledged that he worked for the Respondent's owner. Massara told Harbby that they were standing where the Fishkill police told them they could stand.

Harbby approached Stewart and said that he did not understand her "When there are facilities all over the place that have 1199." Harbby also told Stewart that "I just do not understand why you want to bring it to our building. I do not get it, I do not get it, why do you want to bring it in this environment." (GC Exh. 21A.) Following his conversation with Stewart, Harbby, who was clearly standing on Summit Court, told Massara, who was standing just off the curb on Summit Court near Route 52, to step back on the curb and off of Summit Court. During this conversation, Harbby closely approached Massara who told him "Get out of my face. I'm not one of your workers so get the fuck out of my face." Harbby then asked Stewart "How can you associate with people like this, it is pathetic." Harbby continued to stay in the location of the union representatives and Stewart as they shouted greetings to employees who were arriving at and leaving from work for about 15 minutes until the shift change ended.

Additional Evidence Regarding Union Activity at Shift Changes

Union representatives and employees supporters of the Union were present at shift changes, usually on Wednesdays, at the Respondent's Dutchess facility beginning on August 8 and continuing until the November 12, 2014 election. Generally, union representatives and employees would be present at the entrance to the Dutchess facility at the intersection of Summit Court and Route 52 in the morning from approximately 6:30 to 7 a.m. and return from approximately 2:30.to 3 p.m.. The number of individuals would vary from approximately 3 to 4 to approximately 8 to 10. Nelson testified that on two occasions in late August or early September as she was arriving at work, she observed one of the individuals' present step onto Summit Court and speak to a driver who had stopped his or her car on Summit Court, causing the car behind to stop briefly. Harbby also testified in a vague manner that he also observed union supporters step into Summit Court during a shift change causing cars to stop, but did not indicate how often he had observed this.

Analysis

Paragraph IX of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act on August 13 and 20, 2014, by calling the police to remove employees and union representatives engaged in protected activity on public property.

In *Wild Oats Community Markets*, 336 NLRB 179, 180 (2001), the Board held:

> It is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956). This precedent, however, presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with the denial of union access to its property must meet the threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. See *Indio Grocery Outlet*, 323 NLRB 1138, 1141-1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999) cert. denied 529 U.S. 1098 (2000); *Food For Less*, [318 NLRB 646, 649-650 (1995), enfd. in relevant part 95 F.3d 733 (8th Cir. 1996)]; *BristolFarms, Inc*., 311 NLRB. 437, 438-439 (1993). In determining the character of the employer's property interest, the Board examines relevant record evidence-including the language of a lease or other pertinent agreement-in connection with

the law of the state in which the property is located. See *Food for Less*, supra, at 649.

In *Best Yet Market*, 339 NLRB 860 (2003), the Board applied the principles set forth in *Wild Oats Community Market*, supra, and examined the lease between the owner of the property and the respondent lessee and New York State law, in finding that the respondent violated Section 8(a)(1) of the Act by: directing union handbillers and pickets to remove themselves from a shopping center parking lot; causing the owner of the shopping center to issue a letter seeking to cause the union handbillers and pickets to leave the parking lot; and by threatening union handbillers and pickets that it would call the police if they did not remove themselves from the shopping center parking lot. In so finding, the Board determined that the respondent had not established that it had any exclusionary property interest in the parking lot.

The Respondent's brief does not address the applicability of the above-noted cases to the instant case. In addition, the Respondent does not point to any provision of the lease between the Respondent and NHP and its successors, that gives the Respondent the right, as a lessee, to demand that union representatives and employees leave the parking lot of the Rosicki Rosicki building located at 2 Summit Court (Lot 2); demand that union representatives and employees remove themselves Summit Court itself, or call the police in furtherance of its demands. Rather, the Respondent relies principally on *Berton Kirshner, Inc*., 209 NLRB 1081 (1974), as support for its right to call the police to remove union representatives who it alleges were trespassing on its property. *Berton Kirshner*, supra is inapposite as the complaint allegation in that case involved only the employer's conduct in taking pictures of union representatives distributing handbills to its employees as they left work. The Board's decision did not address the lawfulness of the employer's action in calling the police on the ground that union representatives were trespassing on its property.

I note that it is the Respondent's burden to establish that it had a property interest that entitled it to exclude individuals from its property in a case such as this involving a purported conflict between the exercise of Section 7 rights and private property rights. *Wild Oats Community Market*, supra at 180; *Best Yet Market*, supra, at 863. The lease and the attached diagram establish that the Respondent leases only the Dutchess facility located at 3 Summit Court, the parking lot immediately surrounding that facility, and Summit Court itself. There is absolutely no indication in the lease that the Respondent has any leasehold interest in Lot 1 (1 Summit Court) and Lot 2 (2 Summit Court). As noted above, while the Respondent does have a leasehold interest in Summit Court, the lease grants an access easement to Lots 1 and 2, thus further limiting the right of the Respondent to control access to Summit Court.

Since the Respondent does not have even a leasehold interest in 2 Summit Court it has no right to exclude individuals involved in Section 7 activity from that location. With respect to Summit Court itself, while the owner may have rights to exclude individuals from using Summit Court, the Respondent points to no provision in the lease that gives it that right as a lessee.

In *Best Yet Market*, supra at 863, the Board applied New York law as set forth in *Latrieste Restaurant & Cabaret, Inc. v. Village of Court Chester*, 212 A.D. 2d 668 (1995), leave to appeal denied 86 N.Y. 837 (1995), and *Turrisi v. Ponderosa Inc*. 179 A.D. 2d 956, 957 (1992)

in finding that the respondent in that case was not a "tenant in possession" of the parking lot in front of its store. The Board noted that the respondent did not have the exclusive right of possession of the parking lot but rather had "actual use" of the lot, which it shared with other tenants. Therefore, under New York law the respondent did not have the right to exclude persons from picketing and demonstrating in the parking lot.

In the instant case, the lease does not give any rights to the Respondent with respect to the use of Lot 2 and, while it has a leasehold interest in Summit Court, any rights it has are specifically subject to easements that allow individuals' access to 1 Summit Court and 2 Summit Court. Therefore, I find that under New York law the Respondent did not have a property right sufficient to exclude union representatives and their employee supporters from demonstrating their support for the Union in the parking lot of Summit Court 2 or from Summit Court itself.

While the presence of union representatives and supporters on Summit Court itself raises the potential of blocking ingress to and egress from the Respondent's facility, the record contains no evidence to show that union representatives and employees at the intersection of Summit Court and Route 52 on August 20 were actually on the roadway of Summit Court on that date. Rather, they were standing in the median strip of Summit Court. There is also no evidence that the conduct of union representatives and employees on that date interfered with ingress to or egress from the facility. The Board noted in *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191 (2007) that: "It is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with a legally protected interest." (Citations omitted.) In *Sprain Brook Manor Nursing Home*, however, the Board found there was no evidence that the nonemployee organizers were encroaching on the respondent's property on the days that police were called and thus there was no reasonable concern regarding the protection of its private property interests. In addition, there was no evidence on the days that police were called that union organizers or employees were blocking traffic or creating safety problems. The Board therefore found that the respondent was not motivated by any reasonable concerns when it called the police and, without any evidence establishing a need for police presence, the Board found the respondent's actions violated Section 8(a)(1). In the instant case, I also find that there is no evidence to establish that the Respondent was motivated by any reasonable concerns when it called the police to come to the intersection of Route 52 and Summit Court on August 20, 2014.

Accordingly, on the basis of the foregoing, I find that the Respondent violated Section 8(a)(1) of the Act by calling the police to remove union representatives and employee supporters from the parking lot of 2 Summit Court on August 13 [27] and on August 20, 2014, by calling the police while union representatives and employees were engaged in Section 7 activity at the intersection of Summit Court and Route 52.

Paragraph XI of the complaint alleges that on August 13, 2014, the Respondent, by Martha Lewis,Thresesa Venturini, and Patty D'Amicantonio engaged in surveillance of

[27] This complaint allegation is close enough in time to encompass Nelson's actions on August 8, 2014, in demanding that union representatives and leave the parking lot at 2 Summit Court and calling the police to effectuate their removal. Accordingly, I find that the Respondent's conduct on August 8, 2014, also violated Section 8(a)(1) of the Act.

employees engaged in union activity in violation of Section 8(a)(1). Paragraph VIII of complaint alleges that on August 13, 2014, Martha Lewis interrogated employees about their support for the Union in violation of Section 8(a)(1). Paragraph X alleges that on August 13, 2014, Martha Lewis told employees that union activity was incompatible with employment at Respondent's facility in violation of Section 8(a)(1).

On August 13, as set forth in more detail above, Lewis approached the union representatives and employees who were standing in the parking lot of 2 Summit Court and told the union representatives at they were not permitted to be in that location since they had used Summit court to access the parking lot. Lewis then contacted the police and informed them that union representatives were trespassing on the Respondent's property. Lewis also took a photograph of Burns and the other individuals who were present in the parking lot of 2 Summit Court. Lewis asked Burns what she was doing there and Burns responded she was "standing with the Union." Lewis then told Burns that she knew that the Respondent operated a nonunion facility and that if Burns did not like it, she could find another job. In addition, D'Amicantonio also took photographs of the union representatives and employees and told employee Allen that she should be grateful she had a job. In addition, D'Amicantonio retrieved an individual from the Rosicki Rosicki building in an attempt to have that individual move the union representatives and employees from the area in which they were standing.

Although it is well established that an employer may observe open union activity on or near its premises, an employer may not engage in behavior that is "out of the ordinary, to give employees the impression that is engaging in surveillance of their protected activities." *Sprain Brook Manor Nursing Home, LLC*, supra at 1191; *PartyLite Worldwide, Inc.* 344 NLRB 1342 (2005). In *Washington Fruit & Produce Co.,* 343 NLRB 1215, 1217 (2004), the Board further noted that photographing and videotaping public union activity on or near an employer's property clearly constitutes more than mere observation, because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board indicated that before an employer may engage in photographing or videotaping it has to establish that it had a reasonable basis to have anticipated misconduct by employees and other individuals engaged in union activity.

Applying those principles to the Respondent's conduct on August 13, I find that the actions of the Respondent's supervisors constituted unlawful surveillance in violation of Section of Section 8(a)(1) of the Act. Clearly, the conduct of Respondent's supervisors on August 13 constituted something more than the mere observation of open union activity conducted near its premises. Lewis unlawfully demanded that the union representatives leave the parking lot area of 2 Summit Court and called the police when they refused to move. In addition, both Lewis and D'Amicantonio took photographs of the group of union representatives and employees without any reasonable basis to anticipate misconduct by the individuals photographed.

Lewis' questioning Burns as to what she was doing standing with the union representatives is unlawful interrogation in violation of Section 8(a)(1). Applying the standards of *Intertape Polymer*, supra, the question was asked in the context of demonstrated employer hostility to the union activity of its employees and there was no legitimate basis for the question since Burns presence with the union representatives clearly indicated her support for the Union.

In addition, Lewis was Burns' direct supervisor. Clearly, Lewis' interrogation of Burns was coercive in nature. I also note that in the same conversation, Lewis committed another violation of Section 8(a)(1) by telling Burns that she knew that the Respondent operated a nonunion facility and that if Burns did not like it, she could find another job. The Board has consistently held that statements implying that an employee's union activities were incompatible with continued employment with the employer constitute implied threats of discharge in violation of Section 8(a)(1) of the Act. *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006); *Paper Mart,* 319 NLRB 9 (1995).

Paragraph XI of the complaint further alleges that on September 17, 2014, the Respondent, by Harbby, engaged in the surveillance of employees engaged in union activity in violation of Section 8(a)(1) of the Act. Paragraph X(c) alleges that on September 17, 2014 the Respondent, by Harbby, told an employee that union activity was incompatible with employment at the Respondent's facility in violation of Section 8(a)(1) of the Act.

As set forth in detail above, it is clear that Harbby's conduct on September 17 in approaching Stewart and the union representatives who were engaged in lawful Section 7 activity at the intersection of Summit Court and Route 52 constituted "something more" than merely observing union activity near the Respondent's premises. In this connection, Harbby stood right next to the union representatives and Stewart as they shouted greetings to employees entering and leaving the facility for about 15 minutes. The Board has long held that the close presence of a respondent's representative to employees and union supporters engaging in public union activity near the respondent's premises is unlawful surveillance. *PartyLite*, supra, at 1343; *Gainesville Mfg. Co*., 271 NLRB 1186 (1984).

Harbby's comments to Stewart that there were several facilities in the area that had 1199 and that he did not understand why she wanted to bring it into the Respondent's facility statement reflected the view that support for the Union is not compatible with employment with the Respondent. As noted above, the Board considers such statements to be implied threats of discharge for engaging in union activity. Accordingly, I find that Harbby's statement violated Section 8(a)(1) of the Act.[28]

Paragraph X of the complaint further alleges that the Respondent engaged in surveillance of employees engaged in union activity on August 20 and September 10, 2014 in violation of Section 8(a)(1) of the Act. As noted above, I found that the Respondent called the police to report to the Respondent's facility or August 20, 2014 without any reasonable basis to do so and thus violated Section 8(a)(1) of the Act. There is no evidence, however, that any supervisors engaged in surveillance of employees for engaging in shift change activity on August 20, 2014, or September 10, 2014. Accordingly, I shall dismiss this portion of paragraph X of the complaint.

[28] The complaint alleges an additional independent violation of Section 8(a)(1) committed by the Respondent for which Stewart is the principal witness. Because this allegation is relevant to the consideration of the 8(a)(3) and (1) allegations regarding Stewart, they will be discussed in that section of the decision.

Alleged Interrogation of Employees in mid-August

As noted above, paragraph VIII of the complaint alleges that on or about August 13, 2014, the Respondent, by Lewis, interrogated employees about their support for the Union in violation of Section 8(a)(1) of the Act.

At the time of the hearing, General Counsel witness Maxine Sproul was employed at the Respondent's Dutchess facility as a CNA. On July 25, 2014, Sproul signed a union authorization card. (GC Exh. 22-48.) Sproul testified that, after she had signed her authorization card, in late July or early August, Lewis, her direct supervisor asked Sproul to come to Lewis' office. No one else was present. Lewis asked if anyone had approached Sproul about the Union. Sproul replied, "no" and then asked Lewis why she was asking her questions about this. Louis said that she just wanted to know if someone approached Sproul and gave her a card, whether she would sign it. Sproul said if she was given a card, she would sign it. Sproul then asked Lewis if she was in trouble. Lewis replied "no" but she just wanted to know. Sproul then asked whether she would lose her job if she signed a card . Lewis again replied "no." When Sproul asked if she had a right to sign a card, Lewis said that she did. Sproul replied that she thought she had a right to choose and if she chose to go with the Union, she would sign a card. Lewis replied, "okay" and the meeting ended.

Lewis admitted meeting with employees privately during the union campaign in order to give them information. Lewis testified that during her discussion with Sproul in August 2014, she did not ask Sproul if she had been approached by any one from the Union or whether she would sign a union authorization card.

I credit the testimony of Sproul over that of Lewis regarding this meeting. Sproul's testimony was detailed and thorough and her demeanor was convincing. In addition, at the time of her testimony she was a current employee of the Respondent who testified adversely to the Respondent's position and thus her testimony was unlikely to be false. Based on Sproul's credited testimony, I find that the Respondent, by Lewis, interrogated Sproul regarding her union activity in violation of Section 8(a)(1) under the standards noted above in *Intertape Polymer,* supra. As I noted previously, the questioning occurred in the context of the Respondent's hostility to its employees' union activities. Sproul was not an open supporter of the Union at that point and the questions sought information regarding whether Sproul was inclined to support the Union. Lewis was Sproul's direct supervisor and asked her to come into her office where she spoke to her privately. Sproul did not answer truthfully Lewis' question regarding whether anyone had approached her about the Union. It is clear that Lewis' interrogation of Sproul regarding her sentiments toward that Union was coercive and violated Section 8(a)(1) of the Act.

The Complaint Allegations Regarding the Promise and Grant of Benefits

The Perfect Attendance Bonus

As amended, paragraph XV(a) of the complaint alleges that the Respondent violated Section 8(a)(3) and(1) by, about July 18, 2014, by introducing and subsequently awarding a bonus for perfect attendance for the period from July 18, 2014 through September 18, 2014.

The Respondent contends that the announcement of the attendance bonus at Dutchess in July 2014 was part of an established policy of Wingate. The Respondent also contends that at the time the attendance bonus was announced on July 14, 2014, it had no knowledge of union activity at the Dutchess facility.

It is undisputed that on July 14, 2014, the Respondent posted at the Dutchess facility a memo from Nelson to the nursing staff (GC Exh. 19) that indicated, in relevant part:

> In an effort to show our appreciation to our loyal staff we will be awarding all nursing staff employees with perfect attendance from July 18, 2014 to September 18, 2014 a $100 bonus. For this bonus to be awarded the employee must have no attendance occurrences during that period of time:
>
> *No Call Outs
> *No Tardys

Ianiro's uncontradicted testimony establishes that an attendance bonus was also implemented during the summer of 2014 at the Beacon and Ulster facilities. The notice posted at the Beacon facility indicated that a $100 bonus would be given to all nursing staff employees with perfect attendance for the period from July 30 to September 30, 2014. (R. Exh. 24, Bates number 221.) On September 22, 2014, the 34 employees at the Respondent's Dutchess facility who had achieved perfect attendance as defined by the program received the $100 bonus.

In *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006) the Board noted:

> In *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. While an election was imminent in that case, the rule set out in *Exchange Parts* is also applicable to promises or conferral of benefits during an organizational campaign but before a representation petition has been filed. E.g., *Curwood, Inc*., 339 NLRB 1137, 1147-1148 (2003), enfd. in pertinent part, 397 F.3d, 548, 553-54 (7th Cir. 2005) (holding that a prepetition announcement and promise to approve pension benefits violated Section 8(a)(1) where the respondent was reacting to knowledge of union activity among its employees.)

In *ManorCare Services-Easton*, 356 NLRB No. 39, JD slip op. at 21 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011), the Board reiterated the principles expressed in *Hampton Inn NY-JFK Airport* regarding the applicability of the *Exchange Parts* rule to an organizing campaign before a petition is filed

In ManorCare Services-Easton, Id. at 21, the Board also noted that it had long held that "[a]bsent a showing of a legitimate business reason for the timing of the grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee

rights under the Act." *Yale New Haven Hospital*, 309 NLRB 368, 366 (1992), *Kanawha Stone Co*., Inc.*,* 334 NLRB 235 fn. 2 (2001), citing *Mariposa Press*, 273 NLRB 528, 544 (1984)." This principle was also expressed by the Board in *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002) and *Latino Express, Inc*., 358 NLRB No. 94 (2012), reaffd. 361 NLRB No. 137 (2014)

In *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961-962 (2004) the Board summarized the applicable principles as follows:

> An employer, when confronted by a union organizing campaign, must proceed as it would have done if the union had not been present. It is well established that a grant of benefits made by an employer during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election. The employer has the burden of showing that would have conferred the same benefits in the absence of the union. To meet this burden, the employer needs to establish that the benefits are conferred as part of a previously established company policy and that the employer did not deviate from that policy on the advent of the union. (Footnotes omitted.)

In the instant case, Nelson testified that in June 2014, she spoke to Harbby about granting an attendance bonus for employees at the Dutchess facility in order to give an incentive to increase attendance during the summer months. Harbby testified he sought approval from Blake and Blake approved the request. Ianiro testified that during the summer of 2014 there were staffing shortfalls at all of Wingate's New York facilities and that the attendance bonuses were offered to assist in alleviating the situation. Ianiro also testified, however, that there were staffing issues in 2013 and no attendance bonuses were offered. With respect to its prior practice in granting an attendance bonus, in 2008, the Respondent, at the Dutchess facility, offered a $100 gift card to nursing and dietary employees who had perfect attendance for 30 consecutive days worked during the period from April through September 2008 (R. Exh. 23). In 2011 at the Dutchess facility, the Respondent announced that there would be a monthly drawing for a $100 gift card for all full-time and part-time staff who had perfect attendance during the period from May 23 to September 23, 2011 (R. Exh. 22).

The Respondent introduced evidence that the Wingate facility in Wilbraham, Massachusetts instituted a shift pickup bonus program for the period from December 22, 2014 through January 9, 2015. The Respondent also introduced evidence that it offered an attendance bonus at its Haverhill, Massachusetts facility during the period from June 12 through September 6 in an undetermined year.(R Exh. 24)

With regard to the Respondent's knowledge of union activity at the Dutchess facility, I find, as noted above, that in late June or early July, Harbby asked Allen to go to the Ulster facility to speak to employees on behalf of Wingate during the union campaign that was being conducted there. During the week of July 7, Allen told Harbby that the employees at the Dutchess facility felt that they were "in the same boat" as the employees at Ulster. During this conversation Harbby told Allen "we do not need a union" and that a union would not get into

the Dutchess facility. In addition, in early July 2014 Blake informed Harbby that union representatives were present at shift changes at the Ulster facility and told him that he should have supervisors available at shift changes to monitor activity outside the building during shift changes. During the same time Blake also instructed Nelson that union representatives were not to trespass on the Respondent's property and that if they did, supervisors were to ask them to leave and could call the police if they did not.

The Union filed the petition regarding the Ulster facility on June 12, 2014, and the facilities at Ulster and Dutchess are located within 25 miles of each other. I find that by July 13, 2014, the Respondent obviously knew that there was a union campaign being conducted at the Ulster facility and also knew that some of the Dutchess employees were sympathetic to that effort. I find it reasonable to infer that the Respondent suspected, but did not know for certain, that union activity was being conducted at the Dutchess facility. It is clearly established that an employer's suspicion that employees have engaged in union activity is sufficient to establish knowledge of union activities in determining whether there was a discriminatory motive in 8(a)(3) cases. *Trader Horn of New Jersey*, Inc., 316 NLRB 194, 198, (1995); *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990).

The Respondent has clearly not established that the offer of an attendance bonus was made pursuant to an established practice. The Respondent has only granted an attendance bonus at the Dutchess facility in 2 previous years. In 2011, the bonus offered was the opportunity to be included in a monthly drawing for a $100 gift card. In both 2008 and 2011 the bonus attendance program was instituted during the period from May through September. There is no evidence that Wingate had ever waited until mid-July before offering an attendance bonus during the summer months at any of its facilities and particularly the Dutchess facility. In 2012, although there were short staffing issues present at Dutchess and its other facilities, no attendance bonus was offered by Wingate. While Wingate, on occasion, had offered an attendance bonus at its other facilities, the evidence does not establish that it did so pursuant to a regular corporate practice but rather did so on an ad hoc basis. In addition, in 2014, Wingate offered an attendance bonus only at its facilities located in New York. By the time that the Respondent implemented its attendance bonus program at the Dutchess facility in 2014, a petition had already been filed in Ulster and the Respondent suspected that union activity was commencing at Dutchess. The Beacon facility is also in close geographic proximity to the Dutchess facility. Importantly, there is no evidence that Wingate implemented a bonus attendance program at any of its 16 Massachusetts facilities in the summer of 2014. Under the circumstances present in this case, and applying principles expressed by the Board noted above, I find that the Respondent has failed to meet his burden of showing that it would have granted the July 2014 attendance bonus in the absence of the Union.

I find the Board's decision in *American Roof Corp.*, 248 NLRB 748 (1980), modified on other grounds, 667 F.2d 20 (6th Cir. 1981), relied on by the Respondent, to be distinguishable. There, the Board found that the institution of a new pension plan to employees shortly before the election did not violate Section 8(a)(1). The evidence established that the respondent had begun planning for the institution of such a program long before the union began its campaign. In addition, the respondent instituted the pension plan on a corporate-wide basis at all of its facilities. Accordingly, on the basis of the foregoing, I find that by announcing and implementing

the bonus attendance program at the Dutchess facility in July 2014, the Respondent violated Section 8(a)(3) and (1) of the Act.

The Change in the Payroll Period Instituted on August 8, 2014

Paragraph XV(b) of the complaint alleges that about August 1, 2014, the Respondent violated Section 8(a)(3) and (1) of the Act by changing employees' pay period.

On October 31, 2013, Wingate issued a memo to employees at all of its facilities indicating that, effective February 1, 2014, all of its facilities would be converting from a weekly payroll to a biweekly payroll for all employees. Ianiro and Scott Schuster, Wingate's owner, testified that shortly after the change went into effect on February 1, 2014, they were made aware of the fact that employees at the Dutchess, Beacon and Ulster facilities were unhappy with the change.

On July 23, 2014, at the meetings held by Harbby at the Dutchess facility to address the union campaign at Ulster, Harbby announced that the Dutchess facility would be changing back to a weekly payroll from biweekly, effective August 8, 2014. Schuster's uncontradicted testimony establishes that the weekly payroll period was also reinstituted at the Beacon facility at the same time, but not at Ulster because of the pending petition.

As I have found above, by the time the reinstitution of the weekly payroll period was announced to the Dutchess employees on July 23, the Respondent knew that some employees supported the Union at the Dutchess facility and believed that union activity had commenced there. There is no doubt that the reinstatement of the weekly payroll period must be viewed as the granting of a benefit, given the clear record evidence that the employees at the Dutchess facility had expressed dissatisfaction with the biweekly payroll period and that Respondent was aware of this dissatisfaction.

Under the circumstances, it is clear that the principles expressed by the Board in *Donaldson Bros. Ready Mix*, *ManorCare Services-Easton*, supra, and the other cases cited above in the section of this decision discussing the perfect attendance bonus, should also be applied to the issues presented by the payroll change announced on July 23 and implemented on August 8. Applying those principles, I find that the Respondent granted the benefit of a weekly pay period in order to discourage employees from supporting the Union, as it is unable to establish that it would have granted that benefit if the Union had not been present. In this regard, the Respondent had known since shortly after instituting the biweekly payroll period in February 2014 that employees at the Dutchess and Beacon facilities were extremely unhappy with that change. However, the weekly payroll period was not reinstated at the Dutchess and Beacon facilities until after the Union had filed its petition in Ulster and the Respondent knew that some employees at the Dutchess facility were supportive of the Union. The fact that the Respondent reinstated the weekly payroll period at only at the Dutchess and Beacon facilities also supports that it was designed to dissuade employees from supporting the Union. The reinstatement of the weekly payroll period was not done on a corporate wide basis as it was not extended to any of Wingate's 16 Massachusetts facilities. Accordingly, I find, on the basis of the foregoing, I find that that the

Respondent violated Section 8(a)(3) and (1) of the Act by reinstating the weekly payroll period for the employees at the Dutchess facility or August 8, 2014.

The August 2014 Solicitation of Employee Interest for In-House Daycare

Paragraph XII (b) of the complaint alleges that about September, 2014 Respondent solicited employee interest for in-house day care as a new benefit to discourage support for the Union.

In mid-August, the Respondent posted a flier (GC Exh. 18) at the Locust Grove nurses' station at the Dutchess facility. The flier stated, in relevant part, "If we have an "In-House Child Care" program would staff use it?" The flier had a line to marked "yes" or "no" and indicated that employees could drop off their selection at the front desk. Harbby testified that the Respondent received 35 responses and that all were positive. Harbby testified that the Respondent did not move forward with the in-house day care program because there were "too many things going on at that time." Harbby uncontradicted testimony further established that he had pursued the issue of establishing an in-house day care at the Dutchess facility in 2013 and had prepared a draft of the memo of understanding between the Respondent and a day care provider in the first part of 2013 but was informed by Blake that Wingate would not go forward with the process at the time

The General Counsel contends that posting the flier regarding in-house day care constituted an implied promise of in-house child care to employees and interfered with employee free choice in violation of Section 8(a)(1) of the Act. The Respondent argues that the survey regarding employee interest in on-site child care was lawful as it was consistent with the Respondent's past practice of soliciting employee concerns and complaints at round-the-clock meetings. The Respondent further contends that there was no evidence to indicate that it made an implied or express promise to institute an in-house day care program.

The uncontradicted testimony of Nelson, Harbby, Ianiro and Schuster establishes that for years prior to the advent of the union campaign in the summer of 2014 Respondent maintained a regular practice of conducting round the clock meetings with employees at the Dutchess facility. At these meetings, which were attended by Nelson, Harbby and a member of the Respondent's human resources department, the Respondent would announce rule and policy changes and would also invite employees to ask questions or register complaints about terms and conditions of employment including, inter alia, wages or the need for supplies.

In *Johnson Technology, Inc*., 345 NLRB 762, 764 (2005), the Board held:

> It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign. See *Wal-Mart Stores*, 340 NLRB 637, 640 (2003). It is also well established that it is not the solicitation of grievances itself that violates the Act, but the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is

unnecessary. Id. citing *Maple Grove Health Care Ctr*., 330 NLRB 775 (2000); *Uarco*, 216 NLRB 1, 2 (1974).

In the instant case, the Respondent's action in posting a flier asking employees whether they had any interest in in-house day care is not materially different than asking the employees the same question at one of the Respondent's regularly scheduled meetings in which it invites questions or concerns regarding working conditions. In addition, the Respondent took no action with regard to implementing in in-house day care program in 2014. Thus, there was no explicit or implicit promise to address the interest expressed by a number of employees regarding the provision of in-house day care. Under the circumstances, I find that the Respondent's conduct in posting the flier asking employees if they had interest in in-house day care does support a finding that the Respondent unlawfully solicited grievances and/or promised to remedy them. Accordingly, I shall dismiss this allegation in the complaint.

The August 22, 2014 Announcement and the September 1, 2014 Implementation of a 2-Percent Wage Increase

On August 22, 2014, the Respondent posted a memo to employees at the Dutchess and Beacon facilities (GC Exh. 17). The memo, which contained the name "Scott" [Scott Schuster] at the bottom states, in relevant part:

> As a result of the many meetings and conversations we have had over the past several weeks, one issue that has repeatedly come up in conversation is concerns about annual wage adjustments and the fact that the 1% pay increases over the past few years have resulted in a "compression" of our hourly rates, particularly for longer tenured employees.
>
> We are making the necessary changes **i**mmediately to our wage rates effective September 1 as follows: **A one-time wage increase in addition to the 1% annual increase now in effect for 2014. (**Bold in the original**)**
>
> Eligibility:
>
> Active part-time and full time, hourly(non-management) team members
> Employees hired prior to 1/1/2014 will receive 2%
> Employees must be in good standing and not on a performance improvement plan/final warning
>
> We believe that this additional one-time wage increase adjustment of 2% will effectively bring our hourly rates into a more competitive level when compared other facilities our markets and, it recognizes the commitment of our longer tenured employees who have been so dedicated to our residents and their families for so many years. This is an important step in addressing concerns raised by a number of you, our team of caregivers and I want to assure you that we will continue to evaluate other key concerns and issues raised including Health Insurance and the 401(k) plan.

Consistent with the announcement, on September 1, 2014 the Respondent implemented a 2-percent wage increase for all eligible employees at the Dutchess and Beacon facilities. According to Ianiro, the 2-percent wage increase was not announced or implemented at the Ulster facility because the Union had won the election at that facility at the end of July 2014.

In considering whether the announcement and granting of the 2-percent wage increase violated the Act, I have applied the principles expressed by the Board in *ManorCare Services-Easton*, and *Donaldson Bros. Ready, Inc*., supra, and the other cases cited above in the section of this decision discussing the perfect attendance bonus.

By the time that the Respondent announced the 2-percent wage increase on August 22, the Respondent clearly had knowledge that employees at the Dutchess facility were involved in union activity. In addition to the evidence discussed above regarding the perfect attendance bonus, on July 23, Kelly openly expressed her support for the Union to Harbby and Nelson admitted that she was aware that employees were soliciting union authorization cards by the end of July 2014. Moreover, on August 8, union agents and Stewart were present in the parking lot at 2 Summit Court and were observed by Nelson and D'Amicantonio. On August 13, union representatives and employees were again outside of the Respondent's Dutchess facility in the parking lot at 2 Summit Court.

I also note that in late July or early August 2014, the Respondent posted a survey at the Dutchess and Beacon facilities asking employees what their "top 3 concerns" were and asking them to drop their completed surveys at the front desk (R. Exh. 37) at the Dutchess facility. The results of the survey were compiled by Harbby in a summary. The results revealed that on 47 responses to the survey, 26 listed pay rates as a concern. On August 12, Harbby sent an email containing the summary survey to Schuster, Blake , and Ianiro, which noted that the survey results had been reviewed at the managers meeting the previous week. (R. Exh. 39) Under these circumstances, Respondent has the burden of establishing that the announcement and grant of the wage increase was based on factors other than the pending union organizing campaign. *ManorCare Health Services- Easton*; *Donaldson Bros. Ready Mix, Inc*.; and *Latino Express Inc*. supra.

The record establishes that after completing one year of employment at a Wingate facility, and on succeeding anniversary dates, an employee is eligible for a wage increase after receiving a satisfactory performance review. Ianiro testified that the amount of the increase is based on Wingate's budget for the fiscal year. During Ianiro's tenure with Wingate, in 2011 the wage increase was 2.5 percent and in the following years it has been 1 percent. Ianiro testified that since 2011, employees at the Dutchess facility had never received a wage increase that did not correspond to an employee's annual performance review, until the September 1, 2014 wage increase

Ianiro testified that Wingate looks at the three New York facilities as a group with regard to financial performance and the compensation structure. Ianiro further testified that in May 2014, through round the clock meetings, particularly at the Beacon facility, Wingate representatives learned that employees wanted to know when raises greater than 1 percent would be considered.(Tr. 1158.) Thereafter, according to Ianiro, Wingate began contemplating giving

an additional wage increase to employees in the New York region. Ianiro had conversations regarding this matter with Tamilyn Levin, Wingate's chief financial officer, Judy Lima, the vice president of finance, Schuster and Blake. (Tr. 1154-1155) Ianiro testified that, while considering this matter, the Wingate managers solicited information from Harbby, and George Michaels, the Beacon administrator and Carolyn Kazdan, the Ulster administrator. Ianiro briefly testified that during these meetings there was some discussion that for the first 6 months of 2014, the three New York facilities were doing better financially than in 2013 when they operated at a loss.

On June 3, 2014, Kazdan, sent an email to Ianiro, Blake and Danuta Budzna, a regional HR manager for Wingate (R. Exh. 34a). Kazdan's email indicates that some CNAs at the Ulster facility had researched CNA wage rates on the internet, which the employees had shared with managers. Kazdan attached the wage information the CNAs had gathered to her email. Kazdan's email further stated "I think it is encouraging that they continue to reach out here in open way, but on the flipside, I think they are feeling the impact of the minimum raises we have been able to give. Our last regional wage salary was done in 2009 and we have not adjusted wages since that time. I did ask Danuta to bring up the possibility of doing something like a perfect attendance bonus."

On June 12, 2014, the Union filed its petition to represent CNAs, LPNs and unit secretaries at Wingate's Ulster facility. On June 12, at 5:52 p.m, Tamilyn Levin, Wingate's chief financial officer, sent an email to Carl Pucci, the director of finance and reimbursement for the New York State Health Care Facilities Association (NYSHFA), asking him if NYSHFA had any information regarding CNA and hourly rates for the union and nonunion facilities in New York (R. Exh. 35). Levin's email requested that Pucci send her any such information early the next day. On June 13, at 11:30 a.m., Pucci replied by email and asked Levin if she had any specific facilities in mind. On June 13 at 1:31 p.m., Levin sent an email to Pucci and asked him to look up the CNAs salaries at five facilities she listed and compare them to the information for each of Wingate's three New York facilities by 3:00 p.m. that day. On June 13 at 2:20 p.m. Pucci submitted wage information to Levin regarding three of the facilities she had requested.

On July 18, 2014, Ianiro sent an email to Lima and Helen Thomas, Wingate's payroll manager, stating that she was looking at providing pay increases to the CNAs, LPNs, and RNs, and adjusting the per diem rate at the Dutchess and Beacon facilities. The email indicated that Ianiro was looking at several comparisons, including increases of $.25, $.50 and $.75 an hour. The email asked Lima and Thomas to provide the year to date hours paid for those positions in order to estimate the overall cost impact of a wage increase on the facility. (R. Exh. 36.) On July 21, Lima provided information to Ianiro, Thomas, and Levin regarding the approximate yearly increase in wages based on an hourly increase of $.25, $.50 and $.75 an hour at the Beacon and Dutchess facilities. Ianiro testified that she then discussed with Schuster and Levin whether an increase would be based on a cents per hour basis or as a percentage of the existing wage rate

On August 11, 2014, Blake sent an email to Harbby and George Michaels, the Beacon administrator indicating that Schuster would like the wage comparison information he had requested by the next day in order to make a decision about what to do regarding a wage increase (R. Exh. 38). On August 12, Harbby sent an email to Blake, Michaels and Schuster regarding "Wage comparisons for Lutheran Care Center, a New York salary report customized by the

region and our current New York hiring range." Attached to the email was, inter alia, the wage rates contained in a collective bargaining agreement between the Union and the League of Voluntary Hospitals and Homes of New York for the period from 2007 to 2011. In addition as noted above, on August 12, Harbby also submitted the survey results regarding the concerns of the employees at the Dutchess facility, reflecting that wage rates was one of the major concerns.

Ianiro testified that the decision to grant the 2-percent increase to the existing wage rates was made by Schuster and Levin on August 12, 2014 (Tr. 1166). Ianiro further testified that the basis for the decision to grant the 2-percent increase was the fact that Wingate had a "solid first half of the year, beating projections" and the complaints received from employees that they were dissatisfied with the wages (Tr. 1167).

Schuster testified that in the spring of 2014 he was informed that employees in the three New York facilities had expressed concerns about wage compression and that during the period from April to June 2014, there was an internal discussion at Wingate about the compression of wages. According to Schuster, in spring 2014, the Wingate human resource department began looking at the wage grid and whether Wingate wages were competitive. Schuster testified that he began to spend more time in the three New York facilities in June 2014, after the petition had been filed at the Ulster facility. Schuster testified that after doing so it became clear to him that Wingate needed to make a change in wages in the New York facilities.

Schuster testified that he evaluated the financial situation of the New York facilities at the end of the first 6 months of 2014. According to Schuster, the New York facilities had lost money in 2013 and in 2012 had broken even or showed a slight profit.[29] Schuster indicated that the first 6 months of 2014 were profitable enough to make a change in the wage grid at Beacon and Dutchess. Schuster testified that there was no consideration to granting a wage increase at Ulster because the petition had been filed.

Schuster testified that he assigned Ianiro to gather the information about wage rates at other facilities in the New York region and later in the process also asked Harbby to gather such information. On direct examination, Schuster testified that he directed a wage increase to be instituted at Wingate's Dutchess and Beacon facilities in mid-August 2014 (Tr. 1464). According to Schuster, he was aware of union activity at the Dutchess facility by August 12. Schuster testified that in prior years there had been some union activity at all of the New York facilities. Schuster admitted, however that since the petition had been filed at the Ulster facility, it indicated to him that there was "some more activity directed at Wingate " (Tr. 1468). According to Schuster, in addition to Ianiro, Lima, and Levin and Blake were also involved in the process of deciding to grant the 2 percent wage increase.

On cross-examination, Schuster testified that Wingate had made the decision to grant a 2 percent wage increase to the Dutchess and Beacon facilities earlier than August 2014. In this connection, Schuster testified that "[P]robably in May we decided we needed to decompress the wage grade and make the adjustments. (Tr. 1509.) When Schuster was asked when Wingate decided on the two percent figure for the wage increase, he testified he thought it was in May or

[29] At the hearing Respondent introduced no documentary evidence regarding the profitability of the Dutchess, Beacon, or Ulster facilities in 2012, 2013 or the first 6 months of 2014.

June (Tr. 1509). Schuster later testified that, subject to confirmation of the wage data in the marketplace and the financial condition of the New York facilities, he had decided to implement the 2-percent wage increase at the Beacon and Dutchess facilities in May or June 2014. (Tr. 1518.)

The Respondent contends that it established that there were lawful business reasons for granting the 2-percent wage increase in September 2014 that were unrelated to the pending election campaign at Dutchess. I find, based on the principles expressed in a *ManorCare-Easton*, *Donaldson Bros*., and *Latino Express, Inc*., supra, that the Respondent has failed to meet its burden to establish that its announcement and granting of a 2-percent across-the-board wage increase to eligible employees during a union organizing campaign at Dutchess was governed by factors other than the pending union campaign.

Prior to the granting of the 2-percent wage increase on September 1, the Respondent's established practice was to grant a wage increases to employees on their anniversary dates, after a favorable review.[30] While in 2011 the annual increase given to employees was 2.5 percent, in 2012, 2013, and 2014 it was only 1 percent.

While the Respondent contends that the decision-making process to grant a wage increase at the three New York facilities was well under way before onset of union activity, the facts do not support that contention. According to Ianiro, the first time that Wingate representatives learned of specific complaints from employees regarding wages at the three New York facilities occurred at employee meetings held in May 2014 The only evidence that the Respondent had undertaken any actions regarding granting a wage increase prior to the onset of union activity was the vague testimony of Ianiro and Schuster that there were internal discussions about granting a wage increase to the New York facilities after learning of those complaints and after some consideration of the economic performance of those facilities during the first 6 months of 2014. I note that would place such discussions in June 2014. I note there is no documentary evidence establishing that Wingate had begun to consider granting a wage increase beyond the normal anniversary date increase prior to June 2014.

On June 3, 2014, Kazdan sent an email to Ianiro, Blake, and Budzna regarding research that CNAs at the Ulster facility had done regarding CNA wage rates. Kazdan's email further indicates that she thought that employees were feeling the impact of the minimal raises that they had been receiving. The email further indicates, however, that Kasten had asked Budzna only to bring up the possibility of a perfect attendance bonus. It was not until the Union filed its petition to represent the employees at Wingate's Ulster facility on June 12 that Wingate representatives began to attempt to obtain information regarding wage rates paid by other facilities in the area. As noted above, late in the day on June 12, Levin sent an email to Pucci at NYSHFA asking him to provide information regarding CNA hourly rates for the union and nonunion facilities in New York by early the next day. On June 13, after Pucci asked Levin if she had specific facilities in mind, Levin quickly provided the names of five facilities and asked him to provide the information by 3 p.m. that day. I find that it was the filing of the petition at the Ulster facility that

[30] While Kazdan's June 3 email makes reference to a "regional wage salary" that was "done" in 2009, and that wages have not been adjusted since that time, the record contains no further information regarding a 2009 wage adjustment of the New York facilities.

caused high-level Wingate managers such as Levin to become vitally interested in the wage rates paid by competitors to CNAs in New York and to obtain the information as soon as possible. As noted above, Wingate admittedly viewed the three New York facilities, which are geographically close to each other, as a group with regard to their financial performance and the compensation structure.

On July 18, Ianiro sent an email to Lima and Thomas stating that she was looking to provide an increase in pay to the CNAs, LPNs, an RN's at the Dutchess and Beacon facilities and was looking at several comparisons, including increases of $.25, $.50 and $.75 per hour. The email asked them to provide information to assist in estimating the overall cost impact to the facility. On July 21,Lima responded by email to Ianiro, Thomas and Levin assessing the approximate impact on Beacon and Dutchess of wage increases at the $.25, $.50 and $.75 level.

On August 11, 2014, Blake sent an email to Harbby and Michael's indicating that Schuster would like the wage comparison information he requested by the next day in order to make a decision about what to do regarding a wage increase. On August 12, Harbby sent an email with the requested wage comparison information to Schuster, Blake, and Michaels.

The objective evidence set forth above, renders Schuster's testimony that he decided, in the period of May to June, to make adjustments to the wages at the three New York facilities, and determined that the adjustment should be a 2-percent increase in wages, implausible and I do not credit it. I find that his testimony on this point was an attempt to move up the timeline of this decision in order to support the Respondent's position. As the evidence discussed above indicates, there is no objective evidence that Wingate began to seriously attempt to determine the wage rates paid by competitors in New York until Levin requested such information from NYSHFA on June 12, the date the petition was filed in Ulster.

On July 18, Ianiro was requesting information from other Wingate managers to assess the costs of granting a wage increase at the Dutchess and Beacon facilities on the basis of a cents per hour increase. On August 11, Blake was requesting from Harbby the wage comparison information that Schuster had requested by the next day in order to make a decision about what to do regarding a wage increase. The objective evidence clearly establishes that the Respondent was gathering information prior to making a decision regarding whether a wage increase would be given and the amount of the increase during the period from June 12 up until August 12. I also note that Schuster's testimony that he had made a decision to grant a 2-percent wage increase in May or June, directly conflicts with Ianiro's testimony that this decision was made on August 12, 2014

Based on the record as a whole, I find that Schuster made the decision to grant the 2-percent wage increase at the Dutchess and Beacon facilities on August 12, 2014. I find that by that date, an election petition had been filed at the Ulster facility and the Union had won the election conducted there, and that the Respondent knew that there was an active union campaign being conducted at the Dutchess facility. The 2-percent wage increase granted on September 1, 2014 was clearly not in accordance with the Respondent's normal practice in granting raises only on an employee's anniversary date.

The Respondent's contention that the wage increase was based on a lawful desire to bring its wage structure more in line with competitors and is unrelated to the union activity that was ongoing at the Dutchess facility is not supported by the record. In this regard, as noted above, there was no attempt by the Respondent to investigate the wage data of competitors until the filing of the petition in Ulster. I find that after the petition was filed at its Ulster facility, Wingate high-level management became concerned that the Union may attempt to organize the Dutchess and Beacon facilities, and it was only at that point that Wingate began to seriously examine whether to grant an additional wage increase beyond the normal anniversary date increase to the employees at those facilities

With regard to the Respondent's contention that its financial situation at the New York facilities in the first half of 2014 and improved and was sufficient to grant such an increase and that financial conditions and 2012 and 2013 would not have permitted such an increase, while there was some vague testimony by Ianiro and Schuster to that effect, the Respondent produced no documentary evidence regarding its financial performance in 2012, 2013. or the first half of 2014 that would corroborate that testimony. In any event, however, even if the Respondent's financial condition in its three New York facilities had improved in 2014, when I consider the record as a whole, the Respondent has not demonstrated that it would have granted the employees at the Dutchess facility a 2-percent wage increase in the absence of the union campaign. Rather, the timing of the unprecedented wage increase establishes that it was designed to dissuade employees from continuing to support the Union at the Dutchess facility and therefore violates the Act. *Latino Express Inc*.; *ManorCare Health Services-Easton;* and *Donaldson Bros. Ready Mix, Inc*., supra. See also *Jewish Home For The Elderly of Fairfield County*, 343 NLRB 1069, 1087-1089 (2004)

I find the cases relied on by the Respondent to be easily distinguishable from the instant case. In *Greenbriar Valley Hospital*, 265 NLRB 1056 (1982), the Board found that the respondent had not violated Section 8(a)(1) by providing employees improved sick pay benefits while an organizing campaign was going on at the respondent's facility, which was part of the Humana Corporation's hospital system. In that case, the evidence established that the decision-making process was fully underway before the onset of any organizing activity at the respondent's facility. In addition, the implementation of this benefit at the respondent was done as part of an implementation by the Humana Corporation at 197 hospitals nationwide.

In *Marines' Memorial Club*, 261 NLRB 1357 (1982), the respondent had followed a practice of granting employees two pay raises a year effective on January 1 and July 1. In 1980, because of adverse financial conditions, the respondent delayed the January raise into February and then provided a smaller increase. The employer gave the next raise early, on June 1, rather than July 1, and in amounts substantially larger than the February increase. The Board found that the deviation in the normal amount involved in the February raise was based on ordinary business considerations. The Board also found, based on the employer's credible testimony supported by business records, that the earlier June 1 raise was made possible by a substantial improvement in its financial condition and that the June increase had been made to make up for the smaller delayed raise. The Board noted that the deviation that occurred in connection with the February raise was before the start of union activities and that the changes involving the timing and amounts of the June raise were good-faith attempts by the respondent, in view of its

improved financial condition, to enable its employees to recover from the delayed, smaller February increase. Under these circumstances, the Board found the Respondent's conduct did not violate the Act.

Accordingly, on the basis of the foregoing, I find that the announcement of the wage increase on August 22, 2014 violates Section 8(a)(1) and the implementation of that wage increase on September 1, 2014 violates Section 8(a)(3) and (1) of the Act.

The August 22, 2014 Memo to Employees Regarding a 401(k) Match

Paragraph XII (a) alleges that on August 22, 2014, the Respondent, in a memo to employees, implicitly promised employees the benefit of a 401(k) match in violation of Section 8(a)(1) of the Act.

In the same memo (GC Exh. 17) that was posted at the Dutchess and Beacon facilities on August 22, 2014, in which the Respondent announced the implementation of the 2 percent wage increase , the Respondent also announced:

> We have also began evaluating our 401(k) plan and who is participating and how to get more people involved. We agree that having some retirement savings for everyone is important. So we are investigating a plan to bring back a match to employee 401(k) contributions. We will be looking to include that as part of our annual budgeting process for 2015.

According to Ianiro's uncontradicted testimony, Wingate has had a 401(k) plan since approximately 2000 that has a provision for Wingate to match employee contributions. On September 11, 2009, Wingate issued a memo to all participants in the 401(k) plan at all of its facilities notifying them that Wingate was suspending the 401(k) employer match effective after the September 25, 2009 pay period because of cuts in Medicaid payments (R. Exh. 45).The memo also indicated that Wingate hoped that it would be able to reinstate the match at a future date.

Ianiro's uncontradicted testimony establishes that since 2011 she attended meetings with employees at various facilities and was asked when Wingate would bring back the employer match to the 401(k) plan . As noted above, on August 22, 2014, Wingate notified the employees at the Dutchess and Beacon facilities that it was investigating a plan bring back a match to employee contributions to the 401(k) plan as part of the budgeting process for 2015.

Wingate conducts regular 401(k) enrollment meetings at each facility. In the 401(k) enrollment meetings held in late September 2014 at the New York and Massachusetts facilities, employees were notified that Wingate was considering bringing back a match to employee 401(k) contributions as part of the annual budgeting process for 2015. (Tr. 1119-1120; R. Exh. 48)

On March 20, 2015 Shuster sent a memorandum to Wingate employees that all of its facilities, informing them that effective April 1, 2015, it was reinstating the employer 401(k)

matching program. The memo indicated that the calculation of the match remained at 20 percent of the employee's first 3 percent of annual contributions to the plan and would cap at $100 per employee.

The General Counsel and the Union contend that the statement contained in the Respondent's August 22, 2014 memo that it was considering bringing back the employer match to employees'401(k) contributions is an implied promise of benefits that interfered with employees' support for the Union. Respondent contends that it notified all of its facilities in the August or September 2014 period that it was considering reinstituting in support match program and thus its conduct was not designed to interfere with the organizing campaign at the Dutchess facility.

I find that Wingate's announcements to all of its facilities in August and September 2014 that it was considering reinstating the employer match to the 401(k) program in 2015 makes it clear that this action was not taken to dissuade employees from supporting the Union at the Dutchess facility. To find that the Respondent's notification that it was considering reinstating the 401(k) match at the Dutchess facility violated Section 8(a)(1) would require a conclusion that Wingate made an announcement at all of its facilities in order to interfere with employee rights at the Dutchess facility. I find that the evidence does not support such a conclusion and accordingly I conclude that the Respondent was motivated by lawful business considerations when it notified employees it was considering reinstituting the employer match to the 401(k) program. The fact that the Respondent later implemented the employer match program at all of its facilities, with the attendant costs associated with that action, long after the election was held at the Dutchess facility, also supports the fact that it was a lawful business decision. In reaching this conclusion, I find that the Board's decision in *Greenbriar Valley Hospital*, supra, to be instructive. There, the Board dismissed an allegation that the employer violated Section 8(a) (1) by providing employees with improved sick pay benefits during a union organizing campaign, in large measure because that benefit was implemented at all of the corporate parent's facilities at the same time.

I find that the Board's decisions in *County Window Cleaning Co*., 328 NLRB 190 (1999) and *Lutheran Retirement Village*, 315 NLRB 103 (1994), relied on by the General Counsel in support of the complaint allegation to be distinguishable from the instant case. Neither of those cases presented the question of an employer announcing that it was considering granting a benefit to employees at all of its facilities, when one such facility was in the midst of a union organizing campaign. Accordingly, on the basis of the foregoing, I shall dismiss this complaint allegation.

Miscellaneous 8(a)(1) Allegations

Paragraph XII(c), of the complaint alleges that on November 6, the Respondent violated Section 8(a)(1) of the act by unlawfully threatening employees with a loss of benefits in a memo entitled "Straight Talk."

It is undisputed that on or about November 6, 2014, the Respondent posted a memo entitled "Straight Talk" in various locations at the Dutchess facility. The memo contains the following:

DO YOU WANT TO GAMBLE WITH YOUR
UNION-FREE FLEXIBILITY?

HAVE YOU EVER...??

1. Been allowed to come in late/leave early because of a personal situation at home?
2. Change a shift with a co-worker?
3. Had your schedule adjusted to accommodate a child care issue?
4. Been provided transportation to get to and from work, during bad weather?
5. Been allowed to leave early to pick up a sick child from work?
6. Been granted time-off over the phone on short notice?
7. Moved to a different shift because of a unique, personal or private reason?
8. Had time off for family illness?
9. Received a personal phone call all work?
10. Had lateness excused?
11. Been allowed to cash in your time off for extra pay?
12. Been given a ride to work when regular transportation is a challenge?
13. Received an interest-free loan from emergency situation?
14. Given a "second chance" to work at Wingate?
15. Made an honest mistake and had it be no more than a lesson learned?

How will you be treated as an individual under a union contract with inflexible rules that apply to everyone? Are you willing to trade away your Wingate union free flexibility for representation by 1199?

Know the FACTS
Ask the Right Questions and
Be Informed Before You Vote

The Board has held that telling employees they will lose flexibility in their working conditions if they select a union to represent them is an unlawful threat of a loss of benefits in violation of Section 8(a)(1) of the of the Act. *Allegheny Ludlum Corp*., 320 NLRB 484 (1995). The Board has similarly found that threatening employees that there would be stricter enforcement of the rules if they selected a union is violative of Section 8(a)(1*). Fieldcrest Cannon, Inc*., 318 NLRB 470, 495 (1995); *Be-Lo Stores*, 318 NLRB 1, 33 (1995), enfd. in relevant part, 126 F.3d 268 (4th Cir. 1997).

The language of the memo in the instant case clearly implies that selecting the Union as a bargaining representative would result in a loss of policies that are beneficial to employees and that there would be more inflexible policies imposed under a union contract. The memo contains no discussion of the process of collective bargaining as it relates to existing terms and conditions

of employment. Rather, the memo impliedly threatens that the selection of the Union would automatically result in inflexible rules that would be applied to all employees.

The Board has held that an employer's statements conveying a loss of existing benefits if a union was selected without a discussion of the give and take of the collective bargaining process is violative of Section 8(a)(1). *Pennant Foods Co*., 352 NLRB 451, 461 (2008). On the basis of the foregoing, I find that by posting the "Straight Talk" memo the Respondent threatened employees with a loss of existing benefits if they selected the Union as their representative in violation of Section 8(a)(1) of the Act.

I find *Tri-Cast, Inc*., 274 NLRB 377 (1985), relied on by the Respondent, to be distinguishable. In that case, the employer distributed a letter to its employees on the day of the election stating, in part:

> We have been able to work on an informal person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.

In that case, the Board found that the above noted statement was lawful in that it explained to employees that when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before. In doing so, the Board relied principally on the proviso to Section 9(a) of the Act which provides that employees have a right to present grievances to their employer without the intervention of the bargaining representative, as long as adjustment is not inconsistent with the terms of a collective bargaining agreement, and the bargaining representative has been given an opportunity to be present at such an adjustment. In the instant case, the "Straight Talk" memo does not focus on the relationship between employees and the employer when the employees select a collective bargaining representative, but rather strongly implies that the selection of the Union will result in a loss of existing policies that are beneficial to the employees.

I also find *United Rentals, Inc*., 349 NLRB 190 (2007) to also be distinguishable. There, a supervisor told an employee a week before a scheduled election that because of "activities" going at the employer's facility he could not address the employee's complaint that he had been denied a wage increase. The supervisor said if there was "nothing in between" them "you could come to me and we can talk about any problems about your classification." The Board found that the statement did not violate Section 8(a)(1) in that it did not unlawfully condition future consideration of the employee's grievance on the absence of union representation. The Board found that the supervisor conveyed to the employee that the supervisor's freedom to deal with the employee would be constrained if the union was selected. Therefore, relying on *Tri-Cast, Inc*., supra, Board found that the statement was lawful as it informed employees that unionization will bring about a change in the manner in which the employer and employee deal with each other. Unlike the instant case, *United Rentals* also does not involve an implied threat that specific listed beneficial policies would be lost if the employees selected a union to represent them.

Paragraph 14 of the complaint alleges that in November, 2014 the Respondent, by Sherry Henry-Clifton, told employees that per diem hours would be cut if they selected the Union as their bargaining representative in violation of Section 8(a)(1) of the Act.

General Counsel witness Aniya Williams testified on in support of this complaint allegation. At the time of the hearing, Williams was employed as a per diem CNA at the Dutchess facility, and had worked there since approximately early 2014. Williams testified that in late October or early November 2014, she was working on the night shift and attended a meeting at approximately 11 p.m. in a conference located in the basement of the Dutchess facility with employees Alicia Bland and Meghan Blomquist. According to Williams, the individual conducting the meeting introduced herself as Sherry, but Williams did not recall her last name.[31] Williams further testified that Sherry indicated she was a "consultant for the Labor Board." Williams further testified that the meeting lasted approximately 1 ½ hours and that during the meeting Sherry passed out a booklet and discussed the organizing campaign that was being conducted at the Dutchess facility. Williams testified that during the meeting Bland asked Sherry if per diem employees were allowed to vote in the election. Williams did not recall if Sherry explained the requirements for a per diem employee to vote in the election. Williams testified that Sherry stated that per diem hours would be cut if the Union came in. At that point, Williams told Sherry that she did not think that was true. Williams also testified that Sherry told them that if the Union won the election it would get to negotiate a contract with the Respondent. At the end of the meeting, Sherry asked Williams where the supervisor on duty was and Williams replied that she did know. Approximately 10 to 15 minutes after the meeting, Williams testified that her supervisor, Theresa Daley, came to her and told Williams that she was not supposed to be at that meeting. When Williams asked Daley why she was not supposed to go, Daley did not respond.

Sherry Clifton testified that she is an independent contractor who was hired by the Burke Group to conduct training sessions with employees at the Dutchess facility.[32] According to Clifton, she conducted meetings in October and November 2014 with employees in the proposed bargaining unit. Clifton testified that she conducted approximately seven meetings in October and four meetings in November. Some of these meetings were conducted at approximately 11:30 p.m. in order to reach employees at the shift change. Clifton could not recall the number of employees that attended each meeting. No supervisors or managers attended any of the meetings that she conducted with employees

Clifton testified that the purpose of the meetings was to discuss the National Labor Relations Act. At the meetings, Clifton distributed to employees a "Basic Guide to the National Labor Relations Act" (GC Exh. 54). Clifton testified that at these meetings she introduced herself as a labor consultant and told the employees that she had 14 years experience in human resources, that she had worked for the International Brotherhood of Teamsters and that she was there to do training on the basics of the National Labor Relations Act. Clifton would go through the document that she had distributed to employees and explain various provisions. Clifton testified that she did not discuss per diem hours with any employees in the meetings held in

[31] The record establishes that the name of the this individual is Sherry Clifton.

[32] The Respondent admitted that Clifton was an agent of the Respondent within the meaning of Section 2(13) of the Act.

November 2014 and specifically denied that she told employees that per diem hours would be cut if they selected the Union as their bargaining representative.

I credit Williams testimony that at the meeting that she attended in late October or early November 2014, Clifton stated that if the Respondent' s employees selected the Union, the hours of per diem employees would be cut. Williams 'testimony on this point was consistent on both direct and cross-examination and her demeanor while testifying regarding the specifics of this statement demonstrated certainty. Williams was obviously somewhat unclear about the nature of Clifton's role with the Respondent, given her testimony that Clifton introduced herself as a consultant for the Labor Board. With respect to the statement that Clifton made regarding per diem employees, however, Williams' testimony contains sufficient detail to convince me that it is reliable. In addition, the fact that Williams was a current employee of the Respondent and testified against the Respondent's interest, also supports the fact that her testimony on this point is unlikely to be false.

As noted above, Clifton testified that she conducted approximately 11 meetings during late October and November at the Respondent's Dutchess facility and her recall regarding each individual meeting appeared to be limited. I note, in this regard, that Clifton's testimony that she never discussed per diem hours with employees is contradicted, not only by Williams' testimony, but also by the testimony of Respondent witness Melinda Benedict. Benedict testified that at the meeting with Clifton that she attended, Clifton stated that if the Respondent's signed a contract with the Union it "may cap off the hours" of per diem employees (Tr. 1322). On balance, I find that Williams' version of the meeting that she attended with Clifton to be the more reliable version. Accordingly, on the basis of Williams's credited testimony, I find that the Respondent, through Clifton, violated Section 8(a)(1) of the Act by threatening employees that per diem hours would be cut if the Union won the election. *Rainbow Painting*, 330 NLRB 972 (2000).

Paragraph XIII of the complaint alleges that about November 10, 2014, the Respondent, by Scott Schuster, emphasized the futility of supporting the Union by telling employees it would never sign a labor agreement.

Marcella Burns testified on behalf of the General Counsel regarding this allegation. At the time of the hearing, Burns was employed by the Respondent as a CNA at the Dutchess facility and had worked there since approximately early 2014. Burns testified that on November 10, 2014, at approximately 2:30 p.m., she attended a mandatory meaning with approximately 25 employees at regional conference room at the Dutchess facility Schuster, Harbby, Nelson and Ianiro were present at the meeting for the Respondent. Burns testified that at the meeting Respondent's representatives asked for a chance to let them show that they could do better and stated they would consider making improvements at facility, including improved health care benefits. Burns specifically recalled Harbby stating that he had an open door policy where employees can come to speak to him regarding any issues or concerns. During the discussion, one of the employees present brought up the fact that the Respondent used to give employees turkeys on Thanksgiving. Schuster said that they could not "guarantee a turkey in every pot or a car in every driveway." Burns testified that Schuster stated that he did not think a union was the best way to resolve problems at the workplace. Schuster also stated that if the Union were to win the election they would engage in collective bargaining. According to Burns, Schuster also

stated, however, that he did not want to sign a union contract and that he would not sign a union contract and banged his hand on the desk. He said that he did not want to spend $450,000 defending himself with a lawyer but would rather put money into his buildings.

Schuster testified that he attended a final meeting with employees a couple of days before the election at the Dutchess facility. Schuster testified that the meeting was held in a conference room on the first floor of the Dutchess facility. Besides himself, Ianiro, Budzna, Harbby, and Nelson were also present. Schuster testified that he stated bargaining involved a negotiation between two parties that had to reach an agreement on the issues. Schuster stated that this can take possibly a short period time, or could take a longer period of time and could potentially take years. Schuster denied ever saying that he that he would not sign a collective-bargaining agreement with the Union. Schuster testified that he also spoke about making sure that everybody had the right to vote and that it was their obligation. Schuster said that he wanted the employees to support the Respondent and did not want them to vote for the Union.

Ianiro, Harbby and Nelson testified that at this meeting Schuster did not say that he would not sign a collective-bargaining agreement with the Union. Employee Melinda Benedict testified that she attended approximately three meetings where Schuster spoke and that one of them occurred 2 days before the election. Benedict further testified that she did not have a distinct recollection of what Schuster said at each meeting but she did recall him speaking about the process of collective-bargaining and that he hoped that everyone would vote. Benedict further testified that Schuster never said that he would not sign a collective-bargaining agreement. Benedict testified she did not know Burns and thus was unable to say whether she was present at the same meeting with Burns that Shuster held shortly before the election

I credit the testimony of Burns that on November 10, 2014, Schuster said that he did not want to sign a union contract and would not sign a union contract. Burns testimony on this point was consistent on both direct and cross-examination and her demeanor reflected sincerity. Her testimony contained the type of detail regarding the statement made by Schuster and the context in which it arose makes it reliable in my view. In addition, her credibility is enhanced since she was a current employee testifying against the interests of the Respondent. I found the testimony of Schuster and the other management witnesses not convincing on this issue as they appeared to testify in a way that would support the Respondent's position. With respect to the testimony of Benedict, I find that it is not clear that she attended the same meeting on November 10 that Burns did. In addition, Benedict had difficulty recalling precisely what Schuster said at each of the meetings that she attended.

Based on Burns credited testimony, I find that the Respondent violated Section 8(a)(1) of the Act by Schuster telling employees that he would not sign a contract with the Union as such a statement conveys to employees the futility of selecting a union as a representative. *Equipment Trucking Co.,* 336 NLRB 277, 283 (2001); *Outboard Marine Corp*., 307 NLRB 1333, 1335 (1992).

Paragraph XII(d) of the complaint alleges that on November 11, 2014, the Respondent interrogated employees regarding their union sympathies in violation of Section 8(a)(1) by

allowing employees to wear jeans on the date of the election without paying the customary fees if they wore a pro-employer T-shirt.

On approximately September 9, 2014, the Respondent received notification from the New York Department of Health that it had received a deficiency free survey as a result of the annual examination of the Dutchess facility from September 4 through September 7. A notice of deficiency is incurred for failing to follow a particular regulation within the State health code. In late September, after the results of the survey were announced, all of the employees at the Dutchess facility received a T-shirt that indicated "Wingate Proud." Harbby's uncontradicted testimony establishes that such T-shirts had been provided to employees at other Wingate facilities for receiving a similar survey result. In October 2014, the Respondent conducted a celebration regarding the results of the survey at which Harbby read a statement to employees stating, in part "You should all be extremely proud of yourself for the achievement of a deficiency free survey, in fact the second in a five-year period." (R. Exh. 31.)

The record establishes that for several years prior to the advent of the union campaign, the Respondent's Dutchess facility had a "Jeans Friday." While nursing department employees normally are required to wear nursing uniforms, employees could wear jeans to work on Friday. Pursuant to the established policy, on every other Friday employees could wear jeans for free, while on the alternating Fridays employees were asked to make a voluntary $2 donation to the "fun committee" in order to wear jeans to work.

On November 11, the day before the election, the Respondent sent a text message to all employees that indicated "Wingate proud! Vote no!" (GC Exh. 30). Later on November 11, the Respondent sent another text message to all employees (GC Exh. 32) indicating:

> Free jeans day tomorrow Wednesday 11/12 if you wear your Wingate proud shirt! Spread the word!

Harbby testified that he decided to have a free jeans day on the day of election because he believed that such days are more "laid back" and that if the employees wore their "Wingate Proud" T-shirts it would have a unifying effect after the disruptive union campaign.

It is well established that an employer violates Section 8(a)(1) when it supervisors distribute employer campaign materials in a manner that pressures employees to make an observable choice or open acknowledgment of their union sentiments. *A.O. Smith Automotive Parts Co*., 315 NLRB 994 (1994), and cases cited therein. When such conduct has occurred after the filing of an election petition, the Board has similarly found that such conduct is objectionable *2 Sisters Food Group, Inc*., 357 NLRB No. 168, slip op. at 3-4 (2011); *Circuit City Stores*, 324 NLRB 147 (1997). The instant case does not involve the distribution of employer campaign materials per se, but I believe that the sending of the two emails to all employees on November 11 created a scenario where it equated the wearing of the "Wingate proud" T-shirts with voting in support of the Respondent. The Respondent also offered employees the minor incentive of a free jeans day if they would wear a "Wingate proud" shirt. The failure of an employee to wear a Wingate proud shirt on the day of the election would reasonably be viewed as an indication that the employee was likely to be a supporter of the Union. Under the circumstances, I find that the

Respondent created a situation where employees were pressured to make an "observable choice" on the day of the election that demonstrated their support for or rejection of the Union. Consequently, I find that the Respondent's conduct violated Section 8(a)(1) of the Act.

The 8(a)(3) and (1) Allegations Regarding Sandra Stewart

Paragraph XVI of the complaint alleges that the Respondent suspended Stewart on about October 4, 2014, and discharged her about October 24, 2014 in violation of Section 8(a)(3) and (1) of the Act.

As amended, paragraph VI(h) alleges that in late September 2014, the Respondent, by Harbby, solicited grievances from an employee. Paragraph VII (g) alleges that in about September 2014, the Respondent, by Nelson and Diane McDonald, threatened to discipline an employee for taking her normal lunch hour because she engaged in union activity. Steward is the primary General Counsel witness regarding these allegations.

Facts

Background and Union Activity

Stewart was hired by the Respondent as a full-time CNA at the Dutchess facility in December 2009. In June 2010, Stewart changed her status to that of a per diem employee. Because of injuries she received in a car accident, Stewart took a leave of absence from September 30, 2010 until April 12, 2011, when her employment was terminated because she was unable to return to work. In September 2011, Stewart returned to the Dutchess facility as a per diem employee but was terminated on November 2, 2011, for failing to meet the Respondent's per diem hours requirement. The Respondent rehired Stewart in November 2012 as a full-time CNA. As a CNA, Stewart cared for acutely ill and elderly residents, some of whom were immobile or unable to speak. Her duties included getting residents up in the morning and making their beds and assisting residents with bathing, dressing, eating, ambulating, grooming and toileting. In 2014, Stewart primarily worked on the day shift from 7 a.m. to 3 p.m. on the Locust Grove unit, which is a long term care unit. The Locust Grove unit has two wings, the C wing and the D wing. Stewart was typically assigned to the C wing. A unit is typically staffed by three to four CNAs per shift. If there are four CNAs present, two are assigned to each wing and work as a team. CNAs are typically assigned to care for 10 to 12 residents. Each resident's room has a "call bell" which also activates a "call light" located outside the door that goes on when a resident requires assistance. CNAs are assigned to different residents approximately every 2 weeks so that they become familiar with the different residents on a wing.

Stewart worked 5 days a week on a schedule that included every other weekend. Approximately once or twice a week Steward would work an extra shift, covering the evening shift from 3 p.m.to 11 p.m.. Her immediate supervisors were Unit Manager Diane McDonald and Director of Nursing Nelson.

Stewart's annual evaluation that was completed in March 2011 reflects that she received an employee performance rating of 81 percent, which is on the low end of the outstanding rating (81 to 100 percent) (CP Exh. 13). The employee evaluation that Stewart received in January 2014 reflects that she had an employee percentage rating of 91 percent, which again fell in the outstanding range (CP Exh. 12). Prior to September 2014, the only discipline that Stewart had received was a verbal counseling on December 16, 2013, for not having a patient's call bell within their reach (R. Exh. 6B) and a written warning on May 2, 2014, for using a cell phone in a resident care area. (R Exh. 6A.)

As noted in detail above, Stewart initially contacted the Union in mid-July 2014, and circulated a petition attempting to engage employee support for organizing a union. On July 25, 2014, Stewart and Allen met with union representatives Massara and signed authorization cards. Massara gave Allen and Stewart blank authorization cards in order for them to solicit other employees to sign cards. Stewart was the principal employee advocate for the Union at the Respondent's Dutchess facility. In this connection, she solicited and obtained the signatures of 56 employees on authorization cards. Stewart also regularly attended union meetings and assisted the Union in making phone calls to other employees and often engaged in shift change activities at the Respondent's facility throughout August and September.

The Respondent admits that it was aware of Stewart's support for the Union. In this connection, as set forth in detail above, the Respondent clearly became aware of Stewart's support of the Union by July 29 when Nelson spoke to her about soliciting authorization cards during work time and Harbby unlawfully threatened her with unspecified reprisals because of her open support for the Union. In addition, on September 17, while Stewart was engaged in demonstrating support for the Union outside of the Respondent's facility during a shift change, Harbby engaged in coercive surveillance of her activities and impliedly threatened her with discharge because of her support for the Union.

Stewart testified that in late September 2014, she was called into Nelson's office at approximately 2:45 p.m. near the end of her shift. When she arrived Harbby was also present. Harbby said to her "Let's talk man and woman now. Ever since this union thing is going on in Ulster, there is a problem here. What do you guys want." Stewart replied that the employees at the Dutchess facility felt the same way as the employees at Ulster. Stewart mentioned paychecks being short and that employees did not have a voice at the Dutchess facility. Stewart also told Harbby that after the Respondent had posted information regarding the 401(k) plan, employees had filled out applications but those applications were sitting in the human resources box outside the door. Stewart added that every time an employee went to find out the status of the application, it was still sitting there and there is a "do not disturb" sign on the door. Harbby replied that he could do nothing about it at present but that he had to "wait on the head." At that point Nelson and Harvey told Stewart she could leave. Harbby and Nelson did not testify regarding this issue and accordingly Steward's testimony is uncontradicted. I find her testimony to be credible on this point as her recollection of the conversation was detailed and her demeanor reflected certainty regarding this issue.

The Board has held that an employer who has a past practice of soliciting grievances may continue to do so during an organizational campaign but cannot rely on its past practice if it

"significantly alters its past manner and methods of solicitation during the campaign." *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enfd. mem. 7 F. 3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994). In the instant case, the Respondent had a practice of soliciting grievances from employees at round-the-clock meetings attended by groups of employees. I find that Harbby's solicitation of grievances from Steward was made specifically in response to the union organizing campaign and is substantially different than the Respondent's past practice of asking employees about their concerns at round-the-clock meetings. I further find that Harbby's statement that he had to "wait on the head" before he could do anything, was a reference to waiting to hear from Schuster before he could address the employees' complaints. I find that by such conduct Harbby was implicitly promising to remedy the grievances he had solicited from Stewart. *Center Service System Division*, 345 NLRB 729, 730 (2005). Accordingly, I find the Respondent, by Harbby, violated Section 8(a)(1) of the Act by soliciting grievances and impliedly promising to remedy them.

The September 20 Incident

Stewart testified that on Saturday, September 20, 2014, she was assigned to resident S.M.[33]. The record establishes that SM is a male, 95-year-old resident who is incontinent and wears a diaper. [34] SM typically would need to be toileted 3 to 4 times per shift. SM required two CNAs to toilet him and therefore was referred to as a "two-assist" for toileting. Stewart testified that on September 20 she toileted SM approximately three times with CNA Maria Tardella before she left for the day at the end for shift at 3 p.m.. SM uses a wheelchair to move about on the floor.

Stewart testified that on approximately Wednesday, September 24, Nelson and assistant director of nursing Allison Franks met with her and Nelson told Stewart that SM's family had complained that she had left him wet with urine in his room on September 20. Nelson told Stewart that she had changed SM at 1:30 p.m. and then he left the floor to go and play bingo.Stewart testified that she did not see SM again before her shift ended. Stewart testified that at 2:50 p.m. she was on the floor helping another resident and checked to see if any call lights were on for residents she was assigned to and did not see anything. On September 24, Nelson asked Steward to give a written statement regarding the incident but Stewart refused. Stewart testified that she refused because she had not done what she was accused of doing with regard to caring for SM and that she thought Nelson's questioning of her was another form of harassment for her union activity. Stewart testified that Nelson told her that she should not speak to SM regarding this matter. Stewart continued to be assigned to care for SM until she was suspended on October 4.

Melinda Benedict, an LPN at the Dutchess facility, testified that on September 20, she worked on the 2:45 to 11:15 p.m. shift on the Locust Grove unit.[35] Benedict testified that

[33] At the hearing all of parties agreed that the resident involved in this incident would be referred to as SM in order to preserve the confidentiality of his medical condition.

[34] SM ambulates with a wheelchair. On September 3, 2014, the Respondent conducted a "Brief Interview for Mental Status" of SM in which he scored 13 out of a total of 15. (R. Exh. 7.)

[35] Benedict testified that the LPNs' shift starts earlier than the CNAs.

after she punched in, SM's "family" approached her and said that SM had asked to be changed and that the aide had refused. At approximately 2:55 p.m., while Benedict was speaking to SM's family, SM came down the hallway and Benedict observed that he was wet with urine from his waist to almost his knees. While Benedict was standing there with SM and his family, she noticed Sandra Stewart was walking down the floor with one of the CNAs on the evening shift, Lucy. Benedict told SM that she would get somebody to change him right away and at that point SM pointed to Stewart and said "that's the aide." SM did not say, however, that Stewart was the person who did not change him. (Tr. 1327.) Benedict then asked Lucy to toilet and change SM and she did so . Benedict assured SM's family that she would be there until 11 p.m. and "would keep a close eye" on him.

Benedict testified that on the following day, Sunday, September 21, Stewart spoke to her and told her that SM had been in an activity and had come back to the floor towards the end of her shift and that was why she had not changed him.[36]

According to Benedict, on the following Monday or Tuesday Nelson asked her what had occurred on September 20 and Benedict told her. Pursuant to Nelson's request, Benedict then prepared a written and signed statement (R Exh. 9A) regarding her interaction with SM and his family on September 20 that is generally consistent with her testimony at trial.

Maria Tardella testified on behalf of the Respondent regarding this incident. At the time of the hearing, Tardella had been employed at the Dutchess facility as a CNA since some time in 2013. On September 20, Tardella worked on the 7 a.m.to 3 p.m. shift in the Locust Grove unit. Tardella testified that she did not assist Stewart in toileting SM on September 20. According to Tardellla, a couple of days after September 20, Nelson called her and asked if she had helped Stewart on September 20. Tardellla told Nelson that she had not and that after her break at 1 p.m. she had not seen Steward at all.

Nelson later asked Tardella to provide a written statement regarding the events of September 20. In a written and signed statement dated September 24, 2014 (R. Exh. 9B), Tardellla stated, "I do not remember helping toilet SM with Sandra. SM had rang at the end of the day asking who his aide was next after our shift but I was unable to tell him an exact name. That happened at 2:50 PM. I was not able to find Sandra to tell her when 3 of the 4 people of the next shift came, I left. I do not recall toileting SM at all on Saturday." The second page of Tardellla's statement indicates "I have nothing against the aide. I really cannot remember if I did help toilet SM with her or not. I remember conversations but I cannot seem to recall having any interaction with SM and Sandra at the same time period."

[36] Stewart testified that she had not spoken to Benedict prior to Nelson informing her on September 24 that Nelson believed that Stewart had failed to change SM before she ended her shift on September 20. I credit Benedict's testimony on this point. In doing so I find it plausible that such a conversation occurred, since Benedict's testimony regarding what Stewart said on September 21 is consistent with Stewart's testimony regarding SM leaving the floor for bingo on the afternoon of September 21 and Stewart not seeing him before she left at the end of her shift. I also note that Benedict's written statement regarding this event that she furnished to Nelson (R. Exh. 9A) indicates that Stewart spoke to Benedict on September 21, although Benedict's statement does not contain any reference to the part of the conversation noted above.

At the trial, Tardellla testified that when Nelson asked her to give a written statement she took the witness form that Nelson had given her "back downstairs" because her shift had started. According to Tardellla, once she completed the first page, Stewart approached her and asked her if Tardellla had talked to Nelson. Tardellla said that she had, and Stewart asked her if she had indicated in her statement that Tardella had helped her. Tardellla testified that she asked Steward if she had helped her and Stewart replied that she had not. Tardellla testified that Stewart then asked her if she would put her name down as having helped and Tardellla told Stewart that she would. Tardellla testified it was at that time she decided to write the second page of her statement.

Tardellla testified that she wrote the second page of the statement because she was concerned about retaliation from Stewart. Tardellla also testified that before she gave her written statement to Nelson, Georgann Allen approached her and asked her what happened on Saturday [September 20]with SM and whether she had helped Stewart with him, because Allen knew that SM had complained. Tardellla testified that she told Allen that she had helped Steward with SM. Tardellla again said she made the statement to Allen because of a concern of retaliation as she knew that Stewart and Allen were friends.

With regard to the reference in her written statement that she was in SM's room at 2:50 p.m. on September 20 in answer his call light, Tardellla testified that when she walked into SM's room he was in his wheelchair between the beds and Tardellla asked if there was anything she could help him with. SM asked Tardellla who his aide was going to be and she replied that she did not know. Tardellla testified that she did not notice whether SM had wet himself, although she was only approximately 8 feet away from him and he was facing her. (Tr. 1395, 1398.) Tardellla denied that SM had asked her to change him.

Nelson testified that on Monday morning September 22, when she arrived at work she found the statement of Melinda Benedict, referred to above (R. Exh. 9B), regarding the incident with SM on September 20 in her mailbox.[37] According to Nelson, after receiving this report she checked the assignment sheet and determined that Stewart was assigned to SM on September 20. According to Nelson, Stewart was not at work on Monday, September 22, and Nelson first spoke to Stewart on September 23. Nelson told Stewart there was a concern raised by SM's family with regard to him being wet and not having been changed. Nelson asked Stewart to provide a statement regarding what had taken place and Stewart said that she would do so. When Nelson had not received a statement from Stewart by late in the day, Nelson again spoke to Stewart and told her that she needed her statement for the investigation she was conducting. Stewart then told Nelson that she had changed SM at 1 p.m. with Maria Tardellla and then SM had gone to bingo. Stewart said that she did not see SM again after he went to bingo. When Nelson asked Steward to put that writing, Stewart refused claiming that Nelson was harassing her. Nelson responded that she was following the procedure for collecting statements for

[37] Nelson's testimony on this point conflicts with that Benedict who, as noted above, testified she prepared a report on Monday or Tuesday pursuant to a specific request from Nelson. I credit Benedict's testimony on this point as I found her generally to be a credible witness regarding her role in this incident. I believe that Benedict would recall whether she voluntarily prepared a report of this incident for Nelson's review or whether she was specifically asked to provide a written statement.

incidents that were reported. On the following day, Nelson and Franks met with Stewart again. Nelson presented Stewart with the statement that she had prepared based on what Stewart had told her and read the statement to her. Stewart again refused to sign a statement.

Nelson testified she called Maria Tardellla at home on September 24 and asked her if she had changed SM with Stewart on September 20. Tardellla told her that she had not changed SM at any point with Stewart that day. Nelson asked Tardellla to come in and give a written statement and Tardellla said she would do so. Later that day, Tardellla came to Nelson's office and Nelson again asked Tardellla if she had changed SM with Sandra on September 20. Tardellla said that she had not provided any care to him. According to Nelson, she gave Tardellla a blank witness form and asked her to write statement. Nelson testified that Tardellla took the form and wrote her statement just outside of Nelson's office. Tardellla came into Nelson's office to give her the statement and then took it back and wrote more on the back of it. (Tr. 1822-1823)

Nelson asked Niji George, the unit aide who was on duty in Locust Grove on September 20, whether she had provided any assistance to Stewart in caring for residents that day and George indicated that she had not done so.

Nelson testified that that, based on the information she obtained during the investigation, she concluded that SM was wet and that Stewart had lied regarding the care she provided to him. Nelson relied primarily on the oral and written statements made by Tardellla in reaching this conclusion. In reaching her decision, Nelson also considered the fact that Stewart had not cooperated by refusing to provide a written a written statement.. Based on her investigation, Nelson concluded that SM had not been toileted as Stewart had claimed and recommended that Stewart be placed on a performance improvement plan (PIP). Nelson determined that a PIP was warranted because Stewart did not acknowledge that she failed to care for SM but rather had denied that it happened and then lied about it.

Nelson forwarded the results of her information and her recommendation to Budzna who prepared a draft PIP, which she then forwarded it to Nelson for additional information. Budzna also prepared a time line of the events that Stewart was involved at the Respondent's Dutchess facility since August 8, 2014, including her known union activity, (CP Exh. 16) for review by Wingate's General Counsel regarding the issuance of the PIP. At the same time a draft letter was prepared responding to Stewart's allegations that she was being" harassed." On October 3, Budzna submitted to Nelson the final draft of Stewart's PIP for the September 20 toileting incident, along with the draft letter from Harbby responding to Stewart's harassment complaints. However, as will be discussed in detail below, an incident occurred on October 3, 2014 which resulted in the Respondent's decision to suspend and discharge Stewart. Accordingly, neither the PIP nor the letter addressing Stewart's harassment allegations were ever issued to Stewart.

There are no complaint allegations regarding the alleged failure of Stewart to toilet SM on September 20. However, since the events of that day played a significant part in the Respondent's later allegedly discriminatory decision to suspend and discharge Stewart, I find it necessary to consider whether the Respondent established that it had a reasonable belief that Stewart had failed to deliver appropriate care to SM on September 20 and that it acted on that belief in beginning to take adverse employment action against her. See *Midnight Rose Hotel &*

Casino, 343 NLRB 1003, 1005 (2004). (There, the Board held that if the General Counsel meets the initial burden of proving that an employee's protected activity was a motivating factor in the employer's decision to take adverse action against an employee pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 1989 (1982), an employer, in order to meet its burden that it would have taken the same action in the absence of the protected activity, does not need to prove that the employee actually committed the alleged offense, but must show that it had a reasonable belief that the employee committed the offense and that the employer acted on that belief in taking the adverse action)

I find that Tardella was not a credible witness regarding the events of September 20. At the trial, Tardellla testified that when Nelson first asked her if she assisted Stewart with toileting SM, she told Nelson that she had not. Later, in the second page of her written statement Tardella stated "I really cannot remember if I did help toilet SM with her or not. I remember conversations but I cannot seem to recall having any interaction with SM and Sandra at the same time." Tardellla testified that after receiving the witness form from Nelson he took it downstairs to the floor and wrote the first page. Tardellla then testified that she added the second page to the written statement after Stewart spoke to her. According to Tardellla, she asked Stewart whether she had helped Stewart toilet SM and Stewart told her that she had not but then asked Tardellla if she would put her name down as saying that she had done so.

Nelson's testimony does not corroborate Tardellla's regarding the location that Tardellla was in when she prepared her statement. According to Nelson, Tardellla prepared the statement outside the door to Nelson's office. I also find it implausible that Stewart spoke to Tardellla about her statement and, when Tardellla asked whether she had assisted Stewart in toileting SM, Stewart told her that she had not but then asked her to write in her statement that she had. Rather than accept Tardellla's convoluted explanation for the contents of her statement, including the alleged pressure from Stewart regarding its contents, I credit Stewart's straightforward denial that she spoke to Tardellla prior to Nelson interviewing Stewart on September 24. I also note that Tardellla admitted that she told Allen that she had, in fact, assisted Stewart in toileting SM. In addition, I find that Tardellla's demeanor while testifying regarding this issue reflected substantial uncertainty about whether she had assisted Stewart in toileting SM on September 20.

I also find Tardellla's testimony regarding what happened while she was in SM's room at 2:50 p.m. is not credible. It seems implausible that Tardellla would be in SM's room to answer his call light and the only thing to SM asked her was who was going to be his aide on the next shift. Even more implausible is her testimony that she was standing approximately 8 feet away from him and did not notice whether he had wet himself. According to Benedict's testimony, the urine stain reached from his waist almost to his knees. I find that either SM had not yet wet himself, or he had, and Tardellla observed it yet took no action to toilet and change him.

When Nelson concluded that Stewart had lied about toileting SM and determined that she should be placed on a PIP, she had before her Tardellla's statement admitting that she was in SM's room at 2:50 p.m. Nelson also was aware that at approximately 2:55 p.m.. SM appeared in a hallway and was observed by Benedict to be wet with urine from his waist to his knees. However, Nelson failed to further question Tardellla regarding her observations of SM when she was in his room minutes before he was observed being wet. Rather, Nelson accepted Tardellla's

claim that she did not assist Stewart in toileting in SM, even though Tardellla had provided an equivocal written statement. Based on what I find to be unreliable evidence presented by Tardellla, Nelson relied on Tardellla's verbal and written statements to conclude that Stewart was lying when she had told Nelson that she had toileted SM at approximately 1:30 p.m. and did not see him before she left at the end of her shift. Based on that, Nelson concluded that Stewart had not provided appropriate care to SM.

While I do not condone Stewart's refusal to provide a written statement to Nelson regarding the care that she administered to SM on September 20, it appears that given the equivocal statements of Tardellla regarding whether she provided any care to SM on September 20, coupled with the fact that she was in his immediate presence 5 minutes before he appeared in a hallway wet with urine it, was necessary to further investigate her role in the events of September 20 before reaching any conclusions regarding whether SM had not been cared for properly and, if so, by whom. My review of the facts convinces me that based on the investigation she conducted, Nelson did not have a reasonable basis to believe that Stewart had not delivered appropriate care to SM on September 20.

The September 26 Written Verbal Counseling

On September 26, 2014, Stewart worked on the 7 a.m. to 3 p.m. shift on the C wing of the Locust Grove unit. The daily staffing sheet for that date establishes that Stewart worked with CNAs Marissa Every, Janiece Gordon, and Phillippa Morris (R. Exh. 8D). This document was prepared after the assignment sheet for that date (R. Exh. 16C) which does not reflect the assignment of Morris. The assignment sheet does reflect, however, that Stewart was scheduled to take her lunch at 12:30 p.m. The record establishes that CNAs often trade lunches but the requirement is that there must be one CNA on duty on each wing during lunchtime to properly insure coverage. A CNA is required to tell the LPN on duty on the wing the CNA is assigned, when the CNA is going to lunch.

On September 26, between 11:30 a.m. and 12 p.m., unit manager McDonald noticed that resident call bells were going off without being answered by a CNA. McDonald spoke to the CNA that she did see and asked "Where is everybody." The CNA, whose name does not appear in the transcript, replied that she thought they were at lunch. McDonald checked the assignment sheet to see what the lunch schedule was. McDonald observed that assignment 1 on C wing, who on that date was Morris, was scheduled to take the early lunch at 11:15 am. and that Stewart was scheduled to take lunch at 12:30 p.m.. Both were at lunch however, which left no CNA coverage for the residents on C wing. Joanne Pierce, the LPN assigned to C wing, was also at lunch at this time.

McDonald testified that when Pierce returned from lunch she spoke to Pierce and told her that she had gone to lunch and had allowed the two CNAs on her wing to go to lunch at the same time, which left the wing with no CNA coverage. McDonald testified that Pierce said she was unaware that had happened and she had not been informed by their CNAs.[38] McDonald told Pierce that she held her responsible as the supervising LPN and issued Pierce a written verbal

[38] Pierce did not testify at the trial. Thus, McDonald's testimony regarding statements made by Pierce is hearsay .

counseling for permitting two aides on her wing to go to lunch at the same time that she did. (R. Exh. 72.)[39]

McDonald further testified that she then prepared a written verbal counseling form (R. Exh. 16 B) that she was going to present to Stewart when she returned from lunch. The verbal counseling stated, in relevant part, that Stewart was assigned to lunch at 12:30 p.m. but went to lunch at 11:15 a.m. with an aide on the same wing, without notifying the nurse assigned or McDonald, leaving no coverage on C wing. McDonald asked Frank to also be present for her meeting with Stewart. When McDonald met with Stewart to present the written verbal counseling form that she had already prepared, Stewart started to tell her that she had arranged for coverage but McDonald told her that nobody knew about it. McDonald did not make any effort to verify what Stewart had said. Stewart stated that she was being harassed for union activity and refused to sign the verbal counseling.

Stewart testified that on September 26, she arranged with Every and Gordon that she would take her lunch at 11:15 a.m. and Every and Gordon would work out the order in which they were going to take their lunches. (Tr. 452). Importantly, Stewart testified that before she went to lunch at 11:15 a.m. she told Pierce that she was going to lunch and that Pierce told her that it was okay to go (Tr. 453).

I credit Stewart's uncontradicted testimony that she had arranged with Every and Gordon that she would take her lunch at 11:15 a.m. and that Every and Gordon would determine the order in which they would take lunch in order to make sure there was coverage on both wings. I also credit Stewart's testimony that she informed Pierce that she was going to lunch before she went. As noted above, Pierce did not testify at the hearing and the Respondent's only evidence to support its position that Stewart did not have Pierce's permission to go to lunch when she did is McDonald's hearsay testimony that Pierce was unaware that both C wing aides had left at the same time. With certain exceptions that I have noted, I found Stewart to generally be a credible witness and, based on her demeanor while testifying regarding this issue, I find her testimony to be more reliable than the hearsay testimony of McDonald regarding what Pierce told her on this point.

The October 3 Incident

On October 3, 2014, Stewart worked on the 7 a.m. to 3p.m. shift and was assigned to care for SM, along with CNA Michelle Angot. McDonald testified that shortly after the shift began SM told her that he wanted to be shaved. Since the CNAs were busy getting residents ready for breakfast, McDonald told SM that she would get him shaved after breakfast. At approximately 11:15 a.m, McDonald saw Angot and Stewart in the hallway and asked "Can we please get SM shaved?" Both Stewart and Angot replied "yes" and McDonald wheeled SM, who had been in the hallway sitting by McDonald's office, over to Stewart and then returned to her office.

[39] Verbal counseling is a form of discipline pursuant to the Respondent's handbook which provides that "Discipline ranging from verbal counseling, written warning, suspension, or termination will be based upon the seriousness of the violation, the employee's work record and length of service, and the needs of the facility." (R Exh. 3, p. 44.)

McDonald testified that at approximately 3:15 p.m., SM's daughter, Joyce Galitello, came to her and said that SM had told her that the aide called him "the great reporter" and that her father felt threatened. Galitello also told McDonald that her father had a lot of "nicks" on its face from his shave and requested that the aide not care for her father. McDonald told Galitello that she would prepare a written report regarding her concerns and that she would also prepare a statement regarding the incident. McDonald did not speak to Stewart as Stewart's shift had ended and she had left the facility. Shortly after speaking to Galitello, McDonald prepared a resident problem form that reflected in part "Resident reported to daughter that the CNA today who took care of me "today" and believes is the same one previously called him "the great reporter." (R. Exh. 11D.) McDonald also prepared an "Investigation Report" that is consistent with her testimony (R. Exh. 11E). McDonald then called Nelson and briefly described what had been reported to her and furnished Nelson with her two written reports. During their conversation McDonald told Nelson that Stewart was the aide assigned to SM that day.

Nelson testified that, after speaking to McDonald and receiving her reports, she began to investigate the incident pursuant to the Respondent's patient abuse policy. The Respondent's patient abuse policy provides, in relevant part, that: "It is the policy of the facility that each resident has the right to be free from verbal, sexual, and physical and mental abuse, corporal punishment and involuntary seclusion. Further, each resident at the facility will be treated with respect and dignity at all times." (R. Exh. 1A.) In relevant part, the policy defines abuse as: "The willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical hurt or pain and mental anguish to a resident." Mental abuse is defined as follows: "Includes, but is not limited to, humiliation, harassment, threats of punishment or deprivation of a resident."

The Respondent' s policy entitled "Reporting & Investigating Abuse" (R. Exh. 1C) provides procedural guidelines for such investigations. The policy specifically provides:

> Interview the resident and other resident witnesses. Conduct at least 3 resident interviews. These interviews are to be dated, documented and signed by a supervisor.
>
> 3 resident interviews will be conducted. The purpose of the separate interviews is to determine if the employee's account of the alleged harassment is consistent. A resident with cognitive dementia will not be discounted.
>
> The interviews are conducted by:
> 1. The shift supervisor who was on duty when the incident was reported;
> 2. The Director of Nursing;
> 3. The Social Worker or Administrator.

The Respondent also maintains a policy entitled "Residents Rights" which provides that residents have the right to exercise their rights to file a grievance or complaint without fear of reprisal. The residents' rights policy gives as an example of reprisal "Staff member involved reapproaches the resident/family and refers to the complaint or investigation. This is a form of

intimidation." (R. Exh. 2A.) All employees, including Stewart, are given copies of the Respondent's patient abuse and residents' rights policies.

Nelson began her investigation by going to SM's room and speaking to him and Galitello. Nelson testified that SM told her that the CNA that cared for him that day referred to him as the "great reporter" and that he was doing what was right. SM told Nelson that when he came to the United States, his allegiance was to Mussolini because he was Italian but, as an American citizen, he did the right thing and served the country that he was living in. Nelson asked SM if he knew this was the individual who he had reported for not changing him and he replied "yes. " When Nelson asked SM why he was bothered by the incident, SM stated that he reported something and now the aide was coming back and telling him that he was the reporter. SM felt the aide was angry at him for reporting the incident and he was fearful. Nelson told SM they would investigate the situation and that the aide would not take care of him and that he would be okay. Galitello stated that she did not feel comfortable with the CNA taking care of her father any longer. Nelson asked Galitello to provide a written statement regarding the incident.

Pursuant to the Respondent's policy regarding the investigation of alleged patient abuse claims, after Nelson spoke to SM, she asked , Carol Burke, the director of social work at the Dutchess facility, to interview SM. Burke interviewed SM on October 3 and provided the following statement (R. Exh. 11F) to Nelson:

> SW interviewed resident today because his daughter relayed that a staff member called him "The Great Reporter". Resident confirmed this but was unable to describe the staff person or recall which day this occurred. He said it was not today but "a few days ago" He did relay a complaint about his care today. He relayed that the "girl" that shaved him today was "rough" and does not want her to take care of him again. He did have visible "nicks" on his face with what appeared to be dried blood on them. He was unable to describe her and did not know her name. He said she was "Puerto Rican." [40] SW reassured resident that his concern would be followed up on. Resident did talk about unrelated things i.e. writing to the President., coming to this country and was somewhat difficult to redirect. He also said "Talk to my daughter."

After receiving Burke's report, at approximately 5:13 p.m. on October 3 Nelson submitted an incident report to the New York Department of Health (R. Exh. 11 K). In this report, Nelson identified Stewart as the employee was under investigation for alleged abuse of the resident. Nelson testified she is required to submit such a report within 24 hours of the incident. Nelson called Stewart on the evening of October 3 but was unable to reach her. Nelson spoke to Stewart on the morning of October 4 and informed her that she was under investigation for alleged abuse of SM, that she was removed from the schedule pending the results of investigation, and that she should provide Nelson a statement on Monday, October 6. Stewart asked if she could come in on October 7 and Nelson agreed to meet her on that date.

Before Stewart and Nelson met, Galitello provided a written statement to Nelson on October 6 that is dated October 4. (R. Exh. 11 G.) The statement indicates:

[40] Stewart's ethnicity is Jamaican.

> My dad, SM, reported to me, when I visited him on 10/3/14, that the same CNA he had an incident with on 9/20 and 9/21[41] was sent into his room to shave him. When she entered room she did not refer to him by name but instead chose to call him "the news reporter". In addition while she was shaving him she nicked his face in several places. This was reported to Diane, unit manager.
>
> Due to this latest incident my family and I request that the CNA not be assigned Dad ever and that effective immediately she be removed from the Locust Grove Unit. Dad has stated that he feels threaten (sic) and my family and I believe she poses a threat as well. I must say that I am a bit concerned she was still assigned to Dad after at the first and second incidences (sic) that occurred and to wait for this third one is unacceptable.
>
> Thank you for your attention to this matter and please advise what steps have been taken to rectify situation.

When Galitello gave her written statement to Nelson on October 6, Nelson read the statement and told Galitello that she had not noticed any nicks on SM's face. Nelson told Gallitello that Stewart had been removed from the schedule and would not be taking care of her father.

On October 7, Stewart provided a written statement to Nelson (R Exh. 11C.) Stewart's statement indicates after she and Michelle Angot had gotten SM out of bed and into his wheelchair, he told Stewart that he needed to be shaved. Stewart told SM that she would be back after assisting with another resident. When she returned to his room she saw SM talking to McDonald and, when she asked SM if he was ready to be shaved, McDonald told SM that the mornings are very busy and it was not the best time to get shaved, but that someone would get to him. Stewart's statement then indicates: "At 11:10 AM the unit manager bring him to me and told me he calmed down now so I could shave him. So I went and shaved him and Michelle came him (sic) to watch me shave him because she did not know his routine for shaving. After I'm done he told me thanks and said I did a great job. We then left the room. The next time I saw was at 1:30. I went to change him with coworker Michelle because he is a 2 assist. He was talking nice calm about him (sic) work and he thanked me for a good job and we left."

After reading Stewart's statement, Nelson asked Steward some questions about her statement. Nelson testified that Stewart told her that Angot had come in and watched Stewart shave SM and that Stewart did not see SM again until 1:30 p.m., when she changed him with Angot. According to Nelson, when Nelson asked Stewart if she was alone with SM at any time, Stewart denied being alone with him said that Angot was with her when she was with SM.

[41] At the trial Nelson testified, after reviewing notes she made regarding the toileting incident on September 20 (R. Exh. 11 J), that the alleged incident on September 21 involved a claim that SM had been placed in a closet by his aides on that date. Nelson testified that she did not investigate that complaint because SM could not fit in a closet in his wheelchair. (Tr. 2046-2048).

After obtaining Stewart's statement, Nelson obtained the assignment sheet for October 3 and Angot's time records for that day. Angot's time records reflect that she punched out at 11:18 a.m. for lunch (R. Exh. 11 B).

On October 8, Nelson also interviewed Angot, who refused to provide a written statement. Nelson wrote an "investigation report" regarding what Angot told her (R Exh. 11A) This report indicates:

> Michele (sic) stated that the morning of 10/3/14 She assisted Sandra Stewart to get SM out of bed. Once he was in his w/c Michele states she left the room. She stated she believes Sandra was going to shave SM. Michelle stated that Sandra did not shave him at that time and went back later. Michelle did then help Sandra change SM at 1:30 PM. She showed Sandra a different way to change him.

Nelson testified that she recalled Angot telling her that she did not participate in the shaving of SM and that she was not there when he was shaved.[42]

Nelson testified that, based on her results of the investigation, she concluded that Stewart did refer to SM as the "great reporter" or "news reporter" while administering care to him and did so directly as a result of the incident that he reported on September 20. Nelson further testified that in reaching this conclusion, she considered what she found to be an inconsistency between Stewart's statement that Angot was present during the shave and Nelson's determination that Angot was not present based on her interview with Angot. Nelson concluded that Stewart's actions on October 3 warranted discharge and she recommended that she be terminated. According to Nelson, in reaching this decision she did not consider Stewart's involvement with the union organizing activities that she had been engaging in.

Stewart also prepared a "Termination Summary Report" (R Exh. 12A) which indicated as the reason for discharge: "Sandra failed to provide care to the resident and when this was reported she retaliated and called a resident "The Reporter" which is reprisal." The document also notes: "It was discussed on 9/23/14 that Sandra was not to approached (sic) the resident." This document and the investigative file was transmitted to HR manager Budzna and then to the Ianiro.

Ianiro testified that she reviewed the entire investigative file and the recommendations of Budzna and Nelson that Stewart should be terminated and discussed the matter with Nelson. Ianiro also consulted with Wingate's General Counsel since she viewed the matter as a "high risk termination" given Stewart's involvement with union organizing activities. Ianiro testified that she approved the recommendation to discharge Stewart on October 8 or 9. Ianiro testified that she determined that termination was warranted based on the severity the situation since Wingate had zero tolerance for retaliation against a resident.

[42] Angot did not testify at the trial. Although the General Counsel issued Angot a subpoena, she did not appear at the trial pursuant to the subpoena, and the General Counsel elected to forego enforcement of the subpoena rather than to seek to adjourn the trial in order to initiate subpoena enforcement proceedings.

On October 9 or 10 Nelson prepared an investigation summary (R Exh. 11 H) regarding the incidents of October 3 and September 20 and submitted this summary to the New York Department of Health as required by law.

Ianiro testified that Nelson was on vacation when Ianiro approved the recommendation to terminate Stewart and that Ianiro and Budzna attempted to reach Stewart and notify her of her termination but were unsuccessful. On October 17, Harbby spoke to Stewart and informed her that she was terminated for resident abuse. Stewart received an undated letter from the Respondent on or about October 28, informing her that she had been terminated effective October 24, 2014 (GC Exh. 15). Later, Stewart received a letter dated October 30, 2014, from the Respondent indicating that her termination was effective October 17, 2014, and that the previous letter had reflected an incorrect termination date (GC Exh. 16).

With respect to the events of October 3, Stewart testified that she received a phone call from Nelson on Saturday, October 4 at 10:00 a.m. According to Stewart, Nelson told Stewart that she was taking her off the schedule and that Stewart should not attend work until Monday, October 6, when Nelson wanted to meet with her. Stewart told Nelson that she had an appointment on Monday and Nelson then asked to meet with her on Tuesday. Stewart testified she asked Nelson why she was off the schedule and Nelson replied that when Stewart came to work she would let her know. Stewart testified that she met with Nelson at approximately 8 a.m. on Tuesday, October 7. Nelson began the meeting by asking Stewart whether she remembered speaking to Nelson and Nelson asking her about a resident that she did not toilet. Nelson asked Steward if she remembered Nelson telling her at that meeting that she should not go back and say anything to the resident. Stewart replied that she did recall Nelson giving her that instruction. Nelson then asked Stewart whether she went back and said to the resident, 'You're a news reporter." Stewart testified that she never said that to the resident. Nelson said that there had been a complaint that she had told the resident that he was a "news reporter." Nelson then asked her to write statement about her care of SM on October 3 and Stewart did so. Nelson told Stewart that she would call her whenever the investigation was finished.

Stewart again denied on cross-examination that she had referred to SM as the "news reporter" or the "great reporter." On cross-examination, Stewart testified that she had shaved SM a number of times in the past and that it took approximately 10 to 15 minutes. Stewart initially testified on cross-examination that she was alone with SM when she shaved him on October 3. After being shown the statement that she provided Nelson on October 7 regarding the October 3 incident, Stewart then testified that Angot was in the room with her when she shaved SM. However, in Steward's affidavit that she provided to the Regional Office on January 6, 2015, she stated "At no time did I call him a news reporter, or the great reporter or anything of that sort. I was with Angot at all times in the room with him, except as I was shaving him." (Tr. 490.)

I credit Stewart's testimony regarding the manner in which Nelson notified her that she was under investigation and the meeting between Nelson and Stewart that occurred on October 7. Stewart's testimony was more detailed than that of Nelson and I find it to be a more reliable version of those events. I further credit her testimony that she did not refer to SM as "the great reporter, or "the news reporter" at any time on October 3. Stewart's testimony on this issue was

consistent on both direct and cross-examination and her demeanor while testifying regarding this issue reflected certainty.

On the basis of the record as a whole, I find that Stewart was alone with SM when she shaved him on October 3. As I have noted above, Stewart's testimony was not entirely consistent regarding whether Angot was present with her while she shaved SM. As set forth above Stewart testified that she began to shave SM at 11:10 a.m. and that it took 10 to 15 minutes to shave him. Angot's time card reflects that she punched out for lunch at 11:18 a.m. Given that time line, while it is possible that Angot was present with Steward when she shaved SM, I find that it is more likely that she was not. The fact that Stewart's testimony was not entirely consistent with regard to whether Angot was present while she shaved SM does not diminish, in my view, Stewart's emphatic and credible denial that she ever refer to SM as "the great reporter" or "the news reporter"

Analysis

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 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), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. Accord: *Mesker Door, Inc*. 357 NLRB No. 59, slip op. at 2 (2011).

The September 26 Written Verbal Counseling

Although paragraph VII(g) of the complaint alleges that the Respondent threatened to discipline an employee (Stewart) in September 2014, for taking her normal lunch hour because she had engaged in union activity, the Respondent's handbook clearly reflects that the issuance of a written verbal counseling constitutes actual discipline. Accordingly, I must apply a *Wright Line* analysis in deciding this complaint allegation. In applying the *Wright Line* factors to the written verbal counseling that Stewart received on September 26, as noted above, Stewart was the primary employee advocate for the Union at the Dutchess facility. In this connection, she solicited and obtained 56 signed authorization cards from other employees at the facility. She also regularly engaged in open union support at shift changes beginning in early August, 2014. The evidence establishes, and the Respondent does not dispute, that by late July 2014 it was aware that Stewart was a supporter of the Union. The numerous unfair labor practices I have detailed above establish that the Respondent harbored substantial animus toward its employees efforts to organize a Union. Accordingly, I find that the General Counsel has established that Stewart's union activity was a motivating factor in the verbal counseling she received on

September 26; thus the burden of persuasion shifts to the Respondent to demonstrate that the same action was taken place even in the absence of the protected activity.

As set forth above, the record establishes that CNAs often trade the lunch breaks that appear on schedule and that the Respondent is aware of and condones this practice. CNAs are permitted to trade lunches as long as there is one CNA on duty on each wing during lunchtime and a CNA tells the LPN on duty when he or she is leaving the unit for lunch. On September 26, between 11:30 a.m. and 12p.m., McDonald noticed that there were no CNAs on the C wing of the Locust Grove unit, and only one on D wing. McDonald also determined that the LPN assigned to C wing, Joanne Pierce, was also at lunch and not on the floor. When Pierce returned from lunch, McDonald met with Pierce and told her that the two CNAs assigned to her had gone to lunch at the same time and thus C wing had no CNA coverage for that period. McDonald told Pearce that she held her responsible for this as a supervising LPN and issued her a written verbal counseling for permitting it to a her wing to go to lunch at the same time that she did.

McDonald also prepared a written verbal counseling form that she was going to present to Stewart when she returned from lunch. The verbal counseling form stated in relevant part that Stewart was assigned to lunch at 12:30 p.m. and went to lunch at 11:15 a.m. with an aide on the same wing, without notifying the nurse assigned to wing or McDonald, thus leaving no CNA coverage on C wing.

Based on Stewart's credited testimony I find that Stewart had spoken to the two CNAs on the D wing, Every and Gordon, and arranged with them that she would take her lunch at 11:15 a.m. and that Every and Gordon were going to work out the order in which they were going to take their lunches. Stewart also told Pierce that she was going to lunch at 11:15 a.m. and Pierce gave her permission to go at that time.

As noted above, McDonald prepared a verbal counseling form to give Stewart before she had spoken to her about the circumstances under which she had gone to lunch at 11:15 a.m. When Stewart attempted to explain to McDonald that Stewart had arranged for coverage McDonald merely told her that nobody knew about it. McDonald admitted that she did not speak to any of the aides to verify what Stewart had told her regarding arranging for coverage for C wing while she was at lunch. The Board has found that an employer's failure to conduct a fair and full investigation and give employees the opportunity to explain their actions before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co*., 317 NLRB 933, 938 (1995), enfd. 106 F.3d 41 (6th Cir. 1996).

The Respondent contends that the fact that it issued a written verbal counseling to Pierce establishes a lack of any discriminatory motivation with regard to the written verbal counseling issued to Stewart. I do not agree, as I find the discipline administered to Pierce to be different in kind than that issued to Stewart. The written verbal counseling form given to Pierce was because, as the supervising LPN, she was responsible for a situation where ultimately there was no CNA coverage on C wing during the early lunch period. Thus, regardless of the reasons why, the fact is there ultimately was a lack of CNA coverage on C wing, and Pierce was disciplined for failing to ensure that did not occur.

The discipline issued to Stewart was because she had allegedly left the unit without making arrangements with other CNAs for coverage of the wing she was assigned to and because she had not received permission from her LPN or unit director to go to lunch when she did. However, Stewart was not given a full opportunity to explain the arrangements that she had made for CNA coverage on C wing and McDonald made no attempt to verify with other CNAs whether Stewart had arranged for such coverage. As noted above, I find that the evidence establishes that Stewart did in fact make arrangements with the CNAs on D wing that Stewart was going to take the early lunch at 11:15 a.m. and that she had notified the LPN on duty, Pierce, that she was going to lunch before she left the unit. Under the circumstances, I find that the Respondent has not met its burden under *Wright Line* to establish that Stewart would have been issued a written verbal counseling form on September 26 in the absence of her union activities. Accordingly, I find that the issuance of the September 26 verbal counseling form to Stewart violated Section 8(a)(3) and (1) of the Act.

The Suspension and Discharge of Stewart

For the reasons expressed above in considering Stewart's September 26 written verbal counseling, I find that the General Counsel has established that Stewart's union activities were a motivating factor in her suspension and discharge and that the General Counsel has therefore established a prima facie case of discriminatory motivation under *Wright Line*. With respect to the Respondent's October 4 suspension and October 17 discharge of Steward, the General Counsel's prima facie case is strengthened by the fact that these actions occurred shortly after the filing of the Union's election petition on October 1. The Board has long held that the timing of an adverse action shortly after the filing of an election petition may raise an inference of animus and discriminatory motive. *Lucky Cab Co.,* 360 NLRB No. 43, slip op. at 4 (2014). I find that it is appropriate to draw such an inference in the instant case. Accordingly, the burden of persuasion shifts to the Respondent to demonstrate that it would have taken the same action in the absence of Stewart's union activities. In order to meet the *Wright Line* burden of persuasion, the Respondent must establish that it has consistently and evenly applied its disciplinary rules, *DHL Express, Inc*., 360 NLRB No.87, JD slip op. at 7 (2014). As noted above, while the Respondent does not have to prove that Stewart committed the offense of referring to SM as "the great reporter," it must have a reasonable belief that she committed that offense and that it acted on that belief in suspending and discharging her. *Midnight Rose Hotel & Casino*, supra; *McKesson Drug Co*., 337 NLRB 935, 937 fn. 7 (2002).

The Respondent contends that the investigation of Stewart's conduct established that it had a reasonable belief that Stewart did not toilet and change SM on September 20 and that she retaliated against him on October 3 in response to his reporting the September 20 incident. The Respondent further contends that it discharged Stewart based on its reasonable conclusion that Stewart had engaged in patient abuse.

As discussed above in substantial detail, I find that the Respondent did not have a reasonable basis to conclude that Stewart failed to toilet SM on September 20. Turning to the Respondent's investigation of whether Stewart referred to SM as "the great reporter" or "news reporter" on October 3, I note there is a substantial discrepancy between what Nelson testified SM had reported to her and the information SM relayed to the social worker who interviewed

him on the same day. Nelson testified that SM told her on October 3 that the CNA that cared for him that day referred to him as the "great reporter." When Nelson asked SM if he knew this was the individual who he had previously reported for not changing him, he replied that it was. The report prepared on October 3, by social worker Carol Burke, contains substantially different information. According to Burke's report, while SM confirmed that the staff member referred to him as "the great reporter," he was unable to describe the staff member or recall which day this occurred. Importantly, Burke's report reflects that SM told her he was unable to describe the aide and did not know her name but that she was Puerto Rican. Burke also noted that SM talked about unrelated matters and was somewhat difficult to redirect. Given the substantial discrepancy between these two reports I find that the Respondent's failure to conduct a third interview with SM, as required by its own policy, is a substantial flaw in the manner that Nelson investigated the allegation that Stewart engaged in patient abuse.

I also note that there is a substantial issue raised regarding the reliability of reports made by SM regarding the identity of Stewart as the aide who allegedly referred to him as the "news reporter" or the "great reporter" by virtue of information contained in the written statement of SM's daughter, Galitello. In Galitello's statement she indicated that SM reported to her on October 3, that the same CNA that he had an incident with on September 20 and September 21 had referred to him as the news reporter. The September 21 incident involved a claim by SM that he had been placed in a closet by his aides on that date. Nelson indicated that she did not investigate the complaint by SM regarding his treatment on September 21 because he cannot fit in a closet with his wheelchair. The record does not indicate who SM's aides were on September 21. While Nelson's conclusion regarding the implausibility of SM's claim involving his treatment on September 21 is certainly warranted, SM's report to his daughter that the same aide who he had incidents with on September 20 and September 21 referred to him as "the news reporter" also raises a substantial question as to whether SM was able to accurately identify the individual who referred to him as the "reporter." I find that Galitello's written report of what SM told her also establishes the necessity of the Respondent to follow its own policy and conduct a third interview of SM. While I recognize that the brief mental survey that the Respondent conducted on SM in early September 2014 reflected that he was in the normal cognitive range, there were clearly substantial discrepancies and implausible assertions in his reports regarding the care he received from CNAs in September and October 2014.

As noted above, in the two performance evaluations that Stewart received, she was rated as outstanding. The only prior discipline given to her was a verbal counseling for failure to have a resident's call bell within reach and a written warning for using a cell phone in a resident care area. While I recognize the difficulties in investigating allegations of patient abuse by residents who may be elderly and impaired in some fashion, I believe, at a minimum, that the Respondent is obligated to strictly adhere to its own policy for the investigation of such matters before it issues discipline to employees. I find this requirement particularly important as it applies to the discharge of Stewart, an employee who had received outstanding performance ratings and had only two relatively minor disciplinary occurrences during her tenure. The Respondent's failure to conduct a full and fair investigation prior to discharging Stewart for alleged patient abuse establishes in my view that did not have a reasonable belief that she was engaged in patient abuse and that the Respondent did not act on such belief when it discharged her. Rather, I find

that the Respondent's conduct during the investigation supports a finding that the disciplinary action taken against Stewart was discriminatorily motivated

I next turn to the issue of whether the Respondent has met its burden under *Wright Line* to establish that it has consistently and evenly applied its disciplinary rules. The Respondent asserts that it has not encountered previous instances of employee retaliation against a resident for making a complaint. The Respondent contends, however, that the decision to terminate Stewart was consistent with the termination of other employees who were terminated for patient abuse or neglect. The General Counsel and the Union contend that the Respondent has applied its disciplinary rules in a disparate and more lenient manner to other employees than it did to Stewart.

The relevant evidence involving the Respondent's prior application of its disciplinary rules involving resident care consists of the following. The Respondent terminated CNA Wanda Walker on April 17, 2014, for throwing a diaper at a resident and telling her to change herself. In a termination summary regarding Walker's discharge, the Respondent referred to this conduct as "Resident Neglect" (CP Exh. 3). Prior to her discharge, however, Walker had received a number of disciplinary occurrences for resident care. On October 19, 2012, Walker was issued a written verbal warning for failing to provide a resident with hands, face and mouth care prior to going to bed, as a resident she was assigned to was found to be in bed sleeping with food up around his mouth. On November 6, 2012, Walker was issued a written verbal warning for her attitude and approach upon answering a resident's call bell. On March 8, 2013, Walker was issued a written warning for speaking disrespectfully and tossing a blanket at a resident. On September 30, 2013, Walker was issued a written warning for failing to conduct rounds, which resulted in a resident that she was assigned to being found soaked in urine.

CNA Noreesa Knowles was terminated on November 11, 2011, for failing to place TED stockings on a resident, contrary to the resident's care plan. During the investigation Knowles admitted that she had failed to place the stockings on the resident. (CP Exh. 1, Bates number 471-473) At the time of her discharge, Knowles was on a PIP that became effective on September 30, 2011. The PIP noted, inter alia, that Knowles had been involved in inappropriate interactions with residents and had yelled at residents on two different occasions. The Respondent's internal investigation report that was prepared prior to the issuance of the PIP, indicates that on November 16, 2011, a resident asked Knowles for apple juice and Knowles became upset because she had to go and find some. When Knowles returned to the resident's room she slammed the apple juice on the tray and stated "There! Are you happy now." The resident told Knowles that she was going to report Knowles to her supervisor. Knowles pleaded with the resident not to report her and told the resident that she needed her job as she had 3 children and was pregnant. The resident did not then report the incident.

CNA Wayne Powell terminated on March 28, 2011, for failing to report an injury to a resident (CP Exh. 2). Prior to Powell's discharge, however, he also had a lengthy history of discipline for failing to administer proper care to residents. On December 19, 2001, Powell was issued a written warning for neglect when a resident was discovered sitting in her wheelchair fully dressed and "upset that she has been waiting all evening to be put to bed (CP Exh. 2, Bates number 523). On November 1, 2005, the Respondent suspended Powell for 1 day because he

spoke "inappropriately" to a resident when he told the resident that, "He worked on the 3 to 11 shift because it was quiet and wanted to keep it that way." Powell told the resident that he was "only to touch that call bell, if [he] absolutely had to." The resident indicated during the investigation that he did not want to report the incident because of fear that Powell "might get back at me" (CP Exh. 2, Bates number 520, 522). On February 2, 2007, Powell given a written warning for failing to turn on a resident's bed alarm. The resident fell while attempting to get out of bed and, because the alarm was not on, the staff was not alerted. The warning noted this was the second time that Powell had failed to properly apply a safety device (CP Exh. 2, Bates number 516).

I find that the discharges of Knowles, Powell, and Walker do not support the Respondent's argument that these discharges are analogous to that of Stewart and establish that it applied its disciplinary policy in a consistent and even manner. Powell was terminated for the failure to report an injury to resident after a lengthy history of discipline for failure to administer proper care to residents. Knowles termination occurred because she admitted to failing to place a required therapeutic equipment on a resident while Knowles was on a PIP. Walker was discharged for the egregious the act of throwing a diaper at a resident and then telling her to change herself. As with Powell, Walker had a lengthy disciplinary record for failing to deliver patient care in an appropriate matter. Thus all of these discharges involved clear instances of abuse or neglect in the treatment of a resident.

The Respondent did not discharge Stewart for a failure to deliver appropriate patient care on October 3 but rather for her alleged reference to SM as "the great reporter" after a complaint was raised regarding the his care on September 20. The Respondent claims that this alleged conduct warrants the discharge of Stewart. In this regard, there are incidents involving both Powell and Knowles which establish that the Respondent has treated other employees more leniently than Stewart in similar instances.

As noted above, Powell told the resident that he worked on the night shift because it was quiet and he wanted to keep it that way and thus told the resident that he was to touch his call bell only if he absolutely had to. During the investigation of the incident, the resident indicated that he did not report Powell's instruction to him because he feared that Powell "might get back at him." For this conduct, Powell received a 1-day suspension. Among other performance issues noted in her PIP, Knowles gave rude and inappropriate care to a resident, and when the resident said that she was going to inform Knowles' supervisor, Knowles begged her not to do so because she needed her job and that she had children to support. The resident then did not report the incident. Thus, in other instances when CNA's had rendered care to residents that was not appropriate and the resident did not report it because of a fear of reprisal if they did so, or because the employee improperly begged them not to do so, the Respondent imposed disciplinary measures short of termination. The Board has consistently found that such disparate treatment is evidence of a discriminatory motive. *Lucky Cab Co*., supra; *Windsor Convalescent Center*, 351 NLRB 975, 983 (2007), enfd. in relevant part, 570 F.3d 354 (D.C. Cir. 2009).

On the basis of the foregoing, I find that the Respondent has not met its burden under *Wright Line* to establish that it would have discharged Stewart even if she had not engaged in

union activity. Accordingly, I find that Stewart's suspension and discharge violates Section 8(a)(3) and (1) of the Act.

The Objections to the Election

As noted at the outset of this decision, the Union filed timely objections to conduct affecting the results of the election, most of which parallel the unfair labor practice allegations of the complaint. While the Union has withdrawn several of the objections that it filed, there are several others that remain for consideration. The Board has long held that it will set aside an election if one party engages in conduct that interferes with employee free choice during the critical period between the filing of the petition for an and the date of the election. *The Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961). Conduct which violates the Act interferes with an election unless it is de minimus and virtually impossible to conclude that the violation could have affected the election results. *Jewish Home for the Elderly of Fairfield County*, supra at 1115; *Airstream, Inc*. 304 NLRB 151, 152 (1991); *Dal-Tex Optical Co*., 137 NLRB 782, 786 (1962). Based on my findings set forth above, the Respondent has committed violations of the Act that occurred during the critical period between the filing of the petition on October 1, 2014, and election conducted on November 12, 2014, which parallel certain objections filed by the Union. Accordingly, I make the following findings with respect to the remaining objections filed by the Union regarding conduct occurring during the critical period.

Objection 1 alleges that the Respondent threatened employees with the loss of their jobs if they voted for the Union. Since there is no evidence to support this allegation, I shall overrule it.

Objection 2 alleges that the Respondent discharged Sandra Stewart because of her union activity. Since I find I have found Stewart's October 4 suspension and October 17 discharge violates Section 8(a)(3) and (1) of the Act, I sustain this objection.

Objection 3 alleges that the Respondent threatened employees with a reduction in hours if they voted for the Union. Since I have found that in late October or early November, the Respondent through Clifton threatened employees that per diem hours would be cut if the Union won the election in violation of Section 8(a)(1) of the Act, I sustain this objection. [43]

Objection 6 alleges that the Respondent threatened to change and make more onerous employees' working conditions and schedules if they voted for the Union. Objection 7 alleges

[43] The Petitioner also contends that certain testimony of Allen also supports this objection. Allen testified she heard Nelson tell a per diem employee that Nelson could not promise the employee the special schedule that she had, working every other weekend , would continue if the Union was selected. However, Allen clearly testified that she overheard this conversation in late July or early August, 2014, well before the filing of the petition on October 1, 2014. Nelson denied making such a statement. This statement, even if made, does not constitute objectionable conduct since it occurred outside the critical period. I further note that there is no complaint allegation regarding Nelson making such a statement. I clearly indicated that the hearing that I would not make any findings on matters that were not alleged in the complaint. Accordingly, I make no findings or reach any conclusions regarding the alleged statements made by Nelson on this occasion.

that the Respondent threatened employees with more severe discipline if they voted for the Union. Objection 8 alleges that the Respondent threatened employees with loss of workplace flexibility and stricter enforcement of work rules and policies if they voted for the Union. Objection 9 alleges that the Respondent threatened employees with the loss of their ability to speak directly to management concerning workplace issues if they voted for the Union.

The Union contends that the "Straight Talk" memo that was posted on November 6, 2014, supports Objections 6 through 9. Since I have found that the Respondent's posting of the "Straight Talk" memo violated Section 8(a)(1) of the Act by threatening employees that they would lose policies that are beneficial to them and that there would be the imposition of more inflexible policies under a union contract, I sustain Objections 6 and 8. I do not find that the "Straight Talk Memo is sufficient to support Objections 7 and 9 and accordingly I shall overrule those objections.

Objection 12 alleges that the Respondent informed the employees it would be futile for them to select the Union. The Union contends that Schuster's statement on November 10, 2014, that he would not sign a union contract supports this objection. Since I have found that on November 10, 2014, Schuster stated to employees that he would not sign a contract with the Union, thus expressing to employees the futility of selecting the Union as a representative in violation of Section 8(a)(1) of the Act, I sustain Objection 12.

Objection 14 alleges that the Respondent coerced employees by forcing them to make an observable choice regarding whether they supported the Union. Objection 23 alleges that the Respondent, on the day of election, altered its long-standing practice of charging employees $2 to wear jeans to work, in order to encourage employees to vote against the Union. Objection 24 alleges that on the day of election the Respondent allowed employees to wear jeans without being charged $2, but conditioned this waiver of the $2 charge on employees wearing a "Wingate proud" shirt.

Since I have found that the Respondent's conduct in sending a text message to all of its employees that that November 12, the day of the election, would be a "free jeans day" if they wore their "Wingate proud" T-shirts created a situation where employees were pressured to make an observable choice on the day of the election that demonstrated their support for or rejection of the Union in violation of Section 8(a)(1) of the Asked. I sustain Objections 14, 23 and 24.

Objections 17 alleges that the Respondent promised to remedy and remedied employee grievances.

In support of this objection , the Union contends that at the November 10 meeting Schuster promise to investigate more affordable health insurance. At this meeting, Schuster did indicate that the Respondent was looking into improvements at the Dutchess facility including better health benefits. Schuster also indicated, however that he could not promise anything. I find this statement does not constitute a promise to remedy employee concerns regarding the level of health benefits provided by the Respondent. The Union further contends in support of this objection that on October 4, the Respondent reissued its August 22 memorandum regarding a

401(k) match. Since I have found that Respondent's issuance of the August 22, 2014 memorandum did not violate Section 8(a)(1) of the Act, I find that the Respondent's conduct in reissuing that memorandum on October 4, did not constitute objectionable conduct. Accordingly I shall overrule objection 17.

The meritorious objections filed by the Union involve, inter alia, the discharge of the primary employee supporter of the Union, an unlawful expression of the futility of selecting the Union made by the Respondent's highest ranking official at a meeting attended by approximately 25 employees, the posting of a memorandum to all employees which threatened the loss of policies beneficial to employees and the imposition of more stringent policies, and sending text messages to all unit employees, immediately before the election, which required employees to make an observable choice as to whether they supported the Union. I find that the conduct which I have found has violated the Act during the critical period is clearly more than de minimus pursuant to the principles expressed in the cases cited above. In reaching this conclusion, I have considered the fact that the union lost the election by a narrow margin, 64 to 60. The Board gives significant weight to close election results in determining whether misconduct warrants setting an election aside. *Student Transportation of America, Inc.,* 362 NLRB No. 156, slip op. at 3 (2013); *Hopkins Nursing Care Center*, 309 NLRB 958, 959 (1992). Accordingly, I have determined that the Respondent's misconduct during the critical period is sufficient to set aside the results of the election held on November 12, 2014.

The Request for a Bargaining Order Remedy

In the complaint, the General Counsel seeks a bargaining order remedy. The General Counsel and the Union contend that the Respondent's unfair labor practices impacted employees to the extent that the possibility of assuring a fair rerun election by the use of traditional remedies is slight. The General Counsel and the Union further argue that employee sentiment reflected by the Union obtaining majority support through authorization cards, is a more accurate reflection of the employees' desire for union representation and that employee Section 7 rights are better protected by a bargaining order pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). The Respondent contends that if it committed unfair labor practices, they are not of the magnitude to warrant a bargaining order and that traditional remedies, including a rerun election, would be sufficient to effectuate the policies of the Act.

In order to determine whether a bargaining order remedy is appropriate I must examine initially whether the Union achieved majority status based on authorization cards. As amended, the complaint alleges that the Union had obtained majority status as of October 11, 2014. Pursuant to the stipulated election agreement executed by the parties in Case 03-RC-137858 (GC Exh. 3), the payroll period ending date for eligibility to vote in the election at the Dutchess facility was October 11, 2014. The *Excelsior* [44] list submitted by the Respondent establishes that as of October 11, 2014, there were 139 unit employees employed at the Dutchess facility (GC Exh. 53).

At the trial, the General Counsel properly authenticated, by testimony from either the solicitor or the card signer, the authorization cards of 91 employees who had signed their cards

[44] *Excelsior Underwear,* 156 NLRB 1236 (1966).

before October 11, 2014, and whose names appear on the eligibility list. In its brief, the Respondent does not contest the validity of any of those cards and I find that they are valid and can be relied on in establishing the Union's majority status.

The General Counsel also introduced into evidence at the trial authorization cards purportedly signed by six employees and those employees' W-4 forms, which contained their signatures and which were obtained from the Respondent pursuant to a subpoena. These six authorization cards were not authenticated by either the solicitor or the card signer and the General Counsel requests that I make a determination regarding their validity by comparing them to the W-4 forms. It is well established that an administrative law judge may determine the validity of signatures on authorization cards by comparing them to W-4 forms maintained by the employer. *Parts Depot, Inc*. 332 NLRB 670, 674 (2000). I have compared the authorization cards of the following employees to the W-4 forms they executed and find that the signatures on the following authorization cards are genuine: Ashley Perry (authorization card, GC Exh. 22-41) (W-4 form, GC Exh. 41); Tyesha Smith (authorization card, GC Exh. 22 – 98) (W-4 form, GC Exh. 40); Annamarie Perri (authorization card, GC Exh. 22-70) (W-4 form, GC Exh. 39); Emma McMullen (authorization card, GC Exh. 22-67) (W-4 form GC Exh. 38); and Verdal Lewis (authorization card, GC Exh. 22-97) (W-4 form, GC Exh. 37).[45] Accordingly, I find these 5 cards to be valid. Thus, the Union had obtained 96 valid authorization cards prior to October 11, 2014, from employees who were in the bargaining unit as of that date. Accordingly, as of October 11, 2014, the Union clearly had attained majority status in the bargaining unit.

With regard to whether it is appropriate to issue a bargaining order in the instant case, the Board's decision in *Evergreen America Corp.,* 348 NLRB 178, 180 (2006) indicates:

> The Board will issue a *Gissell* bargaining order in two categories of cases. The first category comprises "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. *NLRB v. Gissel Packing*, [395 U.S. 575, 613 (1969)]. The second category (category II) includes "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." Id. at 614.

I find that the unfair labor practices committed by the Respondent makes this a category II case. In such cases the Board evaluates the "extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and a likelihood of their recurrence in the future" in determining whether a bargaining order remedy is appropriate. *Gissel*, supra at 614; *Evergreen America Corp*., supra at 180.

In *Horizon Air Services*, 272 NLRB 243 (1984), the Board noted that certain unfair labor practices are so coercive that they are characterized as "hallmark" violations and that their

[45] I have also compared the authorization card containing the purported signature of Maritza Anderson (GC Exh. 22-96) to the W-4 form executed by Maritza Anderson (GC Exh. 36). I find that there is a sufficient discrepancy between the signature on the authorization card and the signature that appears on the W-4 form so that I do not find the authorization card of Maritza Anderson to be a valid card.

"presence will support the issuance of a bargaining order unless some significant mitigating circumstances exist." *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980). In *Jamaica Towing* the court stated that "hallmark" violations include, inter alia, the grant of benefits to employees and the discharge of employees in violation of Section 8(a)(3). The court noted that, "In such cases, that seriousness of such conduct, coupled with the fact that it represents complete action as distinguished from mere statements , interrogations or promises justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the workforce."Id. at 212-213.

In the instant case, the Respondent committed two hallmark unfair labor practices. The first involves the Respondent's conduct in granting a wage increase to all eligible unit employees on September 1, 2014, in violation of Section 8(a)(3) and (1.) The Board recognizes that unlawful wage increases, in particular, have a potential long-lasting effect because of their significance to employees and because the Board's traditional remedies do not require the respondent to withdraw benefits it has conferred. *America's Best Quality Coatings Corp*., 313 NLRB 470, 472 (1993); *Holly Farms Corp*., 311 NLRB 273, 281-282 (1993); *Pembrook Management*, 296 NLRB 1226, 1228 (1989).

The second unfair labor practice that constitutes a hallmark violation is the discharge of Stewart in violation of Section 8(a)(3) and (1) of the Act on October 17, 2014. The Board has long held the discharge of a union supporter is one of the most flagrant forms of interference with Section 7 rights and is more likely to destroy election conditions for longer period of time than other unfair labor practices because it tends to reinforce the fear of employees that they will lose their employment if they persist in engaging in union activity. *Michael's Painting, Inc*., 337 NLRB 860, 861 (2002); *A.P.R.A Fuel Oil*, 309 NLRB 480, 481 (1992). See also *Thriftway Supermarket*, 276 NLRB 1450, 1451 (1985), enfd. 808 F.2d 835 (4th Cir. 1986).

Beyond the hallmark unfair labor practices committed by the Respondent, it committed other numerous and serious unfair labor practices. From the outset of the Union's campaign at the Dutchess facility at the end of July 2014 through the November 12, 2014 election, the Respondent reacted to the attempt by its employees to organize union by the commission of numerous violations of Section 8(a)(1) of the Act which are summarized as follows. In mid-July 2014, before the Union began to actively campaign at the Dutchess facility, Harbby requested Allen to speak in support of the Respondent during its campaign against the Union at the Ulster facility. When Allen told Harbby that employees at the Dutchess facility felt they were in the same boat as the employees at Ulster. Harbby informed her that the Union would not "get in here, and that he would not let the Union come in and "take over his house." On July 23, Harbby told a meeting of about approximately 10 employees that he would not let the Union come into his facility. At the same meeting, Harbby unlawfully interrogated employees about their support for the Union. On July 29, 2014 Harbby threatened Stewart with unspecified reprisals for engaging in union activity.

When agents of the Union and employee supporters began engaging in open union activity outside the Respondent's Dutchess facility in August 2014, the Respondent unlawfully called the police to remove union representatives and employee supporters and engaged in the unlawful surveillance of employees engaging in union activity. In addition, on August 13 the

Respondent, by Lewis, interrogated employees regarding their union activity and impliedly threatened to discharge them for their union activity.

On September 17, 2014 Harbby engaged in surveillance of employees engaged in union activity at the entrance to the Respondent's Dutchess facility and impliedly threatened to discharge Stewart for engaging in union activity.

In late October or early November the Respondent, through Clifton told three employees attending a meeting that per diem hours would be cut if the Union won the election Union. On November 10, 2014, at a meeting attended by approximately 25 employees Schuster stated that he would not sign a union contract. On November 11, the Respondent sent an email to all unit employees pressuring them to make an observable choice on the day of the election that demonstrated their support for or rejection of the Union.

In addition to these 8(a)(1) violations, the Respondent committed other violations of the Act that affected all, or a significant portion of, the bargaining unit. In this connection on July 18, 2014, the Respondent offered the employees at the Dutchess facility a bonus for perfect attendance and later granted the bonus to the employees who met the requirements in violation of Section 8(a)(3) and (1) of the Act. On August 1, 2014, the Respondent reinstated a weekly payroll period in violation of Section 8(a)(3) and (1) of the Act. Finally in violation of Section 8 (a)(1) on November 6, 2014, the Respondent posted a memo entitled "Straight Talk" at the Dutchess facility threatening employees with a loss of existing beneficial policies if they selected the

In determining the pervasiveness of an employer's unfair labor practices the Board considers as relevant factors the number of employees directly affected by the violation, size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Garvey Marine, Inc.,* 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (1993); *Holly Farms Corp*., supra at 281.

Applying those factors to the instant case, as noted above, the bargaining unit is composed of 139 employees. The unfair labor practices involving the granting of the wage increase, the attendance bonus, the reinstatement of the weekly payroll and the posting of the "Straight Talk" affected all, or significant portions, of the bargaining. This is a factor that strongly supports the granting of a bargaining order. *Evergreen America Corp*., supra at 180.

As noted above, at a meeting attended by approximately 10 employees, Harbby unlawfully informed employees that the Union would not get into the facility and interrogated them regarding their union sympathies. At a meeting attended by approximately 25 employees, Schuster told employees that he would not sign a union contract. These unfair labor practices are significant in considering the request for a bargaining order since they not only were directed toward a number of employees, but were also committed by Harbby, the highest ranking management official at the Dutchess facility and Schuster, the CEO of Wingate. In addition, Nelson, the director of nursing at the Dutchess facility, was openly involved in the Respondent's unlawful conduct in calling the police to remove union representatives and employee supporters engaged in lawful Section 7 activity's and engaging in unlawful surveillance The commission of unfair labor practices by high management officials has been emphasized by the Board as

supporting the issuance of a bargaining order since, under those circumstances, a respondent's antiunion message is "unlikely to be forgotten" by employees. *Evergreen America Corp*., supra at 181.

While the bargaining unit in this case is not a small one, I find that the nature and extent of the unfair labor practices are sufficient to warrant a bargaining order remedy in a unit of this size. I note that in *Holly Farms Corp*. supra, the Board found that a bargaining order was an appropriate remedy in a unit composed of 201 employees. Id. at 280-283. In *Holly Farms Corp.*, while the respondent gave a wage increase to unit employees and committed a number of other violations of Section 8(a)(1), it did not discharge any employees in violation of Section 8(a)(3) and (1) of the Act. Thus, I find that *Holly Farms Corp*. strongly supports the issuance of a bargaining order under the circumstances present here.

In the instant case, the Respondent met Union's organizing campaign with the commission of serious unfair practices, including hallmark violations, that was sustained over a period of several months. Several violations directly affected the entire bargaining unit and emanated from high-level management officials. The unfair labor practices clearly affected the employees' desire for union representation since 96 employees signed authorization cards but the Union only obtained 60 votes in the election that was held. Under these circumstances, I do not believe simply requiring that Respondent to refrain from unlawful conduct and the reinstatement and payment of back pay to Stewart will eradicate the lingering effects of the unfair labor practices committed nor will it sufficiently deter their recurrence. Rather, I find that the employees representational desires, expressed through authorization cards, would be better protected by a bargaining order. Thus, because I conclude that it is not likely that a fair rerun election can be held because of lasting effect the Respondent's violations of the Act, I find that a bargaining order is an appropriate remedy in this case. Since the Union attained majority status on October 11, 2014, after the Respondent began its commencement of unfair labor practices, I shall date the bargaining order as of October 11, 2014, consistent with the Board's policy on this issue. *Michael's Painting Inc*., 337 NLRB 860 fn. 6 (2002), and cases cited therein

In reaching my conclusion regarding the propriety of a bargaining order, I find the cases relied on by the Respondent,[46] in arguing that a bargaining order is not an appropriate remedy for any unfair labor practices it may have committed, to be factually distinguishable from the instant case. In the instant case, I find the unfair labor practices committed by the Respondent to be generally more extensive and repetitive than the unfair labor practices that were committed in those cases.

However, I find that *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004), requires further consideration. There, a Board panel majority agreed with the administrative law judge that a bargaining order was not warranted and that a rerun election, in conjunction with special remedies, would be a sufficient remedy for the unfair labor practices that occurred. The Board noted, however, in adopting the administrative law judge's conclusion

[46] *Abramson, LLC*, 345 NLRB 171 (2005); *High Point Construction Group*, LLC, 342 NLRB 406 (2004); *McAllister Towing & Transportation Co*., 341 NLRB 394 (2004); *Hialeah Hospital*, 343 NLRB 391 (2004) *Desert Aggregates*, 340 NLRB 289 (2003);*Yoshi's Japanese Restaurant*, 330 NLRB 1339 (2000).

that a bargaining order was not warranted, "we do not necessarily adopt his entire rationale." Id. at 1069. Thus, it is unclear as to what part of the administrative law judge's rationale was relied on by the Board in reaching its conclusion.

In *Jewish Home for Elderly of Fairfield County*, supra, the respondent granted an unlawful wage increase, and discharged one primary union supporter shortly before the election and another union supporter approximately 3 months after the election. The respondent also committed a substantial number of other unfair labor practices. However, the bargaining unit was large, encompassing approximately 400 employees, and some of the high-ranking officials of the employer who had committed unfair labor practices were no longer employed by the respondent by the time the unfair labor practice hearing was held. Thus, there are substantial factual distinctions between *Jewish Home for the Elderly of Fairfield County* and the instant case. When I consider those distinctions in conjunction with the uncertainty that exists regarding precisely what part of the administrative law judge's rationale for refusing to grant a bargaining order the Board relied on, I do not find that *Jewish Home for the Elderly of Fairfield County* requires me to refuse grant a bargaining order remedy case in the instant case. Rather, I find the cases that I have relied on above to be the more persuasive precedent.

CONCLUSIONS OF LAW

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

(a) Recruiting employees to campaign against the Union.

(b) Expressing to employees the futility of attempting to obtain union representation by telling them that it would not allow the Union to come into the Dutchess facility.

(c) Coercively interrogating employees regarding their union sympathies.

(d) Threatening employees with unspecified reprisals because of their involvement with the Union by telling them it wanted to let them know what they were getting into.

(e) Directing employees and union representatives to remove themselves from the parking lot at 2 Summit Court.

(f) Calling the police to remove union representatives and employees from the parking lot at 2 Summit Court.

(g) Calling the police in response to employees and union representatives engaging in protected Section 7 activity at the intersection of Summit Court and Route 52 without having a reasonable basis to do so.

(h) Engaging in surveillance and photographing employees engaged in protected Section 7 activity.

(i) Impliedly threatening to discharge employees by telling them that their union activity was incompatible with continued employment with the Respondent.

(j) Threatening employees with a loss of existing benefits if they selected the Union as their representative.

(k) Threatening employees with the loss of hours for per diem employees if they selected the Union as their representative.

(l) Expressing to employees the futility of selecting the Union as their representative by telling them that the Respondent would not sign a collective-bargaining agreement with the Union.

(m) Sending text messages to employees in such a manner as to pressure them to make an observable choice with regard to their support for the Union.

(n) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting the Union.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) Granting employees an attendance bonus in order to discourage them from supporting the Union.

(b) Reinstating a weekly pay period in order to discourage employees from supporting the Union.

(c) Granting employees a 2-percent wage increase in order to discourage them from supporting the Union.

(d) Issuing Sandra Stewart at a written verbal counseling on September 26, 2014; suspending her on October 4, 2014; and discharging her on October 17, 2014, because of her union activities.

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

4. The Union's Objections 2, 3, 6, 8, 12, 14, 23, and 24 to the election held on November 12, 2014, in Case 03-RC-137858 are sustained and the election is set aside.

5. The unfair labor practices committed by the Respondent, described above, preclude the holding of a fair rerun election, thereby making a bargaining order in an appropriate remedy.

6. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time time, and per diem certified nursing aides, licensed practical nurses, unit aides and unit secretaries employed by the Employer at its Fishkill, New York facility; but excluding guards, confidential employees, professional employees and supervisors as defined in the Act, and all other employees.

7. Since October 11, 2014, the Union has represented a majority of the employees in the unit described above and, since that date, has been the exclusive bargaining representative for the employees in the unit for purposes of collective bargaining.

REMEDY

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

The Respondent, having discriminatorily suspended Sandra Stewart from October 4, 2014 to October 17, 2014, must make her whole for any loss of earnings and other benefits during this period. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent, having discriminatorily discharged Sandra Stewart, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra.

I shall order the Respondent to compensate Stewart for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for her. *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

The General Counsel also seeks an order requiring that the Respondent reimburse Stewart for search-for-work and work-related expenses regardless of whether Stewart received interim earnings for a particular quarter. The General Counsel asserts that these expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts as prescribed in *Kentucky River Medical Center*, supra. The General Counsel concedes, however, that, at present, Board law considers such expenses as an offset to discriminatees' interim earnings rather than calculating them separately. *West Texas Utilities Co*. 109 NLRB 936, 939 fn. 3 (1954). I am, of course, obligated to follow existing Board precedent in resolving the issues present in a case.

Pathmark Stores, Inc., 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I shall deny the General Counsel's request for this additional remedy.

As set forth above, in order to appropriately remedy the serious and pervasive unfair labor practices committed by the Respondent, I shall order the Respondent to, upon request, recognize and bargain with the Union as the exclusive collective-bargaining representative in the appropriate unit described above concerning terms and conditions of employment, and to embody any understanding reached in a signed agreement.

In light of the serious and pervasive nature of the unfair labor practices committed by the Respondent, I shall order also issue a broad cease and desist order. *Evergreen America Corp*., supra, at 264; *Michael's Painting, Inc*., supra, at fn. 3; *Hickmott Foods*, 242 NLRB 1357 (1979).

Finally, the General Counsel requests that I order a responsible management official read the notice to assembled employees or, at the Respondent's option, to have a Board agent read the notice in the presence of a responsible management official. I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6-7 (2014); *Excel Case Ready* 334 NLRB 4, 4-5, (2001). In this regard, the Board has held that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Federated Logistics & Operations* 340 NLRB 255, 256 (2003) citing *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969). In the instant case, I find that the unfair labor practices of the Respondent justify the additional remedy of a notice reading. The Respondent responded to the Union's organizing campaign with extensive and serious unfair labor practices. In the first instance, as described above the Respondent engaged in numerous violations of Section 8(a)(1) of the Act. In addition, the Respondent discharged Stewart, the primary employee supporter of the Union, in violation of Section 8(a)(3) and (1) of the Act. The Board has noted that the unlawful discharges of union supporters are highly coercive. *Excel Case Ready*, supra at 5. I find that a public reading of the remedial notice is appropriate here. The Respondent's violations of the Act are sufficiently serious and widespread such that a reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices. Accordingly, I will require the attached notice to the read publicly by the Respondent's representative or by a Board agent in the presence of the Respondent's representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Wingate of Dutchess, Inc., Fishkill, New York, its officers, agents, successors, and assigns, shall

[47] 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.

1. Cease and desist from

(a) Recruiting employees to campaign against the Union.

(b) Expressing to employees the futility of attempting to obtain union representation by telling them that it would not allow the Union to come into the Dutchess facility.

(c) Coercively interrogating employees regarding their union sympathies.

(d) Threatening employees with unspecified reprisals because of their involvement with the Union by telling them it wanted to let them know what they were getting into.

(e) Directing employees and union representatives to remove themselves from the parking lot at 2 Summit Court.

(f) Calling the police to remove union representatives and employees from the parking lot at 2 Summit Court.

(g) Calling the police in response to employees and union representatives engaging in protected Section 7 activity at the intersection of Summit Court and Route 52 without having a reasonable basis to do so.

(h) Engaging in surveillance and photographing employees engaged in protected Section 7 activity.

(i) Impliedly threatening to discharge employees by telling them that their union activity was incompatible with continued employment with the Respondent.

(j) Threatening employees with a loss of existing benefits if they selected the Union as their representative.

(k) Threatening employees with the loss of hours for per diem employees if they selected the Union as their representative.

(l) Expressing to employees the futility of selecting the Union as their representative by telling them that the Respondent would not sign a collective-bargaining agreement with the Union.

(m) Sending text messages to employees in such a manner as to pressure them to make an observable choice with regard to their support for the Union.

(n) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting the Union.

(o) Granting employees an attendance bonus in order to discourage their support for the Union.

(p) Reinstating a weekly pay period in order to discourage employees from supporting the Union.

(q) Granting employees a wage increase in order to discourage them from supporting the Union.

(r) Issuing written discipline to its employees, suspending its employees, or discharging its employees for engaging in union activity.

(s) In any other 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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement.

The appropriate unit is:

> All full-time, regular part-time time, and per diem certified nursing aides, licensed practical nurses, unit aides and unit secretaries employed by the Employer at its Fishkill, New York facility; but excluding guards, confidential employees, professional employees and supervisors as defined in the Act, and all other employees.

(b) Within 14 days from the date of the Board's Order, offer Sandra Stewart full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Sandra Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(d) Compensate Sandra Stewart for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarter for her.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and suspension of Sandra Stewart and the written verbal counseling issued to her, and within 3 days thereafter notify her, in writing, that this has been done and that the discharge, suspension and written verbal counseling will not be used against her in any way.

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Fishkill, New York, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2014.

(h) During the time that the notice is posted, convene the unit employees, during working time at the Respondent's Fishkill, New York facility, by shifts, departments, or otherwise, and have a responsible management official of the Respondent read the notice to employees or permit a Board agent, in the presence of a responsible management official of the Respondent to be the notice to employees.

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

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

IT IS FURTHER ORDERED that the election conducted in Case 03-RC-137858 be set aside and that the petition shall be dismissed.

48 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.", At 2 Summit Court

Dated, Washington, D.C., November 16, 2015.

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Mark Carissimi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT recruit employees to campaign against the 1199 SEIU United Healthcare Workers East (the Union), or any other union.

WE WILL NOT express to employees the futility of attempting to obtain union representation by telling them that we will not allow the Union to come into the Dutchess facility.

WE WILL NOT coercively interrogate employees regarding their union sympathies.

WE WILL NOT threaten employees with unspecified reprisals because of their involvement with the Union by telling them we wanted to let them know what they were getting into.

WE WILL NOT direct employees and union representatives to remove themselves from the parking lot at 2 Summit Court.

WE WILL NOT call the police to remove employees and union representatives from the parking lot at 2 Summit Court.

WE WILL NOT call the police in response to employees and union representatives engaging in protected Section 7 activity at the intersection of Summit Court and Route 52 without having a reasonable basis to do so.

WE WILL NOT engage in surveillance and photograph employees engaged in protected Section 7 activity.

WE WILL NOT impliedly threaten to discharge employees by telling them that their union activity is incompatible with continued employment with us.

WE WILL NOT threaten employees with a loss of existing benefits if they select the Union as their representative.

WE WILL NOT threaten employees with the loss of hours for per diem employees if they select the Union as their representative.

WE WILL NOT express to employees the futility of selecting the Union as their representative by telling them that we will not sign a collective-bargaining agreement with the Union.

WE WILL NOT send text messages to employees in such a manner as to pressure them to make an observable choice with regard to their support for the Union.

WE WILL NOT solicit grievances from employees and impliedly promise to remedy them in order to discourage employees from supporting the Union.

WE WILL NOT grant employees an attendance bonus in order to discourage their support for the Union.

WE WILL NOT reinstate a weekly pay period in order to discourage employees from supporting the Union.

WE WILL NOT grant employees a wage increase in order to discourage them from supporting the Union.

WE WILL NOT issue written discipline to our employees, suspend our employees, or discharge our employees for engaging in union activity.

WE WILL NOT In any other manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and, if an agreement is reached, embody the understanding in a signed agreement.

The appropriate unit is:

> All full-time, regular part-time time, and per diem certified nursing aides, licensed practical nurses, unit aides and unit secretaries employed by Wingate of Dutchess, Inc., at its Fishkill, New York facility; but excluding guards, confidential employees, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL within 14 days from the date of the Board's Order, offer Sandra Stewart full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Sandra Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest.

WE WILL compensate Sandra Stewart for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarter for her.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and suspension of Sandra Stewart and the written verbal counseling issued to her, and within 3 days thereafter notify her, in writing, that this has been done and that the discharge, suspension and written verbal counseling will not be used against her in any way.

WINGATE OF DUTCHESS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-140576 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.