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CPL (Linwood) LLC d/b/a Linwood Care Center and its successor 201 New Road Operations, LLC d/b/a Linwood Care Center and 1199 SEIU United Healthcare Workers East. Cases 04–CA–146362, 04–CA–146670, 04–CA–148705, and 04–CA–165109

November 30, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On April 5, 2016, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions² and to adopt his recommended Order as modified and set forth in full below.³

¹ There are no exceptions to the judge’s finding that Labor Management Consultants’ employees Jon Buress and Dan Bryan were the Respondent’s agents under Sec. 2(13) of the Act. The Respondent has excepted to the judge’s inference that it retained Labor Management Consultants “to promote decertification of the Union.” Contrary to the Respondent’s contention, we do not believe the judge’s inference is inconsistent with the parties’ stipulation that, shortly after the Union’s certification year expired, it hired Labor Management Consultants “to provide human resources services at the Linwood Care Center.” In any event, the judge’s inference has no bearing on whether the Respondent committed the unfair labor practices addressed herein, as to which the Respondent does not except.

In the absence of exceptions, we adopt the judge’s findings that the Respondent violated Sec. 8(a)(1) when its agents Buress and Bryan solicited employees Mary Jo Halpin, Cassandra Morton, and Henry Waugh to sign a decertification petition; solicited employee grievances and promised to remedy them if employees abandoned their support for the Union; told employees that no changes in working conditions would be made unless either employees got rid of the Union or a collective-bargaining agreement was signed; interrogated employees concerning their support for the Union; and threatened employees by suggesting that it was futile to continue supporting the Union because contract negotiations could go on a very long time.

The General Counsel has excepted to the judge’s failure to find additional violations when the Respondent solicited grievances and promised to remedy them; the judge’s failure to find that the Respondent, by Buress and Bryan, violated Sec. 8(a)(1) by creating the impression that employees’ protected activities were under surveillance, by promising improved benefits if the Union no longer represented the employees, and by telling an employee that employees should get rid of the Union; and the judge’s failure to find that the Respondent violated Sec. 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain before imposing discretionary discipline on seven employees and

CONCLUSIONS OF LAW

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

(a) Soliciting employees to sign a decertification petition;

(b) Soliciting grievances from employees and promising to remedy them in order to discourage employees from supporting the Union;

(c) Telling employees that no changes in working conditions would be made unless they got rid of the Union or a collective-bargaining agreement was signed;

(d) Coercively interrogating employees about their union sympathies; and

(e) Threatening employees that continuing to support the Union would be futile.

2. By committing the unfair labor practices listed above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, CPL (Linwood) LLC d/b/a Linwood Care Center and its successor 201 New Road Operations, LLC d/b/a Linwood Care Center, Linwood, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to sign a decertification petition.

(b) Soliciting grievances from employees and promising to remedy them in order to discourage employees

by unreasonably delaying in furnishing information the Union requested about wage increases. The Respondent has excepted to the judge’s finding that the Respondent, by Director of Nursing Valerie Lowman, violated Sec. 8(a)(1) by interrogating employees and creating the impression that employees’ union activities were under surveillance; that it violated Sec. 8(a)(5) by refusing to process employee Mary Jo Halpin’s request for a schedule change and Sec. 8(a)(1) by telling Halpin it would not process her request because the Respondent was in negotiations with the Union; and that it violated Sec. 8(a)(5) by failing to promptly notify the Union of all disciplines and discharges, by unreasonably delaying in providing the Union personnel files of disciplined employees, and by unilaterally altering the parties’ agreement concerning the Union’s access to its facility. We sever these allegations and retain them for further consideration.

There are no exceptions to the judge’s failure to find that the Respondent violated Sec. 8(a)(1) by telling employees that they could not get a raise if they went on strike and by creating an impression of surveillance on or about February 11 or 12, 2015.

² The judge neglected to include Conclusions of Law in his decision. We shall correct this inadvertent omission.

³ We shall modify the judge’s recommended Order to conform to the violations found herein and the Board’s standard remedial language and to correct the judge’s inadvertent omission of a “narrow” cease-and-desist order. We shall substitute a new notice to conform to the Order as modified.

from supporting SEIU 1199 United Health Care Workers East (the Union).

(c) Telling employees that no changes in working conditions would be made unless they got rid of the Union or a collective-bargaining agreement was signed.

(d) Coercively interrogating employees about their union sympathies.

(e) Threatening employees that continuing to support the Union would be futile.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Linwood, New Jersey, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations in paragraphs 6; 7(b)(1), (3)-(5), and (8); 8(a); 8(b)(1)-(2) and (4); 8(c)(2)-(4), (6), and (7); 9; 10; 11; 13; and 14 of the amended consolidated complaint in Cases 04-CA-146362, -146670, -148705, and -165109 are severed and retained for further consideration by the Board.

⁴ 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."

Dated, Washington, D.C. November 30, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT solicit you to sign a decertification petition.

WE WILL NOT solicit grievances from you and promise to remedy them in order to discourage you from supporting SEIU 1199 United Health Care Workers East (the Union).

WE WILL NOT tell you that no changes in working conditions will be made unless you get rid of the Union or a collective-bargaining agreement is signed.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT threaten you that continued support of the Union would be futile.

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

CPL (LINWOOD) LLC D/B/A LINWOOD CENTER AND ITS SUCCESSOR 201 OPERATIONS, LLC D/B/A LINWOOD CARE CENTER

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-146362 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Henry R. Protas, Esq., for the General Counsel.
Louis J. Capozzi, Jr., Esq., and *Brandon S. Williams, Esq.* (*Capozzi Adler P.C.*), of Camp Hill, Pennsylvania, for the Respondent.
Jay Jaffe, Esq. (*1199 SEIU, United Healthcare Workers*), East New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, between February 8 and 10, 2016. 1199 SEIU (the Union) filed the initial charges between February 12, 2015, and November 30, 2015. The General Counsel issued an amended consolidated complaint covering all 4 charges on February 2, 2016.

The Union has represented the Certified Nursing Assistants, Unit Clerks and Licensed Practical Nurses at Respondent's nursing facility in Linwood, New Jersey, since December 13, 2013. The Union and representatives of Revera Health Systems, which owned the Linwood facility through November 30, 2015, met in collective-bargaining negotiations on about 3 occasions in 2014 and 8-10 occasions in 2015. The Union and Respondent never reached agreement on a collective-bargaining agreement. In January 2015, a decertification petition was circulated. One allegation in this case is that labor consultants, alleged to be agents of Respondent, solicited employees to sign the decertification petition. Linwood filed an RM petition (04-RM-145463) on January 30, 2015, which was dismissed by the Regional Director. The Board on February 17, 2016, declined to reverse that decision.

On December 1, 2015, Genesis Healthcare Systems took over ownership of the Linwood Care Center from Revera

Health Systems. There is no dispute that Genesis, which operates the facility through its subsidiary 201 New Road Operations, LLC, is a successor employer of the bargaining unit employees.

The substantive unfair labor practice allegations in this case are as follows:

Respondent, by its human resource director, Rose Przychozki told an employee that Respondent could not make schedule changes because employees had chosen the Union as their collective-bargaining representative.

Respondent, by its alleged agents, labor consultants Jon Bures and Dan Bryan, violated Section 8(a)(1) in a variety of ways, including soliciting employee complaints and grievances, making promises that conditions would improve if employees decertified the Union and soliciting an employee to sign the decertification petition. The General Counsel also alleges that Bures and Bryan on several occasions created the impression that employees' protected activities were under surveillance.

The General Counsel also alleges that Respondent, by Valerie Lowman, then its director of nursing, violated Section 8(a)(1) in several respects.

In May 2014, Linwood and the Union reached an agreement on a protocol for the Union to access the Linwood facility. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in imposing new conditions on this agreement and then revoking it entirely.

Further, the General Counsel alleges that Respondent violated the Act in discharging and/or suspending unit employees without prior notice to the Union and without affording the Union prior notice and an opportunity to bargain over the discharges and suspensions before they were implemented. The General Counsel relies on the rationale in *Alan Ritchey*, 359 NLRB 396 (2012), a decision invalidated by the Supreme Court due to the composition of the Board at the time.

Finally, the General Counsel alleges that Respondent violated Section 8(a)(5) of the Act by unreasonably delaying the furnishing of certain information requested by the Union regarding wages increases, bonuses and disciplinary measures.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent CPL, a Delaware limited liability company, owned by Revera Health Systems, operated a skilled nursing facility in Linwood, New Jersey, until November 30, 2015. In 2015, it received gross revenues in excess of \$100,000 and purchased and received goods at the Linwood facility valued in excess of \$5000 directly from points outside the State of New Jersey. Respondent admits, and I find, that it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at all material times and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent 201 New Road, a wholly-owned subsidiary of Genesis Healthcare, Inc., is a limited liability company which has operated the same facility since December 1, 2015. It is projected to receive annual gross revenues in excess of \$100,000 and to purchase and receive goods at the Linwood facility valued in excess of \$5000 directly from points outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at all material times. 201 New Road has continued to operate the facility in an unchanged form. 201 New Road was put on notice of CPL's potential liability in the instant cases and is a successor employer to CPL.

II. ALLEGED UNFAIR LABOR PRACTICES

Complaint Paragraph 6, alleged unfair labor practice by Rose Prychodzki

Prior to the Union's certification in December 2013, a unit employee seeking to have his or her schedule changed, submitted a request to the human resources department in writing. In December 2014, unit employee Mary Jo Halpin took a written request for a schedule change to Respondent's human resources director, Rose Prychodzki. Several days later, Prychodzki told Halpin that she could not change Halpin's schedule because Respondent was in negotiations with the Union. Further, she told Halpin that there could be no such changes at least until Respondent and the Union met in contract negotiations in February 2015.¹

Complaint paragraphs 7 and 8, alleged unfair practices by Labor Management Consultants as agent of CPL

Shortly after the expiration of the Union's certification year, Respondent CPL's parent company, Rivera Health Systems, hired Labor Management Consultants (LMC) to survey and interview unit employees at the Linwood facility. Two employees of LMC, Jon Bures and Dan Bryan, were at Linwood from January 21, to February 12, 2015. They walked the halls of the facility freely, talking to employees one-on-one and in group meetings. I infer from this record that CPL retained LMC to promote decertification of the Union.

Several unit employees testified as to their interaction with Bures and Bryan. Since none of this testimony is contradicted, it is credited in its entirety.²

Dan Bryan approached Mary Jo Halpin on several occasions. She agreed to meet Bryan in a storage area. Halpin asked Bry-

an what he was doing at the facility. He responded that Respondent had received an unfavorable employee survey and that Respondent hired LMC to find out what problems existed.

Bryan told Halpin that he had spoken to 60 employees and that virtually all complained about the Director of Nursing, Valerie Lowman. He told Halpin that Respondent would be getting rid of Lowman.³ Halpin said she didn't have any problem with Lowman, but complained about another manager. Bryan responded that possibly Respondent could give the manager more training. Then:

He asked me, he said as a sign of good faith, would I be willing to sign a paper saying that I didn't want the union, that way they could get rid of the people that were the problem and get on with the raises. He had said that he already had a bunch of signatures; that mine really wasn't going to matter. And I ended up, I did sign a paper.

Q. Did he say how many signatures he had?

A.. He said he had like 60 signatures.

Tr. 33-34.

Bryan presented Halpin with a sheet of lined paper which she signed. The paper may not have had any writing on the top. If so, language was added after she signed indicating that she was an employee who no longer wanted union representation (GC Exh. 4).⁴

At about this time, two employees, Christine Howell and Linda Adams, were also circulating a decertification petition. Some unit employees were not aware of this.

Dan Bryan also met with unit employee Cassandra Morton. He told Morton that Respondent's corporate office had sent him to find out what the problems were at the facility. Bryan solicited Morton to sign a decertification petition. She told Bryan she was not interested. He told Morton that the 1199 SEIU was a bad union and that employees could select a different union to represent them.

Unit employee Harry Waugh was approached by Bures on the night of January 28, 2015.⁵ Bures told Waugh that Rivera could do things for the employees if they voted the Union out. He said that Respondent could not give employees raises until the "union thing" was taken care of. Further, Bures said that there would be no raises until Respondent and the Union agreed on a collective-bargaining agreement—which could be a very long time. On the other hand, Bures told Waugh that after the Union was voted out, Respondent would grant employees retroactive raises.

Bures told Waugh that that Respondent would increase its staff once the Union was gone and he solicited complaints about Nursing Director Valerie Lowman. He showed Waugh a decertification petition and told Waugh that 60 percent of the employees had already signed it. Bures also told Waugh that most of the employees who had supported the Union no longer

¹ Rose Prychodzki did not directly contradict Halpin's testimony, which I credit. Prychodzki testified that she did not recall Halpin coming to her about a schedule change. If she had done so, Rose Prychodzki testified that she would have referred Halpin to the director of nursing, Valerie Lowman. Had she sent Halpin to Lowman, the result would not have been different. Halpin testified that Rose Prychodzki told her in December 2014, that her information came from Lowman.

² Respondent suggests that several witnesses are not credible because they were "paid" by the Union. The record shows that Respondent required unit employees who attended bargaining sessions to use personal time or vacation time to do so. The Union compensated them for lost wages if they did neither, Tr. 439-440.

³ Lowman's employment with Respondent ended several months later. The reasons do not appear in this record.

⁴ Unit employee Harry Waugh also did not recall any writing at the top of the paper he was asked to sign.

⁵ Waugh's testimony is also uncontradicted and therefore credited.

worked at the facility. He encouraged Waugh to sign a decertification petition; Waugh declined.⁶

Creating the impression of surveillance by LMC

Both Buress and Bryan told employees approximately how many employees had signed a decertification petition. The General Counsel alleges that by doing so they created the impression that employees' protected activities were under surveillance.

Complaint paragraph 9 (interrogation of new employees by Valerie Lowman; creating an impression of surveillance)

Unit employee Cassandra Morton attended a meeting with 9–10 other employees in January or February 2015. Diane Delaney, the Director of the facility, and Valerie Lowman, the Director of Nursing, conducted the meeting. Lowman told the employees that Respondent was hiring new employees to relieve its staffing problems. Lowman also told the employees at the meeting that Respondent was telling new employees about a decertification petition and was asking them if they wanted a union or not (Tr. 67–69).⁷ Lowman told the employees at the meeting that 50 percent of the new hires said they wanted a Union and that 50 percent said they did not.

Complaint paragraph 10: restricting and denying the Union access to the facility

In March 2014, the Union assigned administrative organizer Roz Waddell to the Linwood bargaining unit. In May 2014, Respondent agreed to allow the Union access to the Linwood facility to meet with unit members under the following conditions:

1. A union representative should request access in advance, at least 24 hours but preferably 48 hours to visit unit employees at the facility
2. The Union would request specific dates and times for such visits, which would be mutually agreed upon.
3. The Union representative would remain in the employee break area by the West Wing.

On March 9, 2015, Roz Waddell emailed Diane Delaney, the facility administrator/executive director. Waddell advised Delaney that she was planning to come to Linwood on the following weekdays: March 10, 11, 17, and 18 and on weekend days March 14 and 22.

Delaney responded the same day that Waddell could come during certain time periods on March 11 and 17, but not March 14 and 22 because Delaney would not be available. Instead she offered Waddell a 4-hour time block on either March 28 or 29. Delaney complained about the fact that she had authorized a visit on March 6, but that Waddell did not show up or advise Delaney that she was not coming.

Waddell arrived at Linwood at 0630 on March 11 at Respondent's parking lot. Cheryl Holmes, the Assistant Administrator, told Waddell that she had to leave. On March 13, Delaney sent a letter to Union Vice-President Rhina Molina

stating that union representatives were not allowed in the Linwood parking lot and advising her that union representatives would be allowed at the facility only under the following conditions that were additional to those agreed upon in March 2014:

1. One representative would be allowed at the facility at a time.
2. Union representatives were not to speak to any employees who requested that they not speak to them.
3. The Union would notify Delaney in advance if the representative was not coming as scheduled.
4. No Linwood property or materials were to be removed from the employee break area or any other part of the facility.

Delany inferred that Roz Waddell had removed 2 memos, from her to employees, from an employee lounge. She warned that noncompliance with these conditions would cause her to revoke the Union's access to the facility.

Waddell also came to the facility on March 14 and March 17. On March 17, Lisa McConnell, Revera's regional human resources director, told Waddell that she was not allowed in the parking lot. McConnell allowed Waddell to meet with employees in the breakroom.

The next day, March 18, Waddell and organizer Diego Santelices arrived at the facility. Assistant Administrator Cheryl Holmes told them that if they did not leave, she would call the police.

In April, Respondent took the position that the Union would not be allowed access to the Linwood facility until the Union's unfair labor practice charges were resolved. Respondent and the Union discussed the access issue at collective-bargaining sessions on June 2 and 3, 2015; no agreement was reached. Union organizers have not been to the Linwood facility since March 18, 2015 other than on two occasions to discuss disciplinary measures.

Complaint paragraph 11: "The Allen Ritchey issue"

Respondent discharged unit employees Dawn Apella on January 19, 2015; Rose Brewer on October 14, 2014; Anthony Barker on September 15, 2014; Laurel Bertonazzi on June 9, 2015 and Theresa Reilly on August 19, 2015. It suspended Harry Waugh on March 30, 2015 and Theresa Reilly on November 3, 2015 (after agreeing with the Union to allow Reilly to return to work after her August discharge). In none of these instances did Respondent notify the Union beforehand and offer the Union the opportunity to bargain over these disciplinary measures before they were implemented. Moreover, Respondent, at least with respect to Apella and Barker, did not promptly notify the Union of the discipline/discharge after the fact. The Union first learned of Apella and Barker's discharges months after the fact when Linwood responded to the Union's information request.

Respondent, when owned by Revera, had a progressive discipline policy (Jt. Exh. 2 pp. 8–9). That policy had a 4-step procedure leading to termination. However, Respondent retained the right to skip steps and the right to terminate on a first offense. Thus, the disciplinary measures in this case were "discretionary" within the meaning of the *Allen Ritchey* decision. Revera also had an internal grievance procedure. The Union

⁶ Like the paper given to Mary Jo Halpin, the sheet that Buress wanted Waugh to sign did not have any printed material on it.

⁷ Morton's testimony on this issue is also uncontradicted and therefore credited.

availed itself of this process only with regard to Theresa Reilly's August 2015 termination.

Complaint paragraph 14: The Union Information Requests

On February 6, 2015, Union Attorney Jay Jaffe sent a 4-page letter to Peter Tsoporis, Revera's Vice President of Labor Relations, requesting 12 categories of information by February 13. The parties met in collective-bargaining negotiations on February 17 and 18. Tsoporis provided some of this information on February 19. Jaffe wrote Tsoporis on March 3, requesting the balance of the requested information by March 13. Tsoporis responded on March 12, indicating that certain information had been provided previously, but declining to provide certain information on the grounds that the Union had not demonstrated its relevance to collective bargaining. That information was contained in paragraph 9 of Jaffe's February 6 letter, which is set forth below:

A list of all bargaining unit employees who have been formally reprimanded, warned, suspended or discharged (including resignation in lieu of discharge) from December 1, 2013, through the present, as well as the following:

- (a) the complete personnel and departmental files for each such employee, including prior disciplinary action and employee evaluations;
- (b) the notice of reprimand, warning, suspension or dismissal in connection with each employee;
- (c) A detailed explanation of the reason each employee was reprimanded, warned suspended or discharged;
- (d) All notes, policies, statements, reports, witness statements, video, audio or electronic evidence, and any other documentation that the Company referred to or relied on in its decision to reprimand, warn, suspend or discharge each employee.

In his March 12, letter, Tsoporis, in response to paragraph 2(f) of the Union's request, provided the names of 4 employees who had received wage increases, the date of the increase, the reason for the increase, but not the amount of the increases.

On March 23, 2015, Respondent provided the amount of the wage increases for the 4 employees and a list of some, but not all employees who had been disciplined since December 1, 2013. Tsoporis did not provide items 9(a)-(d) listed above regarding any disciplined employees.

On March 27, Tsoporis advised the Union that it was cancelling collective-bargaining negotiating sessions scheduled for March 30 and 31, because Respondent deemed the Union's response to its information request inadequate. He asked Jaffe for information regarding additional disciplined employees that the Union was aware of.

Jaffe provided Tsoporis the names of 3 other employees whom the Union believed had been disciplined and 4 additional employees who it believed had received wage increases on March 30. On April 2, Tsoporis provided additional information regarding employees who received wage increases and a log of employees who had been received reprimands and another of employees who had been suspended or discharged. For the first time, Tsoporis raised confidentiality concerns regarding some of the information the Union had requested re-

garding disciplined employees, such as their employee evaluations. Respondent received requests that their personnel files be kept confidential from about 7 employees between March 24 and 27, 2015.

By May 14, 2015, Respondent complied with all of the Union's February 6, 2015 information requests.

Analysis

Respondent, by Rose Prychodzki, violated Section 8(a)(1) by telling Mary Jo Halpin that her schedule could not be changed because Respondent was in negotiations with the Union.

An employer's obligation while bargaining with the certified bargaining representative of its employees for an initial contract is to maintain the status quo, *Daily News of Los Angeles*, 315 NLRB 1236 (1994). In this instance the status quo was that employees could request that their schedules be changed by submitting a written request to the human resources department. By refusing to process Halpin's request, Respondent altered the status quo and violated Section 8 (a)(5) of the Act. By telling Halpin that it would not process it, Respondent violated Section 8(a)(1).

Respondent, by its agents, labor consultants Jon Bures and Dan Bryan, violated Section 8(a)1) of the Act by 1) soliciting employees to sign a decertification petition; 2) soliciting employee grievances and promising to remedy them if employees decertified the Union; 3) telling employees that no changes in working conditions could be made unless either employees got rid of the Union or a collective-bargaining agreement was signed; 4) interrogating employees concerning support for the Union.

First of all, Respondent's contention that labor consultants Jon Bures and Dan Bryan were not its agents pursuant to Section 2(13) of the Act is wholly without merit. The Board applies common law agency principles in determining who is an agent under the Act. When applied to labor relations, agency principles must also be broadly construed in light of the legislative policies embedded in the Act. A party may be bound by the conduct of those it holds out to speak and act for it, even though there is no proof that specific acts were actually authorized or subsequently ratified. *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111 (November 26, 2014), slip op. at 36. *Braun Electric Co. Inc.*, 324 NLRB 1, 2 (1997), *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986).⁸ Statements of a supervisor or agent may be imputed to an employer even if that employer was not aware that the statements were made, *Jays Foods, Inc. v. NLRB*, 573 F.2d 438 (7th Cir. 1978).

Common law principles incorporate the principles of implied and apparent authority. Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the agent to do the act in question, *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996). Another way the Board has stated this principle is "whether under all the

⁸ The language of Sec. 2(13) defining "agent" states that actual authorization or subsequent ratification of specific acts are not controlling in determining whether a person is an "agent."

circumstances the employees would reasonably believe that [a person] was reflecting company policy and speaking and acting for management,” *Community Cash Stores*, 238 NLRB 265 (1978).

In the instant case, employees could not have believed that Buress and Bryan were **not** speaking and acting for management. Why else would the two labor consultants be freely walking around the Linwood facility, even after hours, asking them questions, encouraging them to sign decertification petitions and promising to remedy grievances if they would only get rid of the Union? It would have been unreasonable for employees to have believed that the two individuals were not speaking and acting on behalf of management. Strangers, with no connection to the owners of the facility, would not have any reason to engage in such activities.

Many of things said and done by Buress and Bryan violated the Act. These include soliciting employees to sign a decertification petition, *Beaird Industries, Inc.*, 311 NLRB 768 (1993); and soliciting employee grievances and explicitly promising to remedy them if employees abandon their support for the Union, *Amptech, Inc.*, 342 NLRB 1131, 1136–1137 (2004). I also find that Buress and Bryan, in asking employees to sign a decertification petition in the context a decertification campaign, conducted an unlawful interrogation, *Hercules Automotive*, 285 NLRB 944, 949 (1987). An employee responding to these consultants would necessarily have to reveal their union sympathies if they declined to sign the petition, as did Harry Waugh.⁹

On the other hand, I find that Buress’ statement to Harry Waugh that 60 percent of employees had signed a decertification petition would not reasonably lead Waugh to conclude that employees’ protected activities were under surveillance. *Grand Canyon Mining Co.*, 318 NLRB 748, 752–752 (1995), cited by the General Counsel, is distinguishable. In that case the employee asked the supervisor how he knew the number of employees at a union meeting. The supervisor told him that another agent of the employer had seen 16 employees at the meeting. In the instant case, there is no evidence regarding the basis for Buress’ claim. It is possible that (1) he knew the number who signed a decertification petition because he and Bryan had collected the signatures; (2) he was making the number up out of thin air; or (3) antiunion employees had reported this number to him.

An employer’s statement that contract negotiations could go on a very long time, is not per se a violation of the Act. However, in the context of this case, in which Respondent’s consultants also promised to remedy grievances and expedite wage increases if employees abandoned the Union, such statements suggest futility in continuing to support the Union and violate Section 8(a)(1), *Airtex*, 308 NLRB 1135 fn. 2 (1992).

Respondent, by Valerie Lowman, violated the Act in interrogating new employees about their union sympathies and giving employees the impression that their Union activities were under surveillance.

Director of nursing, Valerie Lowman, violated Section

⁹ There is no evidence that Waugh was an open union supporter in January 2015.

8(a)(1) by interrogating new employees about their union sympathies in the context of a decertification drive. She also, by indicating to other employees, the results of her inquiry, gave these employees the impression that Respondent was keeping track of which employees were prounion and which were not. This would reasonably give employees the impression that their union activities, in general, were under surveillance by Respondent, *Flexsteel Industries, Inc.*, 311 NLRB 257 (1993).

The Access Issue

Board law is clear that when an employer and a union have an agreement allowing the union access to its property to carry out its representational activities, or the employer has an established past practice of allowing access, the employer cannot unilaterally alter that agreement or practice, *Ernst Home Centers, Inc.*, 308 NLRB 848 (1992). The employer’s right to bar union representatives from its property differs in this situation from one in which there is no such agreement or practice, *Turtle Bay Resorts*, 355 NLRB 706 (2010) affg. 353 NLRB 1242, 1274–1275 (2009).

In the instant case, Respondent unilaterally changed the parties’ agreement by restricting access to one representative at a time; requiring union representatives to eschew speaking to any employees who requested that they not speak to them and requiring that the Union notify facility administrator Delaney in advance if the representative was not coming.¹⁰ In adding these conditions in March 2015, Respondent violated Section 8(a)(5) and (1) of the Act.

A closer question is whether Respondent violated the Act by barring union representatives from its parking lot. The 2014 agreement did not specifically address union access to the parking lot. However, Organizer Waddell testified that she talked to employees in the parking lot on about 10 occasions between September 2014 and March 2014. She also testified that Diane Delaney saw her there a couple of times and greeted her, Tr. 210–211. Delaney did not directly contradict Waddell by testifying that she never saw Waddell in the parking lot prior to March 2015. She testified that she observed Waddell on the sidewalk, which is public property. On those occasions, Delaney testified she would greet her. The complaint did not allege that Respondent violated the Act by barring union representatives from its parking lot. Further, I conclude that whether Respondent had a past practice of allowing union representatives in the parking lot was not fairly and fully litigated. Thus, I decline to address this issue.

Respondent violated Section 8(a)(5) and (1) in failing to promptly notify the Union of the discharge or discipline of unit employees

I decline the General Counsel’s invitation to apply the rationale of the *Alan Richey* decision until the Board adopts that rationale; I am bound by existing precedent. Moreover, even if the Board were to reaffirm its holding in *Alan Richey*, it must decide whether it will apply that rationale only prospectively, as it did in the 2012 decision or retrospectively.

¹⁰ The fourth condition that the union representatives not remove employer property or materials need not be discussed since under no circumstances would the Union have a right to do so.

However, even under existing Board precedent, Respondent violated Section 8(a)(5) and (1) the Act. An employer has an obligation to bargain with the Union, upon request, concerning disciplinary matters, even if it has no obligation to notify and bargain to impasse with the Union before imposing discipline, *Fresno Bee*, 337 NLRB 1161, 1186–1187 (2002); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991).

That obligation presumes that an employer will promptly inform its employees' bargaining representative of all discipline or discharges so that the Union can decide whether or not to request bargaining. Here there is no evidence that Respondent promptly notified the Union of any discipline or discharge with the possible exception of the November suspension of Theresa Reilly. With regard to Brewer and Barker, the Union was not aware that they had been discharged for months until Linwood responded to the Union's information request.

Delay in Providing Requested Information

A delay in providing the Union requested information which is relevant to its role of collective-bargaining representative of the employer's employees may, in some circumstances, constitute a violation of Section 8(a)(5) and (1) of the Act, *Postal Service*, 332 NLRB 635 (2000). However, that does not mean that every failure by an employer to respond within the time frame requested by a union constitutes a statutory violation.

In the instant case, Respondent began responding to the Union's request 13 days after it was made and 6 days after the date by which the Union asked for the information. Respondent continued to provide the requested information in March and early April. The company refused to comply with the request regarding the personnel files of employees of disciplined employees, first on the grounds of relevance, then on the grounds of confidentiality. By May 14, 2015, 3 months after the date by which the Union asked for the information, Respondent had satisfied the information request.

I find the Respondent did not violate the Act except in making meritless objections to the personnel files. These files were clearly relevant and Respondent's belated claims of confidentiality were likewise meritless. For one thing, Respondent made no attempt to seek an accommodation with the Union for whatever confidentiality concerns it had. I thus find that Respondent violated Section 8(a)(5) in failing to provide the disciplinary files more promptly.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

¹¹ 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.

ORDER

The Respondents, CPL Linwood d/b/a Linwood Care Center, and 201 New Road Operations, Linwood, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Making unilateral changes while collective-bargaining negotiations are ongoing, such as changing its procedures for requesting schedule changes;
 - (b) Soliciting employees to sign a decertification petition;
 - (c) Soliciting employee grievances and promising to remedy them if employees got rid of the Union;
 - (d) Telling employees that no changes to working conditions would be made unless either employees got rid of the Union or a collective-bargaining agreement was signed;
 - (e) Interrogating employees concerning their support for the Union;
 - (f) Creating the impression that employees' union or other protected activities were under surveillance;
 - (g) Unilaterally altering its agreement with the Union regarding the Union's access to its property;
 - (h) Failing to promptly notify the Union of any discipline or any discharge of any bargaining unit employee;
 - (i) Unreasonably delaying providing information requested by the Union for meritless reasons.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Comply with the terms of the access agreement with the Union of May 2014;
 - (b) Promptly notify the Union of any disciplinary action taken against any unit employee;
 - (c) Maintain the status quo regarding wages, hours and other working conditions until a collective-bargaining agreement has been signed or a legal impasse has been reached;
 - (d) Bargain in good faith with the Union until a collective-bargaining agreement has been signed or a legal impasse has been reached;
 - (e) Within 14 days after service by the Region, post at its Linwood, New Jersey facility copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 4, 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

¹² 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."

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 January 21, 2015.

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

Dated, Washington, D.C., April 5, 2016.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes while collective-bargaining negotiations are ongoing, such as changing our procedures for requesting schedule changes.

WE WILL NOT solicit employees to sign a decertification petition.

WE WILL NOT solicit employee grievances and promise to remedy these grievances if employees get rid of the Union.

WE WILL NOT tell employees that no changes to working conditions can be made unless employees either get rid of the Union or a collective-bargaining agreement is signed.

WE WILL NOT interrogate employees, including applicants for employment, about the support or lack of support for a union.

WE WILL NOT create the impression that employees' union or other protected activities are under surveillance.

WE WILL NOT unilaterally alter any agreements we have

made with the Union regarding access to our property.

WE WILL NOT fail to notify the Union promptly of any disciplinary action taken against any bargaining unit employee.

WE WILL NOT unreasonably delay providing the Union with information it has requested which is relevant to the Union's role as collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL comply with the terms of our access agreement with the Union of May 2014.

WE WILL promptly notify the Union of any disciplinary action taken against any unit employee.

WE WILL maintain the status quo regarding wages, hours and other working conditions until a collective-bargaining agreement has been signed or a legal impasse has been reached.

WE WILL bargain in good faith with the Union, SEIU 1199 United Health Care Workers East, until a collective bargaining agreement has been signed or a legal impasse has been reached.

CPL (LINWOOD) LLC D/B/A LINWOOD CARE CENTER
AND ITS SUCCESSOR 201 NEW ROAD OPERATIONS,
LLC D/B/A LINWOOD CARE CENTER

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-146362 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

