UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEK ARDEN, LLC D/B/A ARDEN POST ACUTE REHAB,	)	
Petitioner,	)	No. 17-1237
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

ORIGINAL

PETITION FOR REVIEW

Petitioner MEK Arden, LLC d/b/a Arden Post Acute Rehab hereby petitions the Court to review and modify or set aside in its entirety the Decision and Order of the National Labor Relations Board issued against Petitioner on July 25, 2017, in NLRB Cases 20-CA-156352, 20-CA-156362, 20-CA-156378, 20-CA-156408, 20-CA-157363, and 20-RC-154840, and the Board order denying Petitioner's motion for reconsideration on November 2, 2017. A copy of the Decision and Order, reported at 365 NLRB No. 109, is attached, along with the Board's unpublished order denying reconsideration, and a Corporate Disclosure Statement.

Respectfully submitted,

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Attorneys for Petitioner

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Petitioner,	)	
v.	)	17-1237
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

ORIGINAL

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioner MEK Arden, LLC d/b/a Arden Post Acute Rehab certifies that it operates a long term care facility in Sacramento, California. Petitioner further certifies that it is a California limited liability company which has no parent companies, and that no publicly-held company has a 10% or greater ownership interest in the Petitioner.

Respectfully submitted,

/s/Maurice Baskin

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Mek Arden, LLC d/b/a Arden Post Acute Rehab *and* Service Employees International Union, United Long Term Care Workers. Cases 20–CA–156352, 20–CA–156362, 20–CA–156378, 20–CA–156408, 20–CA–157363, and 20–RC–154840

July 25, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On May 27, 2016, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, to amend the conclusions of law and remedy, and to adopt the judge's recommended Order as modified and set forth in full below.[2]

We adopt, for the reasons stated by the judge, his findings that the Respondent violated Section 8(a)(1) of the Act by instructing employees not to visit other areas of the facility, directing employees not to wear union scrubs or logos, directing employees to wear attire associated with the Respondent's campaign, creating the impression that the employees' union or protected activities were under surveillance, and prohibiting the posting of union literature and removing such postings.[3]

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

There are no exceptions to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) of the Act by requiring certified nursing assistants to post their break times on whiteboards, changing employees' break schedules in the housing department, "floating" the work assignment of employee Camilla Holcomb on one day and cancelling her shift on another day, and engaging in surveillance of employees' union or protected activity through the use of video cameras in the facility. There are also no exceptions to the judge's dismissal of the complaint allegation that statements made by Jacinth Castellano and Ricki Collins created the impression that the Respondent was surveilling employees' union activities, in violation of Sec. 8(a)(1), because the General Counsel failed to establish that Castellano and/or Collins were agents of the Respondent within the meaning of Sec. 2(13) of the Act.

[2] We shall amend the judge's conclusions of law and remedy in accordance with our findings herein, and modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

Chairman Miscimarra agrees that the Respondent engaged in objectionable conduct that warrants setting aside the results of the election held on July 24, 2015, in Case 20–RC–154840. In recommending that the election be set aside, the judge applied *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962), and *Clark Equipment Co.*, 278 NLRB 498 (1986), which stand for the proposition that "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election," *Dal-Tex*, 137 NLRB at 1786, unless "it is virtually impossible to conclude that the misconduct could have affected the election results," *Clark Equipment*, 278 NLRB at 505. Chairman Miscimarra applies *Dal-Tex* and *Clark Equipment* in the instant case as existing Board precedent, but he expresses no view on the soundness of the "virtually impossible" standard. See *Intertape Polymer Corp.*, 360 NLRB No. 114, slip op. at 6 fn. 2 (2014) (Member Miscimarra, dissenting in part), enf. denied in part 801 F.3d 224 (4th Cir. 2015).

[3] In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by prohibiting the posting of union literature or removing union-related postings from its bulletin board, we note that *Register Guard*, 351 NLRB 1110 (2007), enfd. in part 571 F.3d 53 (D.C. Cir. 2009), states the applicable standard for determining whether an employer has violated the Act by discriminating in the use by employees of its equipment, including its bulletin boards. In *Register Guard*, the Board observed that "discrimination means the unequal treatment of equals," 351 NLRB at 1117, and it clarified that "unlawful discrimination consists of disparate treatment of activities or communications *of a similar character* because of their union or other Section 7–protected status." Id. at 1118 (emphasis added). Here, the evidence shows that the Respondent treated employee bulletin-board postings of a similar character disparately based on their union or nonunion status: postings in support of the Union were removed from the bulletin board while postings in support of nonunion entities (e.g., advertising a fundraiser for a children's school, selling Avon products, and selling cookies in support of the Girl Scouts) were allowed to remain. Indeed, the record shows that the only employee postings the Respondent removed from the bulletin board were union-related postings. Accordingly, we find that the Respondent violated Sec. 8(a)(1). Members Pearce and McFerran agree that a violation has been established under the standard adopted in *Register Guard*, supra, but they express no opinion on whether *Register Guard* was correctly decided.

For the reasons set forth in his separate opinion in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part), Chairman Miscimarra disagrees with the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), which the judge applied in this case to find unlawful the Respondent's directives prohibiting employees from visiting areas of the facility outside their assigned work areas and from wearing union scrubs (SEIU-purple in color and bearing the union logo). He agrees, however, that the Respondent violated Sec. 8(a)(1) with regard to these directives on the basis—also relied on by the judge—that they were promulgated in response to and applied to restrict Sec. 7 activity. In addition, the prohibition against wearing union scrubs explicitly restricted Sec. 7 activity and was also unlawful on this basis.

Contrary to the judge, however, we find that the Respondent violated Section 8(a)(1) by soliciting employee grievances and impliedly promising to remedy them.[4] The Respondent operates a long-term care and rehabilitation facility in Sacramento, California. At some point in mid-June 2015, CNA Marlene Anderson complained to Interim Facility Administrator Mary Perez about the new interim director of nursing (DON), Shirin Ramsini. Around June 21, Perez relayed complaints raised by Anderson and some other employees to Markus Mettler, the chief operations officer of the Respondent's corporate parent. On June 24, during one of Mettler's infrequent visits to the Sacramento facility, he spoke with some of the employees. Mettler testified as follows:

> I went around and spoke with some of the employees that I knew had concerns or issues. Specifically, I met with [Anderson] because she had the complaints that she shared with [Perez] regarding [Ramsini], so I wanted to speak with her directly to see what those issues were.

At around 2 p.m. that day, Mettler approached Anderson and asked her how things were going. Anderson responded that she was upset about nursing ratios and the availability of supplies. Mettler then asked Anderson about Ramsini, and Anderson repeated her previously voiced complaint about Ramsini. Mettler told Anderson that he would "follow up and look into" her concerns. Additionally, he inquired about the employees' union activities. Not long after Mettler left the facility, a group of 20–50 employees led by Anderson and her colleague Camilla Holcomb delivered the Union's election petition to the Respondent.

The judge found that Mettler's interaction with Anderson did not constitute a solicitation of grievances or an implied promise to remedy them. The judge's finding is premised on his view that Mettler "routinely" asked employees about how things were going. On that basis, the judge concluded that Mettler's statement that he would "look into" Anderson's complaints did not constitute a promise of benefits or improved working conditions. The judge's analysis, however, is flawed in several respects.

The Board has explained that:

> Absent a previous practice of doing so … the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act . . . [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one.

Maple Grove Health Care Center, 330 NLRB 775, 775 (2000). "An employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements at issue were not promises." *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010).

Here, the judge failed to apply the *Maple Grove Health Care Center* framework. Applying that framework, we find, based on the facts described above, that Mettler solicited grievances and impliedly promised to remedy them when, on June 24, he sought out Anderson

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[4] Contrary to his colleagues, Chairman Miscimarra agrees with the judge's conclusion that the Respondent did not solicit grievances and impliedly promise to remedy them when its chief operations officer, Markus Mettler, visited the Respondent's Sacramento facility soon after the onset of the organizing campaign. The relevant events were as follows. Unsolicited, CNA Marlene Anderson complained to Interim Facility Administrator Mary Perez that Interim Director of Nursing Shirin Ramsini was intimidating the CNAs. Perez reported Anderson's complaint to Mettler. During a previously scheduled visit to the facility, Mettler asked several employees outside of the proposed bargaining unit how things were going. One of these employees complained about Ramsini. Mettler then encountered Anderson and asked her how things were going as well. Anderson repeated her complaint about Ramsini, and Mettler said he would "look into" it.

On these facts, Chairman Miscimarra agrees with the judge that Mettler did not solicit grievances and impliedly promise to remedy them when he spoke with CNA Anderson. At the outset, the judge found that Mettler's query about "how things were going"—something Mettler also asked employees outside the bargaining unit—was not a solicitation of grievances at all. Indeed, "how are things going?" is a familiar, commonplace greeting. But even if the greeting is deemed a solicitation, "[i]t is . . . 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*." *Johnson Technology, Inc.*, 345 NLRB 762, 764 (2005) (emphasis added). Under the circumstances described above, Chairman Miscimarra does not believe that Mettler conveyed an implied promise to remedy Anderson's complaint about Ramsini so as to "impress[] upon [Anderson] the notion that union representation is unnecessary," id., when Mettler responded that he would "look into" Anderson's complaint. Rather, he agrees with the judge's characterization of Mettler's statement as "a natural human response—with the alternative being to remain in an unnatural and bizarre stone silence in the face of" Anderson's complaint. Accordingly, Chairman Miscimarra would affirm the judge's dismissal of this allegation. Cf. *Reliance Electric Co.*, 191 NLRB 44 (1971) (employer unlawfully solicited grievances in two series of meetings, each series clearly in response to a union organizing campaign, where employer's manager testified that the purpose of the meetings was to hear employees' "complaints so we might adjust [them] where possible"), enfd. 457 F.2d 503 (6th Cir. 1972).

because he wanted to speak with her about her previously voiced complaints about Ramsini, asked her how things were going, and responded to her complaints by telling her that he would "follow up and look into" her concerns.[5] Contrary to the judge's suggestion, there is no evidence that Mettler had previously addressed employees' complaints in this manner.[6] Accordingly, the Respondent has not rebutted the inference of illegality. We therefore reverse the judge and find that Mettler's solicitation and implied promise to remedy Anderson's grievances violated Section 8(a)(1). See *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972); see also *Mandalay Bay Resort & Casino*, supra at 530. Cf. *Johnson Technology, Inc.*, 345 NLRB 762, 764 (2005) (finding employer did not unlawfully solicit and promise to remedy employee grievances because it established a past practice of soliciting grievances that predated the union's campaign).

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. By instructing employees not to visit other areas of the facility, directing employees not to wear union scrubs or logos, directing employees to wear attire associated with the Respondent's campaign, creating the impression that the employees' union or protected activities were under surveillance, prohibiting the posting of union literature and removing such postings, and soliciting grievances from employees and making an implied promise to remedy them in order to discourage employees from supporting the Union, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order it to cease and desist from engaging in such conduct and to take certain steps to effectuate the policies of the Act.

Specifically, the Respondent will be required to cease and desist from instructing employees not to visit other areas of the facility, directing employees not to wear union scrubs or logos, directing employees to wear attire associated with the Respondent's campaign, creating the impression that the employees' union or protected activities were under surveillance, prohibiting the posting of union literature and removing such postings, and soliciting grievances from employees and making an implied promise to remedy them in order to discourage employees from supporting the Union. Moreover, the Respondent will be required to post a notice to employees assuring them that it will not violate their rights in this or any other like or related manner in the future. Finally, to the extent Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner as well as by any other electronic means it customarily uses to communicate with employees.

ORDER

The National Labor Relations Board orders that the Respondent, Mek Arden, LLC d/b/a Arden Post Acute Rehab, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to visit other areas of the facility outside of their assigned work areas in order to discourage union or other protected concerted activities.

(b) Directing employees not to wear union scrubs.

(c) Instructing employees to wear attire associated with the Respondent's antiunion campaign.

(d) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(e) Prohibiting the posting of union literature or removing union-related postings from its bulletin board while permitting employees to post non-union literature of a similar character.

(f) Soliciting grievances from employees and making an implied promise to remedy them in order to discourage employees from supporting the Union.

(g) In any like or related manner interfering with, restraining, or coercing its 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.

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[5] We disagree with the judge and our colleague's characterization of Mettler's reaction to Anderson's complaint as "a natural human response—with the alternative being to remain in an unnatural and bizarre stone silence in the face of such personally conveyed complaint." Mettler could have responded to Anderson by simply saying, for example, "thanks for the information." In any event, given that Mettler specifically sought out Anderson because he wanted to speak with her about her previously voiced complaints, any awkwardness that might have resulted from their conversation was of his own making.

[6] There is no evidence in the record supporting the judge's assertion that Mettler "routinely" asked employees how things were going. It appears from the judge's discussion that he might have meant that Mettler had "routinely" asked employees how things were going *during his visit on June 24*. That alone, however, would not establish that Mettler had a practice of addressing employee complaints in this manner that predated the Union's campaign.

(a) Within 14 days after service by the Region, post at its facility in Sacramento, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 June 29, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 20 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 election held on July 24, 2015, in Case 20–RC–154840 is set aside and that Case 20–RC–154840 is severed and remanded to the Regional Director for Region 20 to direct and conduct a second election whenever the Regional Director deems appropriate.

Dated, Washington, D.C. July 25, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

[7] 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."

(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 instruct you not to visit other areas of the facility outside of your assigned work areas in order to discourage you from engaging in union or other protected concerted activities.

WE WILL NOT direct you not to wear union scrubs.

WE WILL NOT instruct you to wear attire associated with our antiunion campaign.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT prohibit the posting of union literature or remove union-related postings from the bulletin board while permitting you to post non-union literature of a similar character.

WE WILL NOT solicit grievances from you and make an implied promise to remedy them in order to discourage you from supporting the Union.

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

MEK ARDEN, LLC D/B/A ARDEN POST ACUTE REHAB

The Board's decision can be found at http://www.nlrb.gov/case/20-CA-156352 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.

Jason P. Wong, Esq., for the General Counsel.
Manuel A. Boigues, Esq. (Weinberg, Roger & Rosenfeld), for the Charging Party/Petitioner.
Mark W. Robbins, Esq. and *Matthew J. Ruggles, Esq. (Littler Mendelson, P.C.)*, for the Respondent/Employer.[1]

DECISION AND RECOMMENDED ORDER ON OBJECTIONS TO THE ELECTION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. On September 29, 2015, the Regional Director for Region 20 of the Board issued an order consolidating cases and consolidated complaint and notice of hearing in the above-referenced "C" (unfair labor practice) cases. On the same date, the Regional Director issued a decision on challenged ballots and objections and order consolidating cases for hearing, directing that certain of the objections to the election filed by Service Employees International Union, United Long Term care Workers ("Union" or "Petitioner") in Case 20–RC–154840 be consolidated for hearing with the unfair labor practice cases referenced above. Thereafter, on October 27, 2015, the Regional Director issued an amendment to consolidated complaint, and Mek Arden, LLC d/b/a Arden Post Acute Rehab (Respondent or Employer) filed timely answers. I presided over this case in Sacramento, California, on November 9 and 10, and November 16 through 18, 2015.[2]

The (amended) consolidated complaint alleges various coercive and discriminatory conduct by Respondent in violation of Sections 8(a)(3) and (1) of the Act, and the objections by the Union allege that such conduct, as well as additional alleged conduct by Respondent not covered in the complaint, tainted the results of an election held on July 24, 2015, which the Union avers should be overturned. Because much of the conduct alleged in the objections case is also covered by the unfair labor practices alleged in the consolidated complaint, I will first address the allegations of the complaint.

I. THE ALLEGATIONS OF THE COMPLAINT

A. Findings of Fact

Jurisdiction and Labor Organization Status

Respondent admits, and I find, that at all material times, it has been a California limited liability company with an office and place of business in Sacramento, California ("the facility"), where it is engaged in the operation of a long-term care facility. During the calendar year ending on December 31, 2014, Respondent, in conducting its business operations described above, derived gross revenues in excess of $100,000. During the same time period, Respondent purchased and received at its Sacramento facility goods, supplies and materials valued in excess of $5000 directly from points outside the State of California. Respondent thus 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.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

B. The Alleged Unfair Labor Practices

1. Background facts

As briefly described above, Respondent operates a long-term care and rehabilitation facility in Sacramento, which has capacity for approximately 177 patients, also referred to as "residents." These patients are attended to by Registered Nurses (RNs), Licensed Vocational Nurses (LVNs), and Certified Nurse Assistants (CNAs). The events discussed below center around the Union's efforts to organize certain of Respondent's employees at the facility, in a unit consisting primarily of CNAs, but also including other employees, such as housekeepers, cooks, maintenance employees, and others.[3]

The Union's organizing efforts began in late April or May, 2015, after CNAs Marlene Anderson and Camilla Holcomb contacted the Union and expressed an interest in having a union at the facility.[4] Anderson and Holcomb helped organize several employee meetings with Union representatives at a fast food restaurant (Taco Bell) adjacent to the facility, as well as other locations, and were responsible for distributing and collecting numerous authorization cards.

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[1] Both Mr. Robbins and Mr. Ruggles appeared on behalf of Respondent at trial, but only Mr. Robbins appears on brief.

[2] I note that the covers on the transcripts indicate that the location of the hearing was San Francisco. This is incorrect. Additionally, I note at the outset that the "hardcopy" (paper) exhibits do not fully comport to their electronic counterparts. This is particularly true in the case of the Joint Exhibits (Jt. Exhs.). The electronic version of the Joint Exhibits are contained in 8 volumes, to wit, Jt. Exh(s) 1–3; 4–5; 6, Volumes 1-2; and Jt. Exh. 7, Volumes 1, 2, 3, and 4, which contains Joint Exhibits 7 through 15. The "hardcopy" version of this Exhibit, on the other hand, is contained in 5 Volumes, to wit, Jt.. Exhs. 1–3, 4–6, 7 (Volumes 1–2), 7 (Volume 3), 7 (Volumes 4–5). This last Volume of Jt. Exh. 7 ends on p. 256 (the page number appearing on the electronic version, as the hardcopy exhibits are not paginated), whereas the electronic version of Jt. Exh 7 (Vol. 4–5) ends on p. 277, which means that about 20 pages are missing on the hardcopy (paper) version—at least in my version. Moreover, Jt. Exhs. 8 through 15 are encompassed in the last Volume of (electronic) Jt. Exh. 7 (Vol 4–5); Joint Exhibit 9–through 15 are not contained in the hardcopy version. Simply put, the exhibits are difficult to follow, mostly the result of the lack of page numbers in some of the large exhibits introduced in the record. Nonetheless, the electronic version contains a full record of these exhibits, and thus I opted not to further delay the issuance of this Decision by ordering a correction. Whenever a page number is cited in an exhibit, it will correspond to the page number in the electronic version.

[3] The exact and full description of the bargaining unit in question will be provided below, in the part of this decision addressing the representation case objections.

[4] All dates hereafter will be in 2015, unless otherwise indicated.

2. The events of June 24

Holcomb testified that on the morning of June 24, she and Anderson ran into Rickesha (known as Ricki) Collins, who works for Respondent as a "Case Manager."[5] According to Holcomb, she and Anderson asked Collins why Markus Mettler, who is admitted as the chief operations officer of Respondent's corporate parent,[6] Healthcare Management Services, was visiting the facility on the previous 2 days. Collins replied that Mettler was there because they had heard that the CNAs were trying to unionize. Anderson corroborated Holcomb's testimony, also adding that Collins told them that management knew about their union organizing because a CNA "snitch" had attended the union meeting(s) and had reported it to management. Collins did not recall Holcomb and Anderson asking about Mettler's reason for a visit (Tr. 660), but denied telling them that management knew about their union organizing or that a CNA had informed management about it (Tr. 664).

I credit Holcomb and Anderson's testimony, not only because they corroborated each other's testimony, but because their testimony was straightforward and rich in details, and unwavering in cross examination. Additionally, their current status as employees of Respondent enhances their credibility.[7] In crediting Holcomb and Anderson's testimony, I do not necessarily accept Collins' explanation for Mettler's visit, but note that it confirms that by June 24 word had spread union organizing was taking place before the petition was presented to Respondent later that day, as further discussed below.

About 2 p.m. that same day, according to Anderson, she had a conversation with Mettler outside the lobby of the facility. According to Anderson, Mettler told her that he had heard that some CNAs had complaints, and that he wanted to know what the problem was so he could fix it. Anderson told him that some of the supervising nurses—RNs and LVNs—treated the CNAs badly. Mettler said he would speak to the supervising nurses in order to fix the problem. According to Anderson, Mettler then said that he had heard that some of the employees were trying to form a union. Anderson responded that she did not want to talk about it, to which Mettler replied "that must mean yes." (Tr. 237–238.) During cross-examination, Anderson admitted that the part about Mettler saying "that must mean yes" was not in the affidavit she had given to the Board (Tr. 283–284). Mettler had a somewhat different version of this conversation, although he did admit asking Anderson about the employees forming a union.[8] According to Mettler, Interim Facility Administrator Mary Perez had reported to him a few days earlier that Anderson had complained to her about the interim Director of Nursing (DON), Shirin Ramsini.[9] According to Mettler, Perez had reported that Anderson had complained that Ramsini was intimidating to the CNAs, who were fearful of her.[10] Mettler explained that during his visit to the facility on June 23–24, he spoke to several (non-unit) employees about how things were going, and that another employee had complained about Ramsini. Mettler testified that during his conversation with Anderson, he asked her how things were going, and that Anderson voiced her concerns about Ramsini, among other things, including the lack of supplies. Mettler testified that he did not tell Anderson that he would "fix" or resolve her concerns in any way, although he did admit telling Anderson that he would follow up and "look into" her claims. Although he also admitted telling Anderson that he had heard rumors about employees organizing a union, he specifically denied saying "this must mean yes" after Anderson declined to answer his question about the union. (Tr. 507–509; 525–527.)

I found both Anderson and Mettler equally credible regarding this conversation, and conclude they both described the conversation—which had occurred 5 months earlier—to the best of their recollection. I also conclude, however, that Mettler's account was more detailed and accurate, and more plausible under the circumstances. In so concluding, I take into account the fact that Perez confirmed Mettler's testimony that Anderson had complained to her about work conditions, which Anderson never addressed.[11] I also take into account Mettler's candor in admitting that he had indeed asked Anderson about the employees' union activities. I thus conclude that Mettler never told Anderson that he would "fix" the problems she had complained about, only that he would "look into" them, as he admitted.

Within an hour or so of Mettler's conversation with Anderson, after he had departed for the airport to return to southern California where he is based, a group of about 20–50 employees gathered at the lobby of the facility. Led by Anderson and Holcomb, they requested to see Perez, and when she came to the lobby, Anderson presented her with a copy of the (represen-

[5] The amended complaint alleges that Collins is a Sec. 2(11) supervisor and Sec. 2(13) agent of Respondent, which Respondent denies. Whether Collins is either a supervisor and/or agent of Respondent will be discussed later in this decision.

[6] Mettler testified that Healthcare Management owns and operates Respondent and various other long-term care facilities in California. (Tr. 493.)

[7] I also note that Anderson credibly testified that she used to be friendly with Collins and frequently chatted with her at work, something that ended or was markedly diminished after the union activity was revealed. This relationship would make it more likely that Collins would reveal things to Anderson. Although Collins denied telling Holcomb and Anderson that she had been directed by management not to speak to them, as Anderson alleged in her testimony, she never denied Anderson's assertion that their relationship had changed.

[8] Curiously, the General Counsel (GC) did not allege this as an interrogation, although this conversation is alleged as a promise of benefits and better working conditions (complaint par. 6(a)). Mettler's admission that he questioned Anderson about the Union also establishes that Respondent was aware about its employees' union activities prior to the petition being presented to Respondent a short time thereafter, although it is not clear how long before this event such knowledge existed.

[9] Ramsini had taken over as interim DON after Janet Jarvis, the DON, had resigned on June 4. Perez worked as interim administrator of the facility from May 18 through July 16, and is an admitted Sec. 2(11) supervisor and Sec. 2(13) agent of Respondent.

[10] Perez corroborated Mettler's testimony that she told him about what Anderson had reported to her, adding that she also informed Nan Jordan, HMS' vice president of Clinical Services (Tr. 932–933; 968–971).

[11] I note that Anderson was recalled as a witness after both Perez and Mettler testified and was never asked whether she had indeed complained to Perez about Ramsini.

tation) petition the Union was about to file with the Board.[12] Anderson acted as the spokesperson for the group, telling Perez that the employees were united and leading the group in a chant.[13] Perez confirmed that this event took place, but added that she later told Anderson that while she respected what they were doing, she was concerned that the "floor" (where patients are cared for) was left unattended during this gathering. Anderson responded that enough nurses were available on the floor at the time. (Tr. 60–61; 239–241; 958–959.)

Following this event on June 24, it is alleged that Respondent took a series of actions as a result of its employees' union activity. These alleged actions are described below, for the most part in the order they appear in the complaint, with one limited exception.

3. Alleged directive not to visit other areas of facility[14]

Holcomb testified that on or about June 29, Interim Administrator Perez held a "huddle" with CNAs at the West nurses' station.[15] According to Holcomb, Perez announced the CNAs were not permitted to go to or visit other stations or areas of the facility for any reason, and had to remain in their assigned areas. Perez also told the CNAs to take their breaks only in the break room or in the smoking area in the parking lot outside, and not at or near the nurses' stations. Holcomb testified that previously, CNAs would freely visit at other stations or areas of the facility, either for work reasons or simply to socialize ("chit chat") for brief periods with colleagues.[16] She also testified that CNAs would previously take their breaks in the break room, or in the parking lot, or their cars, or at the nurses' stations, or at the Tuscan room, where RNs keep their equipment. During cross-examination, Holcomb clarified that after the directive CNAs—who are typically assigned to one of the three stations—could still go to other stations or areas, but only for work-related reasons, and even then they were often challenged by supervisors who would ask what they were doing there. Anderson corroborated Holcomb's testimony, with the exception that she testified this meeting took place on July 1. She testified that Perez informed the CNAs they could not visit other work stations to talk to other nurses, that if they wanted to talk to other nurses (in other stations) they would have to do so during their breaks. Anderson confirmed that previously, CNAs went to other stations "all the time, all day" not only for work related reasons (such as getting supplies) but also to socialize and "chit chat" or gossip, even during working time. She added ". . . we were like family, we just . . . interacted all the time." She also testified that although they were allowed to go to other stations for specific work reasons after the directive, they were still watched and harassed by supervisors when they were in stations they were not assigned to. Finally, Anderson testified that after the election on July 24, things went back to "normal," meaning they were no longer stopped from visiting other stations. (Tr. 62–63; 66–67; 145–146; 148–149; 245–248; 295–296; 299–300; 305–306.)

Perez testified that she had not made any "general announcement" that CNAs were not to go to other stations, explaining that such rule would be impractical because CNAs are supposed to assist at other stations if needed. She denied instructing CNAs to remain in their stations or restricting their "travel" to other stations (Tr. 940–943).

I credit Holcomb's and Anderson's testimony, not only for the reasons described earlier, including their status as current employees, but because their testimony regarding this meeting was rich in details, vivid, and unwavering during cross-examination. Perez' denials, on the other hand, were general in nature and not persuasive, and her stiff demeanor signaled that there was likely more to the story. Moreover, as discussed further below, other conduct by Perez and/or other supervisors appears to be consistent with this directive. Accordingly, I find that as testified by Holcomb and Anderson, Respondent, in late June or early July, instructed its CNAs not to visit other stations except for specific work reasons, and monitored them for compliance with this rule. I also find that this rule was no longer enforced or in place after the election, which reflects on its nature.

4. Alleged directive regarding the wearing of union "scrubs"[17]

Holcomb testified that the Union, as part of its election campaign, distributed purple-colored scrubs with the union logo for employees to wear on Wednesdays at work, beginning on July 1.[18] As she was arriving at the facility early on the morning of July 1, Holcomb testified, she encountered 3 fellow CNAs, whom she identified as Rita, Sabrina and Simone in the parking lot. They told Holcomb that Terry Walker, a supervisor, had informed them they could not wear the union scrubs at work and would have to go home to change. Holcomb told the CNAs to stay, that she was going to discuss the matter with Walker and Perez. She found Perez at the East station, and handed her an NLRB flyer listing employee rights (GC Exh. 4), which included the right to wear clothing with union logos or pins at work. Perez told Holcomb that wearing such scrubs was in violation of company policy, pursuant to the employee manual, and that they would have to go home to change. Holcomb insisted that she had read the employee manual and that it said nothing about wearing scrubs with logos. She added that some of the employees lived far away, so if they were forced to go home to change they would not return that day. According to Holcomb, this discussion went back and forth, with her insisting it was within their rights to wear the union scrubs, and Pe-

[12] The Union's representation petition was filed with Region 20 of the Board the next day, June 25. (GC Exh. 1(hh).)

[13] This account of the petition's presentation to Perez was also corroborated by the testimony of CNA Danielle Dangerfield. (Tr. 338–340.)

[14] Complaint ¶ 6(b)(i).

[15] "Huddles" are short meetings held by supervisors with the nurses to discuss patient care and other work-related issues, usually on a daily basis at the beginning of the shift. There are 3 nurses' stations at the facility: East, Central, and West stations.

[16] According to Holcomb, although this socializing mostly took place during breaks, it also occurred during work time, and it was never an issue before. (Tr. 148–149.)

[17] Complaint ¶ 6(b)(ii).

[18] A photograph of the purple-colored scrub with the Union logo, which will be referred to as the "Union scrub(s)," was introduced in the record as GC Exh. 2 (Tr. 242).

rez stating that they could not do so because it violated the employer's policy. Finally, Perez, who Holcomb testified looked irritated and angry, told Holcomb she would check with the "corporate" office about this. Holcomb also testified that employees at the facility regularly wore scrubs of different colors, some with logos of sport teams or other entities. Holcomb admitted, however, that following this discussion with Perez, she and other employees were permitted to continue to wear the union scrubs every Wednesday, without apparent interference form Respondent.(Tr. 67–68; 70–75; 168.)

Anderson, on the other hand, testified that Perez had told her, Holcomb and other CNAs that they could not wear union scrubs during a meeting at the West nurses' station on July 1, with Holcomb insisting that it was their right to do so. (Tr. 242–245.) Perez' account differs from that of Holcomb or Anderson. According to Perez, she saw Holcomb passing out union scrubs to other CNAs during "work time," adding that she did not know if Holcomb was on break at the time but insisted that the nurses Holcomb approached were working. She admits telling Holcomb that she wasn't sure wearing these (union) scrubs was "allowable," but said to her that she would "find out." Perez denied telling Holcomb or others to go home to change, and denies that Holcomb said that if they were sent home they would not return, but admitted that Holcomb handed her the Board flyer spelling out employee rights (GC Exh. 4). Perez admitted that she did find out, apparently after speaking to the corporate office, that it was permissible for employees to wear the union scrubs, and testified that she never said another word to any CNAs about wearing union scrubs after that. She confirmed that employees wore the union scrubs every Wednesday after that. (Tr. 948–951; 980–981.)

While I find that Holcomb's version of these events, as partially corroborated by Anderson, more likely and accurately reflect how these events unfolded, I conclude that it is unnecessary to make a detailed credibility resolution in this instance. This is because the truly significant facts are not in dispute: (1) Employees initially wore union scrubs on Wednesday, July 1; (2) Perez initially informed them they could not wear these scrubs; (3) Respondent did not enforce the rule, but never rescinded it nor explained that Perez' directive had been an error; and (4) Employees continued to wear union scrubs every Wednesday, without interference, until at least the election day.

5. The requirement that CNAs post their break times on "whiteboards"[19]

Holcomb testified that Perez and new interim Director of Nursing (DON) Colette Johnson held a "huddle" with CNAs on July 9, during which Perez announced that CNAs would be required to write the times of their breaks on the "whiteboard," which is an erasable bulletin board located at each of the nurses' stations. Previously, these white boards had the names of the CNAs on duty and the (patient) rooms or beds they were assigned to, but not the times of their breaks. (Tr. 101–104.) This is undisputed, as both Perez and Johnson testified that indeed such directive was issued at the time, as discussed below. Holcomb also testified that Perez told the CNAs that they would be required to ask permission to go to use the restroom, and that they could not take breaks in other areas of the facility, only in the break room or in the smoking area outside.

Johnson testified that when she became interim DON on July 1, she was surprised that the CNAs' break times were not listed in these boards, a practice which is standard in the industry, including all long-term rehabilitation facilities where Johnson had worked for many years. Johnson testified that the primary reason she wanted this practice followed is that such posting readily provided information to patients' visiting family members to allow them to locate and speak to the nurses. She considered the whiteboards an important "communication device" for the benefit of the families, patients and staff. The evidence shows that the information regarding the break times of the CNAs had also long been contained in the scheduling notebook (also called assignment sheets) (Jt. Exh. 7), a binder located at each nursing station, which only staff members have access to. Perez testified that it was Johnson's decision to implement this practice, a decision she deferred to on account of Johnson's considerable experience as nursing director. (Tr. 465–466; 468–473; 478–480; 936–937; 973–974.)

I credit Holcomb's testimony regarding the whiteboard policy, which is undisputed, and also her testimony that Perez limited CNAs' ability to go to other areas of the facility, as this is consistent with testimony I have earlier credited. On the other hand, I do not credit her testimony regarding Perez' directive for CNAs to seek permission to go to the bathroom. In this regard I note that Holcomb testified that other CNAs, including Anderson and Dangerfield, were present at this meeting, yet no other witness corroborated this testimony. Moreover, I also noted that Holcomb's testimony changed after direct examination, when she indicated that the new whiteboard policy simply made the nurses record their break times on the board—break times already contained in the scheduling notebook. During cross-examination, when pressed to explain how the whiteboards directive changed break practices, Holcomb testified that unlike before—when CNAs could allegedly take their breaks together, as they saw fit—their break times were now staggered, impeding them from taking their breaks together and "socializing," which presumably also means engaging in union activity. I find this portion of Holcomb's testimony not to be reliable, not only because it deviates from her original testimony, but because it is belied by the scheduling notebook—which contained specific break times, and which had been in place for a while.[20]

[19] Complaint ¶ 6(b)(iii).

[20] In its brief, the General Counsel contends that nurses "rarely" recorded their break times or other information on the assignment sheet (misidentified in the brief as "GC Exh. 7"). To the contrary, these assignment sheets (Jt. Exh. 7) show that approximately 35–45 percent of the time showed the scheduled break times, as well as other information. The practice was clearly uneven and not strictly followed, which helps explain Johnson's concerns upon her arrival about not knowing who was on break or when.

I found Johnson, who testified she was a Jehovah's Witness whose faith allowed no involvement one way or the other in the Union campaign, to be a straight-forward and credible witness. I credit her testimony regarding the reasons for implementing the whiteboard policy.

6. The allegation that Respondent changed housekeeping employees' break times to discourage union and/or protected activity[21]

Angela Snipes testified that she has worked for Respondent as a housekeeper since August 2013, and that her supervisor is Juanita Harmon.[22] According to Snipes, housekeeping employees typically get two 15-minute breaks, one in the morning and one in the afternoon, as well as a half-hour lunchbreak. She testified that prior to the union petition being delivered to Respondent, two of the housekeepers would take their morning break from 9 to 9:15 a.m., and the other two from 9:30 to 9:45 a.m. They would all take their lunch together from 12 to 12:30 p.m. Snipes further testified that 2 to 3 days after the union petition was delivered to Respondent (on June 24), Harmon posted, outside her office, a new break schedule in which all of the employees' breaks were staggered—so that employees would no longer take breaks or lunch together. According to Snipes, Harmon stated that the reason for the change was to comply with California labor laws. After about 3 weeks, Snipes testified that employees complained and requested to be permitted to take their lunches together again, and that Harmon said she would allow this if employees signed a "waiver." However, employees never signed such waiver, according to Snipes, but soon thereafter returned to taking their lunches together, apparently without any interference from Harmon. (Tr. 391–394.)

Respondent does not dispute that the change in the break schedules occurred, but asserts that the change was announced much earlier, on June 10, two weeks before the Union petition was presented to Respondent. Thus, Harmon testified, in her position as Plant Operations manager, she was assigned to take over the housekeeping department on or about June 3 after the departure of Mike Coleman, who had been managing that department. Harmon had previously been the head of the housekeeping department, from August 2013 to November 2014, when Coleman took over that department. When she took over the reins of the housekeeping department again on June 3, she testified, much work needed to be done in preparation for the upcoming "State Survey," an annual review conducted by State health department inspectors.[23] Harmon testified that she needed to schedule deep cleaning of the rooms as well as stripping and waxing of the floors, an arduous job. Harmon found that Coleman had permitted housekeeping employees to take breaks at will, without any apparent fixed schedule, and wanted to return to the staggered system of breaks she had in place before when she had earlier supervised that department. Harmon explained that the system of staggered breaks was based primarily on her understanding of State labor law, which she believed required employees to have a morning break 2 hours after clocking in, lunchbreak after 4 hours, and another break after 6 hours.[24] Another reason for the staggered breaks was that she did not want all employees taking the break at the same time so that someone was always available to respond to emergencies, such as cleaning spills. On June 10, Harmon held a meeting with her department and announced the new schedule system, which was posted by her office door.[25] She also announced that the new system would not go into effect until July, in order to give employees time to adjust. (Tr. 713–715; 716–724; 727; 756; 758–765; 769; 775–778; R. Exh. 3.)

Three housekeeping/maintenance department employees, Theodore (TC) Davis, Diane Marquez, and Herlinda Medina, corroborated Harmon's testimony that she announced the change in the break schedules during a meeting held on or about June 10. All three testified that they attended a meeting on June 10, a short time after Coleman left—which is usually the day of the month that Harmon holds monthly department meetings—and that Harmon posted the new schedule outside her door. They also confirmed that this new schedule did not go into effect for another 2 to 4 weeks after it was announced. They also confirmed that about a month or so after the new system went into effect, the employees asked Harmon to allow them to take lunch (not breaks) at the same time, and that eventually they went back to doing so (Tr. 860–864; 872–874; 897–902; 904–906; 910; 916–919; 920–923).

I credit Harmon's testimony that she announced the change in the schedule of breaks on June 10, for the reasons she testified, both because her testimony was straightforward and consistent, and because her testimony was corroborated by 3 employees whose testimony was credible and unimpeachable. I do not discredit Snipes, whom I believe was testifying to the best of her recollection, but I conclude that in testifying that the change was *announced* after the Union had presented its petition (on June 24), she confused such event with the *implementation* of the new schedule—which no one disputes occurred after the union petition. Simply put, I find that the testimony—and recollection—of four witnesses trumps the recollection of one. Accordingly, I conclude that the change in the schedule of breaks in the housekeeping/maintenance department was announced by Harmon during a meeting on June 10.

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[21] Complaint ¶ 6(c)(i).

[22] Harmon is admitted to be a Sec. 2(11) supervisor and Sec. 2(13) agent, and her title is plant operations manager.

[23] In anticipation of the annual State Survey, Respondent conducted an internal "Mock Survey" in April–May, which found that many rooms had not been properly cleaned under Coleman's watch.

[24] She called this schedule "2, 4, 6, 8 out the door." I take judicial notice of California State Labor Code Sec. 512(a), which in pertinent part states: ". . . An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee."

[25] This schedule was introduced as Respondent exhibit (R Exh.) 3. The scheduled listed s staggered breaks and lunch depending on the starting time of the employee, with a couple of employees' breaks or lunch times over-lapping.

7. Harmon's alleged instruction that an employee take off his union scrub[26]

Holcomb testified that on July 15 she was coming out of the break room, which is adjacent to the service hall, when she overheard a conversation between "Andres," who works as a janitor, and Harmon.[27] She heard Harmon tell Andres to take off a union scrub he was wearing, and hand him a "white" shirt from a bag with a "Big 5" (a sporting goods store) logo. Holcomb a short while later came face to face with Andres, who was wearing the white shirt with a button that said "Arden Strong," a campaign button used by the employer during the election campaign.[28] According to Holcomb, Andres, who speaks no English, gestured with a "disgruntled" face toward Harmon's office, which Holcomb apparently interpreted as his way of saying that Harmon had forced him to wear the white shirt and button. (Tr. 88–90.)

Harmon denied ever telling or instructing Andres to take off a union scrub or directing that he wear a white shirt instead. She denied that Respondent ever had a bag of white shirts to distribute. Instead, she testified that "TC" Davis, a fellow janitor, told her that Andres was interested in wearing a white shirt, and asked to open the room where discarded (resident's) clothing is kept to obtain a white shirt. Harmon testified that she opened the room door and left. Davis corroborated this account, and testified that he helped Andres select a white shirt to wear. Davis provided much detail about his "conversations" with Andres, who does not speak English and must therefore communicate through hand signals.[29] (Tr. 730–736; 798; 869–871; 877–883.)

I note that according to Holcomb's version, Davis was not present when she witnessed the interchange between Harmon and Andres. I credit Holcomb's account of what she heard, and note that since she was instrumental in distributing the union scrubs, she was very familiar with what they looked like, and thus conclude that Andres was wearing one. I believe that her account is more plausible than Harmon's simple denial that this conversation took place, and note that Davis' account of his interaction with Andres appears to describe a different event, perhaps on a different day. Unfortunately, the central character in this event—Andres—did not testify, and given his apparent inability to communicate in English, there is no way to know whether he understood what either Harmon or Davis said to him, or whether he understood the implications of wearing the union scrub or the white shirt.

8. The allegation that Respondent created the impression of surveillance[30]

There are three separate instances that alleged supervisors and/or agents of Respondent allegedly made statements suggesting that Respondent was engaged in surveillance of its employees' union or protected activities.

CNA Danielle Dangerfield testified that on or about July 11, early in the afternoon, she had a conversation with Rita Hernandez, Respondent's Director of Marketing and Admissions, an admitted Section 2(11) supervisor. According to Dangerfield, Hernandez asked her to step away from the nurses' station, so they could speak privately. Once away from the station, Dangerfield testified, Hernandez told her to be careful, because the security cameras throughout the facility were voice-activated and were used to monitor employees' conversations.[31] Dangerfield further testified that the cameras had first been installed years before, but that they had previously been told they were deactivated. She thus believed the cameras were not operational—until Hernandez suggested otherwise in this conversation. (Tr. 343–347.)

In her testimony, Hernandez admitted telling Dangerfield that the cameras were operational and voice-activated, but her version of their conversation was different. According to Hernandez, she was on her way out of the facility to get some pizza for the staff, when Dangerfield approached and asked her if the cameras were operational and voice-activated. Hernandez told her they were, because that is what she believed. She further testified that other employees later approached her, including Anderson and Holcomb, to ask if it was true that the cameras were operational, and she told them they were. About a week later, Hernandez learned from both Perez and Harmon that the cameras were not operational, and she then told both Dangerfield and Anderson that the cameras were not operational, after all.[32]

I credit Dangerfield's version of these events—Hernandez' version appears self-serving and contrived, and thus not as plausible. In this regard I note that other employees testified that they had long been told the cameras were not operational, as Dangerfield testified, and thus Dangerfield would have had no reason to ask Hernandez about the cameras.

The next alleged incident(s) regarding the creation of the impression of surveillance involve conversations Holcomb and Anderson had with Ricki Collins, Respondent's case manager. It is alleged that Collins is a Section 2(11) supervisor and Section 2(13) agent of Respondent, which Respondent denies.[33] Holcomb testified that sometime between June 29 and July 7, Collins approached her at the West nurses' station' and told her

[26] Complaint ¶ 6(c)(ii).

[27] No one seemed to know Andres' last name, and a schedule with his name refers to him and others by their first name (R. Exh. 3/p. 2–3). His name is at times appears as "Andreas" throughout the record.

[28] It is undisputed that white became the color associated with Respondent's campaign during the election, with managers and employees wearing white shirts (or scrubs) on Wednesdays, in apparent response to the wearing of union scrubs on the same day. Photographs of buttons with the language "Arden United & Strong" and "Arden Vote NO!" were introduced as Joint Exhibits (Jt. Exhs.) 11 and 12, respectively.

[29] Davis acknowledged that he often had difficulty communicating with Andres because he did not speak English, and thus their communications—certainly a more accurate term than "conversations"—were through gestures and hand signals.

[30] Complaint ¶¶ 6(d); 6(f); and 6(g).

[31] As discussed below, there is an issue as to whether the cameras were operational at the time.

[32] Anderson testified that Collins had told her on June 25, the day after the petition was presented to Respondent, that the cameras were operational. (Tr. 259–261.) She denied having any conversations with Hernandez about the cameras at all (Tr. 1256; 1259–1260).

[33] Collins' status as a Sec. 2(11) supervisor and Sec.2(13) agent will be discussed below.

and Anderson that she needed to talk to them privately, and they went to the Tuscan room. According to Holcomb, Collins told them that Markus (Mettler) and Mary (Perez) knew they were the union leaders and to watch out because Respondent was keeping a close eye on them. (Tr. 129–130.) Curiously, Anderson did not testify about this conversation. Collins denied this conversation (Tr. 663–664.)

In view of the lack of corroboration by Anderson that this conversation occurred, I find that a negative inference can be drawn that she would not have corroborated this testimony had she been asked about it.[34] Accordingly, I do not credit Holcomb's testimony in this regard.

The final allegation involving creating the impression of surveillance involves alleged comments by Jacinth ("Jac") Castellano, Respondent's "MDS" Coordinator, whose supervisory and/or agent status is denied by Respondent.[35] Holcomb testified that on or about July 15, by the West nurses' station, Castellano told her that Perez and Markus (Mettler) were keeping a close eye on her, because she was the one that was speaking out all the time. (Tr. 130–131.) Castellano denied he said that to Holcomb. (Tr. 633.) I note, however, that Holcomb also testified that Castellano, in the same conversation, had said that Perez had directed him to change his shirt that day, apparently because Perez believed that his shirt resembled the color of the purple Union scrub. Castellano admitted he did say that to Holcomb, which lends credence to her version of the story. (Tr. 632–633.) Accordingly, I credit Holcomb, and conclude Castellano told her that Perez and Mettler were keeping an eye on her.

9. Respondent's alleged surveillance through video cameras[36]

It is alleged that Respondent engaged in actual surveillance of its employees' union or protected activity, presumably by either observing and/or listening to its employees through its security cameras that are located throughout the facility. It is undisputed that security cameras had been installed about 8 years before the onset of union activity, apparently for security reasons. Even the General Counsel's witnesses conceded that they had been informed, and believed, that most of the cameras, except for a couple of the cameras that monitored the outside parking lot(s) had been deactivated a long time before the advent of union activity.

The evidence offered by the General Counsel in support of its allegation that Respondent engaged in actual surveillance with its video cameras is the following: (a) Anderson testified she often heard a *speaker* on top of the nurses' station go on and off, and she would ask "what is that?" and "they" would say "that's where the camera is." (Tr. 261);[37] (b) Collins, as described earlier, told Anderson that the cameras were on, and Hernandez told Dangerfield and others the same thing (although she later retracted that statement); and (c) Anderson testified that she had seen a live "video feed" from the outside cameras in monitors in the administrator's office "this year," meaning 2015, although she could not be more precise about exactly when. (Tr. 365–366; 375; 378.)

The above evidence, in my view, hardly meets the threshold of evidence necessary to establish a prima facie case that the cameras were operational or that Respondent was actually using them to engage in surveillance.[38] Nonetheless, I note that three witnesses for Respondent, Mettler, Perez, and Harmon credibly testified, without any contrary evidence, that all the cameras had been deactivated by May 2015, and that indeed the "inside" cameras had been deactivated years before. Particularly of note is the testimony of Harmon, who personally disconnected the camera system. (Tr. 510–512; 534–537; 736–741; 777–780; 783; 958; 984–985.) I credit their testimony, and find that Respondent did not engage in surveillance with its video camera system, because it was not operational during the relevant time period.

10. Respondent's alleged prohibition of the posting of union literature[39]

It is undisputed that Respondent had the following work rules in place:

- All bulletins other than the ones from Human Resources should be submitted to and approved by Administration before they are posted. (GC Exhs 1(kk); 1(oo)
- Solicitation is defined as any act of urging or persuading an individual by peaceful or other means, to accept a product or service for sale, a doctrine to follow, an organization to join, or to pay a gratuity for services rendered.
- An act of urging or persuading can be precipitated through oral or written communication or by wearing of pins, jewelry or hats on which appear the name or insignia or other identifying symbol of a product, service or organization.
- Solicitation of any kind or the distribution of literature on Company premises by persons not employed by the Company is strictly prohibited.

[34] After all, this is not the case of a reticent employee who might have been afraid to come "out of the shadows" and be exposed by testifying. Anderson was a strong and open union supporter who testified at length in this case, so the lack of corroborative testimony is significant.

[35] As with Collins, Castellano's supervisory/agent status will be discussed below.

[36] Complaint ¶ 6(g).

[37] Anderson did not identify who the "they" she was referring to were, nor explained during what time frame (year/month?) she heard these noises coming from the speakers. Nor is it clear how a speaker (intercom?) system, which is usually independent from and separate from a video camera, could signal whether the camera system is operating.

[38] Moreover, even assuming that the cameras were operational, their existence had been known for years and had long preceded the advent of union activity. If employees, given that knowledge, wanted to boldly or recklessly engage in such activity in plain view of the cameras, they did so at their peril. Employers are under no legal obligation to avert their eyes from such open activity.

[39] Complaint ¶ 7(a) & (b).

- Employees of the Company are prohibited from soliciting residents, visitors or other employees on any matters during work time.
- Employees may not distribute literature, during work time for any purpose unrelated to work.
- Employees at the Company may not solicit, at any time, for any purpose, in immediate resident care areas or in any other area that would cause disruption of the operation of the Company or disturbance of the residents.
- Distribution of literature unrelated to performance of work by the Company's employees is not permitted in working areas of the Company at any time.
- Work time includes the working time of both the employee doing the soliciting or distributing and the employee to whom the soliciting or distributing is directed. Work time does not include off-duty periods, such as break periods or mealtimes.
- Any inquiries concerning the above policy must be cleared through the Administrator. The Administrator must approve any deviations from the above policy in writing. (Jt Exh. 8[E/ J. Exh 7–15, Vol. 4/p. 254)

There is no dispute that these rules are facially valid, but the General Counsel alleges that Respondent selectively and disparately enforced the rule by permitting the posting of anti-union flyers while prohibiting—and removing—prounion literature or flyers.[40]

There is little or no dispute that following the filing of the union petition with the Board, pro-union employees posted, or attempted to post or distribute, much union literature on the break room bulletin board and as well as other places, such as nursing stations.[41] Nor is there any dispute that Respondent, as admitted by Perez, removed these union flyers soon after they were posted or distributed, as Perez instructed its managers/supervisors to do. (Tr. 986–987.)[42] Finally, there is no dispute that Respondent posted and distributed literature discussing its opposition to the Union, and urging employees to vote against the Union, as part of the election campaign. (Tr. 85–86; GC Exh. 7.)

What is in dispute is whether Respondent, prior to the union campaign, allowed its employees to post flyers or literature about non-work related matters. Four employees testified that Respondent had allowed non-work related employee postings for years. Thus, Holcomb testified that during her employment at the facility she had often seen postings of church events, children's school fund raisers, and funeral services for patients, which were posted on the bulletin board in the break room. She added that these postings often remained up for long periods, remarking that only recently had a posting for a church event from December 2014 been taken down. (Tr. 84; 169–171.) Anderson likewise testified that she had seen announcements posted at the bulletin board for children's parties, pot-lucks, baby showers and church events, and that these postings remained in place at least until the time of the events. (Tr. 250–251.) Dangerfield similarly testified that she had seen postings of pot-lucks, funeral arrangements, wedding announcements, church activities, and for the sale of Girl Scout cookies. On cross-examination, she stated that she had seen funeral notice postings in the last few months, that she had seen wedding announcements, although not recently, and had seen Girl Scout cookie postings in 2014 (Tr. 341–342; 361–362). Finally, Snipes testified that she had also seen postings for Girl Scout cookies, for Avon products, for church events and obituaries, and that she saw those postings on the bulletin board, as well as on the hallway near the break room—and that these postings were up for at least a week or two. (Tr. 395–396.)

Respondent's witnesses, on the other hand, denied ever seeing these types of nonwork related postings at all, including, Hernandez , Castellano, Harmon, Collins, and Perez (Tr. 603; 634; 636; 665; 741–742; 960). I would note, however, that Perez had never been in the facility before May 2015; that Castellano testified that he had never seen these postings on the walls, but did not mention the bulletin boards; that Collins admitted she did not usually pay attention to any postings unless they were "mandatory" postings near the time clock; that Hernandez admitted that she does not go into the break room very often, and had signed a pot-luck invitation that was passed around; and that Harmon admitted seeing pot-luck sign-in sheets on the table, although not on the bulletin board.

I credit the testimony of employees Holcomb, Anderson, Dangerfield and Snipes for the reasons I have specified before, including their status as current (rank and file) employees, and because their testimony was straightforward, specific and consistent with each other's testimony, whereas that of Respondent's witnesses had the weaknesses described above—and partly corroborated some of the testimony by the General Counsel's witnesses. Accordingly, I find that prior to the advent of the union activity, Respondent permitted, or at least tolerated, the posting and distribution of nonwork related materials and flyers.[43]

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[40] In this regard, it should be noted that the language of ¶ 7(b) of the complaint plainly suggests that Respondent was permitting a *third* party, such as an employee group opposed to the Union, to post or distribute antiunion literature while banning pro-union employees from posting their literature. As discussed below, this is not what occurred at all. It is undisputed that much "anti-union" literature was posted in bulletin boards and other places during the election campaign, but this literature was posted by Respondent. The evidence introduced by the General Counsel instead focused on nonwork, noncampaign related postings by employees that Respondent allegedly allowed, which is a completely different theory of a violation—and which makes the language of the complaint misleading.

[41] See, e.g., testimony of Holcomb (Tr. 77–82; GC Exh. 5; 6).

[42] Thus, I find it unnecessary to address or describe conversations that Holcomb allegedly had with Perez and Harmon regarding the removal of union flyers, since Respondent admits this was its policy.

[43] I note that Respondent did not assert that permission was sought and granted for these postings, let alone offer any evidence in support of such proposition.

11. Holcomb is floated to another station and has a shift cancelled[44]

It is undisputed that on June 25, Holcomb was "floated" to work at the East nurses' station, and that on June 26 her work shift was cancelled. What is in dispute is how such events came about, and for what reason(s).

Prior to discussing the events of June 25 and 26, certain backgrounds facts will help provide the context that will help to understand the disputed facts. There are three (3) "stations" at Respondent's facility, East, Central, and West, to which patients and nurses are assigned. Patients at the East and Central stations are more severely impaired, and are considered long-term residents, whereas patients on the West station are shorter-term, more mobile and less impaired patients. Undisputed testimony establishes that working at the East or Central stations can be more difficult or onerous for nurses, because the patients in these areas are less mobile and/or more impaired in other physical or mental functions. Each CNA is assigned to a given station permanently, but all have to occasionally "float" (i.e., be assigned) to other stations on a short term basis, usually for one shift, depending on workloads and the needs of the residents. It is undisputed that Rhoda Hearn is Respondent's scheduler, and as such is responsible for scheduling the CNAs and other nurses for work on a day-to-day basis, choosing which nurses will work on each shift, in which station, as well as choosing which nurses, if any, will float or be cancelled.[45] Finally, it is undisputed that for a period of about 30 days from mid-May through June 19, Holcomb, a CNA normally assigned to the West station, was temporarily assigned to be the acting Director of Social Services. As such, she was in charge of the social activities and services for patients at the facility, and was working a normal Monday through Friday 40-hour work shift, and was thus not subject to the CNA schedule managed by Hearn.

Holcomb testified that on Friday June 19, she met with Hearn to inform her that her stint as Social Service Director was ending and that she would be returning to her regular schedule (as a CNA). According to Holcomb, Hearn said that this meant that she would work the next 2 days (Saturday 6/20) and Sunday (6/21), have the next 2 days off, then work the following several days after that. Because the "census" (patient count) was low, however, Hearn asked her to take the weekend off, since she had already worked 5 days (40 hours) that week in order to "help" and avoid having to pay her overtime, and that these two weekend days would count as a "cancellation" for scheduling purposes.[46] Accordingly, according to Holcomb, she would then be put to work on Monday 6/22, be off Tuesday 6/23, and then work the next several days.[47] (Tr. 123–124; 166–167.) The actual schedule for that week (Jt. Exh. 6), shows that Holcomb worked on Monday 6/22, was off on Tuesday 6/23, worked on Wednesday 6/24 and Thursday 6/25 (albeit on a different station), and was cancelled on Friday 6/26. The dispute herein centers on Holcomb's assignment to the East station on June 25, and her cancellation on June 26, which the General Counsel alleges was for unlawful retaliatory reasons on account of her union activity.

Before discussing the facts surrounding such allegation, it should be noted that Hearn's account of her June 19 conversation with Holcomb (about schedules) differs from Holcomb's in one significant detail. According to Hearn, Holcomb *asked* for the weekend (of June 20–21) off because she had already worked (as Social Service Director) 40 hours that week, and wanted to rest before resuming her regular CNA schedule on Monday.[48] She agreed to Holcomb's request because it actually helped her scheduling, and avoided having to pay her overtime, but added that she never considered Holcomb's weekend off as a "cancellation." (Tr. 1006–1007; 1009–1010).

I find it necessary to resolve this conflict in testimony at this point, because it has ramifications in what follows. I credit Hearn's testimony in this instance, because her account seems far more plausible. At the very least, I conclude that the decision for Holcomb not to work that weekend was a mutual, win/win, decision for both sides. It simply does not make any sense for Hearn to have agreed to consider such time off as a "cancellation" to be used as a bargaining chip to avoid future cancellations. By definition—and indeed by practice—a cancellation of a shift is something that implies, for the employee, an unpleasant, unexpected, against-their-will event which represents a loss of wages, not something that is agreed to, in advance, for mutual benefit. Moreover, as later testified by Hearn, her goal as scheduler, when confronted with the necessity of reducing or cancelling shifts, is to attempt, to the greatest degree possible, to balance out the hours of all the nurses, so that they all end up with roughly the same number of hours worked per pay period. (Tr. 1238–1239.) In light of that goal, which I found to be credible and supported by the record, it would have made no sense for Holcomb, who had been for a month working steady 40 hour weeks as Social Service Director—more hours than average for nurses—to be awarded an extra bonus of having 2 days' cancellation "credit" to be used against any future hour reductions or cancellations. This is especially true in light of the common knowledge at the time that the census was low and that reduction of hours and cancellation of shifts were eminent. Accordingly, I credit Hearn's testimony, and conclude that allowing Holcomb to take off the weekend of June 20–21 was not considered a "cancellation."

As noted earlier, on June 25, the day after a group of em-

[44] Complaint ¶ 8(a) & (b).

[45] There are exceptions and limitations to Hearn's discretion in making these schedules, as will be discussed below, but the record is clear that she has significant discretion in making these decisions. The General Counsel has alleged Hearn as a Sec. 2(13) agent of Respondent, which Respondent denied.

[46] As will be more thoroughly discussed below, a "low census" (low patient count) typically means that the number of nurses' hours must be reduced in order to avoid being over budget. This reduction is accomplished either by reducing the hours on a shift, or cancelling shifts altogether.

[47] This explanation appears to be at odds with Holcomb's earlier testimony, as well testimony by Hearn and others that the CNAs' schedules typically were to have 4 days on, 2 days off, and then 4 days on, 2 days off, and so forth. (See, e.g. Tr. 1009.)

[48] I note that Holcomb admitted she was relieved to have the weekend off, so she could relax, before returning to her regular schedule (Tr. 123).

ployees that included Holcomb handed Perez the union petition, Holcomb was floated to the East station, where she worked the entire shift. Hearn testified that she assigned Holcomb and another CNA normally assigned to the West station, D'Angelo Stephens, to float to the East Station because they were the CNAs available to float that day, and it was their turn.[49] Stephens, who admittedly has more seniority than Holcomb, apparently refused to float and left work early.[50] Consequently, Anderson volunteered to float to the East station to cover for Stephens' departure. Two CNAs who were assigned to work on the West station that day, Simone Brasil and Motu Afoa, had less seniority than Holcomb. Hearn testified, however, that both Brasil and Afoa, who had been hired in early June, were still in their probationary period, and that it was Respondent's policy not to initially float such new hires into other stations.[51] Additionally, Hearn testified, and the record shows, that a CNA who normally works on the East station, Paschal Agwara, had a worker's compensation injury that limited him to lighter duty, and thus he was floated to the West station on that date (Tr. 1006–1010; 1016–1018; 1044–1045; 1079–1082; 1084; Jt. Exh 2(a) &(b)).[52] I found Hearn's testimony about the reasons for her scheduling decisions on June 25 to be straightforward, supported by the records, and credible.

As mentioned earlier, it is undisputed that on June 26, Holcomb, who would normally have worked on that day, had her shift cancelled. Hearn sent Holcomb a text message late in the afternoon on June 25 advising her that her shift can been cancelled the next day (June 26). Holcomb responded shortly thereafter, again by text, questioning Hearn about why she had been cancelled when other individuals with less seniority had not been. Hearn, in essence, responded that seniority had been followed, but that she had to take several factors into account and that she was human and that an error was always possible. There were additional text messages exchanged not only between Holcomb and Hearn, but also between Holcomb and Dorothy Machira, Respondent's director of Staff Development. (GC Exh. 8; 9.) I find it unnecessary to repeat, word for word, what the text messages said, for there is nothing in them that ultimately contradicts either Hearn or Machira's testimony, or the documentary evidence. This is particularly true with regard to Machira, who in essence only acted as an intermediary between Holcomb and Hearn in this instance to relay or explain what Hearn was telling her.[53] In light of Machira's undisputed testimony that she does not have supervisory authority over Hearn, or input in how schedules are made, and that CNAs do not report to her, I find Machira's involvement in this exchange, as well as her over-all testimony of how CNAs are scheduled or cancelled, to be of little probative value or consequence. (Tr. 586–587.)[54]

Hearn testified at length, over the course of 2 days, about the way she makes schedules and takes into account a number of factors in determining how many nurses to schedule on a particular day, including whether to float, reduce hours or cancel shifts. According to Hearn, the total number of nurses scheduled on any given day, which includes CNAs, as well as LVNs and RNs, depends on the census, which is the number of patients, or beds occupied, on a given day. One of the things that Hearn is tasked with keeping track of on a daily basis is the "Patient Per Day" ("PPD") ratio, which is deduced by taking the total number of nursing hours, divided by the census (number of patients).[55] In order to stay within budget, the target PPD is 3.47, with anything above that level considered to be "over budget," which means that the lower the census the higher the PPD will be, unless staffing is reduced for the day. Once she determines that the PPD ratio is too high, Hearn must reduce the number of nursing hours, which is accomplished by floating, reducing the number of hours on a nurse's shift, and/or cancelling shifts altogether. According to Hearn, it is a factor that can change from day to day, given that patients could be leaving the facility or checking in, particularly on the West station, where patients tend to stay for shorter terms. When determining how to reduce the number of nursing hours as a result of a low census, Hearn testified that she goes by seniority, with less senior nurses being reduced first, and then going up the list on a rotation basis, so that everyone is eventually affected before starting on the bottom of the list again.[56] Before she chooses which nurse to reduce or cancel, however,

[49] Hearn testified that the float was mandated by low census counts, particularly on the West station. Holcomb confirmed not only that Stephens had been floated to the East station on June 25, then left and went home, but generally confirmed that cancellations were occurring at that time because of the low census. (Tr. 156–157; 165.)

[50] Stephens did not testify, and no evidence or testimony was proffered as to why he refused to float on that day and left early, so no conclusions can be derived from this event. There was testimony that he had been ill the day before and a relative of Stephens was a patient in this station, which in the past had precluded his being assigned to this station, because of the potential conflict of interest. (Tr. 1081–1082.).

[51] Hearn admitted, however, that in the past some probationary employees who had worked only 2 to 3 weeks <u>may</u> have been floated (Tr. 1144–1045).

[52] Agwara, hired on 7/18/13, has more seniority than Holcomb, hired on 9/13/14 (Jt. Exh. 2(a) & (b)). Since Agwara's float to the West station was the result of his worker's compensation injury, however, it would appear that seniority would not be a factor in any event.

[53] Indeed, when asked why she was brought into this discussion by Holcomb, Machira explained that nurses consider her a "Mother figure" or "go-to person," because she tries to help them with their problems. (Tr. 587.)

[54] I find curious, and reject, General Counsel's argument that Hearn's and Machira's testimony should not be credited because their text messages (GC Exhs. 8 & 9) did not convey the full explanation for the shift cancellation later proffered in their testimony. As is by now well understood, text messaging is a form of communication in which the usual rules of grammar, punctuation, syntax and spelling are routinely butchered for the sake of expediency, brevity and speed. Needless to say, legal-caliber explanations or discussions are neither expected nor intended in such messages. To the contrary, any text message so conveyed should be the one viewed with a high degree of suspicion.

[55] The total number of nursing hours includes all nurses, including RNs, LVNs, and CNAs, in all three shifts in a day.

[56] Hearn admitted, however, that if a couple of months go by without reductions or cancellations, the list will start from the bottom again, presumably so that she doesn't have to keep track of ancient reductions/cancellations. There is no exact time limit as to how long she will go back in time.

Hearn runs the "numbers" by her superiors, the director of nursing and/or administrator. She will inform them what the census/PPD is, and recommends how many reductions/cancellations are necessary. If her superiors approve, she will then proceed to choose, in the manner described above. Once she chooses which individuals will be reduced or cancelled, she again runs the names by her superiors. According to Hearn, her superiors can decide if the numbers justify any cuts, and if they do, they can accept or alter her choices for reduction or cancellations. By Hearn's estimate, her superiors go along with her recommendations about 50 percent of the time. All of this must be accomplished late in the day, before she goes home about 5 p.m., because she needs to notify the nurses who are being cancelled the next day, although sometimes this is not feasible, in which case the nurses are notified first thing in the morning. (Tr. 999–1001; 1047–1048; 1174–1176; 1198–1203.)

Hearn testified that she decided that Holcomb should be cancelled on June 26 based on the low census and the fact that it was Holcomb's turn to be cancelled. She testified that all other nurses had either been cancelled previously or had had their hours reduced, whereas Holcomb had not had any reductions or cancellations. This was due, in part, to Holcomb having been out of the CNA rotation during the 30 days she had been acting social services director. As described earlier, in deciding whose hours should be reduced or who should be cancelled, Hearn tried to balance the nurses' hours so that at the end of each pay period, or month, they would have roughly worked the same amount of hours. In making the determination on how to apply the rotational seniority policy for cancellation or hour-reduction purposes, Hearn initially testified that she looked at each shift, by station. In other words, she looked at each station separately and decided whose turn it was to be cancelled or be reduced (Tr. 1001–1004; 1023). Later, towards the end of her lengthy testimony, Hearn apparently contradicts this, testifying that she looked at all the CNAs in the same shift, including all 3 stations, in deciding whose turn it was to be cancelled or be reduced. (Tr. 1237–1239.)

Despite this apparent contradiction, I found Hearn to be a credible witness who attempted to give forthright answers about her job as scheduler, a job that appears at times to be more of an art than an exact science. Particularly when the census is low, Hearn must make quick decisions in a short amount of time at the end of the day in order to prepare—and get final approval for—the next day's schedule. There are a number of variables that she must account for, including the census/PPD, the patient/nurse ratio in each station, rotational seniority, and the number of hours worked by the nurses.[57] In finding Hearn to be a credible witness, I specifically credit her testimony that she chose Holcomb to be cancelled on June 26 because she believed it was her turn to be cancelled, taking into account the above-described factors.[58]

12. The duties and responsibilities of Collins and Castellano

As discussed above, Ricki Collins and Jac Castellano are alleged as Section 2(11) supervisors and Section 2(13) agents of Respondent, who were involved in some of the events described above. Accordingly, their duties and responsibilities are described below.

Collins, an LVN whose title is Case Manager, testified that her duties are to handle HMO insurance-related matters regarding the facility's patients, which includes setting up the clinical needs of patients in coordination with their HMOs. She reports directly to the director of nursing and the administrator. She informs managers and supervisors who will be discharged on what day, and who is checking in. In her capacity as Case Manager, she attends daily briefings called "Stand Up" meetings (SUMs) which are attended by department heads—and others. She further testified that she works alone, that she is not part of a "department" where others work, nor is a "department head," although she shares an office with Castellano. She testified that she attends SUMs to discuss clinical matters with managers, and generally denied having any of the supervisory indicia described in Sec. 2(11), such as authority to hire, fire, discipline, etc., or to recommend such actions. Perez, the interim Administrator during the events described herein, also testified that Collins lacks the above-described supervisory authority, and confirmed that Collins attended SUMs for clinical reasons. (Tr. 653–657; 668–669; 670–671; 952–954.)[59]

Castellano, who is an RN, testified that his title is MDS Coordinator, and that his duties are to assess Medicare patients and report to the State regarding these patients. Like Collins, he generally denied having the Sec. 2(11) supervisory indicia discussed above, although he testified that he believes he has the authority to discipline or "counsel" or to recommend such, although he has not exercised that authority.[60] Castellano also testified that he has an assistant who works only on Saturdays in the MDS department and that he can "assign" work to this individual, although he did not provide any examples of work assigned or other directives he has issued this individual. He attends SUMs for the same reason Collins does, to provide the participants with clinical information regarding patients. As with Collins, Perez testified that Castellano lacks any of the Section 2(11) supervisory authority. (Tr. 624–630; 635–639; 953–954).[61]

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[57] As conceded by Hearn to Holcomb in one of her text messages on June 25, she is human and could make mistakes in these circumstances, although she did not admit making a mistake in this instance. (GC Exhs. 8; 9.)

[58] In its brief, the General Counsel (GC) argues that the monthly schedules and daily staffing sheets produced under subpoena and made part of the record show that several CNAs who worked on June 26 and had less seniority than Holcomb had not been previously cancelled nor had their hours reduced. If true, this would undermine Hearn's testimony and show pretext. For the reasons I will discuss below, I do not believe the cited documents clearly show what the GC contends, nor undermine Hearn's testimony.

[59] It should be noted that no evidence was introduced or proffered that Collins possessed or exercised any of the Sec. 2(11) supervisory authority, as will be discussed below.

[60] Nor did he testify on what basis he believed he had such authority.

[61] As with Collins, no evidence was introduced or proffered that Castellano actually possessed or exercised any of the Sec. 2(11) supervisory authority, as will be discussed below.

C. Discussion and Analysis

1. The alleged solicitation of grievances and promise of benefits

Paragraph 6(a) of the complaint alleges that on June 24, Chief Operating Officer Mettler solicited grievances from Anderson, and impliedly promised to grant increased benefits or improved terms and conditions of employment, in order to dissuade employees from supporting the Union. As discussed in the Facts section, I credited Mettler's version of his conversation with Anderson as being more accurate. Anderson had complained to Perez about the interim director of nurses (DON), Ramsini, a complaint that Perez had relayed to Mettler, who then asked Anderson how things were going. Anderson repeated her complaint (about Ramsini) to Mettler, who told Anderson that he would "look into" it.

Under these circumstances, I conclude that Mettler asking Anderson how things were going—something that he routinely asked employees and that in this case was arguably prompted by Anderson's complaint—does not constitute a solicitation of grievances.[62] Nor does Mettler's statement, under the circumstances, that he would "look into" Anderson's previously voiced and repeated complaint, constitute a promise of increased benefits or improved working conditions. *Flex-N-Gate Texas, LLC*, 358 NLRB 622, 628 (2012); *MacDonald Machinery Co., Inc.*, 335 NLRB 319 (2001); *Best Plumbing Supply, Inc.*, 310 NLRB 143, 148 (1993). Under the circumstances, I find Mettler's reaction (to Anderson's complaint) was a natural human response—with the alternative being to remain in an unnatural and bizarre stone silence in the face of such personally-conveyed complaint. To rule otherwise in these circumstances would raise the specter of employees easily baiting or goading employers into committing automatic, ready-made unfair labor practices by raising unsolicited complaints and then claiming that the employers impliedly promised to resolve their grievances when they respond by stating they would "look" into them. Such is not the intent or purpose behind Section 8(a)(1) of the Act, which is to proscribe truly coercive conduct.[63]

Accordingly, I conclude that Respondent did not violate Sec. 8(a)(1) of the Act in this instance and the complaint paragraph 6(a) should be dismissed.[64]

2. Directive not to visit other areas of the facility

Paragraph 6(b)(i) of the complaint alleges that on or about June 29, Perez instructed CNAs not to visit other areas of the facility or talk to employees in these areas, in order to discourage union activity. As discussed above in the Facts section, I credited the testimony of Holcomb and Anderson, who testified that on or about June 29, during a "huddle" with CNAs, Perez announced what amounted to a new rule prohibiting the nurses from visiting other areas of the facility unless they had a specific work-related reason to do so. I also found, crediting Holcomb and Anderson, that prior to the implementation of this new rule, CNAs (as well as other employees) would routinely visit other areas or stations throughout the facility either for work or nonwork-related reasons, sometimes just to "chit-chat" with colleagues. After the implementation of this rule, even CNAs that had valid work-related reasons to be in other areas would often be stopped and questioned by supervisors regarding the reason for being out of their "area."

In order to determine the validity of this new rule, implemented during the pendency of a union campaign, I must first determine, pursuant to the Board's ruling in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful, with some limited exceptions, such as where the employer has a compelling work or safety-related reason for the rule. If the rule does not explicitly restrict Section 7 rights, I must examine the following criteria: (1) whether employees would reasonably construe the rule to prohibit (or restrict) Section 7 activity; (2) whether the rule was promulgated in response to union activity; (3) whether the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage*, at 647; *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007). See, also, *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013).

The rule announced by Perez does not explicitly restrict Section 7 activity. It does, however, run afoul of the first and second criteria under *Lutheran Heritage*, and most likely the third criteria as well. Thus, there is no doubt that this rule was implemented in response to the union campaign, having been announced only a few days after the election petition was handed to Perez on June 24, and filed with the Board on June 25. The reason for this new rule is fairly obvious: to disrupt employees' efforts to communicate with each other and thus stymie their organizational efforts. It is also fairly clear that this is exactly how employees interpreted the rule, as reflected by the credited testimony of Holcomb and Anderson, as a blatant attempt to interfere with their union activity—certainly a reasonable interpretation under the circumstances. Finally, it appears that this rule was enforced and applied to union activity, indeed with employees being harassed even when they had bona fide work-related reasons to visit other stations within the facility.[65]

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[62] Some of the employees that Mettler had asked the same question earlier in the day were not in the bargaining unit, and thus there can be no inference that the purpose of this question was motivated by the Union campaign. Also, other nurses besides Anderson had also raised complaints about Ramsini.

[63] In no way do I imply that this was Anderson's intent, and I have no reason to believe that her complaints were not bona fide and heartfelt. The point is that automatically labeling the above-described conduct as grievance-solicitation or as a promise of benefits could potentially invite such tactics.

[64] As discussed in the Facts section, Mettler admittedly asked Anderson about the Union in this conversation, which would likely be an unlawful interrogation—had such conduct been alleged in the complaint. It was not alleged, nor did the General Counsel make a motion to amend the pleadings or to conform the pleadings to the evidence. Accordingly, I make no findings in this regard.

[65] There is additional evidence, as discussed in the objections portion of this decision, which supports these findings. Thus Anderson credibly testified that Perez was following her around the facility, always hovering near by, anytime she was out and about in the hallways, and interrupting any time she saw nurses together. Perez denied this,

Accordingly, I conclude that by announcing and implementing this new rule, Respondent violated Section 8(a)(1) of the Act.

3. The directive regarding the wearing of union scrubs

Paragraph 6(b)(ii) of the complaint alleges that on or about July 1, Perez instructed employees not to wear scrubs with the union logo (union scrubs), while permitting employees to wear other logs and insignia. As discussed in the Facts section, it is undisputed that Perez instructed employees not to wear the union scrubs. Holcomb almost immediately confronted her, telling her in no uncertain terms that it was their right to wear the union scrubs, giving her an NLRB flyer to that effect. Perez then said she would check with the corporate office—and that was the end of that. There is no evidence that Perez ever retracted her statement, even after she apparently learned (from the corporate office, or whomever she contacted), that it was permissible for employees to wear the union scrubs. There is also no dispute that employees continued to wear the union scrubs on that day and every Wednesday thereafter at least until the day of the election, without apparent interference (with one possible limited exception, to be discussed below). The evidence also shows, according to the credited testimony of Anderson, that Respondent had never restricted the wearing of any logos previously.

Applying the same criteria under *Lutheran Heritage* discussed above, it appears that this new rule was announced in response to employees' union activity, so it runs afoul of the second criteria announced in that case, as well as the third criteria, because employees could reasonably interpret such rule to inhibit their Section 7 rights. Although it appears that the rule was not enforced after Perez first announced it, such lack of enforcement does not cure the initial coercion, because the mere existence of an overly broad rule tends to restrain and interfere with employee rights under the Act. *Custom Trim Products*, 255 NLRB 787, 788 (1981); *Staco, Inc.*, 244 NLRB 461, 469 (1979); *Automated Products, Inc.*, 242 NLRB 424 (1979).

Accordingly, I conclude that by announcing—and not retracting—the rule prohibiting the wearing of union scrubs, Respondent violated Section 8(a)(1) of the Act.[66]

4. The posting of break times on the whiteboards

Paragraph 6(b)(iii) of the complaint alleges that by requiring employees to post their break (and meal) times on the whiteboard, Respondent discouraged employees from engaging in union or protected activity. At the outset, it needs to be pointed out that the evidence does not support a finding that the actual scheduling of CNAs' break times changed, as implied by the complaint (and Holcomb's discredited testimony). All that changed, according to the credited evidence, was that in addition to having their schedules posted on the scheduling notebook, CNAs were now required to also post their break times on the whiteboard. The whiteboards had long contained the room assignments for the CNAs, and now they were required to add their break times, a practice that is standard in the industry, as credibly testified to by Johnson. It is difficult to understand how adding the break times on the whiteboard—information already supposed to be contained in the scheduling binder—could reasonably inhibit CNAs from protected activity.

The General Counsel (and Charging Party) in essence makes an unspoken, yet implied, argument that the employer does not have the right to know where or when its nurses are on break, lest that inhibit their protected activity. Such argument would be brazen with regard to any employer, but particularly so with regard to employers in the healthcare industry, where the health and life of patients may be at stake. Even worse, there is also an unspoken but implied argument that if Respondent had been lax or even negligent by allowing its nurses to schedule their breaks at will, such practice must be allowed to continue during the pendency of a union campaign—any health and safety concerns, or even standard industry practice, be damned. I find these arguments unpalatable and not supported by Board precedent, let alone common sense. In any event, I find that this modest change implemented by Johnson for valid reasons had nothing to do with the union campaign, and did not inhibit protected activity.[67]

In sum, there was no new rule or requirement put in place that mandated something not already required before the union campaign, and I conclude that this directive or rule was not implemented in order to inhibit union or protected activity. Accordingly, I recommend that paragraph 6(b)(iii) of the complaint be dismissed.

5. The change in break schedules in the Housekeeping Department

Paragraph 6(c)(i) of the complaint alleges that on or about June 25, Respondent, acting through Housekeeping Department Manager Juanita Harmon, changed the break and meal times of employees in order to discourage or inhibit their union or protected activity. More specifically, the nature of the allegation is that employees' break schedules were staggered so that they would be taking their break and meals individually rather than

claiming she was just doing her normal rounds. As Anderson testified, she has been in the business for 40 years and knows the difference between a manager making her normal rounds and one following her and monitoring her activities (Tr. 268–269; 314–315).

[66] I believe that a valid argument could be made that if Perez immediately after she announced the rule—or shortly thereafter—had retracted it, and informed the employees that it was permissible to wear the union scrubs, such violation would have been effectively cured. As it stands, however, Perez never made such announcement, even after she learned the Respondent had no right to make such a rule under the circumstances.

[67] The General Counsel argues, inter alia, that the schedule changes discussed in this allegation and other similar allegations related to schedule changes should be reviewed under the analytical framework discussed in *Lutheran Village*, supra. This is incorrect. The *Lutheran Village* framework is proper when analyzing work rules that govern employee *conduct*, not other work rules (or directives) that govern the scheduling and actual performance of work. Accordingly, in circumstances such as in this particular case, the test is whether the employer instituted the rule or directive in order to interfere with employees' union or protected activity, not the three-pronged test described in *Lutheran Village*. See, e.g., *Invista*, 346 NLRB 1269, 1270–1271 (2006); *Dilling Mechanical Contractors, Inc.*, 318 NLRB 1140, 1144–1145 (1995).

together, therefore inhibiting their interactions, in order to stymie union or protected activity.

The above-described allegation hinges upon a finding that the break schedule changes—which are not disputed—occurred in response to, and as a result of, the union campaign. Otherwise, it would be difficult, if not impossible, to conclude that the changes were undertaken to inhibit union or protected activity. General Counsel thus "bet the farm" on a finding that Harmon announced and implemented these changes on or after June 25, after the union petition had been delivered and filed. As discussed in the Facts section, however, the credited testimony of Harmon and four additional employees establishes that Harmon announced the changes in question during a meeting on June 10, 2 weeks before there is any evidence that Respondent knew about the union campaign. Moreover, the credited testimony also established that the staggered system of breaks that Harmon announced on June 10 were consistent with her practice in 2013–2014, during her first stint as Housekeeping Manager. A different manager had taken over that department in November 2014, and had essentially changed her practice with regard to breaks. When Harmon again took over the department in early June 2015, she re-instituted the practice of staggered breaks. Harmon credibly testified that there were two primary reasons for her using a system of staggered breaks. First, she believed that California labor law mandated that employees take regular breaks and meal breaks within certain time window limits, and she therefore scheduled the breaks according to their starting times. Second, she wanted a housekeeper to be available at all times in cases of emergencies, such as spills, something that would be precluded if all housekeepers were on break at the same time.[68]

In sum, contrary to the allegations of the General Counsel, the evidence shows, and I conclude, that Harmon announced the new break schedule in the Housekeeping Department before Respondent knew about the Union campaign, and was therefore not motivated by it. The scheduling change was therefore undertaken for valid business reasons, and did not violate Section 8(a)(1) of the Act.

6. The incident involving "Andres"

Paragraph 6(c)(ii) of the complaint alleges that Harmon instructed an employee not to wear a union scrub, while permitting others to wear other logos. What truly occurred, however, is that Harmon apparently instructed a housekeeping department employee, Andres, to take off a union scrub he was wearing and then gave him a white garment to wear, which was the "color" associated with the management campaign against the union.

As discussed earlier in the facts section, I credited Holcomb's testimony that she overheard Harmon telling Andres to take off his union scrub, and directing him to put on a white garment instead. As is well settled, an employer violates Section 8(a)(1) of the Act when it instructs employees to remove union shirts, logos or buttons absent a compelling business reason. See, e.g., *AT&T*, 362 NLRB No. 105, slip op. at 3–4 (2015); *W San Diego*, 348 NLRB 372 (2006); *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007). Likewise, it is a form of interrogation, and thus coercive, to offer—let alone direct—an employee to wear pro-employer buttons or attire. *Pillowtex Corp.*, 234 NLRB 560 (1978); *Tappan Co.*, 254 NLRB 656 (1981).

A threshold problem exists in this instance, however, in that it isn't clear that Andres—who indisputably cannot communicate in English—understood what he was being told to do, or even understood the implication of wearing a union scrub or pro-employer attire.[69] Needless to say, coercion is not legally possible where an employee is not aware of the coercive act, either because the employee does not witness it or because the employee does not understand the language used to make the allegedly coercive statement. Andres did not testify, so it is impossible to determine whether he was coerced by Harmon's conduct.[70] Nonetheless, this does not mean that Respondent is exonerated in this instance, because another employee who clearly understood what was said—and its implications—witnessed this incident: Holcomb, who was thus arguably coerced.

Accordingly, I conclude that the employer violated Sec. 8(a)(1) of the Act by instructing Andres, within earshot of Holcomb, to take off the Union scrub and to wear instead pro-employer attire.

7. Creating the impression of surveillance

Paragraphs 6(d), 6(f), and 6(g) of the complaint allege that on separate occasions, acting through different supervisors or agents, Respondent created the impression that its employees' union or protected activities were under surveillance.

With regard to paragraph 6(d), the credited testimony and evidence shows that Rita Hernandez, Respondent's director of marketing and admissions (and admitted supervisor), on or about July 11 told CNA Danielle Dangerfield to be careful, because the cameras throughout the facility were voice-activated and were monitoring employee conversations. The fact that the cameras, as I have previously concluded, were not indeed operational, is not significant in reaching the conclusion that the impression of surveillance was created by making employees believe that they were—and being used to monitor them.

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[68] In its brief, as well as during trial, the General Counsel attacked the validity of Harmon's understanding of California law or the need to have a housekeeper available at all times. Since the evidence shows that Harmon's actions took place long before there was knowledge of union activity—and therefore not motivated by it—her possible misunderstanding of California law is not relevant.

[69] In no way is this meant to imply that the inability to speak English reflects on an individual's intelligence or ability to perceive the significance of events occurring around him/her. In these circumstances, however, because of the legal implications described below, the burden of proof requires that certain elements necessary to establish a violation be proven by the preponderance of the evidence—and Andres' inability to communicate in English clouds that prospect.

[70] The General Counsel contends that it was Respondent's burden to call Andres as a witness. I believe that the opposite is true, since the General Counsel bears the burden to establish that coercive conduct took place, which in this instance meant establishing that Andres understood what was occurring.

The test in determining whether a statement constitutes creating the impression of surveillance is whether the employees could reasonably assume from the employer's statements or conduct that their activities had been placed under surveillance. See, e.g., *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op. at 3 (2014); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004); *Flexsteel Industries*, 311 NLRB 257 (1993). In the above-described circumstances, I conclude that it was reasonable for Dangerfield to assume that Hernandez, a department manager, knew what she was talking about, and thus reasonable for Dangerfield to assume that the cameras were in fact operational and being used to monitor their activities.

Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by suggesting to an employee that the cameras were being used to monitor their activities.[71]

Next, in order to properly discuss the allegations of paragraph 6(f) and 6(g) of the complaint, I must first discuss whether Ricki Collins and Jac Castellano are supervisors and agents of Respondent, as alleged in those paragraphs.

It is well established that the party alleging Section 2(11) supervisory status bears the burden of establishing that the individual in question meets the specific criteria listed in Section 2(11). In this case, as I noted in the Facts section above, the General Counsel has introduced little or no evidence regarding Collins or Castellano that directly—or indirectly—touches upon the supervisory indicia specified in Sec. 2(11). Thus, the General Counsel primarily relies on the fact that Collins and Castellano attended the daily "Stand Up Meetings" (SUMs) to argue the fact that this made them "department heads" and thus supervisors. The General Counsel's argument in this regard is flawed and circular: all department heads attend SMUs, therefore all who attend SMUs are department heads. This is the same flawed logic inherent in the statement "all cats are animals, therefore all animals are cats."[72] Aside from the fact that there is no evidence that *only* department heads attend SMUs, there is no authority for the proposition that a title, without more, conveys supervisory status.[73] As the Board, in rejecting an employer's argument that certain individuals it unlawfully fired were supervisors, stated in *G4S Regulated Security Resolutions*, 362 NLRB No. 134, slip op. at 1–2 (2015):

> Because the Respondent bears the burden of proving statutory supervisory status, the Board must hold against the Respondent any lack of evidence on an element necessary to establish that status. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The Respondent has not proven supervisory status where the record evidence is inconclusive or otherwise in conflict. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Lynwood Manor*, 350 NLRB 489, 490 (2007); see also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Similarly, job descriptions, job titles, and similar "paper authority," without more, do not demonstrate supervisory authority. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (2014); *Golden Crest*, 348 NLRB at 731. And like other statutory indicia of supervisory status, the authority to discipline other employees is not determinative unless it is exercised using independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

Substitute the word "Respondent" in the above paragraph with "General Counsel," and the narrative perfectly captures the state of evidence in the instant case. In sum, I conclude that the General Counsel has not met its burden of establishing that either Collins or Castellano are supervisors within the meaning of Section 2(11).

Additionally, however, I must address the subsumed allegations that Collins and Castellano are "agents" of Respondent within the meaning of Section 2(13).[74] As with supervisory status, the burden is on the party asserting agency status to prove such status, by offering specific evidence in its support. See, e.g., *Pan-Oston Co.*, 336 NLRB 305 (2001). There is no evidence that either Collins or Castellano had actual authority to speak or act on behalf of Respondent. With regard to *apparent* authority, the Board stated as follows in *Hausner Hard-Chrome of Kentucky*, 326 NLRB 426, 428 (1998):

> "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725 (1994), and cases there cited. See also *Alliance Rubber Co.*, 286 NLRB 645, 646 (1987). The test is whether, under all the circumstances, employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426–427 (1987). Under Board precedent, an employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to other employees." *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

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[71] I note that in Hernandez' testimony she admitted that other employees asked her whether indeed the cameras were operational, and she told them they were. It thus appears that word spread fast among the employees.

[72] Notably, Collins worked by herself, a "department" of one, which arguably is an oxymoron.

[73] Indeed, both Collins and Castellano testified that they attended SMUs to provide managers with clinical data, which was part of their jobs. Moreover, Holcomb admitted *she* attended SMUs during the month she was the acting Director of Social Services from mid-May to mid-June. (Tr. 105) If such attendance makes a person a "department head" and thus a supervisor, as the General Counsel contends, this could have significant negative implications for the General Counsel's case as well as the Petitioner's objections case, since this was the time period when Holcomb was actively soliciting cards for the Union.

[74] I would note that the General Counsel did not plead Collins' and Castellano's status as 2(13) agents as an alternative or separate theory, only alleging that they were both 2(11) supervisors *and* 2(13) agents. The General Counsel did not specifically address section 2(13) agency status on brief either, apparently assuming that proving section 2(11) status was sufficient—which it did not do, as discussed above. In light of the fact that the criteria differ, however, I will address this subsumed allegation.

There is no specific evidence that Respondent held out Collins or Castellano as members of management, although it appears that they are part of the administrative staff. Likewise, there is no specific or persuasive evidence that Respondent held out Collins or Castellano as "conduits" for transmitting information from management to other employees, particularly since neither Collins nor Castellano routinely transmitted work-related information to employees or directed other's work.[75] I would note that neither Collins nor Castellano, nor their specific titles or positions, were explicitly excluded from the bargaining unit description in the election (see GC Exh. 1(ii)), although the unit description excludes "MDS Nurses," which could cover Castellano, and LVNs, which could cover Collins, as well as "managerial employees," which could cover both. There is no evidence as to whether or not they voted in the election. In sum, taking all circumstances into account, the evidence is inconclusive as to whether Collins and Castellano had apparent authority to speak or act on behalf of Respondent.

Since it is again the General Counsel's burden in this regard, I conclude that the evidence is insufficient to establish that either Collins or Castellano were agents within the meaning of Section 2(13) of the Act. In light of this conclusion, I find that Respondent cannot he held liable for the conduct described in paragraphs 6(f) and 6(g) of the complaint, which I recommend be dismissed.

8. Surveillance through the use of video cameras

Paragraph 6(e) of the complaint alleges that Respondent engaged in actual surveillance of its employees through the use of its security cameras in the facility. As discussed in the Facts section, however, I found that credible and substantial evidence established that the video cameras had been deactivated before the advent of union activity, and that such cameras were never operational during the relevant time period. Thus, it is not factually or legally possible to have engaged in surveillance in such manner.

Accordingly, I recommend that complaint paragraph 6(e) be dismissed.

9. The removal of union literature

Paragraph 7(a) of the complaint alleges that Respondent has a rule prohibiting the posting of literature without first obtaining permission from management. There is no dispute that this rule exists and the General Counsel has not alleged, nor contends, that this rule is unlawful or facially invalid. Moreover, during the course of the trial, the parties jointly moved for the admission of other work rules that limited or prohibited the distribution or posting of non-work related literature. (Jt. Exh. 8.) Again, the General Counsel has not alleged that these rules are facially invalid.

Paragraph 7(b) of the complaint alleges, however, that Respondent prohibited the posting of pro-union flyers and literature, while at the same time permitting the posting of "anti-union" flyers and literature. As described in the Facts section, this is not what actually occurred. Although it is not disputed that Respondent prohibited the posting of union literature, and proactively had it removed, the "anti-union" literature that was posted or distributed during the campaign was posted by Respondent as part of its election campaign. Quite simply, Respondent has an essentially unfettered right, under Section 8(f) of the Act, not to mention the First Amendment, to conduct a campaign against the Union and post such "anti-union" literature in its own property, so long as the message is not threatening or coercive. This it can do while at the same time prohibiting *all* other postings by employees or third parties, including unions—so long as such prohibition is not selectively or discriminatorily enforced, as described below.

The language in paragraph 7(b) of the complaint alleges that Respondent prohibited union literature from being posted while allowing antiunion literature to be posted, which plainly suggests that a third party, such as an antiunion employee group, was allowed to post its literature. The evidence shows instead that the antiunion literature was posted exclusively by Respondent, who obviously did not violate its own rules (presumably, Respondent gave itself permission to post this literature). Such conduct is perfectly valid and legal, so a strict reading of paragraph 7(b) would require me to recommend dismissal of such allegation.

The credited evidence introduced at trial, however, shows that a violation of the Act occurred, but under a different premise. As such, this evidence can rescue the General Counsel from its pleading folly, because this matter was fully litigated.[76] In these circumstances, I am permitted to find a violation on a different theory than explicitly pleaded by the General Counsel. *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op at 2 fn. 6 (2015); *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015).

As discussed in the Facts section of this decision, the credited testimony shows that Respondent had routinely allowed non-work related postings by employees in its bulletin board(s), as well as in other locations. These postings included announcements of church events, children's school fund-raisers, Girl Scout cookie sales, "Pot-Lucks," "Baby Shower" parties, weddings, and funerals. As the Board explained with regard to such policies and practices in *Wal-Mart Stores*, 340 NLRB 703, 709 (2003):

> . . . In an early decision, the Board recognized that an employer "may uniformly enforce a rule prohibiting the use of its bulletin boards by employees for all purposes." *Vincent's Steak House*, 216 NLRB 647 (1975). The Board also noted however, that when an employer, by formal rule or otherwise, permits employees to post nonwork-related messages on its bulletin board, the employer has demonstrated that its proper-

[75] Although Collins and Castellano admitted that during SMUs policies were sometimes discussed that would later be relayed to the staff, there is no evidence that either Collins or Castellano played any role in the announcement or conveyance of such policies to employees.

[76] It should be noted that the General Counsel made no attempt to amend this inaccurate pleading even though it must have been aware of the evidence in advance of trial, nor requested that the pleadings conform to the evidence at the conclusion of the trial. I also note, however, not only that Respondent vigorously cross-examined General Counsel's witnesses who testified about these matters, but called several witnesses of its own in rebuttal.

ty and managerial rights are not jeopardized by the employee posting. The Board has, thus, held that while employees do not have a statutory right to use an employer's bulletin board, such use receives the protection of the Act when the employer permits them to use bulletin boards for posting personal notices. In these circumstances, an employer may not remove union notices. *Container Corp. of America*, 244 NLRB 318 fn. 2 (1979); *Doctors Hospital of Staten Island, Inc.*, 325 NLRB 730, 735 (1998). Accordingly, if an employer allows employees space or furnishes space to post items of interest, it may not impose content based restrictions that discriminate between posting of Section 7 matters and other postings. See *Vons Grocery Co.*, 320 NLRB 53, 55 (1995); *Amelio's*, 301 NLRB 182 (1991); and *Central Vermont Hospital*, 288 NLRB 514 (1988).

The evidence shows that Respondent routinely and repeatedly removed from its bulletin board(s) and other places union literature that had been placed there by pro-union employees during the campaign. In light of this, I conclude that Respondent discriminately enforced its posting and distribution rules, and therefore violated Section 8(a)(1) of the Act.

10. Holcomb is floated one day and cancelled the next

Paragraph 8(a) of the complaint alleges that on June 25, Respondent floated Holcomb to work on the East Station, and paragraph 8(b) alleges that on June 26, Respondent cancelled her shift. Neither of these facts is disputed. The General Counsel alleges that Respondent took these actions in retaliation for Holcomb's union activity, an allegation that Respondent denies, claiming instead that these actions were taken for valid reasons.

I will initially address paragraph 8(a), the "floating" allegation. To provide proper context, I find it important to first recite certain facts that are either not in dispute or that I have credited, as discussed in the Facts section. First, it is not disputed that most, if not all, CNAs are occasionally floated to work in stations other than where they are normally assigned. This is necessitated by shifting workloads and patient counts. Second, the consensus appears to be that working in the East (or Central) station is somewhat more difficult or arduous than working on the West station, where Holcomb is normally assigned. This is because the East and Central stations have "long-term" residents with greater disabilities or who are more incapacitated, whereas the patients on the West station are generally more mobile and less disabled, and are there for shorter periods. There is no evidence that there is a difference in pay for working in any given station. While Holcomb, when she started working for Respondent (in 2014), expressed a preference for working in the West station and was assigned to work there, she admitted that in the past she has *volunteered* to work on the other stations—indeed, during cross-examination she admitted in her Board affidavit that she had volunteered to work on the East station on *several* occasions.

On June 24, about 2:30 p.m., a group of about 20–30 employees, and perhaps as many as 50, gathered at the lobby of the facility and presented Perez with a copy of the petition that the Union was about to file with the Board (and actually filed the next day). Although Holcomb and Anderson where the main union organizers, it was Anderson who spoke for the group, read the petition to Perez, and led the group in a chant. Although Holcomb was at Anderson's side, so were many other employees who took part in this openly prounion display.

Some time late that afternoon, consistent with the credited testimony of Hearn, Respondent's scheduler, she prepared the schedule for the next day, as was her practice. Because the census (patient count) was low, she decided to float two CNAs, D'Angelo Stephens and Holcomb, to the West Station on the following day, June 25. I credited Hearn's testimony that she decided to float Stephens and Holcomb to the East station based on who had the least seniority in the West station (and I note that Stephens has greater seniority than Holcomb).[77] The next day, on June 25, Stephens went home shortly after his shift started, and Anderson volunteered to take his place. Also, on June 25, a CNA who normally works in the East station, Agwara, had been floated to the West station because he was on "light duty" restrictions based on his worker's compensation injury.

The General Counsel alleges that Respondent floated Holcomb to the East station on June 25 for unlawful discriminatory, retaliatory reasons, on account of her support for the Union. Citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel asserts that it has met its initial burden to prove, by preponderance of the evidence, that the employees engaged in protected activity, the employer knew about it, and the adverse employment action at issue was motivated by it. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.*, 294 NLRB 924, 956 (1989).

I disagree with the General Counsel that it has met, in this particular instance, its initial burden under *Wright Line*, for the following reasons. It is clear that Holcomb was engaged in protected activity—indeed she was one of the main union organizers. It is also apparent that Respondent, as of 2:30 p.m. on June 24, knew *she* (as opposed to others) was engaged in protected activity, since she was present at the employee rally when Perez was handed the union petition—indeed she was standing next to Anderson, who spoke for the group. I am not persuaded, however, that in this instance Respondent took an *adverse* employment action against Holcomb, or that the evidence shows that such action was for an unlawful motive.

Given the evidence, I conclude that working on the East station for <u>one</u> shift (7.5 hours), doing work that all CNAs <u>must</u> do

[77] Two CNAs with less seniority than Stephens or Holcomb, Brasil and Afoa, remained in the West station on June 25. Hearn testified, however, that they were new hires in their probationary period, and that it was her policy not to float such employees, with some occasional exceptions.

as "floats" on occasion, and for which she had *volunteered* on several occasions in the past, was not an adverse employment action. The work in that station, while perhaps more challenging, is part of the regular work required of all CNAs as part of their employment with Respondent. After all, it is not credible to argue that going from the West station to the East station for one shift was onerous and egregious, as if Holcomb had been forced to abandon the soft comfort of an executive suite to work in the belly of a coal mine. If such were the case, it would be difficult to imagine that Holcomb would have volunteered to work there in the past, just like Anderson did on that same day to replace Stephens when he dropped out. Accordingly, I find that such assignment was not an "adverse" employment action, and even if it was, it was truly de minimis. Additionally, I would note that there is no evidence of animus, such as threats, specifically directed at Holcomb or at any other Union supporter. While it is true that animus may be inferred by circumstantial evidence, such as the timing of this event, the very short span of time that elapsed between the petition being presented to Perez and the June 25 schedule being prepared by Hearn (within a couple of hours), actually weakens the inference, in my view. To conclude otherwise would assume that Respondent quickly mobilized with the swiftness of an impressive military operation, reviewed its retaliatory options, discussed it among managers, conveyed its directive to Hearn—and then chose to hit a puzzling target with a soft velvet glove.[78] Further complicating this scenario, we must further assume that Respondent, by now in full Machiavellian mode, then decided it needed to punish Stephens, who had more seniority than Holcomb, by also scheduling him to work in the "coal mine," in order to provide cover for its scheme.

It simply does not add up, nor makes much sense. While the General Counsel's—and Holcomb's—suspicion of Respondent's motive is understandable in light of the confluence of events, a dispassionate, objective review of the evidence yields a different conclusion. A far simpler, far more believable scenario is that scheduler Hearn, due to low census, needed to balance the station workloads on June 25, and decided, late on June 24, to assign Stephens and Holcomb to the East station for one shift, choosing them on the basis of rotational seniority, as she credibly testified. This is what I conclude occurred. Accordingly, I recommend that paragraph 8(a) of the complaint be dismissed.

The cancellation of Holcomb's shift the following day, June 26, as alleged in paragraph 8(b) of the complaint, however, must be analyzed in a different manner, for a couple of reasons. First, unlike the change of station assignment described above, Holcomb's shift on June 26 was cancelled, and she lost a day's wages, making this an adverse employment action. Second, because Respondent had an additional 24 hours, the timing of the action is, paradoxically, more advantageous to the General Counsel's theory, since Respondent arguably had more time to ponder its options. Thus, a *Wright Line* analysis is proper to determine the lawfulness of Holcomb's shift cancellation.

[78] After all, at this point, it was Anderson, not Holcomb, who had been the open, public voice of the employee's movement, having been the spokesperson for the group during their encounter with Perez.

As discussed above, it is clear that Holcomb had engaged in protected activity and that Respondent had knowledge of such activity. Moreover, although there is no evidence of specific animus toward Holcomb in particular (no threats directed at her), there is evidence of general animus against the Union. Such animus can be inferred not only from the timing of this event, but also from other actions taken by Respondent in response to its employees' union activity, as discussed previously. Such actions include directing CNAs not to visit other areas or stations in the facility, creating the impression of surveillance, removing union flyers, and directing employees not to wear, or to remove, their union scrubs. Under *Wright Line*, once the General Counsel has established protected activity, knowledge of that activity, and animus, an inference is warranted that the employee's protected activity was a motivating factor in the adverse employment action. The burden then shifts to the employer to establish, by a preponderance of the evidence, that its employment action would have been taken even in the absence of protected activity. *Seattle Seahawks*, 292 NLRB 899 (1989). For the reasons discussed below, I conclude that Respondent met this burden.

As described earlier in the Facts section, I credited Hearn's testimony that she chose to cancel Holcomb's shift on June 26 because she truly believed that it was Holcomb's turn to be cancelled. I credited Hearn's testimony not only because I believed that she was testifying truthfully based on demeanor and other similar factors, but because the evidence tended to support her testimony. This evidence, while not completely free of doubt, on the whole supports Hearn's explanation for her actions.

The evidence shows that on June 26 the census was low, and that a corresponding adjustment on the number of nurses scheduled to work was necessary.[79] Hearn testified that in applying rotational seniority in order to determine whose turn it was to have hours reduced or be cancelled altogether, she kept track of who had been subjected to such reductions/cancellations in the recent past, and then chose the next least senior person. Holcomb testified that she had last had her hours reduced in January, 5 months before. Moreover, since she had been off the CNA schedule rotation for about 30 days from mid-May to mid-June while she served as acting Director

[79] The census was 106 that day, meaning that there were 106 out of 177 beds occupied in the facility, a fairly low number in comparison to the previous few weeks and months. In its brief, the General Counsel argues that on other dates when the census was this low (106), 4 CNAs had been scheduled to work on the West station, whereas on June 26 only 3 CNAS were scheduled to work there. The General Counsel in essence argues that Respondent (Hearn) deliberately understaffed that station on June 26 in order to retaliate against Holcomb. This argument is unsupported by the evidence. First, the census reveals the total number of patients in the facility, not just the West station, and the daily sheets do not reflect the number of patients in each station. The number of nurses assigned to each station on any particular shift depends on the total number of patients in each station, because certain patient/nurse ratios must be maintained, both by practice and by law. Moreover, to suggest that Respondent would intentionally violate Federal and State health laws and regulations and endanger the health and safety of its patients in order to punish Holcomb for her union activity is completely devoid of evidentiary support.

of Social Services—during which she worked a steady 40 hours a week—she had not been subject to cancellations or reductions of hours, unlike all other CNAs. Hearn testified that when she decided that 2 shifts needed to be cancelled on June 26 because of the low census, she chose two CNAs for the cancellation: Holcomb and another CNA, Yolanda Smith, both who were then placed "on call" so they could be called to substitute if a scheduled nurse could not work (with Holcomb having first right of refusal). In choosing Holcomb and Smith to be cancelled, Hearn credibly testified that she chose them because they were, of the nurses available to work that day, the two who had not previously been reduced or cancelled, according to rotational seniority. Despite lengthy cross examination of Hearn, who was on the stand for the better part of 2 days, neither the General Counsel nor the Charging Party Union was able to establish that this was not the case.

In its posthearing brief, the General Counsel names seven CNAs whom the General Counsel argues were scheduled to work on June 26, even though they were less senior than Holcomb and had neither been cancelled nor reduced since April—according to the General Counsel's reading of the daily staffing sheets and monthly schedules: Cristal Gonzalez; Sheila Johnson; Sherri Matthew; Rita Malouf; Edison Hapita; Casmir Nzewuji; and Motu Afoa. Of these seven individuals, only Afoa was discussed during Hearn's testimony, because Afoa was the only one whom Hearn was asked about. Indeed, contrary to the assertion of the General Counsel, Hearn's testimony established that Afoa's hours had been reduced on June 19 (Tr. 1093). This testimony underscores a distinct problem with the General Counsel's assertions regarding what the records (daily sheets and monthly reports) show regarding these seven individuals. Contrary to the General Counsel's assertion on brief, my review of the daily sheets/monthly schedules does not clearly establish that these individuals had not been cancelled or had their hours reduced during the period from April to June 25. A significant part of the problem is that these records contain notations, some handwritten, and symbols whose meaning is not completely clear nor explained by testimony. The monthly schedules, across the columns corresponding to the names of the above-named individuals, have notations the significance of which is not clearly apparent or discernible, either because the handwriting is not clear or because the meaning of the symbols is not obvious.[80] Moreover, some of the notations, such as in the case of Nzewuji, suggest that this individual indeed had hours reduced. Others such as Matthews, either do not appear on the seniority list, or do not appear on the monthly schedules, as in the case of Malouf.

In short, these records, far from establishing what the General Counsel asserts, are not clear, or, worse, suggest otherwise. I credited Hearn's testimony and found her explanation for her actions to be reasonable, and supported by the evidence discussed on the record. The General Counsel had plenty of opportunity to refute her testimony, during the trial, by pointing out inconsistencies or inaccuracies, through records or otherwise. While the General Counsel can also refute such testimony after the trial by pointing to documentary evidence contained in the record, such records better be clear and unambiguous, lest the General Counsel run the risk that its arguments be found not to be supported by the preponderance of the evidence. In this instance, these records are <u>not</u> clear, I conclude. In this regard, it needs to be stressed that the records in question—the 24-hour daily staffing sheets and monthly schedules— were in the General Counsel's possession on November 9, the day the trial commenced. Hearn testified on November 17 and 18, more than a week later. Thus, General Counsel had plenty of opportunity to digest these records and zero in on that evidence which it believed, or suspected, might advance its case. If these records were ambiguous, there was a perfectly valid and unassailable method to clarify them: ask the witness, in this case, Hearn. Her answers might have helped or hindered the General Counsel's theories; as things stand, we will never know.

Moreover, even assuming, arguendo, that an individual or two who were less senior than Holcomb may have escaped Hearn's attention, I conclude that this is precisely what happened, as opposed to a willful, intentional act on her part (or Respondent's part) in order to retaliate against Holcomb. I base this conclusion the credited testimony of Hearn, who I found had made what at the time she believed was the correct call. As discussed previously, the record shows that scheduling on short notice, under the fast-changing daily circumstances, was more of an art that an exact science, and one that Hearn attempted to perform in good faith. It is possible, as she admitted in one of her text messages to Holcomb, that she could have made a mistake. In these circumstances, I find that if indeed a less senior individual than Holcomb was passed over for cancellation, it was the result of an oversight, and not evidence of pretext.

In light of the above, I find that Respondent met its burden of persuasion, under *Wright Line*, to establish that the action taken with regard to Holcomb—the cancellation of her June 26 shift—would have been taken even if she had not engaged in protected activity. The ball was thus placed back squarely in the General Counsel's court. The General Counsel had the opportunity to refute such defense, such as by establishing that the reasons given for the action were pretextual. I conclude that it failed to do so.

Accordingly, I conclude that Holcomb's June 26 shift was not cancelled for an unlawful reason, and therefore recommend that paragraph 8(b) of the complaint be dismissed.

Before I summarize the findings of fact and conclusions of law in the unfair labor practice case(s), I will next discuss the objections in the representation case.

II. THE OBJECTIONS

The Petitioner/Union filed a representation petition in case 20–RC–154840 on June 25, 2015 (all dates hereafter shall be in 2015, unless otherwise indicated), seeking to represent certain of the Employer/Respondent's employees.[81] A secret ballot

[80] (Jt. Exh.13/262–277.) The monthly schedules are the best source to get a clear picture of the schedules, since according to the credited testimony of Hearn, the daily staffing sheets did not always reflect last-minute changes, such as cancellations or hour reductions.

[81] Pursuant to a Stipulated Election Agreement, the following is the proper collective bargaining unit: All full-time and regular part-time

election was conducted on July 24. The tally of ballots served on the parties at the conclusion of the election showed that of the approximately 93 eligible voters, 41 cast votes in favor of union representation, and 45 voted against such representation. There were 7 challenged ballots, a number sufficient to affect the results of the election. On July 31, the Union timely filed 12 objections to the election. On September 29, the Regional Director for Region 20 of the Board issued his Decision on Challenged Ballots and Objections and Order Consolidating Cases, in which he sustained the challenges to 3 ballots, leaving 4 undetermined ballots, a number insufficient to affect the results of the election. The Regional Director also conducted an investigation of the objections, and determined that objections 1 through 11 raised substantial and material issues of fact, after the Union withdrew objection number 12.

Thereafter, the Union withdrew objections 1, 2, 3, 5, and part of objection 8. Accordingly, I will address the remaining objections according to their numerical order. As discussed below, some of the objections allege the same conduct also addressed by the complaint, and I will refer to my findings and conclusions discussed above as necessary. The objections are as follows:[82]

> Objection No. 4:
>
> The Employer, by and through its agents, including Juanita Harmon on July 22, 2015, and Rita Hernandez during the pre-election period, repeatedly interrogated employees about how they intended to vote and regarding their support for the Union, destroying the laboratory conditions necessary for the conduct of a fair election.

In support of this objection, the Union, in its brief, discusses several instances where admitted supervisors of Respondent allegedly interrogated employees about their support for the Union or their Union activities. The first of these alleged interrogations occurred on June 24, as discussed in the facts section, when Chief Operating Officer Mettler told Anderson that he had heard rumors about employees organizing a union—conduct which Mettler admitted.

Two things are significant about this event. The first, as discussed previously in the fact section, is that this conduct, which would ordinarily be considered a coercive interrogation in violation of Section 8(a)(1), was not alleged in the complaint, and thus I made no findings in that regard. The second, and perhaps more significant factor, is that this event occurred on June 24, prior to the commencement of the "critical period" on June 25, when the Union filed its petition with the Board. Under well-established Board doctrine, the critical period, during which "laboratory conditions" must be maintained, begins on the date the petition is filed, and runs through the date of the election. *Ideal Electric Mfg. Co*, 134 NLRB 1275 (1961); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Generally, conduct that occurs prior to the critical period is not considered objectionable. *Ideal Electric; Data Technology Corp.*, 281 NLRB 1005, 1007 (1986). There are exceptions to this doctrine, however, such as when the prepetition conduct is truly egregious or is likely to have a "significant impact" on the election, *Servomation of Columbus*, 219 NLRB 504, 506 (1975) (violence or threats thereof); *Royal Packaging Corp.*, 284 NLRB 317 (1987) (promises of benefits in violation of the *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) doctrine); or when such conduct "adds meaning and dimension to related post petition conduct," *Dresser Industries*, 242 NLRB 74 (1979). I find, however, that none of these exceptions is applicable here.

Accordingly, I recommend that objection 4 be overruled insofar as it applies to Mettler's interrogation of Anderson.

The next allegation regarding an alleged interrogation involved CNA Danielle Dangerfield and Dorothy Machira, Respondent's Director of Staffing Development. Dangerfield testified that 1 of 2 weeks before the election she was at the solarium of the facility, along with a couple of other CNAs, "Casmir" and "Kim," last names not provided, and patients they were attending to. Machira approached Dangerfield, paper in hand, and stated "I already know how you are going to vote," and then proceeded to ask both Casmir and Kim how they were planning to vote in the upcoming election (Tr. 350–353). Machira denied ever telling Dangerfield that she knew how Dangerfield was going to vote, or asking Casmir or Kim how they were going to vote, although she admitted that she approached other employees to tell them to "vote for us." (Tr. 557–558). I credit Dangerfield, whom I had credited earlier both because I believe her testimony was straightforward and detailed, and because as a current employee of Respondent her credibility is particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971).

The Union also alleges an interrogation involving housekeeper Angela Snipes by Maintenance Director and Environmental Services Manager Juanita Harmon, who is her admitted supervisor. Snipes testified that a couple of days after the petition was filed she was in Harmon's office, and that Harmon asked her how she "stood on voting for the Union, if I was for it or opposed to it." Snipes added that Harmon also told her she wasn't going to ask the other housekeepers, because she did not think it would make a difference. Snipes told Harmon that she had not made up her mind yet. (Tr. 398–399.) Harmon denied this conversation with Snipes, although she acknowledged she may have told employees to "vote with us." I credit Snipes, whose testimony I had credited as to other events, finding her a witness who gave small but significant details about her conversations. In addition to her status as a current employee making her testimony more reliable, I also note that both Snipes and Harmon admitted they had known each other for a while, because they had both worked together for another employer. In

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certified nurse assistants, restorative nurse assistants, cooks, dietary aides, laundry aides, housekeepers, plant operations assistants, activity assistants, medical records assistants, social services assistants, unit clerks, receptionists, and admissions coordinators employed by the Employer at its facility located at 3400 Alta Arden Expressway, Sacramento, California; excluding all other employees, all business office clerical employees, central supply employees, staff schedulers, registered nurses, licensed vocational nurses, MDS nurses, technical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

[82] The objections appear as they are listed in the Attachment to the Erratum issued by the Regional Director on October 28 (GC Exh. 1(vv)).

these circumstances, it is likelier that Harmon felt comfortable in asking Snipes about her thoughts on the Union.

As discussed above, the above-described conduct by Machira and Harmon is not covered by the complaint. Accordingly, since the alleged conduct in this objection was not also an unfair labor practice, the proper standard to apply is whether the alleged misconduct, taken as a whole, warrants a new election because it has "the tendency to interfere with employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Metaldyne Corp.*, 339 NLRB 352 (2003). In making this determination the Board examines several factors: (1) the number of incidents; (2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists on the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157 (2001); *Cedars-Sinai Medical Ctr.*, 342 NLRB 596, 597 (2004).

Applying the above criteria, I conclude, particularly in light of the closeness of the election results, the fact that this conduct was repeated, that several employees witnessed or were subjected to it, and that some of it occurred about a week before the election, that this conduct tended to interfere with the employees' freedom of choice. Moreover, this particular conduct should not be viewed in isolation, but rather as part and parcel of a pattern of conduct that Respondent engaged in, as further discussed below, that in my view could have affected the outcome of the election. Accordingly, I recommend that objection 4 be sustained as it applies to the conduct of Machira and Harmon.

Objection No. 6:

> The Employer, by and through its agents, including Mary Perez, Juanita Harmon, and Theresa Walker, discriminately enforced its no-solicitation and no-distribution rule by allowing anti-union supporters to engage in solicitation and distribution of anti-union literature on work time and in work areas, while denying union supporters the same opportunity. The Employer created a significant imbalance in opportunities to communicate pro-union and anti-union views to employees because of the Employer's active removal of pro-union material from the employee break room, and telling employees not to wear Union logos, which interfered with laboratory conditions for a fair election. This objection is encompassed in Complaint paragraph 7(b).

The above-described objection parallels complaint paragraph 7(b), which as previously discussed above, inaccurately pleads what actually occurred. What actually occurred, as the credited evidence and testimony showed, was that Respondent had in practice allowed employees to post non-work related solicitations or announcements on its bulletin board(s), but prohibited and removed union campaign literature posted in these places during the campaign. I concluded such conduct violated Section 8(a)(1) of the complaint.

A violation of Section 8(a)(1) during the critical period is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election." *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016), and cases cited therein. There is nothing de minimis about the conduct alleged in this instance, which occurred repeatedly, was conducted by high-level managers, and was observed by many employees. Accordingly, I recommend that objection 6 be sustained.

Objection No. 7:

> The Employer, by and through its agent Juanita Harmon, on or about July 15, 2015, discriminately enforced its no-solicitation and no-distribution rule and created an atmosphere of fear and coercion by ordering and requiring a worker to remove pro-union clothing and put on anti-union clothing instead. This objection is encompassed in Complaint paragraph 6(c)(ii).

As discussed earlier, I found that this conduct, which involved housekeeping employee "Andres," as witnessed by CNA Holcomb, violated Section 8(a)(1) of the Act. While this incident, viewed completely in isolation, might arguably be de minimis, I conclude that it is not, particularly when viewed as part and parcel of a wider pattern of conduct engaged in by Respondent, including its announcing of a rule prohibiting the wearing of union shrubs, which I separately found violated Section 8(a)(1) of the Act. Accordingly, pursuant to *Intertape Polymer*, supra, and its predecessors, I recommend that objection 7 be sustained.

Objection No. 8:

> The Employer, by and through its agents, including Rhoda Hearn, Mary Perez, Dorothy Machira, and Juanita Harmon, created an atmosphere of fear and coercion, by reducing employment opportunities and overtime for employees who supported the Union by unilaterally cancelling the shifts of CNAs Camilla Holcomb and Marlene Anderson on June 26 and June 29, 2015, respectively, in retaliation for protected concerted and/or Union activities, and reducing the hours of housekeeping employee Herlinda Medina during the critical period because she supported or assisted the Union and/or engaged in protected concerted activity, thus interfering with the laboratory conditions necessary for the conduct of a fair election. In regards to Camilla Holcomb, this objection is encompassed in Complaint paragraph 8(b).

It should be noted that the Union withdrew the portions of objection 8 that do not involve Camilla Holcomb. Accordingly, I will only address this objection insofar as it relates to Holcomb. As previously discussed in the unfair labor practice section of this decision, I found that the allegation that Holcomb's June 26 shift was cancelled because of her Union or protected activity had no merit, and recommended dismissal of said allegation of the complaint. For the same reasons, I rec-

ommend that objection 8 be overruled.

Objection No. 9:

The Employer, by and through its agents, including Rita Hernandez, on or about July 11, 2015, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election, by creating the impression of surveillance. This objection is encompassed in Complaint Paragraph 6(d).

The Employer, by and through its agents, on various dates in June and July 2015, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election, by engaging in video surveillance of workers who were engaged in protected, concerted and/or Union activity. This objection is encompassed in Complaint Paragraph 6(e).

The Employer, by and through its agents, including Mary Perez, during the critical period, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election, by maintaining a journal about employees' protected, concerted and/or union activity.

The Employer, by and through its agents, including Mary Perez, Theresa Walker, Juanita Harmon, and Juan Cruz, during the critical period, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election, by engaging in surveillance of employees during their meal and rest breaks.

With regard to the portion of this objection encompassed by the allegations of complaint paragraph 6(d) involving conduct by Hernandez, I found that this conduct violated Section 8(a)(1) of the complaint. Accordingly, for the reasons discussed above I conclude that this portion of objection 9 has merit and should be sustained.

Conversely, the portion of this objection encompassed by the allegation of paragraph 6(e), which alleges that Respondent engaged in video surveillance of its employees, I concluded had no merit, since the cameras were never operational during the relevant time period. Accordingly, I recommend that this portion of objection 9 be overruled.

No evidence was introduced about Perez keeping a journal regarding employees' protected activity, so I recommend overruling this portion of Objection 9. Likewise, there is no evidence on the record regarding Walker, Harmon or Cruz engaging in surveillance, so I recommend that this portion of objection 9 be overruled.

On the other hand, there is credible evidence that Perez was actively engaged in surveillance of Anderson and other employees. Anderson credibly testified that she perceived that Perez was following her around the facility, always appearing to be hovering nearby, and that she would interrupt nurses gathered during breaks asking them what they were doing and whether they were actually on break. This conduct only started occurring after the petition was filed, as confirmed by the testimony of Dangerfield, belying Perez' testimony that she was just doing her normal daily rounds. As Anderson credibly testified, she has been a nurse for over 40 years and knows the difference between an administrator making her daily rounds and someone who is following her. (Tr. 267–269; 289–291; 306; 314–315; 354–355.) I conclude this conduct was in keeping with other conduct described herein, which was part and parcel of a wider pattern of similar conduct by Respondent. I conclude that this conduct interfered with the employees freedom of choice and could have affected the results of the election. Accordingly, I recommend that this portion of objection 9 be sustained.

Objection No. 10:

The Employer, by and through its agents, including Mary Perez, Dorothy Machira, Juanita Harmon, and Rhoda Hearn created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election, by isolating employees whom the employer knows to be union supporters, telling other employees not to go near them, and changing break and lunch times to prevent all prospective-bargaining unit employees from speaking with each other during non-work time. This objection is encompassed in Complaint paragraphs 6(b)(i), 6(b)(iii), 6(c)(i), and 8(a).

Regarding the portion of this objection encompassed by the allegations of paragraph 6(b)(i) of the complaint, which alleged that CNAs stopped visiting other areas of the facility, I concluded that such conduct amounted to an unlawful new and overbroad rule implemented in response to employees' protected activity, in violation of Section 8(a)(1) of the Act. Accordingly, I conclude that this conduct interfered with the results of the election, pursuant to *Intertape Polymer*, supra, and its predecessors, and recommend that this portion of objection 10 be sustained.

Conversely, I found the allegations of complaint paragraphs 6(b)(iii), 6(c)(i) and 8(a) not to have merit, and for the same reason, I find that the portion of this objection corresponding to said paragraphs of the complaint lack merit. Accordingly, I recommend that those parts of this objection be dismissed.

Objection No. 11:

The Employer, by and through its agents, including Marcus Mettler, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election, by having increased management presence on the Employer's property during the critical period.

Although there is no dispute that COO Mettler was present in the facility on June 23–24, and actually departed to return to Southern California before the employees presented the petition to Perez on June 24, there is absolutely no evidence that his presence there had anything to do with the election—indeed, the critical period did not start until June 25, the day the petition was filed. Accordingly, there is no factual or legal basis to conclude that his presence in those days was objectionable. Additionally, the record shows Mettler was present at the facility on various other dates in July, up to and including the election held on July 24. Simply put, management has a right to conduct its campaign as it sees fit, so long as no threats or coercion is involved. Even if Mettler's presence at the facility dur-

ing the critical period could be solely attributed to the upcoming election, there is no legal basis to conclude that this alone, without more, represents objectionable conduct. Accordingly, the part of this objection regarding Mettler has no merit, and I recommend it be overruled.

The rest of the objection, which refers to other supervisors and which according to the Union's brief involves the conduct of Perez with regard to Anderson, has already been addressed in my discussion of objection 9. I found merit to such allegations, so I recommend that this portion of the objection be sustained.

In sum, I conclude that objections 4, 6, 7, 9, 10, and 11 be sustained in whole or in part, and that objection 8, as well as parts of objections 4, 9, and 10 be overruled.

Conclusions of Law

1. Mek Arden, LLC d/b/a Arden Post Acute Rehab (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees International Union, United Long Term Care Workers (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By instructing employees not to visit other areas of the facility, directing employees not to wear union scrubs or logos, directing employees to wear attire associated with the Respondent's campaign, creating the impression that the employees' union or protected activities were under surveillance, and prohibiting the posting of union literature and removing such postings, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(2),(6), and (7) of the Act.

4. By the conduct described above, the Respondent has violated Section 8(a)(1) of the Act.

5. Respondent has not otherwise violated the Act as alleged in the consolidated complaint.

6. Respondent has engaged in objectionable conduct warranting the setting aside of the results of the election held on July 24, 2015, and warranting the conduct of a new election.

Remedy

The appropriate remedy for the Section 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from: instructing employees not to visit other areas of the facility; directing employees not to wear union scrubs or logos; directing employees to wear attire associated with the Respondent's campaign; creating the impression that the employees' union or protected activities were under surveillance; prohibiting the posting of union literature and removing such postings. Moreover, Respondent will be required to post a notice to employees assuring them that it will not violate their rights in this or any other related matter in the future. Finally, to the extent Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[83]

Order

Respondent, Mek Arden, LLC d/b/a Arden Post Acute Rehab., Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to visit other areas of the facility;

(b) Directing employees not to wear union scrubs or logos;

(c) Instructing employees to wear attire associated with Respondent's campaign;

(d) Creating the impression that employees' union or protected activities are under surveillance; and

(e) Prohibiting the postings of union literature or removing such postings.

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

(a) Cease and desist from instructing employees not to visit other areas of the facility; directing employees not to wear union scrubs or logos; instructing employees to wear attire associated with Respondent's campaign; creating the impression that employees' union or protected activities are under surveillance; prohibiting the postings of union literature and from removing such postings.

(b) Within 14 days after service by the Region, post at all its facilities in Sacramento, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[84] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 facilities 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 June 24, 2015.

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[83] 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.

[84] If this Order is enforced by a Judgment of the 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."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20, 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.

I FURTHER RECOMMEND that the Board set aside the results of the election held on July 24, 2015, and direct a second election be held by secret ballot in the unit found appropriate whenever the Regional Director deems appropriate. In the absence of exceptions to this decision, Case 20–RC–154840 shall be severed from the unfair labor practice cases herein, and shall be remanded to the Regional Director for action consistent with my findings and Order.

Dated, Washington, D.C. May 27, 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 benefits and protection
Choose not to engage in any of these protected activities

In recognition of these rights, we hereby notify employees that:

WE WILL NOT instruct employees not to visit other areas of the facility in order to inhibit them from engaging in union or protected activity.

WE WILL NOT instruct our employees not to wear union scrubs or logos.

WE WILL NOT direct employees to wear attire associated with Mek Arden's election campaign.

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

WE WILL NOT prohibit the posting of union literature or remove such literature while permitting other non-work related literature to be posted.

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

MEK ARDEN, LLC D/B/A ARDEN POST ACUTE REHAB

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-156352 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.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEK ARDEN, LLC D/B/A ARDEN POST ACUTE REHAB

and

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED LONG TERM CARE WORKERS

Cases 20-CA-156352
20-CA-156362
20-CA-156378
20-CA-156408
20-CA-157363
20-RC-154840

ORDER[1]

The Respondent's motion for reconsideration of the Board's Decision and Order reported at 365 NLRB No. 109 (2017) is denied. The Respondent has not identified any material error in the Board's Decision and Order, raised any issue not previously considered, or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(c)(1) of the Board's Rules and Regulations.[2]

Dated, Washington, D.C., November 2, 2017

PHILIP A. MISCIMARRA, CHAIRMAN

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

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[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Emanuel took no part in the consideration of this case.

[2] Chairman Miscimarra dissented in part from the underlying decision, and he adheres to the views expressed in his partial dissent. Chairman Miscimarra nevertheless agrees that the Respondent has not raised any issue not previously considered or demonstrated extraordinary circumstances warranting reconsideration, and he therefore joins in denying the Respondent's motion.

CERTIFICATE OF SERVICE

I hereby certify that all Respondents in the proceeding below are being served with the Petition for Review, Corporate Disclosure Statement, and attached Decisions, in the manner specified below, this 13th day of November, 2017:

By hand delivery:

Linda Dreeben, Deputy Associate General Counsel
for Appellate and Supreme Court Litigation
Jennifer Abbruzzo, Acting General Counsel
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