United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

June 13, 2018

Marcia M. Waldron, Esquire
Clerk, United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia PA 19106

Re: *NLRB v. 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center*
Board Case No. 22-CA-083628

Dear Ms. Waldron:

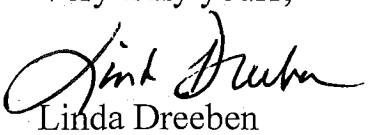
I am enclosing an original and five copies of the National Labor Relations Board's application for enforcement of its Order in this case. Within 40 days of the Court's docketing of this application, I will file the agency record and a certified list of its contents.

Please serve a copy of this application on the Respondent, 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center, whose address appears on the service list. I have served a copy of the application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of any correspondence the Court sends to counsel in this case. The Board attorneys

directly responsible for this case is Kira Dellinger Vol (202) 273-0656 and Jared D. Cantor (202) 273-0016.

Very truly yours,



Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Encls.

SERVICE LIST

NLRB v. 800 River Road Operating Company LLC
d/b/a Woodcrest Health Care Center
Board Case No. 22-CA-083628

Paul D. Clement, Esquire Bancroft PLLC 1919 M Street NW Suite 470 Washington, DC 20036-3557 pclement@bancroftpllc.com	Respondent's Counsel
Brian J. Gershengorn, Esquire Fisher & Phillips, LLP 620 Eighth Avenue 36th Floor New York, NY bgershengorn@fisherphillips.com	Respondent's Counsel
Stephen C. Mitchell, Esquire 1320 Main Street Suite 750 Columbia, SC 29201 smitchell@fisherphillips.com	Respondent's Counsel
Lorri Senk Woodcrest Health Care Center 800 River Road New Milford, NJ 07646-3127	Respondent
Katherine H. Hansen, Esquire William S. Massey, Esquire Gladstein, Reif & Meginniss 817 Broadway, Floor 6 New York, NY 10003 khansen@grmny.com wmassey@grmny.com	Charging Party's Counsel

1199 SEIU, New Jersey Health Care Union
555 US 1 South
Iselin, NJ 08830-3179

Charging Party

David Leach
NLRB Region 22
20 Washington Place
5th Floor
Newark, NJ 07102-3110

Regional Director

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)
Petitioner	)
	)
v.	)
	)
800 RIVER ROAD OPERATING COMPANY LLC D/B/A WOODCREST HEALTH CARE CENTER	)
Respondent	)

APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board hereby applies to the Court for enforcement of its Order issued against 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center on April 26, 2018, in Board Case No. 22-CA-083628, reported at 366 NLRB No. 70. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this application pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(e)). Venue is proper in this Circuit because the unfair labor practices occurred in New Milford, New Jersey.

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 13th day of June 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner	)
v.	)
800 RIVER ROAD OPERATING COMPANY LLC D/B/A WOODCREST HEALTH CARE CENTER Respondent	)

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's application for enforcement of its order in this case is being served today by first-class mail upon the following counsel:

Paul D. Clement, Esquire
Bancroft PLLC
1919 M Street NW Suite 470
Washington, DC 20036-3557
pclement@bancroftpllc.com

Brian J. Gershengorn, Esquire
Fisher & Phillips, LLP
620 Eighth Avenue
36th Floor
New York, NY
bgershengorn@fisherphillips.com

Stephen C. Mitchell, Esquire
Fisher & Phillips, LLP
1320 Main Street
Suite 750
Columbia, SC 29201
smitchell@fisherphillips.com

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 13th day of June 2018

Woodcrest Health Care Center *and* 1199 SEIU, United Healthcare Workers East. Case 22–CA–083628

February 27, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

On April 2, 2013, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed answering briefs, and the Respondent filed reply briefs. In addition, the General Counsel and the Charging Party each filed cross-exceptions, and the General Counsel filed a supporting brief, which the Charging Party joined. The Respondent filed an answering brief to the General Counsel's and the Charging Party's cross-exceptions.

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

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

We agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees both during the Union's campaign to organize employees at the Respondent's rehabilitation and nursing facility and after the Union's certification as the employees' bargaining representative.[4] We also affirm the judge's findings, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) and (3) of the Act by announcing and implementing a reduction in healthcare premiums and copays for all employees except those who were eligible to vote in the representation election. For the reasons that follow, however, we reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance.

I.

As fully recounted by the judge, Assistant Director of Recreation Vladamir Guerrero and certified nursing assistant Jeffrey Jimenez had two conversations about the union organizing drive.

The first conversation occurred in late July or early August 2012. Jimenez, an active union supporter, told Guerrero that the Union was planning several events in August in connection with the organizing drive, and he volunteered that "if management would have listened to their employees, the Union would never be here." Guerrero responded, "I heard your name; your name has been popping out a lot."

The second conversation occurred after Jimenez was quoted in an August 24, 2012, New Jersey Record article about the union campaign. The newspaper article quoted Jimenez as stating that he would like to see certain improvements in his working conditions and that "the Union can make things better for the workers and for the patients." Shortly after the article was published, Guerrero commented as Jimenez passed him in the lunchroom, "Oh, it's the famous boy." Jimenez then followed Guerrero to an office, where Guerrero informed him that the director of nursing had removed copies of the newspaper containing the article from the lobby of the facility, distributed a memorandum regarding the article to other members of management, and mentioned Jimenez by name several times at a management meeting. Jimenez testified that Guerrero then told him to "just watch [your] back, be careful, careful about what you say do what you have to do, come to work early, and then just do your job and go home." Guerrero did not deny warning Jimenez to "watch [his] back" and, in fact, admitted that he told Jimenez, "friend to friend" to "tone it down a little bit" and to "keep it under wraps" because he "felt like it [was] not [Jimenez'] best approach to get extra attention and put his beliefs on everyone else."

[1] The Respondent has set forth certain procedural arguments, including that the complaint is *ultra vires* because the former Acting General Counsel did not lawfully hold office at the time he directed that the complaint issue. The Respondent's argument that the Acting General Counsel lacked the authority to issue the complaint is rejected. The Acting General Counsel was properly appointed under the Federal Vacancies Reform Act, 5 U.S.C. § 3345. Thus, the complaint is not subject to attack based on the Respondent's arguments concerning the circumstances of his appointment.

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

[3] We shall modify the judge's recommended Order to require the Respondent to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. We shall substitute a new notice to conform to the Order as modified.

[4] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by soliciting grievances with an implied promise to remedy them.

Member Johnson finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(1) by interrogating employees Jeffrey Jimenez and Donna Duggar. In his view, those findings are cumulative and do not affect the remedy.

II.

In dismissing the allegation that Guerrero's comments created an impression of surveillance, the judge heavily weighed Jimenez' status as "a very visible and vocal supporter of the Union" who "considered his support of the Union to constitute social activism for all to observe." The judge also emphasized that there was no evidence Jimenez tried to hide his support for the Union. Reasoning that an employer's passive observation of employees engaged in open Section 7 activity does not violate Section 8(a)(1), the judge found that Guerrero's comments that Jimenez' name had been "popping out a lot," that Jimenez was "famous," that the director of nursing had reviewed the newspaper article and sent a memorandum to managers about it, and that Jimenez had been mentioned several times at a management meeting, would not cause Jimenez or other employees to reasonably assume that their union activities had been placed under surveillance. The judge, however, did not address Jimenez' uncontradicted testimony that Guerrero warned him to "watch [his] back, be careful, careful about what you say do what you have to do, come to work early, and then just do your job and go home," or Guerrero's testimony that he advised Jimenez to "tone it down a little bit," and to keep his views about the Union "under wraps."

III.

The testimony overlooked by the judge is highly significant, and it leads us to a different conclusion. Guided by precedent, we find that Guerrero's statements that Jimenez should "watch [his] back, be careful," "tone it down," and "keep it under wraps," would reasonably cause Jimenez to assume that his union activities were under surveillance by the Respondent. In *Golden Stevedoring Co.,* 335 NLRB 410, 416 (2001), a supervisor told an employee, in the context of a discussion about the union, that the employee should "watch [his] back, to watch it close, that they will be out to get [him]." The Board found that this statement created an unlawful impression of surveillance because it implied that the employer would monitor the employee's future union activity and would reasonably be understood as a warning that if the employee continued to engage in such activity, "they" would "get him." Likewise, in *Flexsteel Industries*, 311 NLRB 257, 257–258 (1993), the Board found that a manager's repeated statements to an employee that the manager had heard "rumors" of the employee's protected activity created an impression of surveillance, as they indicated that the employer was closely monitoring the degree and extent of the employee's union activities. In so finding, the Board rejected the argument that the friendly relationship between the manager and the employee militated against finding a violation, noting that, in the context of the friendship, the manager's statement "would reasonably convey a warning to [the employee]: 'Be careful. Management's watching you.'" Id. at 258 fn. 5.

Similarly, here, Guerrero's comments would reasonably be understood by Jimenez as a warning that the Respondent was moving from routine observation to closely monitoring the degree and extent of his union activity, open or not, and if he continued to engage in such activity, he could face reprisals.[5] Accordingly, we reverse the judge and find that the Respondent, through Guerrero, created the impression of surveillance in violation of Section 8(a)(1).[6]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. By interrogating its employees about their union membership, activities, and sympathies; by creating the

[5] In the circumstances of this case, contrary to our dissenting colleague, it is immaterial whether Jimenez initiated the conversations (a matter about which there is some uncertainty), that Guerrero was not Jimenez' immediate supervisor, and that the two men had a friendly relationship. See *Seton Co.*, 332 NLRB 979, 980, 993 (2000) (judge, affirmed by the Board, held that supervisor's well-intentioned advice to a long-time friend whom he did not supervise created an unlawful impression of surveillance, explaining that "[i]f anything, such friendship would only add to the weight of the impression" that management was surveilling employees' union activities); see also *Trover Clinic*, 280 NLRB 6, 6 fn. 1, 7 (1986) (finding that supervisor's advice to "keep a low profile" and "be quiet with it," referring to an employee's organizing activity, was unlawful, despite the friendly relationship between the individuals and the fact that it was the employee who first interjected the union into the conversation). Our dissenting colleague is correct that cases of this kind turn on the totality of the circumstances, and, in our view, those circumstances would cause a reasonable employee to perceive that his protected activities were under close and hostile scrutiny.

[6] Member Johnson would adopt the judge's dismissal of this allegation. In his view, Guerrero's comments did not create an unlawful impression of surveillance because they suggest only routine observation by the Respondent of Jimenez' open and public union activity, not close monitoring. Indeed, Jimenez was an open and active union supporter whose activities (e.g., discussing the Union in a newspaper interview) were well known in the workplace. Further, Guerrero did not supervise Jimenez, but the two men had a friendly relationship. Jimenez appears to have initiated with Guerrero the two conversations concerning the Union, both of which occurred after Jimenez began openly supporting the Union. Member Johnson disagrees with the majority's claim that "it is immaterial whether Jimenez initiated the conversations . ., that Guerrero was not Jimenez' immediate supervisor, and that the two men had a friendly relationship." The cases cited by the majority here unremarkably indicate that a supervisor's statements can still be found coercive within a totality-of-circumstances analysis that includes these factors, not that the factors are immaterial to the analysis. See, e.g., *Thrashers Furniture*, 286 NLRB 547, 547 (1987) (no impression of surveillance where manager "did not threaten or interrogate or even initiate the conversation" with employee.)

impression that employees' union and other protected concerted activities were under surveillance; and by announcing a reduction of healthcare premiums and copays to all employees except those who were eligible to vote in the representation election, the Company violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center, New Milford, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs:

"(b) Creating the impression that employees' union and other protected concerted activities are under surveillance."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you regarding your union membership, activities, and sympathies.

WE WILL NOT create the impression that your union and other protected concerted activities are under surveillance.

WE WILL NOT announce and implement a reduction in healthcare premiums and copays that excludes employees eligible to vote in the representation election.

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

WE WILL implement the January 1, 2012, reduction in healthcare premiums and copays for our unit employees who were eligible to vote in the representation election but were specifically excluded from those benefits.

WE WILL make whole those unit employees who were eligible to vote in the representation election but were specifically excluded from the reduction in healthcare premiums and copays available to our other employees.

WE WILL compensate our employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

800 RIVER ROAD OPERATING COMPANY, LLC,
D/B/A WOODCREST HEALTH CARE CENTER

Marguerite R. Greenfield, Esq., for the Acting General Counsel.[1]

Jedd Mendelson, Esq. and *James M. Monica, Esq.*, for the Respondent.[2]

Katherine H. Hanson, Esq., for the Charging Party.[3]

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried in Newark, New Jersey, on February 5, 2013.[4] The Union filed a charge initiating this matter on June 18 (thereafter amended), and the Acting General Counsel issued a first amended complaint on December 20. The Government alleges the Company, at various dates from February through August, engaged in acts of interference with its employees protected rights in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Company, in its answer to the complaint, and at trial, denies having violated the Act, in any manner set forth in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of

[1] I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the National Labor Relations Board (the Board) as the Government.

[2] I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company or cooperative.

[3] I shall refer to counsel for the Charging Party as counsel for the Union and I shall refer to the Charging Party as the Union.

[4] All dates are 2012, unless otherwise indicated.

the witnesses as they testified and I rely on those observations in making credibility determinations here. I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act in certain of the matters alleged in the complaint.

Findings of Fact

I. JURISDICTION, SUPERVISORY/AGENCY STATUS, AND LABOR ORGANIZATION STATUS

The Company is a New Jersey limited liability corporation, with an office and place of business in New Milford, New Jersey, where it is engaged in the business of operating a rehabilitation and nursing facility. During the 12-month period ending December 20, the Company, in conducting its operations, derived gross revenues in excess of $100,000 and purchased and received at its New Milford, New Jersey facility, goods and supplies valued in excess of $50,000 directly from points outside the State of New Jersey. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted that, at all times material herein, Assistant Director of Nursing Ansel Vijayan (Assistant Director of Nursing Vijayan or Vijayan), Assistant Director of Recreation Vladamir Guerrero (Assistant Director of Recreation Guerrero or Guerrero), and, Supervisor Janet Lewis (Supervisor Lewis or Lewis) are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In addition to calling seven witnesses, the parties stipulated to the following background and other related facts:

> On January 23, 2012, 1199 SEIU, United Healthcare Workers East ("Union"), filed a petition in Case 22–RC–073078 for an election for a unit of approximately 200 employees of 800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center ("Employer" or "Woodcrest"). An election was conducted on March 9, 2012. Respondent filed objections to the election. On January 9, 2013, the Board issued a Decision and Certification of Representative, which is reported at 359 NLRB No. 58 [sic] (2013).[5]

A. Issues and Related Facts

The complaint alleges the Company engaged in various violations of Section 8(a)(1) and a violation of Section 8(a)(3) of the Act. I address each allegation, setting out the paragraph number and allegation(s) as they appear in the complaint.

I note the standard in determining whether employer conduct violates Section 8(a)(1) of the Act is based on whether statements, found to be made to employees, reasonably tend to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

In keeping with the above, I first address the specific 8(a)(1) allegations as set forth below.

[5] The correct citation is 359 NLRB 522.

1. Complaint allegations related to Assistant Director of Nursing Vijayan

It is alleged at paragraph 6 of the complaint the Company through Assistant Director of Nursing Vijayan, in February and March, unlawfully interrogated employees about their union membership, activities, and sympathies; and, in February unlawfully solicited grievances from unit employees and impliedly promised to remedy those grievances.

a. The Government's evidence

Certified nursing assistant, Judith Dolcine (Dolcine), was hired by Assistant Director of Nursing Ansel Vijayan and began working in October 2004. Dolcine was employed during the representation election campaign at the Company. She was, however, discharged after the 2012 union election. Dolcine testified she was at a nursing station on the third floor in February when Vijayan approached asking to speak with her in a vacant patient room nearby. Vijayan gave Dolcine a flyer reading "don't vote union." Dolcine testified Vijayan asked if someone from the Union had visited her at her home; she told him no one had. According to Dolcine, Vijayan then asked if anyone had telephoned her, and, she again responded no. Dolcine told Assistant Director of Nursing Vijayan she was with the Union. Dolcine testified Vijayan then asked why she needed the Union. She said she needed someone to back her up when something happened or she was fired. Vijayan told her that was not going to happen. Dolcine told Vijayan she was part of a union at her very first job. Vijayan asked Dolcine how much the union, at that location, took from her paycheck in dues. Dolcine could not remember and Vijayan walked away.

b. Company evidence

Vijayan has been assistant director of nursing since 2003. He hired and trained Dolcine as a certified nursing assistant. Vijayan explained Dolcine needed additional training because she did not speak much English so he "kept her under [his] wing," spoke up for her following her first, not so great, evaluation, and had a good rapport with her.

Vijayan became aware of the union organizing campaign at the facility around the beginning of 2012. Vijayan said management trained the managers on what they could do and say regarding the Union. He explained they could not threaten, interrogate, make promises to, or spy on employees. Vijayan distributed, to seven or eight employees, including Dolcine, a flyer about union dues captioned "Do You Really Want To Pay 1199 SEIU Dues and Assessments?" Vijayan testified that on the one occasion when he passed out the union-related flyer he gave a copy to Dolcine. Vijayan said Dolcine then asked to speak with him. Vijayan testified Dolcine asked what he thought about the Union. Vijayan told Dolcine he had never been a union member and if he was voting he would not vote for the Union. Dolcine asked how much union dues would be. Vijayan told her he did not know but added he did know there would definitely be dues payments. Dolcine told Vijayan she had been in a union at a factory where she previously worked and asked additional questions about union dues. Vijayan specifically denied asking Dolcine why she wanted a union. He said Dolcine did ask if a union would be good for the employ-

ees and he told her he could not answer that question and ended their conversation.

c. Credibility determinations, analysis, and conclusions

Although Dolcine did not appear fully comfortable testifying in English, I am nonetheless persuaded she did so truthfully. She impressed me as a sincere witness attempting to testify truthfully. I credit her testimony. I do not rely on any testimony of Assistant Director of Nursing Vijayan that contradicts Dolcine's testimony.

The applicable test for determining whether questioning an employee constitutes unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the *Bourne* factors," so named because they were first set out in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964). Those factors, briefly described, call for an examination or consideration of the background of the interrogation; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; and, the truthfulness of any reply. These and other relevant factors are not to be mechanically applied in each case. Determining whether employee questioning violates the Act does not require a strict evaluation of each of the *Bourne* and other factors. Stated differently, the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather are useful indicia that serve as a starting point for assessing the "totality of the circumstances." That the interrogation might be courteous and/or low keyed instead of boisterous, rude, and profane does not alter the case.

The credited testimony establishes a high-level manager, namely, Assistant Director of Nursing Vijayan, approached unit employee Dolcine, a certified nursing assistant at her workstation while she was on duty and asked to speak with her privately. Vijayan gave Dolcine a "don't vote union" flyer and asked if someone from the Union had visited or telephoned her at her home. Dolcine answered no to both questions, but, said she was with the Union. Assistant Director of Nursing Vijayan then asked why she needed the Union. Dolcine explained she needed someone to back her up when something happened or she was fired. Vijayan told her that was not going to happen. The totality of the circumstances surrounding the questioning here persuades me it constituted unlawful interrogation. A high-level manager takes an employee away from her work duties to give her an antiunion flyer while asking about her union activities including why she needed a union. This encounter is one, among other, unlawful actions by supervisors and agents of the Company at about the same timeframe. I find the Company, through Assistant Director of Nursing Vijayan unlawfully interrogated employee Dolcine about her union activities, sympathies, and desires in violation of Section 8(a)(1) of the Act.

I find a lack of evidence in the exchange between Vijayan and Dolcine that would constitute an unlawful solicitation of grievances with an implied promise to remedy same. I dismiss this portion of this complaint allegation.

2. Complaint allegations related to an unnamed company attorney

It is alleged at paragraph 7 of the complaint the Company, in March, through its unnamed attorney unlawfully interrogated its employees about their union membership, activities, and sympathies, and the union membership, activities, and sympathies of other employees. At trial the unnamed company attorney was acknowledged to be James Monica.

a. The Government's evidence

Certified nursing assistant Jeffrey Jimenez testified that about 2 weeks after the March 9 representation election at the Company, his supervisor, Margarita (not further identified), told him, while he was doing patient care, the director of nursing wanted to see him in her office. After finishing patient care, Jimenez went to the director of nursing's office; however, she was not there, but, Company Attorney Monica was. Monica told Jimenez he was a lawyer for the Company and was investigating whether there had been objectionable conduct by supervisors who may have engaged in activities in favor of the Union. Monica told Jimenez his participation in the investigation was completely voluntary. According to Jimenez, Monica gave him a document asking him to read and sign it, which Jimenez did. Monica first asked Jimenez how long he had worked for the Company and then continued to question him further. Jimenez testified Monica asked if he knew certain supervisors, namely; Israel DeDios from housekeeping, Benita Thorton and Janet Lewis from night shifts and former administrator, Lorri Senk. Jimenez acknowledged knowing each of them. Monica asked if supervisors were involved with the Union; if they passed out union cards; and, if any influenced him in any way to change his vote during the election. Jimenez answered no to each of the questions. Jimenez testified Attorney Monica then asked, "[I]f any union representative came to knock on your house" and "[I]f I knew any employees who were involved in a union or passing out cards as well." Jimenez told Monica, "[H]e knew employees who had but, could not give their names for confidential reasons." According to Jimenez, Monica then asked if he (Jimenez) signed a card for the Union. Jimenez could not recall anything else being said and that he left the meeting. After walking toward the building's front lobby, Jimenez returned to the room where he had met with Attorney Monica and asked for the document he had, at Monica's request, signed at the beginning of their meeting. According to Jimenez, Monica first said he could not give it to him but then did. Jimenez tore up the document and threw it in the garbage.

The form type document Jimenez signed and later destroyed follows:

> TO: ALL WOODCREST HEALTH CARE CENTER EMPLOYEES
>
> I am James M. Monica, the Center's attorney.
>
> The only purpose I have in interviewing you is to investigate whether any objectionable conduct occurred in connection with the election held here at Woodcrest on March 9, 2012 and the events leading to that election during the previous weeks and months.

Your participation in this investigation is strictly voluntary.

Your participation or lack of participation in this investigation will not in any way affect your job or your rights as an employee.

We are not interested in determining whether you are for or against the Union or if, or how, you voted in the election.

We positively assure you that you have the right to join or not to join any labor organization without fear of reprisals.

We are interested only in the truth.

If you agree to participate in this investigation, would you please sign your name below to show that you have read this page.

Name: _____

Date: _____

Jimenez acknowledged he read and understood the document before signing it and never at any time advised Attorney Monica he wanted to stop the interview or no longer wished to speak with Monica. Jimenez said his conversations with Monica were cordial with no raised voices.

Jimenez could not recall Monica saying he was not interested in how Jimenez had voted, or that he was not interested in the names of employees who might have engaged in conduct in support of the Union, nor, of Monica saying whatever opinion he had about a labor union at the Company was of no importance.

Approximately 5 days after his first meeting with Company Attorney Monica, Jimenez again met with him. On this occasion, Jimenez was again performing patient care when his supervisor informed him Attorney Monica wanted to see him again in the conference room. The two met alone. According to Jimenez, Monica said he did not believe Jimenez' answers during their first exchange and wanted to give him a second chance. Jimenez testified Monica asked some of the same questions as before, namely, if he knew former administrator, Lorri, and Supervisors Israel, Janet, and Bonita. Monica then asked if Jimenez knew what a union authorization card was, and, told Jimenez he was interested in whether supervisors distributed union authorization cards. Jimenez testified Monica then asked why he wanted to form a union. Jimenez told Monica for better benefits, insurance, wages, less patient load, and a voice in the Company. Jimenez also told Monica that whatever Monica had asked management to do, they were doing it, that they did their jobs, and that management representatives had told employees "not to vote for the union" that "the union is bad" and "when we go, vote no." Jimenez told Monica he made $8.25 an hour cleaning up after people and could make that at Burger King and that the Company should be spending its money to help their employees rather than paying lawyers like him. Jimenez told Monica other institutions paid their certified nursing assistants more than the Company and it was hard for families to make ends meet on the money the Company paid its certified nursing assistants.

b. Company's evidence

Company Attorney Monica testified he visited the company facility sometime after the union representation election "to investigate whether any objectionable conduct occurred in connection with the election." Monica personally interviewed about 40 to 60 of the 100 to 150 employees interviewed and explained some of those he interviewed were election unit employees. Monica testified that before he interviewed each employee, including Jimenez, he explained their rights under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), and had each sign a statement acknowledging their rights. Jimenez signed such a statement. Monica said that about 5 of the 10 minutes he spent with Jimenez, in their first interview, was taken up explaining Jimenez' rights to him. Monica said he did not use a script when explaining employee rights and in conducting his interviews. Monica testified he gave Jimenez, and every employee he interviewed, an assurance he would assume any information they provided was based on something they had heard from other employees and he would specifically assume it was not anything the employee had said or participated in themselves.

Monica testified he asked Jimenez "about union representatives visiting election employees at their homes," "about union representatives telling employees prior to the election that the election was cancelled and that they would not need to report to vote." Monica also asked questions about any union attempts to suppress the vote. Monica said he asked Jimenez about any campaign activities by Supervisors Bonita Thorton, Israel DeDios, Jane Cordero, and Janet Lewis. Monica denied asking Jimenez about his own union activities or even if he engaged in such activities or what kind of union activity other employees engaged in. Monica denied asking Jimenez to identify employees who signed union authorization cards or asking any employee how he or she voted.

Monica testified Jimenez appear very comfortable speaking with him and that Jimenez viewed Monica as someone that had good rapport with company management. Monica said Jimenez volunteered he made $8.25 an hour "to wipe people's butts, except he didn't use the word butts, and that he could make that kind of money working at Burger King. And that it was his opinion that the Company should spend its resources on its employees and not on paying lawyers such as myself."

c. Credibility determinations, analysis, and conclusions

I credit certified nursing assistant Jimenez' testimony that after Company Attorney Monica asked him about any involvement by supervisors passing out union signature cards and trying to influence Jimenez' vote in any way Monica then turned to questions regarding union representatives coming to Jimenez' home and if he knew any employee who had been involved with the Union or passing out cards as well. Jimenez told Monica he could not give him the employees' names for confidential reasons. Company Attorney Monica then asked Jimenez if he signed a card for the Union.

While Monica's initial purpose for meeting with Jimenez may have been for permissible reasons and I note, Monica even gave Jimenez certain assurances, both verbally and in writing

about his rights, he went beyond the permissible into unlawful interrogation of Jimenez. Based on Monica's stated purpose for the meeting with Jimenez, he had no valid justification or permissible basis for asking Jimenez about his personal union activities or the union activities of other unit employees. I so find such questioning by Monica violates Section 8(a)(1) of the Act.

At his second meeting with Jimenez, Monica told Jimenez he was not satisfied with Jimenez' answers at their first meeting and was giving him a second chance by asking a number of the same questions regarding supervisors as he had asked before and then proceeded to go further. Monica asked Jimenez why he wanted to form a union. This inquiry crossed the line from permissible investigation of any possible supervisory misconduct during the union election to an unlawful inquiry into Jimenez' union activities and I so find.

3. Complaint allegations related to Assistant Director of Recreation Guerrero

It is alleged at paragraph 8 of the complaint the Company through Assistant Director of Recreation Guerrero created an impression among its employees their union activities were under surveillance by the Company.

a. The Government's evidence

Certified nursing assistant Jimenez testified about various union activities at the facility in August. He explained union "tee" shirts were distributed across the street from the Company; union flyers were given out; prounion marches and rallies were held; and, various articles appeared in the online New Jersey Record newspaper. On August 24, an online article in the Record addressed the Union's push for bargaining rights at the Company. In the article Jimenez was quoted, "Jeffery Jimenez, a certified nursing assistance who has worked at Woodcrest in New Milford for three years, said he would like to see a boost in his $10-an-hour wage, better benefits and a lighter case load." Jimenez was also quoted as saying he thought "the Union can make things better for the workers and for the patients."

Jimenez said he viewed his activities on behalf of the Union as social activism and was pleased to give an interview to the New Jersey Record reporter about his activities. Jimenez said he openly supported the Union at the time of the newspaper article. Additionally, he said he participated in union rallies at New York University (NYU) as well as in a march from NYU to the corporate headquarters. Jimenez testified he "assisted a representative of the Union in giving out tee shirts before the article was published" and established the date of that activity as "early August, perhaps late July." Jimenez said both of his conversations with Assistant Director of Recreation Guerrero occurred after he had already openly supported the Union at the facility. Jimenez said he knew management may well have been aware of his open support for the Union at the time.

Jimenez had two conversations with then-Assistant Director of Recreation Vladamir Guerrero in August. Jimenez told Guerrero that "if management would have fixed the problem already, if management would have listened to their employees, the union would never be here and this mess will never happen." According to Jimenez, Guerrero said, "I heard your name; your name has been popping out a lot." Jimenez told Guerrero he knew his rights, and, nobody could do anything to him just because he supported of the Union. Jimenez testified, on direct examination, that at the time of his first conversation with Guerrero he had not participated in passing out union flyers or T-shirts at or near the company facility. On cross-examination, Jimenez said he helped give out T-shirts for the Union in late July or early August.

Jimenez said that near the end of August he came into the recreation department at the Company to bring his sister, a fellow employee, lunch when Guerrero entered the department and said, "Oh, it's the famous boy" and proceeded on to his office. Jimenez followed Guerrero. Guerrero told Jimenez management had seen the newspaper article quoting Jimenez and "they're pretty pissed about it." Jimenez testified Guerrero said Director of Nursing Eileen went to the front lobby and "grabbed all the newspapers" and put them in her office. He said the director of nursing and the company administrator sent a memorandum to management personnel inviting them to review Jimenez' newspaper comments and then held a management meeting. Jimenez testified Guerrero told him his name was mentioned a couple of times in the meeting and advised Jimenez; "just to watch my back, be careful, careful about what you say, you know, do what you have to do, come to work early, and then just, you know, do your job and go home." Jimenez told Guerrero okay and left Guerrero's office.

b. The Company's evidence

Assistant Director of Recreation Guerrero testified he and Jimenez were friendly coworkers and added he never supervised Jimenez; however, he supervised Jimenez' sister. Guerrero said he had two conversations, probably in August, with Jimenez about the union organizing drive. Guerrero testified Jimenez was having a conversation with his sister during her lunchtime when he (Guerrero) walked into the area in route to his office. Guerrero said Jimenez followed him into his office and asked his thoughts about the union situation. Guerrero told Jimenez he had always been neutral as far as the Union and the Company were concerned. Guerrero told Jimenez he was aware Jimenez had been quoted in a newspaper article about the Union and talked to Jimenez on a "person-to-person" basis and as "friend-to-friend" rather than as a "manager to employee." Guerrero testified, "So I basically shared with him my sentiments as far as him just trying to not get as much attention as he is getting. And that was basically my part in the conversation." Guerrero said he "felt like it was not his [Jimenez'] best approach to get extra attention and put his beliefs on everyone else." Guerrero said he was not involved in the representation election at the Company and was never included in training for managers about the campaign and was not involved in pamphleting adding "basically, I was left out." Guerrero testified he did not tell Jimenez the views of other managers concerning Jimenez.

Guerrero testified about the second occasion, in front of the Company facility, when Jimenez spoke with him about the union organizing campaign. Guerrero was taking a smoke break and observed a union representative in the residence

parking lot across the street giving out union T-shirts. Guerrero testified Jimenez approached and "asked me do you think I should go over there?" Guerrero replied, "I said you can do what you want. And once again reiterated to him just don't get extra attention." Guerrero denied saying anything to Jimenez about other managers' impressions of him.

The Board's test for determining whether an employer has created an impression of surveillance of its employee's activities is whether an employee would reasonably assume from the statement(s) in question his or her union activities have been placed under surveillance. The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. Additionally, the Board does not require that an employer's words on their face reveal the employer acquired its knowledge of the employee's activities by unlawful means. The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Tres Estrellas de Oro,* 329 NLRB 50, 51 (1999), *Flexsteel Industries,* 311 NLRB 257 (1993).

c. Credibility determinations, analysis, and conclusions

As indicated elsewhere in this decision, I find Jimenez generally to be credible. I am persuaded, however, the credited evidence here fails to establish Guerrero created an impression Jimenez', or other employees, union activities were under unlawful surveillance by the Company. First, Jimenez was a very visible and vocal supporter of the Union. He participated in rallies, and marched for the Union to the Company's headquarters. The level of participation by Jimenez in union activities does not, on this record, appear to have been exceeded by other unit employees. In fact, Jimenez considered his support of the Union to constitute social activism for all to observe and for which he was proud. There is no evidence Jimenez tried to hide his support for the Union. Management may observe open union activity on its promises by its employees, such as Jimenez here, without engaging in unlawful surveillance.

Second, I do not find the Company, and specifically Assistant Director of Recreation Guerrero's statements to Jimenez to demonstrate Guerrero was more closely monitoring or observing Jimenez' actions such as to constitute an unlawful impression of surveillance. Finally, what happened here in the first conversation between Jimenez and Guerrero is Jimenez spoke with Guerrero about the Union telling him that if the Company had listened to its employees and fixed the problems the Union would never have been at the Company and "this mess" would never have happened. Guerrero had observed, heard, and read of Jimenez' open union activities and told Jimenez his name was popping up a lot, which Jimenez could not deny. In the second meeting between Jimenez and Guerrero, Guerrero's comment to Jimenez that he was famous does not establish Guerrero was observing or monitoring him or his activities more closely, he was just stating an observation. The fact the Company reviewed a newspaper article that made reference to Jimenez and sent a memorandum to managers about Jimenez and the newspaper article, or that management mentioned a self-described social activists at a management meeting, does not establish the Company, or Guerrero in particular, engaged in actions that would cause employees to reasonable assume their union activities were under unlawful surveillance. I shall dismiss this complaint allegation.

4. Complaint allegations related to Supervisor Lewis

At the beginning of the trial, I granted the Government's motion to amend the complaint to add an allegation that between January 23 and March 9, Supervisor Janet Lewis unlawfully interrogated employees about their union membership, activities, and sympathies.

a. The Government's evidence

At trial the Government introduced portions of the official transcript in a related underlying representation case, Case 22–RC–073078. The portion of transcript received in evidence contains Lewis' testimony given on May 12. Counsel for the Government, here, relies exclusively on Lewis' representation testimony in support of the amendment to the complaint. Lewis' representation testimony reflects she and Donna Duggar, were friends as well as coworkers, and that Lewis mentored and trained Duggar. The transcript reflects Lewis, after being promoted to management on February 5, attended company management meetings at which the Union was discussed generally and whether certain employees supported the Union specifically. The record reflects Lewis was told by a company lawyer that Duggar supported, or was in favor of, the Union. Lewis was surprised by the comment and following the meeting located Duggar asking her, "[A]re you in favor of the union?" Duggar replied she was not. Lewis explained she knew Duggar well enough to "ask her directly" about her support for the Union. The transcript further reflects Lewis attended the next company management meeting, at which the Union was discussed, and reported she had contacted Duggar and Duggar was not supporting the Union. Lewis stated some managers were surprised while others did not seem to believe it.

b. The Company's evidence

Supervisor Lewis testified for the Company and traced her employment with the Company, namely, that she started as a part-time (weekend) licensed practical nurse in 1997 and, thereafter, became a registered nurse and was promoted in February to a supervisory nurse position. Lewis trained licensed practical nurse Duggar in "one-on-one" training, and taught Duggar "the ropes of being a nurse." Lewis testified she and Duggar telephoned each other outside of work and are friends. Lewis stated that prior to the union representation election the Company conducted supervisor and management meetings which she attended. She said that at one such meeting someone, perhaps a company attorney, Pat, mentioned Duggar was in favor of the Union. Lewis was in "shock" and could not believe Duggar was a member of the Union knowing what she did about Duggar. Lewis later spoke with Duggar telling her that her name had been brought up at the supervisors and managers meeting. Lewis told Duggar, "I heard you are a member of the—you are in favor of the Union." Duggar responded she

was not. Lewis said she asked Duggar about the Union, "because she is my friend and I heard she was in the Union, she was in favor of it, so, I wanted to find out." Lewis said no one from management asked her to find out Duggar's union status and she never thereafter asked Duggar about her union sentiments. Lewis said she never asked any other employee about his or her union sentiments but did report, at a company supervisors meeting, prior to the election, that Duggar was not supporting the Union.

c. Analysis and conclusions

The facts related to this allegation are not disputed. It is clear Nursing Supervisor Lewis asked Duggar, sometime after February 5, but before the representation election, if she was in favor of the Union. It is clear the Company had an interest in knowing which of its employees supported or favored the Union. It was even discussed at supervisory/management meetings. A company attorney even told management representatives Duggar supported the Union. Upon learning this, Supervisor Lewis determined to specifically ascertain, if in fact, Duggar supported the Union. After asking Duggar, point blank, if she favored the Union, Lewis reported her findings to management at the next supervisors meeting at which union-related matters were discussed. Although Lewis was not a top-level manager, she did specifically report her findings to all management at a management meeting. It appears Duggar's response was truthful in that there is no showing on this record to the contrary. The fact Supervisor Lewis may have conversed with Duggar in a friendly manner does not somehow make her inquiry lawfully or protected. The totality-of-the-circumstances persuades me the interrogation was unlawful and reasonably tends to interfere with the free exercise of employee rights under the Act, and I so find.

5. Complaint allegations related to healthcare premiums and copays

It is alleged at paragraph 9 of the complaint the Company, on March 5 announced, and on March 23 implemented, a reduction of healthcare premiums and copays to all employees except those who were eligible to vote in the upcoming representation election.

In addition to stipulations set forth elsewhere herein, the parties also stipulated:

> Woodcrest is managed by HealthBridge Management, LLC ("HealthBridge"). In New Jersey, HealthBridge manages four centers. Those centers are Woodcrest, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center ("Somerset Valley"), 600 Kinderkamack Road Operating Company LLC ("Oradell"), and 2 Cooper Plaza Operating Company, LLC ("South Jersey").
>
> Each of the 4 companies referenced in paragraph 2 provides a common health insurance plan for its employees, which is arranged through HealthBridge. Effective January 1, 2012, there were changes in that health insurance coverage that resulted, among other things, in reduced benefits and increased costs for all employees at Woodcrest, Oradell, and South Jersey. Employees at Somerset Valley in classifications that had not been eligible to vote in an election held on September 2, 2010 were subject to the same cost and benefit changes. As a result of these changes, some employees of those 4 companies changed their coverage or dropped their coverage.
>
> In response to complaints about these changes, HealthBridge arranged certain improvements to the common health insurance plan, including a reduction in employee premiums. These improvements applied to all employees except those involved in a union representational campaign. At each of the 4 companies, a common memorandum announcing these improvements was distributed to all employees who were not eligible to vote in a union election. At facilities with no union campaign, the memorandum was distributed to all employees. The improvements were subsequently implemented, retroactive to January 1, 2012, for the employees to whom the memoranda were distributed.
>
> On March 5, 2012, Lorri Senk, who was then the Administrator for the Employer, directed the distribution of a memorandum to all Woodcrest employees, except those eligible to vote in the March 9, 2012 election, announcing the improvements in the health insurance plan. A copy of that memorandum is marked Joint Exhibit 1. The classifications identified on the memorandum were those classifications at Woodcrest that were not part of the election unit to which the Union and Employer had stipulated and, therefore, were not eligible to vote in the March 9 election. The memorandum was distributed at the Employer's facility solely to employees who held the positions identified on the memorandum. The improvements were implemented retroactive to January 1, 2012 only as to the employees to whom the memorandum was distributed.
>
> To date, the improvements referenced in Paragraph 4 have not been implemented as to the employees within the Woodcrest election unit.
>
> The Employer did not announce or raise the matter of the health insurance improvements to the election eligible employees either at communication meetings with them or otherwise. When election eligible employees asked about the health insurance improvements being applied to them, managers or supervisors responded on behalf of the Employer "we cannot discuss this matter at this time."

Certified nursing assistant Jimenez, a self-described social activists for the Union, and one who would like to be a shop steward or contract negotiator for the unit employees, gave testimony regarding changes in health insurance coverage for all employees except those eligible to vote in the March 9 representation election at the Company. Jimenez learned of the changes in March when he observed a memorandum, in the breakroom from then-Administrator Senk, dated March 5, announcing changes to the health insurance coverage for all employees except those eligible to vote in the representation election and professional employees. Jimenez stated that "right after the election" he attended a general monthly meeting of employees (approximately 40–50) presided over by Senk. Jimenez said that at the end of the meeting Senk did, as she usually did, and asked if there were any grievances or concerns that could be addressed. Jimenez said an employee, whom he did not further identify, asked Senk about the insurance memo-

randum applicable to those not eligible to vote in the representation election and asked if those eligible to vote could have their health insurance coverage "looked upon" and whether "there might be changes" on the insurance plan. Jimenez said Senk answered that "we cannot negotiate your contract, your benefits, your insurance because right now you are in the critical period with the Union."

Acting Director of Nursing Chereece Steele, who served in that capacity from the beginning of February until mid-April, testified she attended communication sessions at which Administrator Senk spoke. Steele testified Senk did not raise with the election-eligible employees the health benefits package for nonelection-eligible employees, announced in March. Steele testified that the matter of the improvement of benefits for the nonelection-eligible employees arose when one of the election-eligible employees mentioned they had heard the health benefits were changing and wanted to know how it would affect them. Steele testified, "Lisa Crutchfield, one of our [Company] lawyers, told her in front of the whole audience that we were not allowed to discuss that matter at this time."

a. Analysis and conclusions

The facts, as fully set for above and summarized here, are stipulated and/or un-contradicted and undisputed. The Company is one of four nursing facilities operating in New Jersey and managed by HealthBridge Management, LLC. All four of the HealthBridge managed facilities are provided a common health insurance plan arranged by HealthBridge and applicable to employees at the four facilities. HealthBridge on January 1 made changes in the provided health insurance plan that, among other things, reduced benefits and increased costs for all employees including the facility at issue here. Employee dissatisfaction with the changes resulted in some employees dropping coverage altogether with others changed their coverage. As a result of employee dissatisfaction and complaints with the changes to their health insurance plan, HealthBridge arranged certain improvements to the common health plan including a reduction in employee premiums. The cost savings and improvements were implemented retroactively to January 1 and applied to all HealthBridge employees in New Jersey except employees involved in a union representation campaign. A common memorandum announcing the improvements was distributed to all employees who were not or, had not been, eligible to vote in a union election. Specifically, Company Administrator Senk directed the common memorandum be distributed, on March 5, to all employees at the facility here except those eligible to vote in the March 9 union representation election. Election eligible employees at the facility here became aware of their exclusion from the improved health insurance plan benefits and asked management about their exclusion. Employee Jimenez testified, without contradiction, that Company Administrator Senk told employees at a communication meeting, right after the election, regarding their health insurance coverage "we can not negotiate, your contract," "your benefits," "your insurance" "because right now you are in the critical period with the Union." Acting Director of Nursing Steele testified Company Attorney Crutchfield told election eligible employees, at a communication meeting, at which non-election employees were also present, that "we were not allowed to discuss that matter at this time."

The unit employees, to date, have not received the improved health insurance benefits including the reduction in employee premiums.

Did the Company violate the Act by announcing on March 5, a reduction of healthcare premiums to all employees, systemwide, except those who were eligible to vote in the upcoming representation election set for March 9? Further, did the Company violate the Act by, on March 23, implementing the reduction of healthcare premiums to all employees, systemwide, except those who were eligible to vote in the representation election? The answer to both questions is yes. As a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as it would if a union was not in the picture. *Great A&P Tea Co.*, 166 NLRB 27 fn. 1 (1967). Here, the Company addressed concerns raised by its employees, systemwide, related to its decision to change its employees health insurance premiums and coverage. The Company announced to all its employees, systemwide, favorable changes to its health care benefits except it did not announce the changes to its election-eligible employees. The evidence establishes the Company took the action it did, toward certain employees, because they were not involved in a representation campaign and failed to take action toward other of its employees specifically because they were involved in such a campaign. The Company here did not proceed, as the law required it to do, as though there was no ongoing union campaign.

The withholding of systemwide benefits from employees involved in union representation proceedings, as was the case here, while granting the same benefits systemwide to employees not involved in such proceedings violates Section 8(a)(3) and (1) of the Act. *Noah's Bay Area Bagels, LLC,* 331 NLRB 188 (2000). There is an exception to this rule; however, the Company did not avail itself of the exception. The Board detailed the exception in *KMST-TV, Channel 46,* 302 NLRB 381, 382 (1991), citing *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), as follows:

> An exception to this rule, however, is that an employer may postpone such a wage or benefit adjustment so long as it "[makes] clear" to employees that the adjustment would occur whether or not they select a union, and that the "sole purpose" of the adjustment's postponement is to avoid the appearance of influencing the elections outcome.

The Company's failure to inform its unit employees its withholding the improved health insurance benefits from them, benefits it had granted to its other employees systemwide that were not in the midst of a union campaign, was temporary and would be provided retroactively, deprived the Company of a defense here to its failure to provide the benefits to its unit employees. The failure by the Company to grant the benefits to its unit employees and failure to advise them the withholding was only temporary and would be later provided leaves its unit employees with a clear impression they were deprived of these systemwide benefits because of their Section 7 rights.

I find the Company's silence with respect to its denial of the improved health insurance premiums and benefits to unit employees does not negate the unlawful discriminatory impact of its conduct. *Medical Center at Bowling Green,* 268 NLRB 985 (1984).

In summary, I conclude and find the Company's announcement on March 5 and the implementation on March 23 of the reduction of healthcare premiums and copays to all employees except those eligible to vote in the representation election violates Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Company, Woodcrest Health Care Center, is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, 1199 SEIU, United Healthcare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees about their union membership, activities, and sympathies; and, by announcing a reduction of healthcare premiums and copays to all employees except those who were eligible to vote in the representation election, the Company violated Section 8 (a)(1) of the Act.

4. By implementing a reduction of healthcare premiums and copays to all employees except those who were eligible to vote in the representational election, the Company violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act, and the Company's obligation to remedy its unfair labor practices. Having found the Company violated Section 8(a)(1) and (3) of the Act by withholding the implementation of a reduction of healthcare premium and copays to its unit employees effective January 1, 2012, I recommend the Company be ordered to implement the changed healthcare benefits and reimburse its unit employees for losses they suffered as a result of the Company's decision not to provide the changed healthcare benefits to its unit employees. This recommended make-whole order shall include out-of-pocket losses, if any, suffered by any unit employee that had to drop health coverage because of the failure of the Company to provide the new reduced premiums and copays to its unit employees. The amount paid to each unit employee shall include interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Company, Woodcrest Health Care Center, New Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, and sympathies; and, announcing a reduction of healthcare premiums and copays to all employees except those who were eligible to vote in the representation election.

(b) Implementing reductions in healthcare premiums and copays that specifically excludes employees eligible to vote in the representation election.

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

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

(a) Implement the changed healthcare benefits for the unit employees effective January 1, 2012, and make whole its unit employees for losses they may have suffered as a result of the Company's failure to implement the changed healthcare benefits for the unit employees in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its New Milford, New Jersey facility, copies of the notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since January 1, 2012.

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

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

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[6] 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.

[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 the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."