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**First American Enterprises d/b/a Heritage Lakeside and United Food and Commercial Workers Union Local 1189.** Cases 18–CA–211284, 18–CA–212666, 18–CA–216776, and 18–RC–212417

April 9, 2020

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

On February 7, 2019, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge’s rulings, findings, and conclusions<sup>2</sup> only to the extent consistent with this Decision and Order.

I. BACKGROUND

The Respondent operates a nursing home in Rice Lake, Wisconsin. On January 2, 2018,<sup>3</sup> United Food and Commercial Workers Union Local 1189 (the Union) filed a

<sup>1</sup> The Respondent has implicitly 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.

<sup>2</sup> We have amended the judge’s conclusions of law consistent with our findings herein. We shall also modify the judge’s recommended Order to conform to our findings and to the Board’s standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

<sup>3</sup> All subsequent dates are in 2018 unless otherwise indicated.

<sup>4</sup> Before July 2017, the Respondent operated two nursing homes in the Rice Lake, Wisconsin vicinity: Heritage Manor and Heritage Lakeside. The Union represented the cooks, dietary aides, activity aides, housekeeping personnel, and certified nursing assistants at Heritage Lakeside; Heritage Manor employees were not unionized. Between July and October 2017, the Respondent closed Heritage Manor and transferred most of the patients and employees from that facility to Heritage Lakeside. On December 4, 2017, the Respondent withdrew recognition from the Union, stating that of the 70 bargaining unit employees, 47 were transferees from the nonunion Heritage Manor facility and only 23 were from the unionized Heritage Lakeside location. The Union promptly filed a petition for an election.

representation petition, and the Board conducted an election on February 1.<sup>4</sup> The ballots were impounded until March 8, when a tally of the ballots established that 25 votes were cast for and 25 votes were cast against the Union. On March 15, the Union filed objections to conduct affecting the results of the election, and the Regional Director ordered a hearing on two of the objections.<sup>5</sup> On June 27, the General Counsel, pursuant to charges filed by the Union, issued a consolidated complaint alleging that the Respondent committed numerous unfair labor practices both before and during the critical preelection period, and on July 27, Case 18–RC–212417 was consolidated for hearing with the unfair labor practice cases. On December 12, a hearing was held before Administrative Law Judge Amchan. As discussed below, the judge found four of the alleged violations and dismissed the remaining allegations,<sup>6</sup> and he recommended that the election results be set aside.

II. DISCUSSION

A. Overview

First, we agree with the judge, for the reasons stated in his decision and as further discussed here, that the Respondent violated Section 8(a)(1) of the Act by promulgating, disseminating, and/or enforcing a new policy prohibiting conversations other than those that are “resident-centered” in working areas;<sup>7</sup> threatening employees, through Director of Nursing (DON) Kristina Taylor, with unspecified reprisals if they refused to sign or violated the new policy;<sup>8</sup> and maintaining a “Non-disclosure” policy

<sup>5</sup> The Regional Director ordered a hearing on Objection 1 (alleging that the Respondent forced employees to sign a new policy that prohibited them from discussing the Union in the workplace) and Objection 3 (alleging that the Respondent interrogated employees about how they intended to vote in the election and instructed them to vote if they intended to vote against the Union).

<sup>6</sup> There are no exceptions to the judge’s dismissal of allegations that the Respondent violated Sec. 8(a)(1) of the Act when Dietary Manager Melissa Kern asked employees how they were going to vote in the election and when, after the election, she asked employees how they voted and subsequently recorded their votes in a notebook.

<sup>7</sup> We agree with the judge that the Respondent violated the Act by promulgating the “resident-centered” conversation policy in response to union activity, i.e., only 6 days after the filing of the representation petition. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (*Lutheran Heritage*) (“If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following . . . (2) the rule was promulgated in response to union activity.”); accord *Boeing Co.*, 365 NLRB No. 154, slip op. at 2–3 (2017) (leaving undisturbed *Lutheran Heritage* “prong two,” which states that a rule promulgated in response to union activity is unlawful).

<sup>8</sup> In affirming the judge’s finding as to this violation, we rely on the fact that DON Taylor, when disseminating the quality care management form (QCM Form) containing the “resident-centered” conversation policy, told employees that they could not leave the room or take their breaks until they signed the QCM Form and that they should not

in its employee handbook that prohibits employees from discussing salary or wage information.<sup>9</sup>

We also agree with the judge, for the reasons stated in his decision and as further discussed here, that the Respondent did not violate the Act when Administrator Derek Joswiak and Vice President of Operations Eric Everson asked employee Carolyn Hafele whether she still wanted to be in the Union; when Manager Kern repeatedly told employee Kayla Anderson that employees need to vote “no” in the election;<sup>10</sup> and when Manager Kern, on the morning of the election, told Hafele and employee Lily Swanson that voting for union representation is incompatible with having a good relationship with their supervisor.<sup>11</sup>

However, as discussed below, we reverse the judge and find that the Respondent violated Section 8(a)(1) of the Act when Administrator Joswiak told employee Darla Buesser to keep confidential their discussion about Buesser’s union-related conversation with Hafele, and Manager Kern solicited Hafele to “work on” Swanson to get her to vote against the Union. We also reverse the judge and find that the Respondent did not violate the Act when Administrator Joswiak asked Buesser about a union-related conversation with Hafele.

Finally, we agree with the judge, for the reasons stated in his decision and those set forth below, that the election should be set aside.

#### *B. Administrator Joswiak’s Conversation with Buesser*

In August 2017, Buesser, a certified nursing assistant and one of two union stewards at Heritage Lakeside, approached dietary aide Hafele and urged her to sign a union membership application. Buesser stated that the Union was the only thing that would save Hafele’s job once the two facilities merged. She also warned Hafele that because employees transferring from Heritage Manor had greater seniority than Hafele, Hafele could lose her job without the Union. Hafele filled out the application,

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disrespect her or there would be consequences. Taylor’s comments constituted a threat of unspecified reprisals and would reasonably tend to interfere with employee rights under the Act, as she strongly suggested that the Respondent would take disciplinary action if employees refused to sign or violated the newly disseminated and illegal rule. See *NLRB v. Long Island Assn. for AIDS Care, Inc.*, 870 F.3d 82, 87–88 (2d Cir. 2017) (enforcing Board’s finding of a Sec. 8(a)(1) violation where the employer summoned an employee to a meeting, demanded that he sign an unlawful confidentiality agreement “or get fired,” and added that the employee “just terminated his own employment” because he wrote “under duress” on the confidentiality statement when he signed it).

<sup>9</sup> Specifically, we find that the non-disclosure policy is unlawful under *Boeing* Category 3. See *Boeing Co.*, supra, slip op. at 4 (“An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.”).

<sup>10</sup> We agree with the judge that the Respondent did not violate the Act because it is unclear from the record what Dietary Manager Kern

including a dues check-off form, and gave the application to Buesser, who submitted it to the Respondent’s Business Manager, Jackie Damaske-Frame. Subsequently, Hafele’s supervisor Sarah Noggler told Hafele that she did not need the Union and that Hafele should have talked to her first. Hafele then went to Damaske-Frame and asked if it was too late to stop her union dues deduction.

About 2 days later, Administrator Joswiak called Hafele into his office and said he would have to get back to her about her union dues cancellation inquiry. Hafele told Joswiak that Buesser had said that only the Union could save her job. Joswiak replied that Hafele had nothing to worry about.

A week later, on about August 17, 2017, Joswiak summoned Buesser to an empty room and asked whether Buesser had told Hafele that Hafele would be fired if she did not join the Union. Buesser denied the statement. Joswiak said he believed her and that he had spoken to his own boss, Vice President of Operations Everson, who similarly did not believe the statement. Joswiak then asked Buesser to keep their conversation confidential.

The judge found that Joswiak’s questioning of Buesser was an unlawful interrogation. Relying on *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the judge found that it was coercive for Joswiak to summon Buesser into an empty room, ask her about an unfounded allegation, and tell her that he had discussed that allegation with his boss. The judge also found that Joswiak’s request for Buesser to keep their conversation confidential was not unlawful because the Respondent had not disciplined Buesser. We disagree on both counts.

In determining whether the questioning of an employee about union or other protected activity constitutes an unlawful interrogation, the Board considers the totality of the circumstances, including whether the employee is an open and active union supporter, whether there is a history of

actually said to Anderson. Therefore, the General Counsel did not carry his burden of proof.

<sup>11</sup> The judge found that Kern told two employees that if they voted for the Union, they were saying she was a bad boss. We agree with the judge that the General Counsel did not carry his burden of proving that the statement was objectively threatening. Rather, the statement conveyed no actual threat or promise of benefits. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (“[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit.”) (internal quotations omitted); cf. *Heritage Nursing Homes, Inc.*, 269 NLRB 230, 231 (1984) (finding an employer’s statement threatening where it “conveys the message that support for the [u]nion and continued employment by the [employer] are incompatible”).

employer antiunion hostility or discrimination, the nature of the information sought, the position of the questioner in the company hierarchy, and the place and method of interrogation. See *Rossmore House*, supra at 1178 fn. 20.

We find that under *Rossmore House*, supra, Joswiak's questioning of Buesser would not tend to restrain, coerce, or interfere with the exercise of rights guaranteed by the Act. Buesser was an open and active union supporter, Joswiak asked Buesser only a single question and assured her that he believed her denial, and the Respondent did not have a history of discrimination. Thus, under *Rossmore House*'s totality of the circumstances standard, we find the evidence insufficient to support an unlawful interrogation violation. Accordingly, we reverse the judge and dismiss the allegation.

However, we find that Joswiak's instruction to Buesser to keep their conversation confidential was unlawful. Section 7 of the Act protects employees' rights to discuss the terms and conditions of their employment with other employees. The Board recently emphasized that employees not involved in a disciplinary investigation are free to discuss discipline or incidents that could result in discipline without a confidentiality limitation, and employees who are involved may also discuss them, provided they do not disclose information that they either learned or provided in the course of the investigation. See *Apogee Retail LLC d/b/a/ Unique Thrift Store*, 368 NLRB No. 144, slip op. at 8 (2019).<sup>12</sup> Here, Buesser had the right to discuss the interaction with other employees, especially because she was neither the subject nor witness in a disciplinary investigation and Joswiak asked her about a union-related conversation.

The Respondent does not dispute that Joswiak instructed Buesser to keep their conversation confidential. Instead, it argues that the confidentiality instruction was necessary to protect Hafele's privacy. The Respondent,

<sup>12</sup> The specific question in *Apogee* was whether the employer lawfully maintained two investigative confidentiality rules. The Board, overruling its prior approach and applying the test for facially neutral workplace rules established in *Boeing Co.*, 365 NLRB No. 154 (2017), held that such confidentiality rules generally are lawful where, by their terms, the rules are limited to the duration of the investigation. The Board reasoned that "[i]nvestigative confidentiality rules, by their nature, bind those who are privy to internal investigations from sharing information that might bias the investigation." *Apogee Retail LLC*, supra, slip op. at 8 fn. 14. Here, Joswiak demanded confidentiality from Buesser regarding a single informal question rather than pursuant to an ongoing disciplinary investigation. In fact, the Respondent itself asserts in its answering brief that Joswiak's conversation with Buesser was *not* a disciplinary investigation. Thus, *Apogee*'s holding regarding investigative confidentiality rules is not controlling.

<sup>13</sup> Chairman Ring would not find that the Respondent violated the Act when Administrator Joswiak asked employee Buesser to keep their conversation confidential. That conversation consisted of Joswiak asking Buesser whether she told employee Hafele that Hafele would be fired if

however, has not pointed to any evidence suggesting that Joswiak's instruction was necessary to protect Hafele's privacy or that her privacy was at risk. Cf. *SNE Enterprises, Inc. v. NLRB*, 257 Fed. Appx. 642, 646–647 (4th Cir. 2007) (employer's justification did not outweigh employee's right to discuss his employment conditions; employer's investigation was already complete and its desire to prevent conflict at the plant was "too general" to outweigh employee's rights); *Westside Community Mental Health Center, Inc.*, 327 NLRB 661, 666 (1999) (employer's general testimony about "conflict and friction" and its "bare claims" about safety were insufficient to justify instruction to employee not to discuss her discipline). We therefore find that Buesser's right to discuss the interaction with her coworkers outweighs the Respondent's asserted business justification.

Contrary to our colleague, we believe that Buesser had a Section 7 right to discuss Joswiak's questioning about her union-related conversation with Hafele, regardless of any assurances Joswiak made, and therefore that the Respondent could not lawfully request confidentiality without a legitimate business justification. We find that the Respondent's business justification—concern about Hafele's privacy and rumors being spread on the floor with wrong information—is unpersuasive given that Joswiak could have preserved Hafele's confidentiality by omitting her name from the conversation if confidentiality was a concern. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) of the Act when Administrator Joswiak asked Buesser to keep their conversation confidential.<sup>13</sup>

### C. Dietary Manager Kern's Statement to Hafele

On the morning of the election, Hafele was alone in the facility's kitchen when her boss, Manager Kern, told her, "You got to help me work on Lily [Swanson] to vote no

she did not join the Union, Buesser denying that she had said that, Joswiak assuring Buesser that he believed her and so did his boss, and Joswiak requesting confidentiality. That request did not interfere with, restrain, or coerce Buesser in the exercise of her Sec. 7 right to discuss terms and conditions of employment with her coworkers. As the summary of the conversation shows, Joswiak did not ask Buesser what she *did* say to Hafele, and he did not instruct Buesser not to repeat to her coworkers whatever she said to Hafele. Thus, Buesser was free to say to others what she said to Hafele, i.e., that only the Union would save their jobs. And contrary to the majority, Joswiak's request was not unlawful on the basis that it interfered with Buesser's right, in their words, "to discuss discipline or incidents that could result in discipline" because there was no discipline, and there was no prospect of discipline. Indeed, Joswiak had just taken the prospect of discipline off the table by telling Buesser that he and his boss believed her side of the story, and the majority acknowledges that Joswiak's conversation with Buesser was not a disciplinary investigation. Thus, the Chairman would dismiss this allegation.

for the Union today.” The judge summarily found that this statement did not violate the Act because, as a general rule, an employer can lawfully encourage employees to vote against union representation or seek the help of employees to convince others to vote against representation. Although the judge is correct that an employer can, under certain circumstances, lawfully seek the help of employees to convince others to vote against representation, we find that those circumstances are not present here. Rather, we find that the Respondent violated the Act when Manager Kern asked Hafele to help get Swanson to vote “no.”

It is well established that “an employee has a Section 7 right to choose, free from any employer coercion, the degree to which he or she will participate in the debate concerning representation.” *Allegheny Ludlum Corp.*, 333 NLRB 734, 741 (2001), *enfd.* 301 F.3d 167 (3d Cir. 2002); see also *Smithfield Packing Co.*, 344 NLRB 1, 3–4 (2004), *enfd. per curiam* 447 F.3d 821 (D.C. Cir. 2006). That right includes “the right to express an opinion or to remain silent.” *Dawson Construction Co.*, 320 NLRB 116, 117 (1995) (quoting *Texaco, Inc. v. NLRB*, 700 F.2d 1039, 1043 (5th Cir. 1983)). Accordingly, under Board law, employers may only request that employees solicit other employees to vote against a union if such request is “generally made to all employees through [an] indirect and rather impersonal medium . . . rather than directly to selected employees by their supervisors.” *Leggett & Platt, Inc.*, 230 NLRB 463, 463 (1977) (emphasis added). This rule prevents an employer from using “the power of management to instruct [specific] employees to get other employees to vote against the Union.” *Hendrix Mfg. Co.*, 139 NLRB 397, 405–406 (1962) (finding a violation where supervisors instructed one employee to “go and tell your friends not to vote for [the union]” and instructed another employee to “make [other employees] see the light cause the union wouldn’t do us any good”), *enfd.* 321 F.2d 100 (5th Cir. 1963).

Here, the facts establish that Manager Kern’s direct request to Hafele would reasonably tend to coerce Hafele and/or interfere with her free choice in the election. Cf. *Leggett & Platt, Inc.*, *supra* at 463 (finding no violation where the employer’s requests and solicitations to employees to vote “no” in the election were generally made to all employees through a form letter, “rather than directly to selected employees by their supervisors”). We therefore reverse the judge and find that the Respondent violated Section 8(a)(1) when Kern told Hafele to “work on” getting Swanson to vote against the Union.

### III. SECOND ELECTION

In light of the Respondent’s objectionable conduct during the Union’s organizing campaign, we adopt the judge’s finding that the election should be set aside. In

doing so, we rely on the Respondent’s promulgation of the “resident-centered” conversation policy, the statements DON Taylor made when disseminating the policy, and Manager Kern’s instructions to Hafele to “work on” getting Swanson to vote against the Union. Accordingly, we will set aside the election held on February 1, 2018, sever Case 18–RC–212417 from the other cases in this consolidated proceeding, and remand that case to the Regional Director for further appropriate action.

### AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge’s Conclusion of Law 1:

“1. On August 17, 2017, Respondent, by Administrator Derek Joswiak, violated Section 8(a)(1) by telling Darla Buesser to keep their conversation confidential.”

Insert the following as Conclusion of Law 5:

“5. On February 1, 2018, Respondent, by Director of Nursing Kristina Taylor, violated Section 8(a)(1) by soliciting employee Carolyn Hafele to “work on” employee Lily Swanson to get her to vote against the Union.

### ORDER

The National Labor Relations Board orders that the Respondent, First American Enterprises, Rice Lake, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to keep management’s questions about their union activity confidential.

(b) Maintaining a policy prohibiting conversations other than those that are “resident-centered.”

(c) Threatening employees with discipline if they engage in activities on behalf of the Union.

(d) Maintaining work rules that prohibit employees from discussing salary or wage information.

(e) Soliciting specific employees to help “work on” getting other employees to vote against the Union.

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

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

(a) Rescind the policy prohibiting conversations other than those that are “resident-centered” and notify employees that the policy has been rescinded.

(b) Rescind the rule in its employee handbook that prohibits the discussion of salary or wage information.

(c) Furnish all current employees with an insert for the employee handbook that (1) advises that the unlawful rule has been rescinded or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision, or publish and distribute to all current employees a revised employee handbook that (1) does not contain

the unlawful provision or (2) provides a lawfully worded provision.

(d) Within 14 days after service by the Region, post at its Rice Lake, Wisconsin facility copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 18 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 February 1, 2018, is set aside, and Case 18-RC-212417 is severed and remanded to the Regional Director for Region 18 to direct a second election whenever the Regional Director shall deem appropriate.

Dated, Washington, D.C. April 9, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>14</sup> 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

## 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 to keep management's questions about your union activity confidential.

WE WILL NOT maintain a policy prohibiting conversations other than those that are "resident-centered."

WE WILL NOT threaten you with discipline if you engage in activities on behalf of the union.

WE WILL NOT maintain work rules that prohibit you from discussing salary or wage information.

WE WILL NOT solicit your help to "work on" getting other employees to vote against 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.

WE WILL rescind our policy prohibiting conversations other than those that are "resident-centered" and notify you that the policy has been rescinded.

WE WILL rescind the rule in our employee handbook that prohibits you from discussing salary or wage information.

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

FIRST AMERICAN ENTERPRISES D/B/A HERITAGE  
LAKESIDE

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

The Board's decision can be found at <https://www.nlr.gov/case/18-CA-211284> 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.



*Rachel M. Simon-Miller and Florence Brammer, Esqs.*, for the General Counsel.

*Robert S. Driscoll and Christopher Schuele, Esqs. (Reinhart Boerner Van Deuren, S.C.)*, of Milwaukee, Wisconsin, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Rice Lake, Wisconsin, on December 12, 2018. UFCW Local 1189 filed the charges in this matter on December 7, 2017, January 8, 2018 and March 19, 2018. The General Counsel issued the consolidated complaint on June 27, 2018, and consolidated Case 18-RC-212417 with the unfair labor practice cases for hearing.

Prior to July 2017, First American Enterprises operated 2 nursing homes in the Rice Lake, Wisconsin vicinity.<sup>1</sup> The Union represented the cooks, dietary aides, activity aides, housekeeping personnel and certified nursing assistants at one these, Heritage Lakeside, formerly known as the Rice Lake Convalescent Center. The other facility, Heritage Manor, was not unionized.

Between July and October 2017, First American consolidated the nursing homes, moving most of the patients and employees from Heritage Manor to Heritage Lakeside. It closed Heritage Manor. On December 4, 2017, Respondent withdrew recognition from the Union, stating that 47 of the its then bargaining unit employees had come from Heritage Manor and only 23 were from the unionized Heritage Lakeside home.

On January 2, 2018, Local 1189 filed a representation petition. A Board election was conducted on February 1, 2018. The ballots were impounded until March 8. The tally conducted on that date established that 25 votes were cast for the Union and 25 votes against it. On March 15, the Union filed objections to conduct affecting the results of the election. The Regional Director ordered a hearing on union objections 1 (Respondent forced employees to sign a new policy prohibiting discussion of the Union in the workplace) and 3 (unlawful interrogation and instructing

employees to vote if they intended to vote against union representation). These objections mirror complaint paragraphs 5(c)-5(h).

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

### FINDINGS OF FACT

#### I. JURISDICTION

First American, a Minnesota corporation, operated Heritage Lakeside, a long-term care facility in Rice Lake, Wisconsin. Heritage Lakeside is now managed by another business entity.<sup>2</sup> Heritage Lakeside annually derives revenues in excess of \$100,000. Heritage Lakeside purchases and receives goods valued in excess of \$50,000 directly from points outside of Wisconsin. Heritage Lakeside admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### Complaint Paragraph 5(a) and (b), August 2017 Alleged Interrogation and Threats

The test as to whether an employer's statement or conduct violates Section 8(a)(1) is whether it may reasonably be said that the conduct or statement tends to interfere with employee rights under the Act. The employer's motive in making the statement or engaging in the conduct is irrelevant to whether it violated Section 8(a)(1), *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959).

Darla Buesser, a current employee and activity aide, was one of 2 union stewards at Heritage Lakeside. In August 2017, Buesser approached Carolyn Hafele, a dietary aide, and urged her to sign an application for union membership.<sup>3</sup> Buesser told Hafele that the Union was the only thing that would save her job when Heritage Manor and Heritage Lakeside merged. Buesser warned Hafele that employees transferring from Heritage Manor had greater seniority than Hafele and that as a result, Hafele might lose her job without the Union.

Hafele was concerned about losing her job in the merger, but it is unclear whether she had communicated this to Buesser. Hafele filled out the application, which included authorization for Respondent to deduct union dues from her paycheck. She gave the completed application to Buesser who turned it in to Respondent's business manager, Jackie Damaske-Frame.

Afterwards, Sarah Noggler, then Hafele's supervisor, told Hafele that she did not need to join the Union and that Hafele should have talked to Noggler before joining. Hafele then went to Jackie Damaske-Frame and asked if it was too late to stop the dues deduction.

Two days later, Respondent's administrator, Derek Joswiak, called Hafele into his office. He told her that Noggler and Jackie Damaske-Frame should not have been talking to her about joining the Union. He said he would have to get back to her about the dues cancellation. Hafele told Joswiak that Buesser had told

<sup>1</sup> In December 2018 Health Dimensions Group managed Heritage Lakeside. First American was only a conservator.

<sup>2</sup> By Respondent, I mean Heritage Lakeside, regardless of who owned that facility.

<sup>3</sup> Hafele voluntarily left Respondent's employ in March 2018.

her that only the Union could save her job. Joswiak told Hafele she had nothing to worry about. There is no credible evidence that Hafele told anyone that Buesser told her she would be fired if she did not join the Union.

About a week later, Joswiak approached Buesser and took her into an empty room. Joswiak told Buesser that Hafele had told him that Buesser had told Hafele that she would be fired if she did not join the Union. Buesser denied this. Joswiak told Buesser that he believed her. Joswiak also told Buesser that he had spoken to his boss, Eric Everson, and that Everson also did not believe that Buesser had told Hafele that she would be fired if she did not join the Union.<sup>4</sup> Joswiak asked Buesser to keep their conversation confidential.

A week later, Buesser met with Joswiak, Everson and Carolyn Hafele. Either Joswiak or Everson or both asked Hafele if she still wanted to belong to the Union; Hafele said that she did and would leave her union application alone.

The lead Board case regarding the legality of interrogations is *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

[I]t is [well established] that interrogations of employees are not per se unlawful but must be evaluated under the standard of “whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.”

In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002).

I find the violation alleged in complaint paragraph 5(a) (i), but not the allegations in 5(a)(ii) and 5(b). There is no evidence that Carolyn Hafele told Administrator Derek Joswiak that Darla Buesser told her that she would be fired if she did not join the Union. Thus, I find that it was highly coercive for Joswiak to summon Buesser into an empty room by herself and pass that accusation along to Buesser. It was also highly coercive for Joswiak to tell Buesser that he had discussed this unfounded allegation with his boss, Erik Everson. Regardless of the fact that Joswiak told Buesser that he believed her denial and that Everson also gave no credence to the allegation, this conversation would necessarily inhibit Buesser from advocating union membership to fellow employees. Thus, I find that Respondent, by Joswiak, violated Section 8(a)(1) in this conversation with Buesser.

However, I do not find that Joswiak violated the Act by telling

<sup>4</sup> There is no evidence as to how Buesser’s conversation with Hafele came to Erickson’s attention.

<sup>5</sup> The two other employees, high school students who apparently worked part time, did not testify. Due to the lack of corroboration of Hafele’s testimony by Anderson and Swanson, I also decline to credit her testimony regarding Kern’s alleged inquiries to the 2 high school students.

<sup>6</sup> While it is unclear as to whether Respondent’s awareness of the Stevens-Buesser conversation precipitated the new rule discussed herein, I infer its promulgation was related to the union organizing drive and the upcoming election. I specifically discredit the testimony of Director of

Buesser to keep their conversation confidential. He had not disciplined Buesser which distinguishes this case from those cited by the General Counsel.

I also find that Respondent did not violate the Act in asking Hafele whether she still wanted to be a union member. Hafele had asked Respondent not to deduct union dues. It was reasonable and not coercive for Joswiak under the circumstances to ask Hafele what she wanted him to do about the dues deduction.

#### Complaint Paragraph 5(c) & (d) & (f)(i) and (ii)

Kayla Anderson was employed as a dietary aide and cook at Heritage Manor from about July 2014 until August 2017, when she was transferred to Heritage Lakeside. She quit her employment voluntarily in October 2018. Several times after the representation petition was filed on January 2, 2018, Dietary Manager Melissa Kern came into the home’s kitchen and told employees that Respondent needed them to vote against union representation. Anderson told Kern that she had taken off for February 1, did not really care about the outcome of the election and did not want to come into work. Kern pressed Anderson about coming to work to vote on February 1 to the point that Anderson thought Kern was threatening her job.

Carolyn Hafele testified that in early January, Kern asked Anderson and Lilly Swanson how they planned to vote and that Kern asked 2 other employees on election day how they voted. Hafele also testified that Kern immediately recorded this in a notebook she was carrying. Kern denies this. Both Anderson and Swanson testified and neither stated that Kern asked them how they planned to vote. On account of this, I decline to credit Hafele and decline to find that Kern asked any employees how they planned to vote or how they voted.<sup>5</sup> I dismiss all allegations regarding interrogations by Kern or surveillance of union activities by Kern.

#### Complaint Paragraph 5(e), (g) and (h): Implementation of New Policy Prohibiting Other Than “Resident-Centered” Conversations in Working Areas and Accompanying Threats.

On January 7, 2018, Certified Nursing Assistant (CNA) Lee-Ann Stevens and Darla Buesser had a brief conversation near a nurse’s station. They discussed the need to make all employees aware of an upcoming union meeting. Patti Urmanski, a charge nurse, was nearby when this conversation occurred.<sup>6</sup>

The next day, January 8, 2018, Kristina Taylor, Respondent’s Director of Nursing (DON), required employees to attend a brief meeting. At this meeting she told them that she did not want to hear any talk in the facility unless it was resident-related. Taylor then required the employees to sign a QCM Form stating, “The only conversation that needs to be heard/discussed on the floor,

Nursing Kristina Taylor that the rule dissemination was precipitated by her learning that 2 CNAs were discussing their boyfriends in front of a resident. If that were the case, there would be no need to have the entire nursing staff acknowledge the rule in writing and no need for a rule that was so broadly worded. Moreover, Taylor did not mention this “inappropriate” conversation to employees when meeting with them the next day. The fact that Respondent did not offer employees any explanation for the promulgation of this rule or its timing, a week after the representation petition was filed, gives rise to an inference that promulgation was unlawful and intended to interfere with employees’ Sec. 7 rights, *Shore and Ocean Services*, 307 NLRB 1051 (1992).

in resident's rooms, dining rooms is resident-centered. Any other topics are not appropriate and can be discussed on your breaks or your own time." Approximately 50 of the approximately 70-unit employees were required to sign a QCM Form either by Taylor or other managers (GC Exhs. 4(a)-4(e)).

There is no evidence that any Heritage Lakeside employee was aware of the "resident-centered conversation" rule prior to January 8, 2018. LeeAnn Stevens, Carolyn Hafele and Amber Morgan credibly testified that they had never seen such a written rule, were unaware of any company policy regarding what could be discussed at the nurses' station or, of such a rule being enforced previously.

Respondent was strongly opposed to having the Union represent Heritage Lakeside employees. In January 2018, it posted a flyer that said as much (GC Exh. 3). Respondent also held 3 mandatory meetings for employees in which it encouraged them to vote against union representation. For these reasons I conclude that the new conversation rule was precipitated by the upcoming union election, not any inappropriate conversations amongst nurses in front of residents. As such I find that this change in policy was a violation of Section 8(a)(1), *Dayton Hudson*, 316 NLRB 477 (1995), at 478 and 486, *Nashville Plastic Products*, 313 NLRB 462 (1993). Even if I were credit DON Taylor that this rule or policy predated the filing of the representation petition, it is apparent that the rule was widely disseminated to employees for the first time and enforced only after the filing of the representation petition of January 2. Therefore, the rule was established and/or broadly disseminated and/or enforced for the purpose of interfering and restraining employees in the exercise of their Section 7 rights. As alleged in complaint paragraph 5(g) and (h), promulgation of the rule therefore violated Section 8(a)(1) of the Act,

In addition, Taylor's statements to employees when promulgating or disseminating the rule violated the Act as alleged in complaint paragraph 5(e) per the long-standing principles enunciated in *American Freightways*. By requiring the majority of the bargaining unit to sign the QCM form, and her verbal statements, Taylor was strongly suggesting that disciplinary action would be taken if employees violated the newly disseminated and illegal rule.

The illegality of the rule and Taylor's statements are not in any way negated by the admission of former employee Kayla Anderson that she was aware that having inappropriate conversations in front of residents was part of an employee's role as a health care provider. That a nurse might understand that he or she should not talk about the employee's sex life or the resident's medical condition in front of the patient does not mean that an employee could not talk about wages, hours and working conditions (including the desirability or not of union membership) in front of residents so long as it did not interfere with the quality of care rendered.

The Promulgation of Respondent's "Resident-Centered" Conversation Rule, in of Itself, Warrants Ordering a New Election.

The Board's usual policy is to direct a new election whenever an unfair labor practice occurs during the critical period. However, the Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have

affected the election results. In determining whether the misconduct could have affected the election result, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit and other relevant factors, *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

In this instant case, there are many factors supporting an order for a second election: the timing of the unfair labor practice, starting a little more than 3 weeks before the election and continuing throughout the critical period; the closeness of the election result (25-25); the dissemination of Respondent's illegal policy to about 70 percent of the bargaining unit; and the identity of the officials committing the violation, i.e., the director of nursing and the dietary department manager.

#### Complaint Paragraph 5(f) (iii)

Melissa Kern told Lily Swanson and Carolyn Hafele that if they voted for the Union, they were saying that she was a bad boss. Kern testified that she told a group of employees that if she was a fair boss, there was no need for a union. The General Counsel alleges that Kern's remark to Hafele, Swanson and others is an illegal threat that a vote for the Union is incompatible with having a good relationship with their supervisor. I do not find any precedential support for the proposition that Kern's statements violate Section 8(a)(1). Therefore, I dismiss complaint paragraph 5(f)(iii).

#### Complaint Paragraph 5(i)

Respondent's employee handbook contains the following rule:

Rice Lake Convalescent Center has various types of confidential business information which must be protected. Such confidential information includes, but is not limited to, the following examples...All personnel file information, employee names, addresses, home phone numbers, salary or wage information, medical data and any other information about our employees.

The legality of Respondent's confidentiality rule is governed by the Board's recent decision in *The Boeing Company*, 365 NLRB No. 154 (2017). In *Boeing*, the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with section 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, application of Respondent's rule is not an issue in this case.

Don Kristina Taylor testified that the rule is intended to insure that the business office not divulge personal information. I do not find that explanation credible because if that was Respondent's concern, it would not have put the rule in a handbook applicable to all employees. Moreover, it never informed employees that the rule was applicable only to office personnel. Finally,



the rule is not limited to personnel file information, it prohibits disclosure of “any other information about our employees.”

Respondent argues in its brief at page 7 that no employee would reasonably interpret this rule to prohibit discussion of wages. It contends that since employees would not conclude that it violated the rule to tell each other their names or phone numbers, they would not reasonably believe they were prohibited from discussing wages. I find this argument unpersuasive. The likely understanding of this rule would be that employees are not to discuss their wages or other employees’ wages regardless of whether they are free to exchange names, addresses and phone numbers. Finally, Respondent has no legitimate business justification to prohibit employees from discussing salary or wage information, thus the rule, as written, violates Section 8(a)(1).

**Alleged Illegal Threats to Employees that Respondent Needed Them to Vote Against Union Representation (Complaint Paragraph 5(d) and 5(f))**

As a general rule, an employer does not violate the Act by encouraging employees to vote against union representation or seeking the help of employees to convince others to vote against union representation. The Board has on at least on one occasion found such encouragement or solicitation of “no” votes to violate the Act in the context of other unfair labor practices, *Modern Manufacturing Company*, 261 NLRB 534–535 (1982). I see no reason to depart from the general rule in this case and therefore dismiss complaint paragraphs 5(d) and 5(f) insofar as they allege that such solicitation for “no” votes was illegal.<sup>7</sup>

**SUMMARY OF CONCLUSIONS OF LAW**

I find that Respondent violated the Act in the following respects and no others:

1. On August 17, 2017, Respondent, by Administrator Derek Joswiak, violated Section 8(a)(1) by interrogating Darla Buesser about a union-related conversation with Carolyn Hafele.
2. On or about January 8, 2018, Respondent, by Director of Nursing, Kristina Taylor, violated Section 8(a)(1) by threatening employees not to engage in union activity.
3. On January 8, Respondent violated Section 8(a)(1) by promulgating, or for the first time, disseminating and/or enforcing a rule forbidding conversations in work areas other than those that are “resident-centered.”
4. Respondent’s “Non-disclosure” policy in its Employee Handbook violates Section 8(a)(1) in so far as it prohibits employees from discussing salary or wage information.

**Recommendations Regarding Objections**

I recommend that the election be set aside and remanded to the Regional Director for the purpose of conducting a second election since the Respondent committed a significant unfair labor practice during the critical period. By this I mean its

<sup>7</sup> Thus, while I credit Carolyn Hafele’s testimony that Melissa Kern tried to get her assistance in convincing Lily Swanson to vote “no,” I find this did not violate the Act.

<sup>8</sup> 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.

promulgation, dissemination and enforcement of the “resident-centered” conversation rule. Additionally, during the critical period, Respondent impliedly threatened employees with discipline if they violated this rule.

**REMEDY**

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

**ORDER**

The Respondent, Heritage Lakeside, Rice Lake Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) impliedly threatening employees with discipline if they engage in union or otherwise protected discussions in work areas.
  - (b) promulgating and/or disseminating and/or enforcing a rule in reaction to a union organizing campaign that forbids union or other protected conversations in work areas.
  - (c) interrogating employees as to their conversations soliciting support from other employees for the Union.
  - (d) maintaining a rule in its employee handbook that can reasonably be read to prohibit employees from discussing salary and wage information.
  - (e) In any like or related manner 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) Rescind its rule prohibiting any conversations in work areas that are not “resident-centered.”
- (b) Rescind or revise its employee handbook rule to clarify that employees are not prohibited from discussing salary and wage information with each other—unless that information had been obtained as a result of their access to official personnel files.
- (c) Within 14 days after service by the Region, post at its Rice Lake, Wisconsin facility copies of the attached notice marked “Appendix.”<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, 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

<sup>9</sup> 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.”

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2017.

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

Dated, Washington, D.C. February 7, 2019

#### 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 impliedly threaten employees with discipline if they engage in conversations that are not “resident-centered” in work areas.

WE WILL NOT interrogate employees about their conversations in which they seek to encourage other employees to support United Food and Commercial Workers Local 1189 or any other union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, rescind our rule forbidding conversations in work areas that are not “resident-centered.”

WE WILL, rescind or revise our employee handbook so as to make clear that employees are allowed to discuss salary and wage information unless they have acquired such information from their access to other employees’ personnel files.

FIRST AMERICAN ENTERPRISES D/B/A HERITAGE  
LAKESIDE

The Administrative Law Judge’s decision can be found at [www.nlr.gov/case/18-CA-211284](http://www.nlr.gov/case/18-CA-211284) 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.

