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**Holy Cross Health d/b/a Holy Cross Hospital and National Nurses Organizing Committee/National Nurses United (NNOC/NNU), AFL–CIO.** Cases 05–CA–182154 and 05–CA–187452

September 11, 2020

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

<sup>1</sup> Subsequently, the Board issued a notice to show cause why two allegations regarding the Respondent’s June 2016 solicitation-and-distribution policy—an allegedly overbroad definition of solicitation and a prohibition on soliciting through the Respondent’s email system—should not be severed and remanded to the judge for further proceedings in light of the Board’s precedent-changing decisions in *Boeing Co.*, 365 NLRB No. 154 (2017), and *Caesars Entertainment d/b/a Rio-All Suites Hotel & Casino*, 368 NLRB No. 143 (2019). In response, the General Counsel filed a motion, joined by the Respondent, to sever and remand these two allegations to accept the Charging Party’s withdrawal of them. In a June 10, 2020 Order, the Board granted the motion.

<sup>2</sup> 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.

The judge mistakenly (1) attributed soliciting union support on March 21, 2017, in the operating room lounge to Suzanne Mintz instead of Jeanee Scott, (2) included Mintz in the list of nurses who gathered in front of a statue to have their picture taken on September 16, 2016, and (3) stated the Respondent’s union fact sheets were emailed and faxed without any evidence that they were ever faxed. None of these errors affects our disposition of this case.

<sup>3</sup> We adopt the judge’s conclusions, for the reasons he stated, that the Respondent violated Sec. 8(a)(1) by maintaining the June 2016 solicitation-and-distribution policy and the October 2016 follow-up memorandum to the extent that (1) the October memorandum prohibited “discussion about wages, hours and conditions of employment” during working time, (2) the October memorandum limited solicitation and distribution to locations “where [the Respondent] allows [it],” and (3) the June policy and October memorandum both have overinclusive definitions of immediate patient care areas. We do not rely on the judge’s citations to *Crowne Plaza Hotel*, 352 NLRB 382 (2008), a decision that was decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

We agree with the judge that the June policy’s prohibition of “solicitation and distribution of literature to patients or visitors at any time by unauthorized persons” also violated Sec. 8(a)(1), but we do not rely on the judge’s reasoning applying the “reasonably construe” prong of the Board’s decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which the Board overruled in *Boeing Co.*, *supra*. Instead, we find this rule unlawful on its face because, with no explanation of who is authorized to solicit or distribute, the rule leaves employees unable to determine whether they are “unauthorized persons” prohibited from soliciting or distributing to patients or visitors at any time—a broader restriction than the Act allows. See *UPMC, UPMC Presbyterian*

On July 21, 2017, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.<sup>1</sup>

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

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,<sup>2</sup> and conclusions<sup>3</sup> and to

*Shadyside, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital*, 366 NLRB No. 142, slip op. at 1 & fn. 5 (2018).

Member Emanuel does not agree that it was unlawful to prohibit solicitation and distribution of literature to patients of the hospital and visitors of patients. He believes that a hospital should be permitted to prohibit solicitation and distribution to patients and visitors even if it occurs in a part of the facility that is not an immediate patient care area. Interrupting a patient or visitor in a hospital can be disruptive of patient care. For example, if a parent needs to focus on a consultation with a doctor about treatment options for a child who is a patient in the hospital, being interrupted by solicitation or distribution could be disruptive even if it occurs in a part of the facility that is not an immediate patient care area.

We adopt the judge’s conclusions, for the reasons he stated, that the Respondent violated Sec. 8(a)(1) by the following actions: (1) through Supervisor Dwight Lyles on August 6, 2016, calling hospital security because he suspected employees Suzanne Mintz and Jeanee Scott were engaged in union activity, (2) through security officers Daniel Webster, Kelley Varnado, and Lawrence Hawkins on August 6, 2016, confronting Mintz and Scott for engaging in union activity, (3) through security officer Hawkins on October 19, 2016, interrogating a group of employees when he approached them to ask if they were talking about the Union, and (4) through Hawkins during the same October 19 interaction, telling employees that it was illegal to talk about the Union in the hospital.

Member Emanuel agrees that Lyles unlawfully called hospital security on off-duty employees Mintz and Scott, but emphasizes that the Respondent had no rule prohibiting off-duty employees from entering its facility.

We affirm the judge’s conclusion that the Respondent violated Sec. 8(a)(1), through Manager Cynthia Hawley on July 20, 2016, by threatening employee Susanna Reed-McCullough with more onerous working conditions if the employees unionize. In finding this violation, we rely on Hawley’s statements indicating that the Respondent’s leave policies might become less generous and its shift scheduling less flexible, which were unaccompanied by any qualification that changes to leave policies and shift scheduling would be collectively bargained. These statements threatened adverse changes to specific terms and conditions of employment; the statements at issue in *Tri-Cast, Inc.*, 274 NLRB 377 (1985), and *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465 (6th Cir. 2019), cited by our colleague, did not. We do not, however, rely on Hawley’s statements that union representation might limit direct access to management because such statements are not threats; rather, they factually advise that representation will change employees’ relationship with their employer. See *Tri-Cast*, *supra* at 377.

Member Emanuel disagrees with his colleagues and would find that Hawley lawfully told Reed-McCullough that union representation could limit access to management and result in less generous leave policies and less flexible shift scheduling. It is a “fact of industrial life” that union

adopt the recommended Order as modified and set forth in full below.<sup>4</sup>

### ORDER

The National Labor Relations Board orders that the Respondent, Holy Cross Health d/b/a Holy Cross Hospital, Silver Spring, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining documents regulating employee solicitation and distribution that (1) prohibit “solicitation and distribution of literature to patients or visitors at any time by unauthorized persons,” (2) prohibit “discussion about wages, hours and conditions of employment” during working time, (3) limit solicitation and distribution to locations “where [the Respondent] allows [it],” or (4) have an overinclusive definition of immediate patient care areas.

(b) Threatening employees with more onerous working conditions if employees select union representation.

(c) Coercively interrogating employees about their union support or activities.

(d) Calling hospital security to respond to employees engaging in union activities.

(e) Coercively confronting employees with hospital security for engaging in union activities.

(f) Telling employees it is illegal to talk about unions in the hospital.

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representation changes the relationship between employees and their employer and may lead to inefficiency and reduced flexibility. See *Tri-Cast*, supra at 377–378 (citing *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110, 112 (9th Cir. 1980)). The Respondent had a protected right to emphasize these potential negative consequences and no corresponding duty to temper such statements with reminders of employees’ collective-bargaining rights. See, e.g., *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 476–477 (6th Cir. 2019) (“Hendrickson had the right to emphasize the negative aspects of the loss of ‘direct’ relationship, . . . and Supreme Court precedent does not require Hendrickson to provide the counterargument to its own argument”), reversing 366 NLRB No. 7 (2018). Whether Reed-McCullough’s statement was more specific than those in *Tri-Cast* and *Hendrickson* is not, contrary to the majority’s view, a meaningful basis of distinction. It was not a factor in those decisions and has no bearing on the principles discussed therein.

We affirm the judge’s conclusion that the Respondent violated Sec. 8(a)(1), through Supervisor Jolly Joseph on September 16, 2016, by surveilling employees who had gathered to take a photograph for use in a pronoun flyer. We rely specifically on the fact that Joseph took pictures of the assembled employees with her cellphone and texted them to Nursing Director Mariamma Ninan in an effort to identify union supporters. We find it unnecessary to pass on whether Joseph or the other supervisors observing the employees also created the impression of surveillance because that finding does not materially affect the remedy. See, e.g., *Photo Drive Up*, 267 NLRB 329, 329 fn. 2 (1983).

We also find it unnecessary to pass on the allegations that the Respondent violated Sec. 8(a)(1) by the following actions: (1) Manager Hawley on July 20, 2016, interrogating Reed-McCullough about her

(g) Placing employees under surveillance while they engage in union activities.

(h) 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 following provisions: (1) the prohibition of “solicitation and distribution of literature to patients or visitors at any time by unauthorized persons” in the June 2016 solicitation-and-distribution policy, (2) the prohibition of “discussion about wages, hours and conditions of employment” during working time in the October 2016 follow-up memorandum, (3) the limitation of solicitation and distribution to locations “where [the Respondent] allows [it]” in the October 2016 memorandum, and (4) the overinclusive definitions of immediate patient care areas in both the June 2016 policy and the October 2016 memorandum.

(b) Furnish employees with inserts for the June 2016 policy and the October 2016 memorandum that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised documents that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(c) Post at its Silver Spring, Maryland facility copies of the attached notice marked “Appendix.”<sup>5</sup> Copies of the

union support or (2) security officer Hawkins on August 6, 2016, approaching employees he overheard talking about the Union and asking “what are they offering?” Because we adopt the judge’s conclusion that security officer Hawkins unlawfully interrogated a group of employees on October 19, 2016, these additional findings would be cumulative and would not affect the remedy. We similarly find it unnecessary to pass on the allegation that the Respondent violated Sec. 8(a)(1), through Nursing Director Ninan on September 21, 2016, by threatening employee Vera Ngezem with more onerous working conditions if employees unionize because we affirm the judge’s conclusion that the Respondent unlawfully threatened Reed-McCullough with more onerous working conditions on July 20, 2016.

Contrary to his colleagues, Member Emanuel would reverse the judge’s finding that Ninan unlawfully threatened Ngezem with more onerous working conditions. In Member Emanuel’s view, Ninan’s statements were lawful for the same reasons as Hawley’s similar statements to Reed-McCullough, discussed above. In addition, because the judge did not clearly credit Ngezem’s testimony over Ninan’s, his finding that Ninan failed to explain that any such changes would be subject to collective bargaining is unsupported.

<sup>4</sup> We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language for the violations found and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and we have substituted a new notice to conform to the Order as modified.

<sup>5</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these

notice, on forms provided by the Regional Director for Region 5, 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 June 8, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 5 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. September 11, 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

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

proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if

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 maintain documents regulating your solicitation and distribution that (1) prohibit “solicitation and distribution of literature to patients or visitors at any time by unauthorized persons,” (2) prohibit “discussion about wages, hours and conditions of employment” during working time, (3) limit solicitation and distribution to locations “where Holy Cross allows [it],” or (4) have an overinclusive definition of immediate patient care areas.

WE WILL NOT threaten you with more onerous working conditions if employees select union representation.

WE WILL NOT coercively interrogate you about your union support or activities.

WE WILL NOT call hospital security to respond to you engaging in union activities.

WE WILL NOT coercively confront you with hospital security for engaging in union activities.

WE WILL NOT tell you it is illegal to talk about unions in the hospital.

WE WILL NOT place you under surveillance while you engage in union activities.

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 the following provisions: (1) the prohibition of “solicitation and distribution of literature to patients or visitors at any time by unauthorized persons” in our June 2016 solicitation-and-distribution policy, (2) the prohibition of “discussion about wages, hours and conditions of employment” during working time in our October 2016 follow-up memorandum, (3) the limitation of solicitation and distribution to locations “where Holy Cross allows [it]” in our October 2016 memorandum, and (4) the overinclusive definitions of immediate patient care areas

the Respondent customarily communicates with its employees by electronic means. 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.”

in both our June 2016 policy and our October 2016 memorandum.

WE WILL furnish you with inserts for the June 2016 policy and the October 2016 memorandum that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to you revised documents that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

HOLY CROSS HEALTH D/B/A HOLY CROSS HOSPITAL

The Board's decision can be found at <http://www.nlr.gov/case/05-CA-182154> 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.



*Brendan Keough, Esq.*, for the General Counsel.  
*Stephen M. Silvestri and Chelsea Leyh, Esqs. (Jackson & Lewis P.C.)*, of Baltimore, Maryland, for the Respondent.  
*Jonathan Harris, Esq. (California Nurses Association/National Nurses United (CNA/NNU))*, of Oakland, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Baltimore, Maryland on May 18–19 and 23, 2017. The controversy involves an assortment of alleged unfair labor practices by Holy Cross Health d/b/a Holy Cross Hospital (the Hospital or the Respondent) during a union organizing campaign. Based on timely filed charges by the National Nurses Organizing Committee/National Nurses United (NNOC/NNU), AFL–CIO (the Union or Charging Party), the complaint alleges that the Hospital unlawfully interfered with, restrained, and coerced employees in the exercise of their Section 7 rights to engage in pro-union activity.

<sup>1</sup> 29 USC §§ 151–169.

<sup>2</sup> All dates are in 2016 unless otherwise indicated.

<sup>3</sup> The General Counsel's Motion to Strike Portions of Respondent's Brief to the Administrative Law Judge, served July 13, 2017, essentially

Specifically, the complaint alleges that the Hospital violated Section 8(a)(1) of the National Labor Relations Act (the Act)<sup>1</sup> by: (1) on June 8, 2016,<sup>2</sup> and October 7, promulgating a facially-unlawful "Solicitation and Distribution" policy; (2) on July 20, unlawfully threatening employees with more onerous working conditions and loss of benefits if they selected the Union as their collective-bargaining representative, and asking employees to disclose to the Hospital their feelings about the Union; (3) on August 6, coercively interfering with employees engaged in protected concerted activities by sending security officers to prohibit employees from communicating about the Union; (4) on August 6, coercively interfering with employees engaged in Union and/or protected concerted activity by writing down the names of employees engaging in such activity and threatening to alert the Hospital's nursing coordinator; (5) on August 6, coercively interfering with employees engaged in union and/or protected concerted activity by confronting a group of nurses and interrogating them by asking "what are they offering?"; (6) on September 16, surveilling employees engaged in Union and/or protected concerted activity by taking pictures of organizing employees and disseminating the pictures to the Hospital's supervisors; (7) on September 21, threatening employees with loss of benefits if they selected the Charging Party as their collective-bargaining representative; and (8) on October 19, interrogating employees about union sympathies and instructing employees that they were prohibited from discussing the Union in the Hospital. The Hospital denies the allegations.

On the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Hospital, a corporation, is engaged in the operation of a hospital providing inpatient and outpatient medical care at its facility in Silver Spring, Maryland, where it annually derives gross revenues in excess of \$250,000, and purchases and receives products, goods, and materials valued in excess of \$5000 directly from points outside the State of Maryland. The Hospital 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 a health institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Hospital's Operations*

Hospital staff, which includes approximately 1300 nurses, sees approximately 7000 patients per month and annually welcomes over 9000 babies into the world. The Hospital facility consists of one building with two separate towers: the fairly new "South tower" and the older "Hospital tower." The Hospital's

amounts to a post hearing reply brief, which is not permitted under Board rules. To the extent that the motion includes a request for reconsideration of certain evidentiary rulings, that application is denied.

operational floors are connected by elevators and stairwells, which, on each floor, open into a general public hallway. From the hallway, employees and visitors enter hospital units staffed by administrative personnel—such as the Neonatal Intensive Care Unit (NICU) on the third floor, which is a locked unit and requires that visitors be buzzed in—or sit in an open lounge. Public access areas include these open patient lounges, along with hallways, elevators, the parking lot, the Hospital cafeteria, and the landing outside of the cafeteria, which provides a through-point for many other rooms in the Hospital. Restricted areas include the Hospital units themselves, many of which require a Hospital-issued badge to enter. The different units include soiled utility rooms, doctors’ charting rooms, staff lounges, the open nursing station, lab rooms, patient rooms, storage areas, supply areas, administrative offices, and isolation rooms. Once a non-Hospital employee (such as a patient or a visitor) is admitted onto a unit, the in-unit hallways connecting patient rooms and areas surrounding the nursing stations are also thought of as general public-access areas. These hallways are frequented by everyone in the hospital.<sup>4</sup>

The pertinent Hospital managers, supervisors and statutory agents include: Judith Rogers—president, interim; Celia Guarino—chief nursing officer; Cynthia Hawley—director, Neonatal Intensive Care Unit;<sup>5</sup> Mariamma Ninan—director of nursing, Acute Care and Surgery Unit; Jolly Joseph, Michele Jones, Dwight Lyles, Irene Pasas, Monique LaSingh, and Damarius Collins—nurses in charge (NIC). Daniel Webster is a hospital security supervisor, and Lawrence Hawkins and “Varnado” are special police officers.<sup>6</sup>

The NICU is on the 3d floor of the “Hospital tower,” and is staffed by approximately 140 nurses. Access to the NICU is regulated electronically and limited to that department’s staff. NICU staff includes Suzanne Mintz, a clinical nurse, and Jeanee (Nina) Scott, and Susanna Reed-McCullough, registered nurses (RNs). Their supervisor is Nancy Wood, interim director of the Neonatal Unit. Wood was preceded in that capacity by Hawley. Hawley/Wood’s supervisor is Nancy Nagle, director of women and children’s services.

The Acute Care department is on the fifth floor of the Hospital, and is broken up into two departments: 5 West and 5 East. Aieun Grace Yu and Vera Ngezem are both acute care RNs stationed on the 5th floor. Maryann Wysong is an RN in the Mother/Baby department.

### B. The Hospital’s Rules

The Hospital issued an updated version of its employee rules book on June 8. The update contained a “Solicitation and Distribution” policy, which provided the following definitions:

- (a) Solicitation - “...[P]romoting, encouraging, or discouraging participating, support or membership in any organization; or promoting of a doctrine or belief.”
- (b) Distribution of literature - “Distribution, delivery, or posting of any written, printed, or electronic matter for the purpose of, or as an aid to, solicitation.”
- (c) Immediate patient care area - “...[P]atient units; patient lounges and waiting areas...nursing stations; corridors; sitting rooms...elevators and stairways used by or to transport patients.”
- (d) Working time - “...[A]ll time during which a colleague is responsible for performing tasks, duties, or functions for which s/he is employed.”<sup>7</sup>

The new “Solicitation and Distribution” policy also promulgated the following rules:

- (a) Holy Cross Health does not allow colleagues to solicit colleagues, patients, or visitors at any time in immediate patient care areas or during working time (including the working time of either the colleague soliciting or being solicited).
- (b) Colleagues may not distribute literature during their working time or to any colleagues who are on working time.
- (c) Colleagues may not distribute literature at any time in working areas or immediate patient care areas.
- (d) The health system also prohibits solicitation through the use of the health system’s electronic communication systems to colleagues or non-employees.<sup>8</sup>
- (e) The health system does not permit non-employees to solicit or distribute literature anywhere on Holy Cross Health’s properties for any reason.<sup>9</sup>

On October 7, the Hospital issued another policy update in a memorandum titled “Solicitation in Nursing Units.” The Hospital reiterated its definition of “immediate patient care areas,” which includes “areas on unit that are adjacent to patient rooms (where patients can hear our conversations), patient lounges, waiting areas where patients are usually present . . . nursing stations, hallways/corridors on the units[, and] elevators and stairways used by or to transport patients.”

The October memorandum also promulgated the following rules:

<sup>4</sup> These findings are based on the credible and unrefuted testimony of Suzanne Mintz and Maryann Wysong. (Tr. 46–49, 82, 331–332.)

<sup>5</sup> Hawley was on an unspecified form of extended leave during the hearing.

<sup>6</sup> The Hospital admits that the aforementioned medical staff are supervisors within the meaning of Sec. 2(11) of the Act. With respect to the security officers, the Hospital stipulated that they were agents within the meaning of Sec. 2(13) of the Act but reserved the right to introduce evidence that they acted outside the scope of their authority. It did not do so.

<sup>7</sup> GC Exh. 2; Jt. Exh. 1.

<sup>8</sup> Notwithstanding this policy provision, in an email dated March 17, 2017, Guarino communicated to nursing staff that: “Holy Cross has done what most employers *don’t* do, and made it’s [sic] email system and distribution list available to all nurses so they can exchange ideas and thoughts, whether they or [sic] for the union or not.” (Emphasis in original.) (R. Exh. 1.) There is no indication in the record, however, that the Hospital ever rescinded its June or October “Solicitation and Distribution” policies.

<sup>9</sup> GC Exh. 2.

- (a) Nurses opposed or in support of the union may leave literature for pick up as long as it is a non-work or patient care area where Holy Cross allows solicitations and/or distributing personal materials.
- (b) Solicitation or discussion while either nurse is on work time (not off duty and not on break) or with a nurse who is performing her duties – charting, speaking with other caregivers, family – in the patient’s room, or speaking to physicians is not permitted on the unit.
- (c) Solicitation or discussion in a patient room or elsewhere on the unit where patients are or can be present – such as corridors where patients wait or treatment rooms – is not permitted on the unit.<sup>10</sup>

It is common practice for the Hospital’s nurses to discuss various nonwork-related topics, including politics and religion, at nursing stations in the presence of their NICs. Nurses and other employees, including Hospital managers and supervisors, regularly use working areas for solicitations. For example, it is common to see items such as donation requests to the Girl Scouts and to the Hospital’s Holy Cross Foundation at nursing stations. The Hospital has never disciplined employees for engaging in non-work discussions at nursing stations. This is not surprising, since the Hospital itself distributed antiunion solicitations, termed “fact sheets,” at the NICU nursing station during the organizing period.<sup>11</sup>

As of late June 2016, nurses were also permitted to discuss the pros and cons of union affiliation in all Hospital areas, including stairwells and lobby areas. Nurses were also permitted to communicate with each other via Hospital email and had personal use of the email system without consequence. From as early as September 2016 to as late as May 2017, employees and management regularly used the hospital email to advocate both for and against the Union.<sup>12</sup> In September 2016, however, department supervisors began to enforce other aspects of the Hospital’s new solicitation and distribution policy. In the Mother-Baby Department, for example, NIC Michelle Jones informed 15–20 nurses at the nursing station in late September of the solicitation/distribution policy, specifically noting that nurses were not allowed to talk about the Union in any patient care area, the nursing station, the hallways, or anywhere else in the building – only in the parking lot or elsewhere outside of the hospital. In one instance, Jones followed up on that edict by approaching Wysong during a lull in the latter’s shift. Wysong had just sent out a hospital-wide email showing her support for the Union. Jones told Wysong that the Hospital had always taken care of her and a union was unnecessary.<sup>13</sup>

Most recently, Mintz went to the Operating Room (OR)

lounge on March 21, 2017, to solicit support for the Union and hand out box lunches to the nurses there during break time. There is no hospital policy against bringing food into break rooms. A few minutes after Mintz entered, the OR’s nursing director, Allison Sheedy, entered the lounge and said she was calling security. Sheedy said Mintz was “not supposed to be in there” and “should be ashamed” of herself. Mintz left the lounge and went directly to the Human Resources Department to file a complaint against Sheedy for inappropriate conduct.<sup>14</sup>

### C. The Union Campaign

Concerned about short staffing and its impact on patient safety, some employees began soliciting support from coworkers to organize into a union in January or February. Nurses began attending information sessions at the Union’s offices. Union supporters, including Scott, had conversations with other nurses at nursing stations. She was one of many nurses whose picture appeared in some of the pronoun flyers. Scott distributed union flyers in the Hospital, including the nurses’ lounges, but not in the units. There are still Union flyers in the NICU today.<sup>15</sup>

Several nurses have been particularly active and open in their solicitation of support for the Union. Mintz and Scott have been especially active in soliciting union support since February, including talking to other nurses in other units, distributing flyers, attending meetings at National Nurses United, and convening information sessions for coworkers.<sup>16</sup>

On September 16, several nurses posed for a group photograph on the hospital lawn next to a statue of Saint Joseph. Nurses in the group included Mintz, Scott, Vera Ngezem, and Jessie Norris. As they posed for the photograph, the nurses held up a large letter of demands entitled: “WHAT WE NEED TO CONTINUE TO PROVIDE THE BEST PATIENT CARE.” The nurses’ letter also identified Saint Joseph, the statue behind them, as “the Patron Saint of Workers.” The group published this picture in a pronoun flyer and disseminated it over email later that day. After the photographs were taken, the nurses went to meet with Dr. Norvell Coots, the Hospital’s president and chief executive officer, to present him their list of demands.<sup>17</sup>

Upon arriving at Dr. Coots’ office, Mathew Lukeziak, the Hospital’s vice president for Human Resources, said it was inappropriate for the group to just “show up” and demand a meeting. Nevertheless, the nurses left a letter for Dr. Coots, with a copy for Guarino, demanding that the Hospital stop harassing union supporters and agree to Union representation.<sup>18</sup> Since that date, union supporters have continued distributing pronoun flyers in common areas and nurses lounges, as well as using Hospital email to advocate for and against union representation.

<sup>10</sup> GC Exh. 3.

<sup>11</sup> This finding is based on the credible and undisputed testimony of Mintz, Reed-McCullough, and Scott. (Tr. 85, 127, 291–296.)

<sup>12</sup> R. Exh. 1.

<sup>13</sup> This finding is based on the credible and undisputed testimony of Scott and Wysong. (Tr. 88, 103–104, 330–338.)

<sup>14</sup> A charge was not filed over this incident. However, Mintz’ credible and undisputed testimony establishes that the Hospital continues to enforce its solicitation and distribution policy. (Tr. 317–319.)

<sup>15</sup> R. Exh. 31.

<sup>16</sup> Scott could not recall the exact dates of events but was otherwise very credible and detailed.

<sup>17</sup> GC Exh. 8.

<sup>18</sup> Wysong and Scott testified that they have never been prohibited from speaking about the Union by Hospital managers, supervisors, or security officers. (Tr. 297–299, 305, 344.)

#### D. The Hospital's Response

The Hospital became aware of the Union's organizing campaign in late June.<sup>19</sup> Beginning in July, Guarino began presenting the Hospital's position relating to union affiliation in fact sheets distributed in staff lounges and nursing stations and by email and fax.<sup>20</sup> On July 28, Hospital managers, including interim president Rogers, Guarino, Cynthia Hawley, and Nancy Nagel, convened an optional meeting with NICU staff to respond to nurses' concerns about patient satisfaction, prospective changes, staffing/floating, and other unit issues. About 12–15 nurses were present, including Mintz and Scott. In the course of the meeting, Rogers addressed the Union's organizing campaign. She implored the nurses to work with management to address issues of concern and asserted that a union was not necessary in order for nurses to communicate with management. Mintz left the meeting early, but Scott remained until its conclusion and even interrupted Rogers to charge that it was unfair for Rogers to use the meeting venue to discuss the merits of union representation.<sup>21</sup>

At least one Hospital administrator gave regular antiunion speeches during the organizing period. Mariamma Ninan, a nursing director who managed two hospital units and four NICs, conveyed the Hospital's position to nurses during numerous "huddles." The huddles were designed to be daily meetings at the nursing station between the nurses from previous shifts and new nurses coming into the next shifts. Nurses, nursing assistants, HUCs, and NICs were all present at huddles, which consisted of approximately 10–14 people. Prior to the campaign, huddles usually lasted about 5 minutes. After the union campaigning started, Ninan typically spent 20–30 minutes during huddles talking about the Union and passed out fact sheets.<sup>22</sup>

Dr. Yancy Phillips, the Hospital's chief quality officer, also promoted the Hospital's antiunion position by speaking with potential bargaining unit members in patient care areas. On August 7, Dr. Phillips visited the NICU. The charge nurse, Gaston, informed nurses on duty that Dr. Phillips was on the unit and available to speak with anyone interested in discussing the Union. Visitors and patients were visible and around at this time. Scott went to see Dr. Phillips, who was by the nursing station speaking with another nurse, Charlie Storck. Scott interrupted the two and asked Storck if she was on a break, because the nurses had been told that they could not discuss the Union during work time or while caring for patients. Dr. Phillips stopped talking to Storck, but then asked Scott if she had any questions for him. Scott informed Dr. Phillips that she was working, not on a break, and that they were in a patient-care area. Dr. Phillips left his business card on the table and told the nurses that his number was there if they needed it. Scott responded that she would only meet with Dr. Phillips in the lounge during break time. Scott did, in fact,

meet with Dr. Phillips in the lounge during break time later that day and asked him a question about the solicitation policy.<sup>23</sup>

The Hospital also retained a labor relations consulting firm, Yessin & Associates, LLC (Yessin) to speak with nurses at nursing stations and public areas and present them with informational antiunion videos. In some instances, Yessin consultants played the videos on laptop computers for nurses while patients and visitors were in the vicinity. In other instances, the consultants met employees during Hospital meetings such as ACT training, a required session relating to employee rights. Yessin consultants have continued approaching nurses on a regular basis in nursing and public areas until as recently as the week before the hearing.<sup>24</sup>

#### 1. July 20, 2016

On July 20, supervisor Cynthia Hawley asked to meet with Susanna Reed-McCullough. Before walking into Hawley's office around the end of her shift, Reed-McCullough sent text updates to union representatives and to coworkers notifying them that her supervisor had asked to speak with her. During the meeting, Hawley mentioned that the Hospital administration knew that some nurses were in contact with union representatives. Hawley said that she wanted Reed-McCullough to be informed before she made a decision about the Union, and that some nurses had been called at home and harassed. Hawley also said that if anything like that were to happen to Reed-McCullough, she should let Hawley know.

Hawley added that, in her personal experience and in her daughters' experience from working in unionized hospitals, there was no "huge difference" between union-affiliated hospitals and non-affiliated hospitals when it came to staffing and nurse satisfaction. However, according to Hawley, the presence of a union might limit employee access to management by requiring that union representatives be present for such meetings. There might also be changes to the Hospital's generous leave and flexible-schedule customs and practices. Specifically, Hawley compared the current NICU policy—which allowed nurses who were hired as shift rotators to work straight nights or straight days after only 8 years—with the general hospital policy, which required 15 years of work before a nurse could switch to straight shifts. Hawley said that, because unions like things to be equal "across the board," the policy could shift to 15 years for the NICU too. Hawley then handed Reed-McCullough a fact sheet.<sup>25</sup> At no time did Hawley explain that any possible changes to working conditions would be the result of a collective-bargaining process between Hospital and union representatives, or

<sup>19</sup> Jt. Exh. 1.

<sup>20</sup> Mintz described the fact sheets as "hospital-issued flyers that are distributed in the staff lounge and nurses' stations that address union-related issues and talk primarily about the negative aspects of unionizing." The fact sheets first appeared in mid-July and circulated for a limited period of time. Guarino also distributed the fact sheets by email. (Tr. 86.) Scott testified that the fact sheets were distributed through emails, posted in break rooms, and stacked in the NICU at the charge nurse desks, which were visible to the public from the hallway. (Tr. 291–292.)

<sup>21</sup> This finding is based on the undisputed testimony of Scott and Mintz. (Tr. 54–56, 258, 261.)

<sup>22</sup> Ngezem credibly testified that Ninan spoke about the Union many times during huddles and told the nurses that senior union nurses could take the jobs of less senior union nurses. (Tr. 171, 205, 208.)

<sup>23</sup> Scott's testimony regarding her conversations with Dr. Phillips is undisputed. (Tr. 271–73, 278.)

<sup>24</sup> A charge was not filed in connection with any of the statements by any of these labor consultants. (Tr. 90, 173, 180–181, 339–340.)

<sup>25</sup> GC Exh. 7.

even mention the collective-bargaining process at all.<sup>26</sup> The fact sheet that Hawley handed to Reed-McCullough also did not mention the collective-bargaining process. After the meeting, Reed-McCullough passed along Hawley's comments to coworkers.<sup>27</sup>

Reed-McCullough was not the only nurse to meet with Hawley about the Union. On July 22, Scott—on her own initiative—went to Hawley's NICU office and told Hawley that she supported the Union. Scott prefaced her comments by stating that she was not going to argue, but that she wanted to let Hawley know that she would be very active in organizing the Union. Scott added that she had concerns about patient safety and that her choice to organize was not personal. Hawley said it felt personal.<sup>28</sup>

## 2. August 6, 2016

Prior to August 6, Mintz and Scott regularly approached and solicited nurses in other units. On August 6, they went to the Hospital in order to solicit support for the Union. They were off-duty and in plainclothes but were both wearing Hospital badges (though Mintz' badge did not state her last name). Mintz and Scott started on the sixth-floor oncology unit around 3 p.m. and asked the hospital unit coordinator (HUC) to speak with Ester, another nurse. Ester came out and met with Mintz and Scott. They asked if Ester could help them organize. Ester agreed but explained that she was busy and would catch up with them later.

Around 3:15 pm, Mintz and Scott left the 6th floor and took the stairs down to the 5 South Acute Care Unit on the 5th floor. There, they told the 5 South HUC that they wanted to speak with Aieun Grace Yu, another RN. The HUC told them that Yu was in the medicine room and offered to escort them there. Mintz and Scott, however, declined the offer and said they would wait for Yu in the visitor waiting area, which was in the hallway outside the 5 South Unit, across from the elevator landing.

Inside the unit, Dwight Lyles, the unit's NIC, then came out to the HUC area. From the unit, Lyles observed Mintz and Scott waiting for Yu in the visitor bay. Yu had not yet finished with her work. Lyles did not recognize Mintz, but recognized Scott as a nurse who had previously received a Hospital achievement award. After a conversation with the HUC, Lyles determined that Mintz and Scott were engaged in union activity. Lyles then called administrative coordinator Carrie Weakland and relayed this information. Weakland instructed Lyles to call security. Lyles did so, and told the security dispatcher that he was concerned that Mintz and Scott were attempting to speak with a staffer on his floor, which he deemed unusual.

After Lyles spoke with the dispatcher, Yu approached Lyles' desk. Lyles told Yu that there were two people waiting to speak with her. At 3:23 p.m., Yu left the nursing unit to meet with Mintz and Scott in the waiting room across the hall. The three nurses spoke for about 2 minutes. During this time, Mintz and Scott asked if Yu would be willing to solicit nurses on her unit. Yu identified a potential supporter in her unit named Nene and

said she would check and hopefully send Nene out to meet with them. At 3:25 p.m., Yu returned to her unit.

Upon Yu's re-entering the 5 South unit, Lyles confronted Yu about her conversation with Mintz and Scott. Specifically, Lyles asked Yu how Mintz and Scott had known her name. Lyles also informed Yu that he called security. This news surprised Yu, who responded by asking why Lyles had called security. Lyles replied that union advocates were not permitted to solicit employees during work time, and then asked Yu if she had spoken to her boss about the Union. After confirming that she had, indeed, spoken to her boss about the Union, Yu returned to work.

Meanwhile, at 3:34 p.m., Ester came down to the fifth floor and met with Mintz and Scott in the visitor waiting area. During their approximately 6-minute conversation, Ester updated Mintz and Scott on her recruitment efforts. Mintz and Scott expressed their appreciation for Ester's help and said that they would be around the Hospital if Ester got card signers or needed assistance speaking with other nurses.

At 3:40 p.m., as Ester turned to leave, security supervisor Daniel Webster and security officer Varnado stepped out of the fifth-floor elevator. A third security officer, Lawrence Hawkins, stepped off the elevator 1 minute later and joined them. The security officers went directly to the 5 South Acute Care Unit and asked Lyles why they had been called. Lyles told the officers that there were two off-duty nurses sitting in the waiting area attempting to recruit his unit's nurses to the Union.

At 3:41 p.m., the three security officers approached Mintz and Scott, who were still seated in the waiting room. As the three officers formed a loose semicircle around the nurses, Webster explained that the officers were responding to a complaint about a disturbance on the unit and asked what Mintz and Scott were doing. The nurses replied that they were waiting for a friend and referred the security officers back to the HUC on the unit. Webster then asked to see Mintz and Scott's identification, and the nurses complied. None of the security officers wrote anything down, but Webster told the nurses that he needed to file an incident report. At 3:42 p.m., the security officers walked away.

After obtaining Mintz and Scott's names, Webster returned to the unit, spoke with Lyles, and then asked to speak with Yu. Yu, who had returned to work but then saw Lyles and Webster speaking, approached them. Upon seeing her, Lyles stated to Webster, "this is Grace." Webster wrote her name, told Lyles and Yu that he was going to report this matter to the nursing coordinator, and left. Webster then went to the NICU to confirm that Mintz and Scott had, in fact, been off duty that day. Webster prepared an incident report, which included the factual description "Off-duty Employees suspected of trying to recruit working nurses to Union," and referred to an attached report. The report stated that Lyles called security because Mintz and Scott had been on his unit to solicit on-duty nurses for the Union. Follow-up communications with Weakland, the administrative coordinator, further

<sup>26</sup> Contrary to Respondent's contention in its brief, Reed-McCullough's testimony made no mention of Hawley bringing up negotiations during their conversation. (R. Br. at 9.)

<sup>27</sup> Reed-McCullough was not intimidated by Hawley's remarks. However, she credibly testified that the flexibility and day work shifts

afforded her by Hawley's NICU schedules were extremely important to her for childcare reasons. (Tr. 120–123, 129.)

<sup>28</sup> Scott's credible testimony is undisputed. (Tr. 258.)



indicated that the security officers were previously aware of the card solicitation activity on the part of Scott and Mintz.<sup>29</sup>

Back in the unit and after Webster left, Lyles tried to hand Yu an antiunion fact sheet, but Yu would not take it. Yu then texted Mintz and asked if she could call. Around 3:50 p.m., Yu called Mintz and said that a security supervisor approached her and said he would report her to the nursing coordinator. Yu also mentioned that her NIC had prohibited her from leaving the unit, and that the nurse whom Yu intended to send out to them was now too scared to leave. Mintz apologized and hung up.<sup>30</sup>

At 3:53 p.m., after Mintz' phone conversation with Yu, Mintz and Scott took the elevator from the fifth floor to the Hospital lobby and sat near the public café to plan their next step. As they sat there, Ester called Scott's cellular telephone to say that she had obtained a signed union authorization card. The nurses gave Ester their location and said that they would wait for her to bring the card. After Ester brought them the authorization card and left the lobby, Mintz and Scott decided that their next recruitment stop would be the Emergency Department. However, at this point, the nurses noticed that two of the security officers from the earlier fifth floor incident suddenly reappeared and were standing nearby, looking at them. Rather than proceed on to the Emergency Department as planned, Scott and Mintz left the building.<sup>31</sup>

Officer Hawkins was not part of the initial response to Lyles' call, but merely happened to walk past the elevator lobby commotion while patrolling the acute care unit. Later that afternoon, while making his rounds, Officer Hawkins overheard a group of three or four nurses discussing their interest in seeing what the Union "had to offer." Hawkins inserted himself into the conversation and asked, "what are they offering?" At that point, the nurses dispersed.<sup>32</sup>

### 3. September 16, 2016

On the morning of September 16, a group of uniformed nurses congregated in front of the St. Joseph's statue on the Hospital's lawn and were photographed by a professional photographer. As they posed for the photograph, the nurses held up a large letter

<sup>29</sup> GC Exh. 18–19.

<sup>30</sup> Lyles, Webster, and Hawkins all confirmed during hearing that they were not reacting to a disturbance, but rather, union activity based on the Hospital's position opposing it in working areas. They also conceded that the visitor sitting area was not a hospital work area. (Tr. 406, 477–478, 480, 496–497, 501–505.) Moreover, Webster conceded that it was "unusual" to be called to report on employees for union behavior. (Tr. 493.)

<sup>31</sup> These findings are based on the credible testimony of Mintz, Scott, Yu, Lyles, and Webster, as well as a time-stamped security video of the fifth floor elevator lobby. (Tr. 62–70, 100, 134–136, 264–266, 271, 452–454, 457, 477–480; R. Exh. 32.)

<sup>32</sup> Hawkins attempted to depict a jovial encounter. However, his incident report portrayed a much more serious tone to the interaction: "[w]hile Officer Hawkins was walking around the Unit, he witnessed three to four nurses huddled together and overheard them say 'I want to see what they are offering.' He then approached the Nurses and asked them 'What are they offering'. [sic] After confronting them the Nurses ignored him and dispersed. Officer Hawkins then stated right after speaking to the Nurses he saw two NICU nurses leave when they saw him.'" (Tr. 489, 501; GC. Exh. 18.)

<sup>33</sup> GC Exh. 8.

of demands entitled: "WHAT WE NEED TO CONTINUE TO PROVIDE THE BEST PATIENT CARE."<sup>33</sup> The nurses intended to print the photograph and disseminate it within a separate, prounion flyer.<sup>34</sup> The subject of the photograph—the large letter of demands—was to be delivered to Dr. Coots, CEO of Holy Cross, later that morning.

After the picture had been taken but while the union nurses were still congregating, Ngezem, an RN on the fifth floor East Care Unit, spotted about ten other nurses watching and photographing her group from inside the hospital. At the time, Ngezem could not identify any of the nurses taking the photographs. However, she saw at least ten people in the window, at least 5 of whom were pointing cellular telephones in her direction, with the cameras flashing. Ngezem informed the other nurses in her group that they were being photographed. Ngezem's group then turned toward the nurses in the windows and waved. Ngezem and the other prounion nurses then entered the Hospital to deliver their large letter, with its list of demands, to Dr. Coots.<sup>35</sup>

Jolly Joseph, a NIC in the Acute Care Unit, was one of the nurses taking pictures of Ngezem's group. Joseph had been attending a training meeting in the first-floor conference room of the Hospital, along with about 20 other NICs. From the conference room, which was about 25 feet away from the St. Joseph's statue, the NICs saw the group of nurses taking pictures below. Some of the NICs, including Joseph, then began photographing the group from the window. Several other NICs expressed interest in Joseph's photos of the union nurses and excitedly grabbed her phone. Joseph testified that she was aware at this time that a union campaign was ongoing, and she texted several of her pictures to her director, Mariamma Ninan.<sup>36</sup>

### 4. September 21, 2016

In addition to displaying her support for the Union through the group photograph used in the union flyer, Ngezem also solicited union authorization cards and distributed prounion flyers in Hospital break rooms.<sup>37</sup> Although counseled by her NIC, Barbara Kline, on several occasions for performance deficiencies,<sup>38</sup> Ngezem has had a good working relationship with Ninan. In fact,

<sup>34</sup> The flyer was published and disseminated throughout the Hospital through email later that day.

<sup>35</sup> This finding is based on Ngezem's credible and undisputed testimony. (Tr. 154–158.)

<sup>36</sup> Joseph was not credible when she testified that she was unaware of Ngezem's union support. Joseph was also not credible when she testified that she did not know why the Union nurses were posing for a picture. Joseph took 2–3 pictures of the nurses and then texted those pictures to Ninan, along with the captions "[l]ook at the activity in front of the saint near parking lot, send barbra" and "Gisele, [Ngezem], Jessy [Scott] all were there." Ninan responded, "[i]s [sic] Gisele and [Ngezem] there?" Joseph confirmed that Gisele and Ngezem were in the picture: "4th and the 5th person." Ninan replied, "I see, so we were correct about Gisele!" Joseph responded, "Yep." In later testimony, both Joseph and Ninan confirmed that Ninan's "so we were correct" statement was, in fact, a reference to the Union. (Tr. 365–374, 379–380 422–425; GC Exh. 13–17.)

<sup>37</sup> GC Exh. 8; R. Exh. 15 at 3.

<sup>38</sup> I do not credit Ngezem's testimony denying that she was counseled on several occasions, including June 2016 (failing to administer pain medicine and having a dispute with a patient) and August 2016 (putting

Ninan previously provided Ngezem with employment verification letters in connection with a mortgage application and approved Ngezem's flexibility, work, and vacation schedules.<sup>39</sup>

On the morning of September 21, Ninan called Ngezem into her office to convey her position about the Union. Ninan proceeded to warn Ngezem that if the Union came in, a lot of things would change. For instance, Ninan said she would not be able to provide any more employment verification letters and may reduce the flexibility previously afforded to Ngezem with respect to vacations and schedules, which could impact Ngezem's continuing education. Ninan then shared stories of unionized nurses who were unable to get vacation time because of seniority. Further, Ninan warned that if the nurses unionized, more experienced nurses could bump less experienced nurses—such as Ngezem—from their jobs. At no time did Ninan explain that any possible changes to working conditions would be the result of a collective-bargaining process between Hospital and union representatives, or even mention the collective-bargaining process at all. Ngezem said virtually nothing during this meeting, which lasted 15–20 minutes.<sup>40</sup>

After the meeting, Ngezem was upset because she felt that somebody (either Ninan or the Union) lied to her. Ngezem immediately called union organizer Mansi Kathuria and informed her about Ninan's remarks. Kathuria assured Ngezem that what Ninan said about the Union was not true. Kathuria explained to Ngezem that having a union would not impact communication with her manager, nor change her ability to have flexible scheduling and swap shifts with other nurses or impede Ninan's ability to support other nurses with personal efforts, such as obtaining a mortgage. Kathuria requested that Ngezem summarize the meeting with Ninan in an email and send it to Kathuria. Ngezem did so, 6 days later.<sup>41</sup>

#### 5. October 19, 2016

As Mintz and Scott were leaving the Hospital cafeteria on October 19, they ran into another nurse, Jessie Norris, and stopped to talk with her on the hospital landing. The landing is a central, public-use area within the building. The landing is not a patient area and is used by everybody in the Hospital, including staff, families, patients, and visitors.

As the nurses chatted about a number of things—including

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the wrong name on a medical document and allowing a patient to take medicine from her own inhaler). (Tr. 185–186.)

<sup>39</sup> GC Exh. 21.

<sup>40</sup> Ninan essentially confirmed Ngezem's credible testimony regarding Ninan's statements, except with respect to the employment verification letters, which Ninan did not recall discussing. Ninan also testified that she had approached other employees, who had personal reasons for working a particular set schedule, to inform them that the Union may bring adverse changes: "I have been talking with employees who had personal reasons to work only Saturdays or only works [sic] certain choice of days because they are in school. They would say I can only work Tuesdays and Thursdays because I have classes. So we've been very flexible with scheduling to accommodate school. And so—and there are employees who may be taking, working only weekends and being off on weekdays so they can care for their elderly parents or sick children. And knowing who those employees are, I have approached them to let them know that if we have a contract, that may change." (Tr. 162–164, 406–411.)

oncology, the Union, organizing, and their children—security officer Hawkins approached, in uniform, and asked if they were talking about the Union. The nurses asked why he wanted to know. Hawkins said that there was a memorandum from management stating that it was illegal to talk about the Union in the Hospital. Scott replied that it was actually illegal for Hawkins to be asking the nurses about the Union. The nurses asked for Hawkins' name, which he provided. Hawkins then left the landing and generated an incident report for his supervisor. The entire interaction lasted a few minutes.<sup>42</sup>

#### Legal Analysis

##### A. *The Hospital's No-Solicitation Policy is Facially Unlawful*

The complaint alleges that the Hospital's written solicitation and distribution policies violate Section 8(a)(1) of the Act by unlawfully restricting employees in the exercise of their Section 7 rights. The Company denies this charge.

Employers may lawfully impose restrictions on workplace communications among employees. *Pilot Freight Carriers, Inc.*, 265 NLRB 129, 133 (1982); *Stone & Webster Engineering Corp.*, 220 NLRB 905 (1975). Thus, employers may lawfully ban work time solicitations when defined so as not to include times before or after regular working hours, lunch breaks, and rest periods. *Sunland Construction Co.*, 309 NLRB 1224, 1238 (1992). However, a no-solicitation rule is unlawful when it unduly restricts the organizational activities of employees during periods and in places where these activities do not interfere with the employer's operations. *Our Way, Inc.*, 268 NLRB 394 (1983); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994), cited in *Adtranz, ABB Daimler-Benz*, 331 NLRB 291 (2000). An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). To determine whether such rights are chilled, the Board first examines whether the policies at issue explicitly restrict protected Section 7 activity. *Id.* If the challenged policy does not explicitly prohibit protected activity, a violation may still be shown if: (1) employees would reasonably construe the policy to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity. *Id.* Finally,

<sup>41</sup> An email summary of the encounter sent by Ngezem to the Union shortly thereafter was initially rejected as impermissible evidence of a prior consistent statement. (Tr. 167–169.) However, after the Hospital sought to impeach Ngezem's credibility based on potential bias because she was counseled for faulty performance on several occasions, I reconsidered my ruling and received the email over objection pursuant to FRE 801(d)(1)(B)(i). (Tr. 247–252, 352; GC Exh. 9.)

<sup>42</sup> I relied on the credible and consistent testimony of Scott and Mintz regarding this incident. (Tr. 82–84, 288–290.) Hawkins testified that he merely asked whether the nurses were having a union meeting and then thanked them and told them to have a nice day. However, Hawkins' version was not credible because he already knew from management's instructions that discussion about the Union was permitted in non-patient treatment areas. Yet Hawkins still found it necessary to ask whether the nurses were discussing the Union. Moreover, the unexplained failure to produce Hawkins' written report of the incident further detracted from the weight to be given to Hawkins' testimony. (Tr. 499–502.)

“the absence of evidence of enforcement of a[n unlawful] rule does not preclude the finding of a violation or the issuance of a remedial order.” *J. C. Penney Co.*, 266 NLRB 1223, 1224–1225 (1983). It is “axiomatic” that merely maintaining an overly-broad or ambiguous rule violates the Act. *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000), citing *id.*

For the reasons below, I find that the Respondent’s promulgation and maintenance of several policies are facially unlawful violations of Section 8(a)(1).

#### 1. Overbroad and ambiguous prohibitions and policies

Ambiguity in a rule is construed against the rule’s drafter. *St. Joseph’s Hospital*, 263 NLRB 375, 377 (1982); see also *First Transit, Inc.*, 360 NLRB 619, 629 (2014). The Board has struck down employer rules when an employee would reasonably construe them to require management’s permission before engaging in protected activity, thereby allowing management to abrogate the Section 7 right to engage in such activity. *Trump Marina Associates, LLC*, 354 NLRB 1027, 1029 fn. 3 (2009); *Crowne Plaza Hotel*, 352 NLRB 382, 386–387 (2008); *In re Saginaw Control and Engineering, Inc.*, 339 NLRB 541, 553 (2003), citing *Brunswick Corp.*, 282 NLRB 794, 798 (1987). Additionally, an employer violates Section 8(a)(1) when it permits employees to discuss nonwork-related subjects during working time, but simultaneously prohibits discussion of union-related matters. *Jensen Enterprises*, 339 NLRB 877, 878 (2003); see also *Frazier Industrial Co.*, 328 NLRB 717, 717 (1999).

##### (a) “Solicitations” and “Discussions”

The General Counsel alleges that the Respondent’s June definition of “solicitation” is overbroad, insofar as it encompasses “promoting, encouraging, or discouraging participation, support, or membership in any organization; or promoting of a doctrine or belief.” I agree. “The Board has consistently held that solicitation for a union usually means asking someone to join the union by signing his name to an authorization card at that time.” *Conagra Foods, Inc.*, 361 NLRB 944, 946 (2014), *enf. in part* and set aside in part 813 F.3d 1079 (8th Cir. 2016) (internal quotations omitted), citing *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enf. 582 F.2d 1118* (7th Cir. 1978). The Hospital’s broadened definition obscures the line between “solicitation” and “discussion” of union activity and would lead an employee to reasonably believe that lawful discussions are also forbidden during working time. See *Conagra Foods*, slip op. at 3, *supra*, citing *Lutheran Heritage*, 343 NLRB at 647 (striking down an employer prohibition against union “discussions”—which the employer claimed were covered under its “no solicitation policy”—as employees would reasonably construe this rule to

prohibit protected Section 7 activity). By promulgating an unlawful policy, the Hospital violated Section 8(a)(1).

Additionally, the Hospital’s October policy also prohibits “solicitation or discussion while either nurse is on work time” and “solicitation or discussion in a patient room or elsewhere on the unit where patients are or can be present.” This policy is facially overbroad insofar as it explicitly prohibits discussions about union activity during work time, when it is undisputed that the Hospital permits employees to discuss other nonunion topics while at work. *Jensen Enterprises*, 339 NLRB at 878 (finding unlawful a policy prohibiting union discussions during working hours, while simultaneously allowing the discussion of other nonwork-related subjects). Here, the Hospital explicitly distinguishes union “solicitations”—which, when lawfully defined, an employer may restrict in this manner—and related “discussions,” which an employer may not.<sup>43</sup> In reading this policy, an employee would reasonably be led to believe that she cannot discuss the Union during work time or in patient care areas, even though she can discuss other nonwork topics in those areas. See *id.*; *Lutheran Heritage*, 343 NLRB at 647. By promulgating an explicitly unlawful policy, the Hospital violated Section 8(a)(1).

##### (b) “Unauthorized Persons”

The Hospital’s June policy notes that “[t]he health system prohibits solicitation and distribution of literature to patients or visitors at any time by unauthorized persons.” General Counsel alleges that, because the Hospital does not define “unauthorized person,” employees could reasonably construe the prohibition to include off-duty employees, which would have a chilling effect on lawful Section 7 activities. I agree. Section 7 encompasses the right to seek support and sympathy from customers and the general public. *Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000) (“the fact that the off-duty employee distributions . . . were to customers rather than to other employees appears to be a distinction without a difference and is an irrelevant consideration”); *NCR Corp.*, 313 NLRB 574, 576 (1993) (“the right of employees to distribute union literature during nonworktime and nonwork areas is not limited only to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations”).

Even further, the policy sends the explicit message that any solicitation or distribution to non-employees would need to be pre-“authorized” by the Hospital. Absent additional clarification, an employee would reasonably construe the policy to read that any employee—on or off-duty—seeking to exercise their Section 7 rights to solicit and distribute to non-employees must first seek authorization from the Hospital. The Hospital may not promulgate policies implying that employees must seek permission before engaging in protected activities.<sup>44</sup> *Crowne Plaza*

<sup>43</sup> Indeed, the policy’s preamble reiterates that the Hospital intended to draw a distinction between “solicitations” and “discussions” as it prohibits them both: “[t]his memo is our attempt to review our rules regarding solicitation and other similar activity . . . this includes solicitation for any cause, including in favor of or against a union and discussion about wages, hours and conditions of employment. . . . there are limits to when and where solicitation and these discussions may occur.” (GC Exh. 3 at 4.)

<sup>44</sup> Respondent argues that employees would not reasonably construe the term “unauthorized persons” to apply to off-duty nurses and provides examples of off-duty employees soliciting other employees on numerous occasions. (R. Br. at 30–31.) However, the language at issue specifically constrains solicitation activity pertaining to non-employees—“patients or visitors,” which Respondent distinguishes from “colleagues” elsewhere in the policy. See GC Exh. 2 at 2: “Holy Cross does not allow colleagues to solicit colleagues, patients, or visitors at any time in

*Hotel*, 352 NLRB at 386–387 (finding unlawful a rule prohibiting employees from “leaving [their] work area without authorization before the completion of [their] shift”); In re *Saginaw*, 339 NLRB at 553 (finding unlawful a rule requiring employees to seek written permission from management to solicit or distribute materials while on company property). By promulgating an unlawful policy, the Hospital violated Section 8(a)(1).

(c) “Where Holy Cross allows Solicitations”

The Hospital’s October policy notes that “[n]urses opposed or in support of the union may leave literature for pick up as long as it is a non-work or patient care area where Holy Cross allows solicitations and/or distributing personal materials.” While the Hospital may reasonably restrict workplace communications, it may not do so at times or in places where the employees’ activities do not interfere with employer operations. *Our Way*, 268 NLRB at 394. A non-work and non-patient care area is, by definition, outside of the Hospital’s operations. Thus, for Respondent to attach the additional condition to its policy—“non-work or patient care area where Holy Cross allows solicitations and/or distributing personal materials” (emphasis added)—is to send the message that there are places outside of patient care and non-work areas where Holy Cross might still prohibit protected activity. This rule is facially overbroad and sends the explicit message that an employee’s ability to engage in protected solicitations is contingent upon Respondent’s “allow[ing]” it. See *Trump Marina Associates*, 354 at fn. 3; *Crowne Plaza Hotel*, 352 NLRB at 386–387; In re *Saginaw*, 339 NLRB at 553. An employee reading the plain language of the rule would reasonably understand it as such. *Lutheran Heritage*, 343 NLRB at 647. By promulgating an unlawful policy, the Hospital violated Section 8(a)(1).

2. Email distribution system

“[A]n employer that gives its employees access to its email system must presumptively permit the employees to use that email system for statutorily protected communications during nonworking time.” *Purple Communications, Inc.*, 361 NLRB 1050, 1063 (2014); See also *UPMC*, 362 NLRB 1704, 1706 (2015) (extending *Purple Communications*’ Section 7 email protections to hospital employees).

The Hospital’s policy prohibiting solicitations “through the use of the health system’s [email]” is impermissibly vague to the extent that an employee who has rightful access to the email system would reasonably feel restrained from posting Section 7 material via email during non-work time. See *Purple Communications, Inc.*, slip op. at 14, supra.

The Respondent, citing *Ichikoh Manufacturing, Inc.*, correctly notes that “where an employer has a facially unlawful rule, the employer has the burden of showing that it communicated or applied the rule in such a way as to convey an intent clearly to permit solicitation during breacktimes or other nonwork periods.” R. Br. at 29, citing 312 NLRB 1022 (1993). The Respondent then contends that, because many nurses and members of Hospital management openly used the Respondent’s email to argue for or

against the Union, without rebuke, the Hospital conveyed its intent to permit union solicitation over email. *Id.* However, *Ichikoh* also states that, “the fact that some employees ignored the rule and were not disciplined fails to meet the Respondent’s burden of establishing that it conveyed to employees ‘an intent clearly to permit solicitation.’” 312 NLRB at 1022. Here, the fact that members of management also flouted the rule is similarly un-compelling. The Respondent had many opportunities to clarify or retract its unlawful policy: for example, Respondent’s October clarification of its Solicitation and Distribution rule provided examples of permissible and impermissible in-person solicitation but remained silent as to its email policy. Indeed, there is no evidence that the Hospital ever sought a retraction of its email solicitation policy, notwithstanding Guarino’s March 17 email seemingly condoning union discussion over the Hospital’s network. The unlawful rule was still on the books at the time of trial, which itself violates the Act. *J.C. Penney Co.*, 266 NLRB at 1224–1225 (finding a violation where an employer did not communicate to employees the elimination of an unlawful rule: “it is well established that the mere maintenance of such a rule serves to inhibit employees from engaging in otherwise protected organizational activity, and, therefore, the absence of evidence of enforcement of a rule does not preclude the finding of a violation”); see also *Ichikoh*, 312 NLRB at 1022 (finding a violation where an employer did not show “that it has clearly communicated to all the unit employees to whom the presumptively invalid rule was disseminated that the rule did not mean what it said”). By promulgating an unlawful policy, the Hospital violated Section 8(a)(1).

3. “Immediate Patient Care Areas”

In recognition of the fact that a hospital’s primary function is patient care, and “that a tranquil atmosphere is essential to carrying out that function,” the Board, with Supreme Court approval, has given health care institutions some latitude in restricting the exercise of Section 7 rights. *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *St. John’s Hospital & School of Nursing*, 222 NLRB 1150 (1976), *enfd.* in part 557 F.2d 1368 (10th Cir. 1977). Thus, health care facilities may prohibit solicitation in “immediate patient care areas,” such as patients’ rooms, operating rooms, X-ray areas, therapy areas, and other places where patients receive treatment. *NLRB v. Baptist Hospital*, 442 U.S. at 781 (approving the standard applied by the Board in *St. John’s Hospital*). In such places, where solicitation might be unsettling to patients who need quiet and peace of mind, the balance between certain concerted activities and patient needs may be struck against employee rights. See *Beth Israel Hospital*, 437 U.S. at 483. However, the Board has long held that this latitude does not extend to other, non-immediate care areas to which patients and visitors have access (such as lobbies, waiting rooms, and hallways). Solicitation bans in these areas are presumptively unlawful “unless the hospital can show that such a ban is necessary to avoid a disruption of patient care.” *Baptist Hospital*, 442 U.S. at 780; see also *Healthbridge Management, LLC.*, 360 NLRB 937, 938–939

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immediate patient care areas or during working time.” There is no evidence in the record about employees soliciting nonemployees so the Respondent’s examples do not apply.

(2014); *Brockton Hospital*, 333 NLRB 1367, 1368 (2001); *Eastern Maine Medical Center*, 253 NLRB 224, 226 (1980), enfd. 658 F.2d 1 (1st Cir. 1981).

The Hospital's promulgated definition of "immediate patient care areas" is impermissibly broad. By defining "immediate patient care areas" to include such non-care areas as patient lounges, waiting areas, corridors, sitting rooms, elevators, stairways, or "[areas] on the unit where patients are or can be present," the Hospital has coopted the legal language and expanded it to an unlawful degree. See *Baptist Hospital*, 442 U.S. at 780; see also *Healthbridge Management, LLC.*, 360 NLRB 937, 938–939 (2014) (finding that a hospital rule prohibiting the wearing of union buttons in "all areas" of the facility was presumptively invalid, when the employer could show no special circumstances justifying the action); *Brockton Hospital*, 333 NLRB 1367, 1368 (2001) (finding unlawful a hospital rule prohibiting solicitation in areas used by patients, including the vestibule, gift shop, and cafeteria); *Eastern Maine Medical Center*, 253 NLRB 224, 226 (1980), enfd. 658 F.2d 1 (1st Cir. 1981) (finding unlawful a solicitation ban extending to the hospital's second-floor lobby, which opened into the cafeteria and which was used by all employees and visitors). Absent a showing of patient care disruption, "[o]n balance, the interests of the patients well enough to frequent [non-immediate patient care areas] do not outweigh those of the employees to discuss or solicit union representation." *St. John's Hospital*, 222 NLRB at 1151.<sup>45</sup> By promulgating a policy that is impermissibly broad, without demonstrating that such an expansive policy is necessary to avoid disruption of patient care, the Hospital violated Section 8(a)(1).

#### B. Threats, Coercion, and Unlawful Interrogation

The complaint also alleges that the Hospital unlawfully threatened employees with onerous working conditions and loss of benefits if they selected the Union as their collective-bargaining representative, coercively interfered with employees engaged in union and protected concerted activity, and interrogated employees about their union and protected concerted activity. The Hospital denies these charges.

For the reasons below, I find that the Hospital engaged in at least eight instances of unlawful threats, coercion, and interrogation in violation of Section 8(a)(1).

##### 1. Threats of more onerous working conditions and/or loss of benefits

An employer is free to communicate her general views about unionism, and an employer may make predictions as to the precise effects she believes unionization will have on her company. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

<sup>45</sup> The Respondent asserts in its brief that, under *NLRB v. Great Dane Trailers*, the Board has the duty to "strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." (R. Br. at 22, citing 388 U.S. 26 (1967).) However, *Baptist Hospital* and its progeny, which the Supreme Court decided after *Great Dane*, provide precisely the business justification/employee rights balancing test for solicitation in acute health facilities: the Respondent must carry the burden of demonstrating, by the preponderance of the evidence, why a restrictive ban is necessary to avoid a disruption of patient care. 442 U.S. at 781. The Respondent argues that its "Solicitation and Distribution" memo sufficiently justifies the

However, these predictions are only lawful when "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Id.* Employer predictions become unlawful threats, however, when their context has a reasonable tendency to interfere with, restrain, or coerce employees' exercise of Section 7 rights. *Flying Foods*, 345 NLRB 101, 105–106 (2005). A threat of more onerous working conditions is unlawful. *Liberty House Nursing Homes*, 245 NLRB 1194, 1199, 1204 (1979). Similarly, the statement that the presence of a union "could" deteriorate employment conditions is unlawful absent a reference to the collective-bargaining process. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010).

##### (a) July 20—Cynthia Hawley threatened Susanna Reed-McCullough

On July 20, manager Cynthia Hawley convened a one-on-one meeting with Susanna Reed-McCullough, whom Hawley knew to be an open union supporter. During this meeting, Hawley told Reed-McCullough that the presence of a union might limit employee access to management and might worsen the NICU's FMLA and flexibility policies, because unions like to equalize things "across the board." Hawley also handed Reed-McCullough a Hospital-issued "fact sheet" about union authorization cards.<sup>46</sup> Neither Hawley, nor the fact sheet, mentioned the collective-bargaining process. During this conversation, Hawley was aware that flexibility leave policies were particularly important to Reed-McCullough, as Hawley had approved Reed-McCullough's day-shift contract. Hawley was also aware that Reed-McCullough had used FMLA for her own family.

By omitting any reference to the collective-bargaining process, the Respondent, through Hawley, unlawfully threatened Reed-McCullough with more onerous working conditions and loss of benefits, in violation of Section 8(a)(1) of the Act. See *Novelis Corp.*, 364 NLRB No. 101 (2016), citing *Allegheny Ludlum Corp.*, 320 NLRB 484, 484 (1995) (statements that employees would lose their flexible work schedules constituted threats of more onerous working conditions when those threats omitted any reference to the collective-bargaining process).

##### (b) September 21—Mariamma Ninan threatened Vera Ngezem

On September 21, manager Mariamma Ninan convened a one-on-one meeting with Vera Ngezem, whom Ninan knew to be an open union supporter. During this meeting, Ninan warned Ngezem that if a Union came to the Hospital, "a lot of things would change." Specifically, Ninan presented as fact that she "would not" be able to provide future employment verification letters—a benefit that had been previously afforded Ngezem—

policy's purpose, which is to "protect the privacy of our patients and prevent interference with the delivery of patient care." (R. Br. 22 at 22, citing GC Exh. 3.) I disagree. This statement of purpose merely repeats the standard of protecting patient care; it does not meet it. There is no record evidence demonstrating how employee solicitation would disrupt patient care in such areas as patient lounges, waiting areas, hallways, or elevators. As such, I find that Respondent has failed to meet its burden.

<sup>46</sup> Hawley also mentioned that, in her and her daughters' experience, there was not a "huge difference" between unionized and non-unionized hospitals in terms of staffing and nurse satisfaction. This statement was grounded in personal experience and did not violate the Act.

to employees. Ninan also said that nurses would lose scheduling flexibility with respect to vacation and schooling. Ninan further warned that if the nurses unionized, more experienced nurses could bump less experienced nurses from their jobs. At no time did Ninan mention the collective-bargaining process. Additionally, during this conversation, Ninan was aware that scheduling flexibility was particularly important to Ngezem, due to Ngezem's family needs.

By omitting any reference to the collective-bargaining process and presenting unsubstantiated predictions as certainties, the Respondent, through Ninan, unlawfully threatened Ngezem with more onerous working conditions and loss of benefits in violation of Section 8(a)(1) of the Act. See *Metro One*, 356 NLRB at 89 (the statement "it could get much worse," absent a reference to the collective-bargaining process, constituted a threat of more onerous working conditions).

## 2. Coercive interference with protected, concerted activities

It is established that an employer violates Section 8(a)(1) of the Act if its conduct "may reasonably be said to have a tendency to interfere with the free exercise of employee rights." *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997), *enfd.* in part 118 F.3d 795 (1997); *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987).

### (a) August 6—Dwight Lyles coercively interfered with nurses' union activities

On August 6, NIC Dwight Lyles called hospital security on nurses engaged in protected, concerted activities. By Lyles' own admission, he called security specifically because he was concerned that Mintz and Scott were engaging in Union activity on his floor. The security officers' subsequent report (entitled "Off-Duty Employees suspected of trying to recruit working nurses to Union") and an administrative email confirm that Lyles called security in direct response to the suspected union activity, and because he intended to interfere with it. Lyles succeeded in this goal: after the incident, Lyles' unit nurses were too afraid to meet with Mintz and Scott, and the organizers left the floor.

By using hospital security to impede employees' lawful organizing activities, the Respondent, through Lyles, coercively interfered with Mintz, Scott, and Yu's protected union activities, in violation of Section 8(a)(1) of the Act.

### (b) August 6—Security officers coercively interfered with nurses' union activities

On August 6, security officers responded to Lyles' call by confronting employees who were engaged in organizing activities. The security officers wrote down the name of every nurse involved in the organizing incident (Mintz, Scott, and Yu), told Yu that they were going to "take this matter to the nursing coordinator," and filed an incident report naming all the nurses. After the security officers left the floor, Yu told Mintz and Scott that she and another nurse were too afraid to leave the unit, and the nurses ceased all organizing activities on that floor.

By interfering with the lawful organizing activities of Mintz, Scott, and Yu, the Respondent, through its security officers, violated Section 8(a)(1) of the Act. See *Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach and Hotel Renew*, 365 NLRB No. 53, slip op. at 1 (2017) (finding that the employer's security

officer unlawfully prohibited off-duty employees from distributing union leaflets in the employer's hotel).

### (c) August 6—Officer Hawkins coercively interfered with nurses' union activities

During the incident on August 6, Officer Hawkins, one of the responding officers, overheard a group of nurses at 5 South Acute talking about their desire to see what the Union "had to offer," and asked them, "what are they offering?" According to the Hospital's incident report, the nurses dispersed, and right afterward "[Hawkins] saw two NICU nurses leave when they saw him."

By intimidating and dispersing a group of nurses who had been discussing union activities, the Respondent, through Officer Hawkins, coercively interfered with employees' protected concerted activities in violation of Section 8(a)(1). See *id.* (employer held liable for unfair labor practices committed by security guards acting in their official capacity).

### (d) October 19—Officer Hawkins coercively interfered with nurses' union activities

On October 19, Officer Hawkins approached Mintz, Scott, and Norris as they chatted on the Hospital landing. Hawkins asked the nurses if they were talking about the Union, and incorrectly informed them that it was "illegal" to talk about the Union in the Hospital. Though Hawkins did not succeed in halting the union activity—because the nurses pushed back—his intent had been to stop any Union discussions and disperse the nurses.

By attempting to intimidate and disperse a group of nurses who had been discussing Union activities, the Respondent, through Officer Hawkins, coercively interfered with employees' protected, concerted activities, in violation of Section 8(a)(1) of the Act. See *St. John's Health Center*, 357 NLRB 2078, 2096 (2011) (security guards acting under direct authority from upper management violated Section 8(a)(1) by threatening to have employees charged with trespassing for distributing prounion literature).

## 3. Interrogation about protected, concerted activities

Questioning an employee constitutes unlawful interrogation when, considering the totality of the circumstances, the interaction at issue would reasonably tend to coerce the employee to an extent that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 940 (2000); *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

### (a) July 20—Hawley unlawfully interrogated Reed-McCullough

During Hawley's July 20 meeting with Reed-McCullough, Hawley mentioned that the Hospital knew that some nurses were in contact with union representatives. Hawley said that "some nurses had been called at home and harassed" by union representatives and encouraged Reed-McCullough to let Hawley know if anything like this were to happen to her.

The Board has frequently found unlawful employer's statements encouraging employees who feel harassed or pressured in the course of union solicitations to report the incident to

management. *Tawas Industries, Inc.*, 336 NLRB 318, 322–323 (2001), citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). These statements violate Section 8(a)(1) “because they have the potential dual effect of encouraging employees to identify union supporters based on the employees’ subjective view of harassment and discouraging employees from engaging in protected activities.” *Id.* Moreover, though remarks may not be framed in the customary interrogative form, where a remark has the natural tendency to solicit a response which reveals or discloses union sympathies, those remarks violate Section 8(a)(1). See *Jefferson Apparel Co.*, 248 NLRB 555, 560 (1980).

By making statements that had the natural tendency to solicit a response from Reed-McCullough that would identify union supporters and disclose the union sympathies of others, the Respondent, through Hawley, unlawfully interrogated Reed-McCullough, in violation of Section 8(a)(1) of the Act.

(b) *October 19—Hawkins unlawfully interrogated Mintz, Scott, and Norris*

In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board weighs five factors holistically: (1) the truthfulness of the replies from the employee being questioned; (2) the nature of the information sought; (3) the identity and rank of the questioner; (4) the place and method of the interrogation; and (5) the background between the employer and union, i.e., whether a history of employer hostility and discrimination exists. *Metro-West Ambulance Services, Inc.*, 360 NLRB 1029, 1091 (2014); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Whether an interrogation is courteous rather than rude or profane is not dispositive. *Woodcrest Health Care Center*, 360 NLRB 415, 421 (2014).

During Officer Hawkins’ October 19 interaction with Mintz, Scott, and Norris, Hawkins asked the nurses if they were talking about the Union. Applying the *Bourne* factors, first, the truthfulness of the nurses’ response cannot be assessed. Instead of answering the question, the nurses angrily turned their backs on Hawkins and informed him, correctly, that his question was unlawful. Second, Hawkins specifically asked the nurses if they were discussing the Union, a protected Section 7 right. Third, the questioner was a uniformed security officer who had previously been involved with a union-related security incident also involving Mintz and Scott.<sup>47</sup> Fourth, the incident took place in an open, public-use landing, where the nurses had been speaking freely to one another prior to Hawkins’ intervention. Fifth, the Hospital had, at this point, committed a number of prior unfair labor practices as to this union campaign, at least one in which involved Hawkins himself.

Considering the totality of the circumstances, I conclude that Hawkins coercively questioned the nurses in a way that would reasonably constrain employees from exercising their Section 7 rights. Accordingly, the Respondent, through Hawkins, unlawfully interrogated Mintz, Scott, and Norris, in violation of Section 8(a)(1) of the Act.

### C. *Surveillance, and Impression of Surveillance, of Union Activity*

While the random or isolated viewing of a union gathering by an employer agent is not prohibited surveillance, *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 (1987), an employer that photographs or videotapes employees engaged in concerted activities may engage in prohibited surveillance, or may unlawfully create the impression of surveillance, or both. See generally *F. W. Woolworth*, 310 NLRB 1197 (1993). An employer unlawfully creates the impression of surveillance by statements or other conduct which, under all relevant circumstances, would lead reasonable employees to assume that their union activities have been placed under surveillance. *Durham School Services*, 361 NLRB 407, 407 (2014). In general, the Board has analyzed this problem by presuming that the photographing of peaceful protected activity violates Section 8(a)(1), but it allows the employer to attempt to rebut the presumption with proof of a legitimate security objective. *Alle-Kiski Medical Center*, 339 NLRB 361, 364–365 (2003); *Fairfax Hospital*, 310 NLRB 299, 310 (1993).

On September 16, Ngezem observed approximately 10 people watching her group through a Hospital window as they posed for a prounion photograph. Ngezem also noticed at least 5 of the watchers taking photographs and concluded that she and her fellow union supporters were being surveilled. Jolly Joseph confirmed that she and several other NICs had in fact been taking pictures of the union supporters from the window, and that the NICs distributed these photos to upper-level management.

Absent a legitimate security objective, this photography was presumptively unlawful. *Alle-Kiski Medical Center*, 339 NLRB at 364–365 (hospital security guards violated the Act by videotaping and photographing union organizers without advancing a security justification); *Fairfax Hospital*, 310 NLRB at 310 (employer’s photographing employees during union campaign not justified by simultaneous media picture-taking). The Hospital advanced the following justifications for Joseph’s behavior: (1) the nurses advocating for the Union were posing for pictures in plain sight; (2) it was coincidental that the NICs were training right next to the organizing nurses; (3) Joseph observed a professional photographer taking the organizers’ picture; (4) Joseph did not know that she was photographing Union activity; (5) the organizers ultimately published a hospital-wide, substantially-similar picture to the ones Joseph took; (6) it was not out of the ordinary for Joseph to take pictures of nurses on her cell phone; (7) Ngezem did not know the NICs were management; and (8) the organizers smiled and waved upon seeing the NIC photographers.<sup>48</sup>

The Hospital’s contentions are unavailing as none of the alleged justifications evince a legitimate security objective or risk posed by the organizers. *Id.* Further, that the nurses were advocating in plain sight, that a professional photographer was present to help publicize union photographs, that some of the organizers’ identities were public, and that the organizers did not demonstrate fear at the sight of the NICs—these justifications

<sup>47</sup> Though Hawkins had not responded to the initial call to stop Mintz and Scott’s August 6 union activities, Hawkins happened to be on the

floor during the incident. Hawkins aided his fellow officers in surrounding Mintz and Scott during security’s first confrontation with the nurses.

<sup>48</sup> R. Br. 39–42.

misunderstand the reason for which surveillance can be an unfair labor practice. As the Board upheld in *Fairfax Hospital*:

... the fact that pictures were also taken by the media and even by a friend of one of the participants who invited him to take the pictures, makes no difference. The essence of the unfair labor practice charge is that employers have no right to spy on the union and concerted activities of its employees. Such spying is coercive ... even if the union adherents had made their identities public. 310 NLRB at 310.

Finally, even if Joseph had been credible in testifying that she did not know her surveillees were union adherents, that she regularly takes such photographs, and that the interaction was entirely coincidental, the Respondent has no refuge here. Employer curiosity is not an appropriate justification for spying on protected, concerted activities. *BRC Injected Rubber Products*, 311 NLRB 66, 75-76 (1993) (violation found where work-bound supervisor, claiming to have acted out of curiosity, drove through parking lot of inn where he knew union meeting was being held).

On the above reasoning, I conclude that the Respondent, by Jolly Joseph and other nurses in charge, unlawfully surveilled, and created the unlawful impression of surveillance of, employees engaged in protected, concerted activity, in violation of Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. The Hospital/Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act and a health institution within the meaning of Section 2(14) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent's prohibitions against the use of its electronic communications systems violated Section 8(a)(1) of the Act.
4. The Respondent's June 2016 solicitation and distribution policy violated Section 8(a)(1) of the Act by prohibiting nurses from using the Respondent's electronic communications systems, including email, during nonworking time.
5. The Respondent's policy of prohibiting nurses from discussing the Union in nursing stations, corridors, stairwells, elevators, and immediate patient care areas violated Section 8(a)(1) of the Act.
6. On July 20, by threatening employees with more onerous working conditions and/or loss of benefits if employees chose union representation, the Respondent, by Cynthia Hawley, violated Section 8(a)(1) of the Act.
7. On July 20, by stating that she was aware that nurses had been called at home and harassed by the Union and asking that a nurse alert Hawley if this happened to her, the Respondent, by Cynthia Hawley, violated Section 8(a)(1) of the Act.
8. On August 6, by calling hospital security to respond to nurses engaged in protected concerted activities, the Respondent, by Dwight Lyles, violated Section 8(a)(1) of the Act.
9. On August 6, by recording nurses' names and threatening to "take the matter to the nursing coordinator," the Respondent,

by its security officers, violated Section 8(a)(1) of the Act.

10. On August 6, by quelling nurses' interest in speaking with prounion nurses, the Respondent, by Officer Hawkins, violated Section 8(a)(1) of the Act.

11. On September 16, by taking photographs from a nearby conference room of nurses' protected concerted activities and disseminating those pictures to other managers and supervisors, the Respondent, by Jolly Joseph and other Nurses in Charge, violated Section 8(a)(1) of the Act.

12. On September 21, by threatening nurse Vera Ngezem with more onerous working conditions and loss of benefits if the nurses selected the Union, the Respondent, by Mariamma Ninan, violated Section 8(a)(1) of the Act.

13. On September 21, by presenting certain changes to working conditions as eventualities if a union represented the nurses, the Respondent, by Mariamma Ninan, violated Section 8(a)(1) of the Act.

14. On October 19, by asking nurses if they were discussing the Union and instructing them that they were prohibited from such discussion in the hospital, the Respondent, by Officer Hawkins, interrogated and interfered with nurses in violation of Section 8(a)(1) of the Act.

15. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

#### 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>49</sup>

#### ORDER

The Respondent, Holy Cross Health d/b/a Holy Cross Hospital, of Silver Spring, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Promulgating and maintaining overly broad and/or ambiguous solicitation and distribution policies.
  - (b) Promulgating and maintaining an overly broad prohibition on employees' use of electronic communications systems.
  - (c) Promulgating and maintaining any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization on the Respondent's premises other than immediate patient care areas during nonworking time or prohibiting the distribution of union literature in nonworking areas during employees' nonworking time.
  - (d) Promulgating rules prohibiting discussions about the Union anywhere and at any time in the hospital.
  - (e) Interrogating employees about their union membership, activities, and sympathies.
  - (f) Threatening employees with more onerous working conditions if they select the Union as their bargaining representative.

<sup>49</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.



(g) Threatening employees with loss of benefits if they select the Union as their bargaining representative.

(h) Creating the impression among its employees that their protected concerted and/or union activities are under surveillance.

(i) Photographing employees engaged in protected concerted and/or union activity.

(j) Disseminating unlawful photographs of employees engaged in protected concerted and/or union activity.

(k) Using security guards to coercively interfere with employees engaged in protected concerted or union activities.

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

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

(a) Within 14 days after service by the Region, post at its Silver Spring, MD facility copies of the attached notice marked "Appendix."<sup>50</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 25, 2013.

(b) Within 14 days after service by the Region, Respondent will post a copy of the notice in English and in additional languages if the Regional Director decides that it is appropriate to do so, on its intranet for its employees at its facility located at 1500 Forest Glen Road, Silver Spring, Maryland 20910 and keep it continuously posted there for 60 consecutive days from the date it was originally posted.

(c) Within 14 days after service by the Region, Respondent will email a copy of the signed Notice in English and in additional languages if the Regional Director decides that it is appropriate to do so, to all employees who work at its facility located at 1500 Forest Glen Road, Silver Spring, Maryland 20910.

(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., July 21, 2017

<sup>50</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 coercively question you about your union support or activities.

WE WILL NOT promulgate and maintain overly broad and/or ambiguous solicitation and distribution policies.

WE WILL NOT promulgate and maintain an overly broad prohibition on employees' use of electronic communications systems.

WE WILL NOT promulgate and maintain any rule or regulation prohibiting our employees from soliciting on behalf of any labor organization on our premises other than immediate patient care areas during nonworking time or prohibit the distribution of union literature in nonworking areas during employees' nonworking time.

WE WILL NOT promulgate rules prohibiting discussions about the Union anywhere and at any time in the hospital.

WE WILL NOT threaten you with more onerous working conditions if you select the Union as your bargaining representative.

WE WILL NOT threaten you with loss of benefits if you select the Union as your bargaining representative.

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

WE WILL NOT photograph you engaged in protected concerted and/or union activity.

WE WILL NOT disseminate unlawful photographs of employees engaged in protected- concerted and/or union activity.

WE WILL NOT use security guards to coercively interfere with your protected concerted or union activities.

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

WE WILL rescind the definition of "solicitation" in our Solicitation and Distribution policy regarding ". . . promoting, encouraging, or discouraging participation, support, or membership in any organization, or promoting of a doctrine or belief."

WE WILL rescind the definition of "distribution of literature" in our Solicitation and Distribution policy regarding

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

“... electronic matter for the purpose of, or as an aid to, solicitation.”

WE WILL rescind the definition of “immediate patient care area” in our Solicitation and Distribution policy regarding “. . . nursing stations, corridors . . . elevators and stairways used by or to transport patients.”

WE WILL rescind the rule in our Solicitation and Distribution policy that prohibits “solicitation and distribution of literature to patients or visitors at any time by unauthorized persons.”

WE WILL rescind the rule in our Solicitation and Distribution policy that prohibits “solicitation through the use of the health system’s electronic communication system to colleagues or non- employees.”

WE WILL rescind the rule in our October 7, 2016 memorandum, “nurses opposed to or in support of the union may leave literature for pick up as long as it is a non-work or patient care area where Holy Cross allows solicitations and/or distributing personal materials.”

WE WILL rescind the rule in our October 7, 2016 memorandum that prohibits “. . . discussion while either nurse is on work time (not off duty and not on break) or with a nurse who is performing her duties – charting, speaking with other caregivers, family – in the patients room, or speaking to physicians.”

WE WILL rescind the rule in our October 7, 2016 memorandum that prohibits “. . . discussion in a patient room or elsewhere on the unit where patients are or can be present – such

as corridors where patients wait or treatment rooms.”

WE WILL notify you that the rules and/or portions of rules from our Solicitation and Distribution policy have been rescinded.

WE WILL notify you that the rules and/or portions of rules from our October 7, 2016 memorandum have been rescinded.

HOLY CROSS HEALTH D/B/A HOLY CROSS HOSPITAL

The Administrative Law Judge’s decision can be found at [www.nlr.gov/case/05-CA-182154](http://www.nlr.gov/case/05-CA-182154) 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.

