Bloomfield Health Care Center *and* New England Health Care Employees Union, District 1199, SEIU. Cases 34–CA–11512, 34–CA–11536, 34–CA–11559, 34–CA–11562, 34–CA–11600, and 34–RC–2172

March 20, 2008

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN AND SCHAUMBER

On March 30, 2007, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The judge found that Bloomfield Health Care Center (the Respondent) committed a number of unfair labor practices in May 2006,[3] and afterward; he recommended dismissal of several other unfair labor practice allegations. We affirm the judge's unfair labor practice findings except as discussed below. He also recommended overruling the Respondent's objections to an election and certifying the Union. We agree with those latter recommendations as discussed below.

I. ALLEGED INTERROGATION

As explained, we reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by interrogating employees, through Administrator Penni Martin, about their union activities.

The Union held a meeting on July 20, approximately 2 months after the election. Notices of the meeting had been posted inside the Respondent's facility. The day after the meeting, several employees were in the break room when Martin admittedly asked them how the meeting had gone. At least one employee responded that she had not attended. According to Martin's testimony, she replied that she really did not care who was at the meeting and that she was just making conversation. Employee Cynthia Masters testified that she did not hear Martin say that she did not care what happened at the meeting, but that Martin asked two or three individuals directly whether they had attended the meeting. Martin denied that she had asked any employees whether they had attended the meeting.[4]

The judge, without resolving the differences between Masters' and Martin's testimony, found that this single incident "was essentially trivial and noncoercive," noting that managers and employees were aware of the meeting and its time and place as a result of the notices posted inside the facility. We disagree.

The test for whether an unlawful interrogation occurred is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Id.; *Stoody Co.*, 320 NLRB 18, 18–19 (1995). The Board has held that questioning employees about whether they attended a union meeting and what occurred at the meeting is an unlawful interrogation. *Resolute Realty Management Corp.*, 297 NLRB 679, 685 (1990), and cases cited therein.

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

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] We shall modify the judge's recommended Order to conform to our findings herein. We shall also substitute a new notice in accordance with the Order as modified and in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] All dates are in 2006, unless otherwise indicated.

[4] Masters and one of the other employees who were questioned had signed a union petition that was posted in the facility, but Masters testified that she never wore union buttons to work.

Applying the *Rossmore House* factors, we find that the Respondent unlawfully interrogated the employees. First, although the questioning was in the employees' break room and not a management office, it was done by the Respondent's highest-ranking manager at its facility, Administrator Martin. Second, although the time and location of the union meeting were publicized, there is no indication that the particular employees questioned in the break room were open and active about their union activities. Indeed, the testimony indicates otherwise. Even assuming, arguendo, that signing the union petition that had been posted in the facility constituted open and active union support, only two of the five to six employees present had signed the petition. Moreover, the Respondent does not contend that any of the questioned employees previously had discussed the topic of union meetings or any other union activities with Martin or that she had any lawful reason to ask the employees how the union meeting went. Although Martin denies that she directly asked the employees who attended the union meeting, she admits that she asked the employees how the union meeting had gone. The employees' responses would reveal, at the least, whether they attended the meeting; thus, the employees were put in a position of having to confirm or deny protected activity that they have a right to keep confidential. We find that Martin's questions reasonably tended to restrain, coerce, or interfere with employees' Section 7 rights.[5]

II. DENIAL OF ACCESS TO AND SUSPENSION OF OFF-DUTY EMPLOYEE WINSOME KITSON

We adopt the judge's finding that the Respondent violated Section 8(a)(1) by attempting to deny Kitson access to its facility. We also adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending Kitson.[6]

On the day of the election, union supporter Kitson became involved in a discussion with Penni Martin. Although Kitson denied some of the conduct attributed to her by Martin, which was alleged as the basis for Kitson's subsequent suspension from work, the following events are undisputed. The Respondent sponsored various events on election day, which occurred during National Nursing Home Week. The events included a wheelchair race for residents and a party for staff members in the recreation room. The timing of the party overlapped with the afternoon election session and an employee shift change. As is customary, off-duty employees were among those picking up paychecks; the Respondent did not have a policy against off-duty employees entering the facility. Employees picking up paychecks, including Kitson, were told to pick up free coffee mugs that the Respondent was distributing in the recreation room.

As Kitson was walking toward the recreation room to get her coffee mug after picking up her paycheck, Martin approached her and asked what she was doing there. Kitson responded that she was picking up her paycheck, and Martin told her that she had to leave the facility because she was not on duty. Kitson told Martin that she was going to get a coffee mug, and the two women entered the recreation room. During their conversation, Kitson asked Martin if she was going to tell other off-duty employees to leave, and Martin said yes. Martin, however, did not subsequently do so. Earlier in the day, Martin had told union supporters Avril Wallace and Fay Richards to leave. Martin acknowledged that the Respondent had no policy against off-duty employees entering the facility; she testified that she had decided to implement this edict on the day of the election because she realized at that time "that it had become so chaotic that day with all of the activities for the residents that were happening . . . and the voting and all of the people in the building." In the recreation room, both Kitson and Martin spoke to several other employees who were present, and Kitson eventually left the building.

Martin acknowledged that there might have been other off-duty employees in street clothes in the recreation room, but she testified that she did not pay much attention. Two employees testified that Martin initiated conversations with them upon entering the recreation room, including complimenting employee Tameka Edwards on her clothing (because Edwards was off duty, she was not in uniform).

In contrast to these undisputed facts, the record reflects several differences in the witnesses' versions of events. Martin testified that she told several members of her management team, including then-Director of Nursing (DON) Carol Mortensen, of her ad hoc decision to exclude off-duty employees from the facility, but Mortensen denied that Martin told her to ask off-duty employees to leave. Martin additionally testified that, when she approached Kitson, asking her to leave, Kitson yelled loudly at her, waved her hands and paycheck close

[5] In so finding, Member Schaumber relies particularly on Masters' testimony that Martin, the highest ranking individual at the facility, directly asked two or three individuals whether they had attended the meeting; this testimony was not discredited by the judge.

[6] In light of our adoption of these findings, we find it unnecessary to pass on the General Counsel's cross-exception to the judge's failure to find that the Respondent additionally violated Sec. 8(a)(3) by attempting to deny Kitson access to the facility because this additional finding would not materially affect our remedy.

to Martin, and made several allegedly threatening statements to her in the recreation room. This testimony was partially corroborated by Jennifer Donovan, a registered nurse supervisor and Martin's friend, but the judge credited Kitson, who denied making the alleged statements or waving anything in Martin's face. Rather, according to Kitson, she asked Martin why she was harassing her when there were other off-duty employees at the party. Several witnesses corroborated Kitson's testimony, including DON Mortenson. The judge found that "at most," Kitson said either to Martin (or to other employees in the room) that Martin didn't know who she was messing with. The Respondent thereafter suspended Kitson because of what had occurred between her and Martin that day.

We agree with the judge, for the reasons he stated, that Martin's conduct in telling Kitson that she had to leave the facility interfered with the employees' rights to engage in Section 7 activity and therefore violated Section 8(a)(1).

We also agree with the judge that Kitson's subsequent suspension violated Section 8(a)(3) and (1).[7] The Respondent claims that it suspended Kitson because she failed to leave the facility and because of her alleged threats. There is no dispute that the Respondent had knowledge of Kitson's prominent union activity, including her serving as the Union's observer for the morning session of the election. The General Counsel demonstrated the Respondent's antiunion animus by showing disparate treatment; only known prounion employees were asked to leave the facility, whereas other off-duty employees were not asked to leave. Indeed, Martin had a pleasant conversation with employee Edwards in the recreation room and even complimented her on her off-duty attire—within minutes of asking Kitson to leave because she was off duty. Martin was unable to name any other employees whom she asked to leave, aside from the three known prounion employees. Moreover, Edwards' testimony undermines the Respondent's argument that it asked off-duty employees to leave for the purpose of maintaining an orderly environment. Thus, the Respondent has not satisfied its burden under *Wright Line*[8] to prove that it would have suspended Kitson for failing to leave even in the absence of her protected activity.[9]

We further find that Kitson's protest against the Respondent's unfair labor practice was not sufficiently egregious to remove it from the protection of the Act. In determining whether an employee's conduct is so opprobrious as to lose the Act's protection, the Board balances the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). All four factors favor finding Kitson's conduct to be protected. The incident occurred in and near the recreation room, not in a work area where work could be disrupted. The subject matter involved the issue of whether Kitson had a right to remain on the Respondent's property, and whether Martin was discriminating against her because she was a union supporter. The nature of Kitson's outburst involved no profanity and no threatening conduct, according to the facts credited by the judge.[10] Finally, Kitson was provoked by Martin's unfair labor practice of trying to interfere with Section 7 rights by excluding only active union supporters from the facility on the day of the election.

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[7] In adopting the judge's finding that the Respondent's suspension of Kitson violated Sec. 8(a)(3), Member Schaumber finds it unnecessary to rely on fn. 5 of the judge's decision, regarding the Respondent's failure to question nonmanagement witnesses during its investigation prior to suspending Kitson.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To prove a violation of Sec. 8(a)(3) under *Wright Line*, the General Counsel must first show discriminatory motive, by a preponderance of evidence, by offering evidence that the employer was aware of the employees' protected activity and that animus against that activity motivated the employer's alleged discrimination. The burden then shifts to the employer to demonstrate that the same action would have occurred even in the absence of protected conduct. See, e.g., *KFMB Stations*, 343 NLRB 748, 751 (2004).

Member Schaumber adheres to his previously stated position that *Wright Line* requires a showing of a causal nexus between the union animus and the adverse employment action. *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003).

[9] The Respondent contends that it suspended employee Celina Snell for similar conduct before the union campaign. The only reference to Snell is in Kitson's testimony that she asked Snell where to find anger management classes, which Snell had previously attended. Kitson testified that she did not know any details regarding the reason for Snell's discipline, and the Respondent did not introduce any such evidence. Therefore, the Respondent has failed to support its counterargument to the General Counsel's showing of disparate treatment.

Additionally, the Respondent disputes the judge's make-whole remedy based on Kitson's suspension, arguing that Kitson was responsible for any delay in returning from her 2-week suspension, due to the timing of her enrollment in anger-management classes as the Respondent required. We find it unnecessary to reach this issue because a determination of the applicable backpay period is more appropriately determined at the compliance stage of these proceedings.

[10] Member Schaumber finds it unnecessary to rely on the judge's alternate discussion in fn. 6 of his decision, in which he posits that Kitson's alleged statements, if made, cannot reasonably be construed as a threat of assault. Member Schaumber stresses that the Board does not require an insubordinate or threatening statement by an employee to necessarily rise to the level of a threat of assault before an employer may lawfully discipline the employee. Nonetheless, for the reasons described herein, he finds that the credited facts do not establish conduct that falls outside the Act's protection.

III. UNILATERAL CHANGES

We reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) by unilaterally eliminating the rehabilitation aide position and transferring its duties to certified nursing assistants. We also reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) by unilaterally changing the work schedules of two employees.

A. Unilateral Elimination of Rehabilitation Aide Position

Carol Blackwood-Lindsey, who holds a certification as a certified nursing assistant (CNA), was hired as a rehabilitation aide (RA) in 1997. An RA works with patients to perform certain exercises to restore the patient's range of motion; these RA duties are somewhat different from those of the CNA position. CNAs also do some range of motion exercises with patients, but CNAs have additional tasks. As an RA, Blackwood-Lindsey worked Monday through Friday, but not on weekends. Sometime in 2004, the Respondent reassigned Blackwood-Lindsey to work 3 days a week as an RA and 2 days a week as a CNA. In May 2006, several weeks before the election, the Respondent reassigned Blackwood-Lindsey to again work a Monday through Friday schedule as an RA.

In early August (several months after the Union won the election), the Respondent eliminated the RA position but allowed Blackwood-Lindsey to continue to work as a full-time CNA. The Respondent transferred the duties of the RA position to the CNAs. As a result, Blackwood-Lindsey performed on-the-job training with the CNAs to demonstrate the RA duties, which took about 5 minutes per patient. This change also resulted in the requirement that Blackwood-Lindsey work some weekend days, as described in the following section. It is undisputed that the Respondent did not notify the Union of the change or provide an opportunity to bargain about it. Therefore, the only issue is whether the change was material and substantial. The judge found that it was not. He stated that the change did not make much difference in the jobs of the other CNAs, and there was no evidence that it resulted in more overall work for them. He found that "Walking patients and doing arm exercises was something that they did during the course of their normal job duties and to the extent that there was any change . . . it took about five minutes per patient to learn."

We find merit in the General Counsel's exceptions. In *Finch, Pruyn & Co.*, 349 NLRB 270, 277–278 (2007), the Board found that an employer violated Section 8(a)(5) by unilaterally eliminating a unit position called a "pcc oiler" and reassigning the position's duties, which took about an hour per day, to another oiler position. The Board reiterated that the elimination of a unit job is a mandatory subject of bargaining, even if the job is eliminated for economic reasons. Id. at 277. The Board found this violation notwithstanding the fact that the pcc oiler duties had historically been included in the "basement oiler" position before they were performed by an employee who worked solely as a pcc oiler. Id.

Here, the Respondent's elimination of the RA position and transfer of duties to the CNA position was a material and substantial change no different from the unilateral change in *Finch, Pruyn*. The fact that RA duties can easily be assigned to other employees without necessarily increasing their hours of work does not negate the fact that a unit position has been eliminated and the duties of the position redistributed without giving the Union prior notice and an opportunity to bargain. Moreover, the decline in the number of patients is analogous to the lack of full-time pcc oiler work in *Finch, Pruyn* and does not rise to the level of compelling economic considerations. *Maple Grove Health Care Center*, 330 NLRB 775, 779 (2000) (citing *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)). Additionally, the Respondent acted at its peril by changing terms and conditions of employment while its objections to the election were pending. *Mike O' Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Accordingly, because we certify the Union as the bargaining representative of the unit employees, we reverse the judge and find that the Respondent violated Section 8(a)(5) by unilaterally eliminating the RA position and transferring its duties to CNAs.

B. Unilateral Changes to Work Schedules

Because CNAs are required to work every other weekend, the unilateral change described above resulted in Blackwood-Lindsey's having to work weekends rather than her former Monday through Friday schedule. When changing Blackwood-Lindsey's schedule, Martin realized that another CNA, Avril Wallace, did not work weekends. Although Wallace had been working only Monday through Friday for 20 years at the Respondent's facility, the Respondent subsequently required her to work alternating weekends like all other CNAs.

Again, it is undisputed that the Respondent did not provide notice to the Union or an opportunity to bargain, and the issue is whether the changes were material and substantial. The judge found that "what really took place was to have *all* employees conform to what had been basically the uniform practice of requiring CNAs to work alternative weekends." (Emphasis in original.) He noted that this change affected only two employees in a much larger unit, who had previously been working under exceptions to the uniform rule.

We find merit in the General Counsel's exceptions. The Board has held that an employer violates Section 8(a)(5) by making unilateral changes in the workweek that require employees to work on weekends and take days off during the normal workweek. *Mimbres Memorial Hospital*, 342 NLRB 398, 399 (2004), enfd. sub nom. *NLRB v. Community Health Services*, 482 F.3d 683 (10th Cir. 2007) (changed schedule that included weekend work found to be a unilateral change); *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 904, 912 (2000), enfd. mem. 2001 WL 791645 (4th Cir. 2001) (requiring employees to work on the weekend for the first time was deemed to be a mandatory subject of bargaining). Significantly, the Board in both cases held that such changes are material and substantial changes to terms and conditions of employment. *Mimbres Memorial Hospital*, 342 NLRB at 401; *Pepsi-Cola Bottling Co.*, 330 NLRB at 904. Additionally, in *Intracoastal Terminal, Inc.*,[11] the Board held that changing a Monday through Friday workweek to Wednesday through Sunday is an unlawful unilateral change, rejecting the argument that the changes in work schedules were insubstantial and noting the well-settled principle that "regular and overtime hours of work are vital aspects of working conditions" that must be discussed with the employee's representative.[12] Likewise, the Respondent's change in the workweek for Blackwood-Lindsey and Wallace is a mandatory subject of bargaining and a material and substantial change.

The judge's reasoning that the Respondent's unilateral change affected only two employees is similarly unpersuasive. The Board rejected such an argument in *Carpenters Local 1031*, 321 NLRB 30, 32 (1996) (the Board is not precluded from finding 8(a)(5) violation even if unilateral change affects only one employee). See also *Georgia Power Co.*, 325 NLRB 420, 420 fn. 5 (1998) ("[I]f a change involves the terms and conditions of employment of unit employees, it is a mandatory subject even if only a relatively few employees are affected."), enfd. mem. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999). Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(5) by failing to give the Union notice and an opportunity to bargain about the schedule changes.

IV. ELECTION OBJECTIONS

We have also considered objections to the election held on May 18, and the judge's decision recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 68 votes cast for and 42 votes cast against New England Health Care Employees Union, District 1199, SEIU (the Union), with 7 challenged ballots, an insufficient number to affect the results. As discussed below, we affirm the judge's decision to overrule the Employer's objections to the election and we certify the Union as the employees' exclusive bargaining representative.

A. Kitson/Martin Incident

The Respondent alleged that the incident involving Winsome Kitson and Penni Martin, described above, constituted objectionable conduct. The judge recommended overruling this objection, noting his finding that Kitson did not make any threatening statements to Martin or engage in any conduct that could reasonably be construed as threatening. The Respondent excepts, arguing, inter alia, that Kitson threatened and intimidated Martin, which had a similar effect on eligible voters. The Respondent alleges that Kitson was an agent of the Union because she served as its observer, engaged in leafleting, appeared in campaign materials, drove coworkers to the polling place, and spoke out on behalf of the Union during the organizing campaign. The Respondent argues, however, even assuming Kitson was not an agent of the Union, that her conduct nonetheless meets the nonparty standard of objectionable conduct discussed below.

The judge did not specify whether he was applying the party standard (whether the conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election"), which would apply if Kitson was an agent of the Union, or the third-party standard (whether the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible"). *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002), and cases cited therein. Based on the facts as credited by the judge, Kitson's conduct does not satisfy either the third-party standard or the party standard for objectionable conduct. As the judge found, Kitson said, at most, either to Martin or to other employees in the recreation room that Martin didn't know who she was messing with. As noted above, he credited testimony that Kitson neither yelled nor made any threatening gestures or statements. Given the context of Kitson's statement, which was part of a "very minor" conversation in which she was protesting Martin's unfair labor practice, we find no threat that could have interfered with employees' free choice or created a general atmosphere of fear and reprisal.

[11] 125 NLRB 359, 359–360, 367–368 (1959), enf. denied in relevant part on other grounds 286 F.2d 954 (5th Cir. 1961) (court, unlike Board, found that parties had reached impasse).

[12] 125 NLRB at 367–368 (citing *Fleming Mfg. Co.*, 119 NLRB 452 (1957)).

B. The Union's Dues Policy

The Respondent also alleged that the Union engaged in objectionable conduct by offering to waive dues for certain eligible voters. According to the testimony of several management employees, some unit employees said that the Union told them that they would not have to pay dues as Bloomfield employees if they worked at other facilities represented by the Union and paid dues there (many of the unit employees had second jobs at other facilities). The Union's actual dues policy, as explained in campaign literature distributed before the election, is somewhat more detailed. Dues are based on each employee's pay, up to a maximum fee of $60 per month. Thus, if an employee is employed at another facility represented by the Union and already pays the maximum amount of dues, that employee's dues would not increase if the Union became the bargaining representative at the Respondent's facility. The Union's campaign materials included documents containing the statement "If you work two or more 1199 jobs and pay more than the monthly max, you'll receive a refund of the difference."

The judge concluded that the Respondent's evidence was based solely on hearsay because the Respondent did not present any direct evidence from unit employees as to what the Union told them. The judge also noted that none of the employees who allegedly described the dues policy were shown to be agents of the Union, and thus, there was no objectionable conduct even if these employees misunderstood the Union's dues policy and expressed that misunderstanding. Although the judge did not specify what weight, if any, he gave to the hearsay testimony, it appears that he relied on this evidence only to the extent that it shows the employees' interpretation of what they might have heard but not to prove the truth of the Respondent's assertion that union officials actually made inaccurate statements about waiving dues.[13]

We agree with the judge's recommendation to overrule this objection. Even assuming, as the judge did, that some employees misunderstood the dues policy, there is no evidence that the Union or its agents knew about or perpetuated any misunderstanding or unlawful promise to waive dues. The Union distributed literature to employees during the campaign that contained the lawful, accurate description of its policy quoted above. Contrary to the Respondent's argument, the Union's statement about receiving a refund of dues payments in excess of the monthly maximum is not ambiguous.[14] Accordingly, we find that the Union did not engage in objectionable conduct.

AMENDED REMEDY

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

As we have adopted the judge's finding that the Respondent illegally suspended Winsome Kitson, we shall order it to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the suspension to the date of a proper offer of reinstatement less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We amend the judge's proposed remedy to address the additional 8(a)(5) violations that we have found. The Respondent must, at the Union's request, rescind the unilateral changes it has made, provide the Union notice and an opportunity to bargain prior to implementing such changes in the future or any other changes in wages, hours, or other terms and conditions of employment, and make its employees whole for their losses. Any backpay due for these violations shall be determined in the manner set forth in *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest

[13] The Respondent argues that its right to a fair hearing was prejudiced because the judge decided the merits of this objection before hearing any evidence. We reject that contention. The Union objected to the Respondent's attempt to elicit the hearsay testimony described above. The judge allowed the Respondent's attorney to make an offer of proof describing what its witness's testimony would be regarding the alleged union dues rumor. Although the judge viewed the proffered evidence as neither material nor probative of whether the Respondent's election objection was valid, he nonetheless allowed the testimony to complete the record in the event of a possible appeal or remand as to the admissibility of the evidence.

The judge's ruling cannot be fairly characterized as prematurely deciding the merits of the issue and prejudicing the Respondent's right to due process. As an alternative to sustaining the Union's objection to the testimony and excluding the evidence altogether as irrelevant hearsay testimony, the judge allowed the testimony for the limited purpose of developing the record for possible future use on appeal. Thus, the judge acted to the Respondent's benefit in preserving the admissibility issue for review without the necessity of a remand in the event that it was determined on appeal that the evidence should have been allowed. We further find that even if the Respondent's evidence is considered and its admissibility is assumed, it is insufficient to establish that the Union either promulgated or had knowledge of any inaccurate or unlawful descriptions of its dues policy.

[14] And, assuming, arguendo, that the Union or its agents were responsible for ambiguous statements, the Union clearly publicized its lawful dues policy in literature that was widely disseminated to employees during the organizing campaign. *Hollingsworth Management Service*, 342 NLRB 556, 559 (2004); *Davlan Engineering*, 283 NLRB 803, 805 (1987).

as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Respondent, Bloomfield Health Care Center, Bloomfield, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

(b) Preventing off-duty employees from entering the facility in order to talk to other employees about the Union or about other employment matters of mutual concern.

(c) Suspending employees because of their union or protected concerted activity.

(d) Unilaterally eliminating the position of "Rehabilitation Aide" and transferring those duties to the Certified Nursing Assistants without first giving notice to and bargaining with the Union.

(e) Unilaterally changing employees' work schedules without first giving notice to and bargaining with the Union.

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

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

(a) Within 14 days from the date of this Order, offer Winsome Kitson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Winsome Kitson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Winsome Kitson, and within 3 days thereafter notify the employee in writing that this has been done and that the suspension will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All full-time and regular part-time service and maintenance employees, including all certified nursing assistants, rehabilitation aides, dietary aides, recreation aides, cooks, housekeepers, laundry aides, scheduler/supply coordinators, receptionists, and maintenance employees, but excluding all business office clerical employees, department heads, certified therapeutic recreation directors, payroll clerks, and all other employees, and all professional employees, guards and supervisors as defined in the Act.

(f) On the Union's request, rescind the elimination of the rehabilitation aide position and transfer of its duties to certified nursing assistants.

(g) On the Union's request, rescind the changes to the work schedules of Carol Blackwood-Lindsey and Avril Wallace.

(h) Make Carol Blackwood-Lindsey and Avril Wallace whole for losses suffered as a result of the unlawful changes in the manner set forth in the amended remedy section of this decision.

(i) Within 14 days after service by the Region, post at its Bloomfield, Connecticut facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 May 18, 2006.

(j) 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 at-

[15] 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."

testing to the steps that the Respondent has taken to comply.

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

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for New England Health Care Employees Union, District 1199, SEIU, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees, including all certified nursing assistants, rehabilitation aides, dietary aides, recreation aides, cooks, housekeepers, laundry aides, scheduler/supply coordinators, receptionists, and maintenance employees, but excluding all business office clerical employees, department heads, certified therapeutic recreation directors, payroll clerks, and all other employees, and all professional employees, guards and supervisors as defined in the Act.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union activities.

WE WILL NOT prevent off-duty employees from entering the facility in order to talk to other employees about the Union or about other employment matters of mutual concern.

WE WILL NOT suspend employees because of their union or protected concerted activity.

WE WILL NOT unilaterally eliminate the position of "rehabilitation aide" and transfer those duties to the Certified Nursing Assistants without first giving notice to and bargaining with the Union.

WE WILL NOT unilaterally change employees' work schedules without first giving notice to and bargaining with the Union.

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, within 14 days from the date of the Board's Order, offer Winsome Kitson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Winsome Kitson whole for any loss of earnings and other benefits resulting from her suspension, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Winsome Kitson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension will not be used against her in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time service and maintenance employees, including all certified nursing assistants, rehabilitation aides, dietary aides, recreation aides, cooks, housekeepers, laundry aides, scheduler/supply coordinators, receptionists, and maintenance employees, but excluding all business office clerical employees, department heads, certified therapeutic recreation directors, payroll clerks, and all other employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL, on the Union's request, rescind the elimination of the rehabilitation aide position and transfer of its duties to certified nursing assistants.

WE WILL, on the Union's request, rescind the changes to the work schedules of Carol Blackwood-Lindsey and Avril Wallace.

WE WILL make Carol Blackwood-Lindsey and Avril Wallace whole for losses suffered as a result of the unlawful changes less any net interim earnings, plus interest.

BLOOMFIELD HEALTH CARE CENTER

Jennifer Dease, Esq., for the General Counsel.
John G. Zandy, Esq., for the Respondent.
Kevin A. Creane, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Hartford, Connecticut, on February 13, 14, and 15, 2007.

A petition for an election was filed by the Union on April 10, 2006. Pursuant to a Stipulated Election Agreement approved by the Regional Director on April 19, 2006, an election was conducted on May 18, 2006. Although a majority of the votes were cast for the Union, the Employer filed Objections to the Election on May 25, 2006.[1] On September 8, 2006, the Regional Director issued a Report on Objections and concluded that a hearing should be held with respect to Objections 1 and 5. These objections allege (a) that on the day of the election, employee Winsome Kitson, acting as the observer for the Union, threatened the Respondent's administrator and communicated her threats to eligible voters; and (b) that representatives of the Union told eligible voters that the Union would waive union dues for employees who also worked at other facilities represented by the Respondent.

The Board issued a Decision and Order on October 26, 2006, sustaining the Regional Directors findings with respect to the objections.[2]

The charge and amended charge in Case 34–CA–11512 were filed on May 25 and July 31, 2006. The charge in Case 34–CA–11536 was filed on June 22, 2006. The charge and amended charge in Case 34–CA–11559 were filed on July 24 and October 30, 2006. The charge and amended charge in Case 34–CA–11562 were filed on July 28 and October 30, 2006. The charge and amended charge in Case 34–CA–11600 were filed on September 22 and October 30, 2006.

The Regional Director issued a complaint on August 30, 2006, and issued another consolidated amended complaint on October 31, 2006. The latter complaint, which consolidated all allegations, made the following assertions.

1. That on May 1, 2006, the Respondent, by letter, threatened employees with the loss of hours if they selected the Union.

2. That on or about July 21, 2006, the Respondent, by Penni Martin (a) interrogated employees about their union activities and (b) created the impression that their union activities were being kept under surveillance.

3. That in its "Employee Handbook," the Respondent maintained a rule, enforceable by disciplinary action, prohibiting employees from discussing each other's salaries.[3]

4. That on or about May 18 and 19, 2006, the Respondent for discriminatory reasons, denied its employee Winsome Kitson access to its facility and suspended her from employment.

5. That on or about May 18, 2006, a majority of the employees in an appropriate bargaining unit, selected the Union as their collective-bargaining representative. The unit consists of the following employees of the Respondent:

> All full-time and regular part time service and maintenance employees, including all certified nursing assistants, rehabilitation aides, dietary aides, recreation aides, cooks, housekeepers, laundry aides, scheduler/supply coordinators, receptionists, and maintenance employees, but excluding all business office clerical employees, department heads, certified therapeutic recreation directors, payroll clerks, and all other employees, and all professional employees, guards and supervisors as defined in the Act.

6. That on or about June 29, 2006, the Respondent unilaterally and without affording the Union an opportunity to bargain, implemented an attendance policy concerning making up weekend shifts.

7. That on or about July 13, 2006, the Respondent unilaterally and without affording the Union an opportunity to bargain, implemented a scheduling and time-off policy.

8. That on or about September 18, 2006, the Respondent unilaterally and without affording the Union an opportunity to bargain, eliminated the position of "Rehabilitation Aide" and transferred those duties to the certified nursing assistants.

9. That on or about September 23, 2006, the Respondent unilaterally and without affording the Union an opportunity to bargain, instituted a policy of enforcing its previously unenforced telephone usage policy.

10. That on or about October 1, 2006, the Respondent unilaterally and without affording the Union an opportunity to bargain, changed the work schedules of certain employees.

At the hearing, based on a non-Board settlement, the Union withdrew and I approved the following allegations:

1. The contention that the rule in the handbook prohibiting employees from talking to each other about their pay and benefits was unlawful. The Company agreed to delete this provision from the employee handbook.

2. The contention that the Company unilaterally implemented an attendance policy concerning making up weekend shifts. The parties agreed that this "change" was not actually implemented and that the Company would maintain the status quo as it existed before the election.

3. The contention that the Company unilaterally instituted a policy of enforcing its previously unenforced telephone usage policy. The evidence showed that after the purported change, the rule continued to be unenforced and the Company agreed to maintain the status quo as it existed before the election.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I make the following

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[1] Of approximately 117 eligible voters, the Union received 68 votes while 42 votes were cast against the Union and 7 ballots were challenged. The challenged ballots were therefore not determinative of the outcome of the election.

[2] The Employer withdrew Objections 2, 3, and 4 and the Regional Director found that Objection 6 had no merit.

[3] Martin claims that she told Carol Mortenson, the director of nursing, about her decision to exclude off-duty employees from the facility. Mortenson, however, denies that this was the case.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company operates a 120-bed nursing home in Bloomfield, Connecticut. The facility has four wings. At the time of the organizing campaign and election, the administrator was Penni Martin and the director of nursing was Carol Mortenson. There were approximately 117 employees in the bargaining unit.

The Union's organizing campaign started sometime in February or March 2006. The campaign was headed up by Union Representative Malcolm Harris and he was assisted, from time-to-time, by two other paid union organizers whose names are Suzi Hewitt and Yvonne Beck. Also involved in the campaign, under the direction of Harris, were about 20 employees who by attending union meetings, were described as an organizing committee. According to Harris, the members of the organizing committee were self-selected and they engaged in solicitation and literature distribution activities. He testified that they were not authorized to make policy or to write or determine the kinds of literature given out to employees. This group included Winsome Kitson, who the General Counsel alleges to have been discriminatorily suspended. Others in this group included Avril Wallace, Millicent Jackie Jordan, Fay Richards, and Carol Bowen.

Carol Mortenson testified that during conversations that she had with Penni Martin, the latter told her that she was aware that Kitson, Avril Wallace, and another employee named Bernadette were very strong union supporters.

On or about April 10, 2006, Wallace and a group of about 20 employees entered the premises where they made a demand for recognition. On that same day, the Union filed a petition for an election. As noted above, the parties entered into a Stipulated Election Agreement on April 19, 2006, and an election was conducted on May 18, 2006.

B. The May Memorandum

On May 1, 2006, the Employer issued a memorandum to employees stating that there would be an election on May 18, 2006 and that management believed that union representation would not be in the best interest of the employees. The memorandum noted that within the next few weeks, management would be holding a series of mandatory meetings to discuss union representation and collective bargaining. There is one sentence in this memorandum that the General Counsel alleges to be an illegal threat of reprisal. This states:

> This is a very important issue that will affect each and every staff member. It can affect your status as a per diem employee, the availability of hours and the ability of our managers to use per diem staff to assure adequate staffing.

In my opinion, the memorandum does not rise to the level of a threat of reprisal. In her brief, the General Counsel underlined the first sentence, which states that the election *will* affect each and every staff member. That sentence, constituting a generalized prediction that electing union representation will affect the staff is self evidently true, but nonspecific. The second portion of the memorandum merely states that the selection of a union *can* affect per diem employees in terms of their status and hours of work. It does not state how it can affect these employees and doesn't even indicate that a possible affect might be adverse. A statement that the selection of a union can affect terms and conditions of employment is self evident and should reasonably be construed not as a threat that the employer will take a specific adverse course of action, but that negotiations may change the existing hours and terms and conditions of employment for the people encompassed by the negotiations.

C. The Election, the Party, and the Suspension of Winsome Kitson

The election was held on Thursday, May 18 (a payday), and it was held in two sessions. The first session was held from 6 to 8 a.m. The second session was held from 2 to 5 p.m. At the first session, the Union selected Winsome Kitson, who that day, was off duty, to be its observer. For the afternoon session, commencing at 2 p.m., the Union selected Carol Bowen, to be its observer.

Also on May 18, the Employer had previously chosen to have some other events at the facility. One was a wheelchair race held in the lobby area of the facility. The second was a party to which all employees had been invited and which was held from 11 a.m. to about 4 p.m. in the recreation room. (Thus overlapping the afternoon session of the election.) The party, described by Martin in her announcement as the "Big Event" was held in a large room that was located between the lobby where employees picked up their paychecks and the dining room where the election was being conducted. It is clear to me that the party was conducted by the Company so as to contain a mild form of electioneering. In this regard, employees were given mugs, plates, and cups that contained the phrases, "give Penni a chance," and "Union no."

The Respondent asserts that the reason it suspended Kitson was because she refused to leave the facility when asked to do so by Martin and that she threatened Martin during the transaction.

Martin claims that sometime on the morning of May 18, she thought that the situation at the facility was going to be too chaotic given the election, the party and the wheelchair races. She testified that she therefore decided to disinvite from the party, *all* employees who were not on duty. This ad hoc decision made by Martin, was contrary to existing policies and/or practices that allowed off-duty employees to visit the facility and talk to other employees. It also was not communicated to any employees except for employees known by Martin to be union activists. In this regard, the evidence shows that it was not applied to any other employees who attended the party and who were not on duty at the time. Indeed, it is obvious that Martin essentially decided to exclude from this party (where the

Employer was engaged in a form of electioneering), those individuals who Martin knew might try to convince employees to vote in favor of unionization. In effect, Martin decided to exclude Kitson, Richards, and Wallace because she thought they might undermine the Respondent's last minute attempt to influence the employees to vote against the Union.

The evidence shows that after obtaining her check from the receptionist in the lobby, Kitson was told that they were giving out mugs to employees in the recreation room. As Kitson proceeded to the room, Martin came up behind her and asked where she was going. When told, Martin informed Kitson that she had to leave because she was not on duty. Kitson ignored her and continued into the recreation room where she got her mug. During that brief period of time, Martin again asked her to leave and Kitson asked Martin why she was harassing her when other off-duty employees were in the room and attending the party. Shortly thereafter, Kitson left and went out to the parking lot where she reported the incident to union organizer Harris and to other employees.

Martin claims that when she approached Kitson and told her that she had to leave, Kitson started to yell and scream and began waving her check in her face. She states that when she followed Kitson into the recreation room, to ask her to leave, Kitson continued to yell and scream at her. According to Martin, while in the hallway and also inside the recreation room, Kitson said that she (Martin), didn't know who she was messing with; that she was messing with the wrong person; and that she didn't know who she was dealing with. Martin claims that based on Kitson's statements and behavior, she was afraid that Kitson might assault her. She didn't.

Martin's testimony was corroborated to some degree by Jennifer Donovan who is a supervisor of the Respondent and a personal friend of Martin. On the other hand, the General Counsel offered the credible testimony of Kitson and four other employees who were present in the recreation room including Carol Mortenson, the former director of nursing. All of these people testified that they did not hear Kitson yell or scream or wave anything at Martin.[4] To the extent that they heard anything said between Kitson and Martin, they testified that Kitson asked why other off-duty employees were being allowed to attend the party and she was not. They denied that Kitson engaged in any type of physical behavior that could be viewed as threatening. At most, Carol Mortenson testified that she heard Kitson say to some other employees in the room, that Martin didn't know who she is messing with.

The evidence also shows that after Kitson left the facility and met with some people at the parking lot, she related the incident with Martin. Although described as being upset, witnesses testified that she did not yell, curse or scream. The harshest thing attributed to her was reported by Michelle Womack who testified that when she asked Kitson why Martin had asked her to leave, was told by Kitson; "she don't know what [I'm] capable of." In this regard, Kitson testified that Harris told her to write everything down because he might file a charge.

[4] I note that the door to the recreation room was open and if as Martin contends, Kitson was yelling in the hallway, this would have attracted the attention of people in the recreation room.

On Friday, May 19, 2006, Kitson was told on the phone by Penni Martin that she should not come to work and that the Company was investigating the alleged threats that Kitson made on May 18. Subsequently on May 25, Kitson was suspended and notified that she could not come back to work until she enrolled in an anger management course.[5]

In my opinion, Martin's decision to exclude from the facility, the known union activists, including Kitson, interfered with the employees' rights to engage in union activity and therefore violated Section 8(a)(1) of the Act. In this regard, off-duty employees have always been allowed to visit the facility and talk to other employees. The decision made by Martin on May 18, 2006, was not designed to deal with an allegedly "chaotic situation." Rather, it is my opinion that Martin's decision was designed to exclude only those off-duty employees who might decide to go to the Respondent's party and by speaking in favor of the Union to other employees, undermine the electioneering that the Respondent was doing on its premises on the day of the election.

Therefore, it is my opinion that the Respondent violated Section 8(a)(1) of the Act when Martin told Kitson that she had to leave the facility when Kitson was attempting to go to the party. Kitson ignored her and this caused what I think was a very minor confrontation between Kitson and Martin. The credible evidence shows that at most, Kitson said either to Martin or to other employees in the recreation room that Martin didn't know who she was messing with. But this, in my opinion, is not even remotely equivalent to a threat of assault. I think that the description of the confrontation by Martin and her friend Donovan was greatly exaggerated. In short, I credit Kitson and the other witnesses who testified that Kitson, neither in the facility nor outside, cursed, yelled, screamed or otherwise made any gestures or statements that could be construed as threatening to a reasonable person.[6]

Inasmuch as the decision to suspend Kitson was made because of the transaction that occurred between her and Martin on May 18, and since that transaction was provoked by Martin's unlawful attempt to force Kitson off the premises in order to prevent her from talking to other employees about the election, I conclude that the suspension violated Section 8(a)(1) and (3) of the Act.[7]

[5] In making the determination to suspend Kitson, it appears that the Company relied on statements given by Martin and Donovon and that none of the other people who were in the room were questioned.

[6] Michelle Womack testified that after she voted, she spoke to Kitson in the parking lot. Womack testified that Kitson told her that Penni Martin had asked her to leave the facility because she was off the clock; that Kitson told Martin to get off her back and leave her alone; and that "she" [Martin] did not know what she [Kitson] is capable of. Assuming that Kitson made this statement, I don't think that it can reasonably be construed as a threat of assault.

[7] See for example, *Louisiana Council No. 17 AFSCME*, 250 NLRB 880, 886 (1980). Having determined that Kitson's suspension was illegal, it is not necessary for me to consider the impact of the Company's requirement that she enroll in an anger management course. This is simply not relevant.

D. Alleged Interrogation and Impression of Surveillance

Cynthia Masters testified that on or about July 21, 2006, she and some other employees were in the breakroom when Martin asked if they had gone to the meeting and how it was. Masters assumed that Martin was talking about a union meeting that had been held the night before. She testified that after the other employees said that they had not gone to the meeting, Martin asked her if she was okay. Masters testified that at that point she replied that she was okay and that the two walked out together.

Regarding this incident, Martin testified that she knew about the union meeting because notices of the meeting had been posted inside the facility. She concedes that on the day in question she was in the breakroom and asked the employees how the meeting had gone. According to Martin, another employee, Janet Davis, said she hadn't attended the meeting and she (Martin) replied that she really didn't care who was at the meeting; that she was just making conversation.

In my opinion, this transaction, occurring 2 months after the election, was essentially trivial and noncoercive. The evidence shows that notices of the meeting had been posted inside the facility and therefore the time and place of the meeting was known to employees and management alike. That Martin asked a few employees about the meeting does not, in my opinion, rise to a level where employees could reasonably believe that their union activities were being kept under surveillance. Nor do I conclude that this single incident amounted to coercive interrogation.

E. Alleged Unilateral Changes

Carol Blackwood-Lindsay, who holds a certification as a CNA (certified nurse's aide), was hired into a job title called a rehabilitation aide. In this capacity she worked with the rehabilitation department under the direction of physical, occupational and speech therapists. To the extent that she had any training, it was informal and obtained on the job.

Blackwood-Lindsey, as a Rehabilitation Aide, worked with patients who possibly could benefit from restorative aide. Essentially this seems to have consisted of walking patients and doing certain types of arm exercises that could be useful in restoring a person's range of motion. This doesn't seem to me to be very complicated and does not require much training. As a rehabilitation aide, her schedule was to work 5 days a week, not including weekends.

Some time in 2004, Blackwood-Lindsey was reassigned so that her schedule consisted of 3 days a week as a rehabilitation aide. She also was given the opportunity and accepted 2 days a week as a CNA.

It seems that because of the request of certain patients, Blackwood-Lindsey was reassigned to work as a rehabilitation aide for 5 days a week in early May 2006. This took place a couple of weeks before the election and as before, her schedule was from Monday to Friday.

In early August 2006, Martin decided to eliminate the position of rehabilitation aide and notified Blackwood-Lindsey that although her job title was being eliminated she could continue to work as a CNA. This offer was accepted. At about the same time, other employees who worked as CNAs were also told that the rehabilitation aide position had been eliminated and that they would be assigned to do some of the work that had to be done with Blackwood-Lindsey's patients. This resulted in some on the job training, which Avril Wallace described as taking about 5 minutes per patient.

As a consequence of the change, Blackwood-Lindsey was told that as a CNA, she would have to work every other weekend. When she told Martin that she had another job on weekends, Martin replied that all of the other CNAs were required to work alternating weekends and that she could not make exceptions because that could lead to a situation where some weekends might not be covered. Martin agreed to give Blackwood-Lindsey 30 days to make the transaction and ultimately the Respondent agreed to allow her to work every Saturday instead of working every other Saturday and Sunday.

Also as a result of this change, Martin testified that she realized that one other CNA, Avril Wallace, did not work on weekends. Wallace, who has worked for the Respondent for 28 years, testified that in mid September, Martin told her that as of October 1, 2006, she would have to work every other weekend. Wallace testified that she told Martin that she had been working Mondays to Fridays for 20 years and Martin responded that, "everybody who's employed here will have to work every other weekend."

There is no doubt that the Respondent unilaterally, and without notice to or bargaining with the Union, eliminated the job title of Rehabilitation Aide. In doing so, this resulted in a change in the weekly schedule of Blackwood-Lindsey and the reassignment of some of her previous work to other employees. Also, as a consequence, this led to the change of Wallace's work schedule so that she was required to work every other weekend.

The question is whether this set of changes was significant or was essentially inconsequential.[8]

The elimination of the rehabilitation aide position changed, at least to a degree, the job of Blackwood-Lindsey. But prior to this change, she had worked for almost 2 years doing both the job of a rehabilitation aide and a CNA. And in many respects the jobs are not all that dissimilar. The things done by a rehabilitation aide in terms of helping patients to walk and moving their arms, is also done, perhaps to a lesser degree, by the CNAs. On the other hand, a rehabilitation aide does not have to do some of the things that CNAs do, such as feed or help wash patients.

From the point of view of Blackwood-Lindsey, the most basic change seems to be the alteration of her schedule from working Monday to Friday to being required to work alternative weekends, or as ultimately was the case, every Saturday. (For the same number of hours.) As far as I know, the change to working exclusively as a CNA did not result in any change

[8] In cases such as *Ramada Plaza Hotel*, 341 NLRB 310 (2004), and *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974), the Board has held that unilateral changes made after a union has won an election but before a certification, will violate Sec. 8(a)(5) of the Act. The Respondent asserts that this rule should not apply in the healthcare industry in circumstances where the Employer's objections to an election are pending and unresolved.

in her pay or in any other term or conditions of her employment.

From the point of view of some of the other CNAs, the change did not make much difference in their jobs. Walking patients and doing arm exercises was something that they did during the course of their normal job duties and to the extent that there was any change, Avril Wallace said that it took about 5 minutes per patient to learn. There was no evidence that this resulted in any more overall work for these people.

The evidence shows that for many years, the practice of the Company was to require CNAs to work every other weekend. One exception was Blackwood-Lindsey who, since 2004 to May 2006, worked as a rehabilitation aide for part of the week and as a CNA for the remainder of the week. The other exception was Avril Wallace who was a very senior employee.

Accordingly, to the extent that we are talking about work schedules, what really took place was to have *all* employees conform to what had been basically the uniform practice of requiring CNAs to work alternative weekends. This affected only two employees in a much larger unit. One was Avril Wallace who for reasons unknown did not previously work weekends. And the other was Carol Blackwood-Lindsey, who had never previously been assigned to work full time as a CNA.

To the extent that we are talking about a change in Blackwood-Lindsey's job functions or the actual job functions of the other CNAs, it is my opinion, that these changes were neither material nor substantial. See for example *Sunoco Inc*., 349 NLRB 240 (2007).

Based on the above, I therefore am going to recommend that these allegations be dismissed.

III. THE OBJECTIONS TO THE ELECTION

One of the Employer's objections is that on the day of the election, employee Winsome Kitson, acting as the observer for the Union, threatened the Respondent's administrator and communicated her threats to eligible voters.

The evidence regarding this objection has already been discussed in relation to my conclusion that the Respondent illegally suspended Kitson. I have concluded that when Penni Marti sought to force Kitson out of the facility at around 3 p.m., she did so in order to bar Kitson from talking to other employees about the election and thereby preventing Kitson from spoiling the Company's party where it was engaged in its own last ditch electioneering. I have concluded that the credible evidence did not establish that Kitson made any threatening statements to Martin or that she engaged in any conduct that could reasonably be construed as threatening. Nor did I conclude that Kitson made any statements to employees that could reasonably be construed as threats to Martin.

Based on the above, I conclude that this objection has no merit and should be overruled.

The Employer also alleged that representatives of the Union told eligible voters that the Union would waive union dues for employees who also worked at other facilities represented by the Respondent.

In support of this objection, the Employer presented management employees who testified that at several meetings that the company held before the election, certain employees asserted that they were by the Union that if they worked at other facilities represented by the Union and paid dues there, they would not have to pay dues in relation to their employment at Bloomfield.

The Employer did not produce any witnesses who testified that they were told this by any union representatives and the employees who allegedly made these statements at the meetings were not union agents. Therefore, the testimony presented by the Employer was based solely on hearsay.

The evidence establishes that the Union's policy regarding dues is to base dues on each employee's pay with a maximum of $60 per month. In situations where employees work at more than one represented facility, the Union bases an individual's dues on his or her total income but with a maximum of $60 per month. Before the election, this policy was described and transmitted by the Union to the employees in its campaign literature. Moreover, the Company's management was aware of the Union's policy and could have communicated it either orally or in writing to the employees.

Assuming that some employees, who cannot be construed to be union agents, misunderstood the Union's dues policy and expressed that misunderstanding at company meetings, this would not, in my opinion, be grounds for setting aside this election. I therefore overrule this objection.

CONCLUSIONS OF LAW

1. By preventing off-duty employees from talking to other employees at the Company's facility on May 18, 2006, the Respondent violated Section 8(a)(1) of the Act.

2. By suspending Winsome Kitson because the Respondent sought to prevent her from engaging in union and protected concerted activity, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Except to the extent found herein, the Respondent has committed no other violations of the Act.

5. The objections to the election are without merit and should be dismissed.

REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Respondent illegally suspended Winsome Kitson, it must reinstate her to her former job and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]