

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

-----X  
**BON SECOURS HEALTH SYSTEM,  
WARWICK HEALTHCARE CAMPUS**

**Employer,**

**- and -**

**Case No. 2-RC-23303**

**1199 SEIU UNITED HEALTHCARE  
WORKERS EAST,**

**Petitioner.**

-----X  
**PETITIONER'S ANSWERING BRIEF OPPOSING THE EMPLOYER'S  
EXCEPTIONS TO THE ALJ'S RECOMMENDED DECISION ON OBJECTIONS**.....

William S. Massey  
GLADSTEIN, REIF & MEGINNISS, LLP  
817 Broadway, 6<sup>th</sup> Floor  
New York, New York 10003  
(212) 228-7727

Attorneys for Petitioner

## TABLE OF CONTENTS

<b>PRELIMINARY STATEMENT .....</b>	<b>1</b>
<b>ARGUMENT:</b>	
<b>Exceptions 1 and 2: Mike Deyo's Unlawful Statements .....</b>	<b>3</b>
<b>Exceptions 3-5 and 10: The Leaflet Posted by Mary Duncan.....</b>	<b>5</b>
<b>Exception 6: Mary Duncan's Unlawful Surveillance .....</b>	<b>10</b>
<b>Exceptions 7-8: Mary Duncan's Unlawful Statements.....</b>	<b>14</b>
<b>Exception 9: Thomas Brunelle's Unlawful Statements .....</b>	<b>17</b>
<b>Exception 11: The Employer's Bulletin Board Policy .....</b>	<b>24</b>
<b>CONCLUSION .....</b>	<b>28</b>

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**PRELIMINARY STATEMENT**

1199 SEIU United Healthcare Workers East ("Petitioner" or "the Union"), by its attorneys, Gladstein, Reif & Meginniss, LLP, submits this answering brief opposing the exceptions to Administrative Law Judge ("ALJ") Steven Fish's Recommended Decision on Objections filed by Bon Secours Health System, Warwick Healthcare Campus ("the Employer"), and supporting the ALJ's findings, conclusions, and recommendation that: (1) Petitioner's objections 1, 3, 4, 8, and 9 and portions of objections 5 and 7 should be sustained; and (2) the results of the October 30, 2008<sup>1</sup> representation election be set aside, and the case be remanded to the Regional Director to schedule a new election.

On July 3, the Union filed a representation petition to represent employees of the Employer. On September 11, the parties entered into a stipulated election agreement, which was

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<sup>1</sup> All dates are in 2008 unless otherwise noted.

approved by the Regional Director on September 12. On October 30, an election was conducted in a combined unit of non-professional service employees at the Employer's three facilities, namely Schervier Pavilion ("the nursing home"), Mount Alverno (an assisted living facility), and St. Anthony's Community Hospital ("the hospital"). The tally of ballots showed that of 270 eligible voters, 121 votes were cast for the Union, 118 votes were cast against the Union, and there were 11 challenged ballots. On November 6, the Union filed 15 objections to the election. On January 6, 2010, after the fate of the challenged ballots had been decided, a revised tally of ballots showed 123 votes cast against the Union and 121 votes cast for the Union.

In a Notice of Hearing on Objections issued on January 21, 2010, the Regional Director directed that a hearing be held on Petitioner's objections 1-10 and 12-15. At the hearing and in its brief, the Union withdrew objections 2 and 12-15. On April 26, 2010, the ALJ issued his Recommended Decision on Objections ("ALJD") sustaining objections 1, 3, 4, 8, and 9 and portions of objections 5 and 7. On May 10, 2010, the Employer filed 11 exceptions to the ALJD. The Board should overrule all of the Employer's exceptions and fully adopt the ALJ's findings, conclusions, and recommendations at issue, as the credible evidence shows that during the critical pre-election period, from the Union's filing of the representation petition on July 3 through the October 30 election, the Employer engaged in unlawful conduct that "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *See Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), *citing Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

## ARGUMENT

### Exceptions 1 and 2: Mike Deyo's Unlawful Statements

Employer exceptions 1 and 2 relate to Union objection 5 and the conduct of Mike Deyo, the nursing home's Administrator. In its first exception, the Employer takes issue with the ALJ's reliance on the testimony of employee Ashley VonHahsel. VonHahsel testified that in early October, Mike Deyo conducted an anti-union meeting during the work day with approximately 20 employees at the Employer's facility. After Deyo made opening remarks urging employees to vote against the Union in the October 30 election, he opened the floor for questions. VonHahsel asked why she had been denied permission to hang Union literature. Deyo responded that posting Union literature was against company policy. Deyo added, "If anyone wants information about the Union, they should go attend your Wednesday Union meetings." Tr. 23-26, 55-58.

The ALJ found VonHahsel's testimony to be credible. The Board's well established policy is not to overrule an ALJ's credibility resolution unless the clear preponderance of all the relevant evidence establishes that the ALJ's determination was incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). Here, the record fully supports the ALJ's credibility determination, as VonHahsel's testimony was not even controverted by the Employer. In fact, the Employer failed to call as a witness Administrator Deyo, its top official at the nursing home. Further, Nurse Manager Mary Duncan was present at the relevant early October meeting conducted by Deyo. Tr. 23-26. Although Duncan testified at the hearing on behalf of the Employer, she was not questioned, and did not testify regarding this meeting or Deyo's response to VonHahsel's question. Thus, the ALJ properly drew adverse

inferences against the Employer.<sup>2</sup> See *NLRB v. Edgar Spring, Inc.*, 800 F.2d 595, 599 (6th Cir. 1986) (party's unexplained failure to call seemingly key rebuttal witness suggests witness's testimony would have been adverse). Moreover, apart from any adverse inferences, the ALJ properly credited Von Hahsel's testimony because it was not refuted or contradicted. ALJD at 5.<sup>3</sup> Exception 1 should thus be overruled.

In its second exception, the Employer takes issue with the ALJ's finding that Deyo's comments created the impression of surveillance. This argument is without merit. It is well settled that employees should be free to participate in union organizing campaigns without fearing that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Flexsteel Industries, Inc.*, 311 NLRB 257, 257 (1993). The test for determining whether an employer has created an impression of surveillance is whether employees would reasonably assume from the employer's statement that union activities had been placed under surveillance. The Board does not require evidence that employees intended their participation to be covert or that management was actually engaged in surveillance. *Id.* In *Flexsteel Industries*, the employer's personnel manager created the impression of surveillance when he informed an employee that he had heard rumors about the employee's union activity. *Id.*; see also *Mountainer Steel, Inc.*, 326 NLRB 787 (1998) (foreman unlawfully told an employee who advocated for the union with fellow employees during lunch, "I thought you was (sic) a union radical and now I know you are"); *Donaldson Bros. Ready Mix*,

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<sup>2</sup> Employer agents Jody Collins, Sondra Gomas, and Sharon Webster also attended this meeting. As the Employer did not call any of these individuals to testify, additional adverse inferences are warranted.

<sup>3</sup> The Employer incorrectly asserts that VonHahsel's testimony was contradicted by that of employee Valene DeWitt. As the ALJ pointed out, Dewitt was not asked about the specific statements made by Deyo. Instead she testified that at the meeting in question Deyo said other things beyond that she could recall. Tr. 159-60; ALJD at 5.

*Inc.*, 341 NLRB 958, 963 (2004) (employer unlawfully identified employees it believed were leaders of the union organizing campaign); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887-888 (1991) (company president unlawfully told two employees that he had heard that they and a third employee were for the union, and by telling another employee that he knew the employee was for the union).

Here, Deyo's response to VonHahsel's question reasonably conveyed to the twenty employees in attendance the impression that the Employer was monitoring when the Union held off campus meetings and which employees attended these meetings. Deyo's words also reasonably communicated that the Employer was taking careful note of the specific activities engaged in by VonHahsel, and of her leadership role in the Union's campaign. There is no evidence that the Union's Wednesday meetings were publicized or otherwise made open. Further, in spite of the fact that VonHahsel was an open Union supporter, there is no evidence that either her attendance at the off-campus meetings or her leadership role in the Union's campaign, if any, was ever publicized. *See Beverly California Corp.*, 326 NLRB 153, 155 (1998) (where there was no evidence that the organizing campaign was public knowledge or that the employer had been informed of the campaign by the union or its employees, statement that the employer was aware of the organizing campaign unlawfully conveyed the impression to employees that their union activities were under surveillance). For the foregoing reasons, exception 2 should be overruled.

### **Exceptions 3-5 and 10: The Leaflet Posted by Mary Duncan**

Employer exceptions 3-5 and 10 relate to Union objections 3 and 5-7, and Petitioner's Ex. 1, the leaflet posted by Nurse Manager Mary Duncan. In exception 3, the Employer takes

issue with the ALJ's decision to credit the testimony of employee Carina Oros. Oros testified that at approximately 9 or 9:30 a.m. on September 10, she was sitting alone in the nursing home's Maple Hall break room when Duncan entered, exchanged greetings with Oros, and proceeded to post Petitioner's Ex. 1 on the break room's small bulletin board. Oros was seated very close to the small bulletin board, on which other anti-union leaflets were posted. Tr. 76-77, 79, 97-98, 101-102. On the following day, September 11, Oros returned to the Maple Hall break room and removed Petitioner's Ex. 1 from the small bulletin board with the intention of showing it to the four co-workers identified as Union bullies. Tr. 78, 100. However, Oros heard footsteps coming and got nervous, and slid the leaflet underneath some books on the table in the break room. Tr. 78, 100-102. Oros was off from work on September 12. Tr. 102. On September 13, Oros, back at work, returned to the break room to see if Petitioner's Ex. 1 was still where she had slid it underneath the books two days prior. Upon seeing that it was still there, Oros folded the leaflet and put it in her lunch bag. Tr. 78-79, 101-102. When she left work that day in the afternoon, Oros showed Petitioner's Ex. 1 to employees Ashley VonHahsel and Valene Dewitt and Union organizer Robin Ringwood, who were engaged in a Union shift change activity outside the nursing home. Oros also told VonHahsel, Dewitt, and Ringwood that she had seen Duncan post Petitioner's Ex. 1 on the small bulletin board in the Maple Hall break room. Tr. 18-20, 35, 79, 119-120, 200-201.

As with exception 1, the record fully supports the ALJ's determination to credit Oros' testimony over Duncan's denial. As the ALJ pointed out, Oros' testimony was highly detailed and was consistent throughout direct and the Employer's thorough cross examination. ALJD at 8. Further, although Oros was alone in the break room when Duncan posted the leaflet, Oros' extremely credible testimony was buttressed by that of VonHahsel, Dewitt, and Ringwood, all

three of whom corroborated that Oros brought the leaflet outside the nursing home to the afternoon shift change activity, and informed them that she had observed Duncan post it on a bulletin board in the Maple Hall break room. Tr. 18-20, 35, 119-120, 200-201; ALJD at 7-8.

The record evidence also fully supports the ALJ's finding that Duncan was not a credible witness. As the ALJ noted, Duncan conceded that she regularly distributed and posted Employer campaign literature and verbally communicated the Employer's weekly campaign message to employees, often in one-on-one conversations. Tr. 464, 496-498, 517. Duncan repeatedly testified, however, that she could not recall, even generally, the substance of the written or verbal information that she communicated. Tr. 465, 498, 515, 517. Further, Duncan repeatedly testified that the Employer's campaign communications had a neutral content, and that she and the other members of management never encouraged employees to vote no in the election. Tr. 500-501, 515-516, 524. This testimony concerning the Employer's supposed neutrality towards the Union is completely contradicted by the Employer's campaign literature (which Duncan distributed and posted), Executive Vice-President Thomas Brunelle's testimony concerning Employer campaign meetings he conducted (some of which Duncan attended), and the testimony of the five employee witnesses called by the Union. Pet. Ex. 2-4, 6-8; Tr. 420, 424-425, 527; ALJD at 8.

Moreover, the testimony of Irene Caldwell, the Employer's Acting Director of Nursing, contradicted Duncan's testimony and partially corroborated that of Oros. Caldwell testified that the only conversation regarding the Union that she had with Duncan was one in which Duncan brought to her attention that someone's tires had been slashed Tr. 254-255, 258, and 265. This conversation took place in late August or September. Tr. 265. Only Duncan (and Petitioner's Ex. 1) appeared to be focused on the issue of tire slashing, as Caldwell, the Director of Nursing, did not receive or become aware of any reports of tire slashing, and only Duncan ever raised this

subject to Caldwell. Tr. 265-266, 268-269. More significantly, Caldwell testified that she saw Duncan holding in her hand a leaflet with tape on it, and that the leaflet had a picture of a tire and addressed the Union. Caldwell further testified that she had seen (but had not read) the same leaflet posted, that the leaflet looked like and could have been Petitioner's Ex. 1, and that her observation of Duncan holding the leaflet could have occurred in mid-September. Tr. 257-258, 267-270. As the ALJ properly noted, Caldwell's contradicting of Duncan further detracts from Duncan's credibility. ALJD at 8-9.<sup>4</sup> Exception 3 should thus be overruled.

In exception 4, the Employer contests the ALJ's finding that the Employer is responsible for the content of the leaflet posted by Duncan. The Employer argues that since that there is no evidence that the Employer authored or issued Petitioner's Ex. 1, no employee would reasonably believe that the flyer's contents reflected the Employer's policy or point of view. This argument is without merit, as Duncan posted the leaflet on an Employer bulletin board that contained other Employer campaign literature. Board law also fully supports the ALJ's finding. For example, in *Monroe Auto Equipment Co.*, 230 NLRB 742, 748 (1977), a supervisor exhibited and made available to employees a newspaper containing an ad threatening plant closure that had been placed by "Concerned Employees" of the employer. The Board affirmed the ALJ's ruling that by its supervisor's conduct, the employer had adopted and sponsored the threatening message of the "Concerned Employees". Similarly, in *VOCA Corp.*, 329 NLRB 591, 592 (1999), the Board held the employer liable for an unlawful recommended change cited in the minutes of a meeting held by a committee comprised of employees and managers, even where the evidence only established that two of the twelve committee members were employer agents. In holding that

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<sup>4</sup> The ALJ correctly rejected the Employer's argument that Oros' testimony should be discredited because Dewitt did not see the flyer in question posted in the break room on September 11 or 12. As the ALJ noted, there was no evidence that Dewitt even looked at the bulletin board on those days. ALJD at 8.

employees could reasonably assume that the minutes were authorized by the employer, the Board relied upon the fact that the posting of the minutes was directed by a company official. *Id*; see also *Beverly California Corp.*, 326 NLRB 232, 234-35 (1998) (nursing home liable for remarks made by an anti-union employee, its tacit agent, where the employer's administrator repeatedly called on the employee to present her views at a captive audience meeting). Here, as in *Monroe Auto Equipment*, when Duncan, an undisputed Employer agent, posted Petitioner's Ex. 1, the Employer adopted the leaflet's objectionable statements. Tr. 12-13.<sup>5</sup> Exception 4 should thus be overruled.

In exception 5, the Employer argues that the content of the leaflet posted by Duncan did not create the impression of surveillance. This exception should be denied, as Petitioner's Ex. 1 identified employees Coffee, VonHahsel, Dewitt, and Cooper as leading union promoters. As the ALJ noted, the leaflet did not disclose the source of the Employer's information as to which employees were organizing the Union. Moreover, as there was no evidence that employees Coffey or Cooper were open supporters of the Union, the leaflet reasonably conveyed to employees the impression that the Employer was monitoring Union activity. See pages 4-5, 9 at FN 5, *supra*.; ALJD at 9. Exception 5 should thus be overruled.

In exception 10, the Employer argues that the content of the leaflet posted by Duncan did not constitute an implied threat of discharge. This exception should be denied, as the leaflet states that if Union supporters "want to work in a union facility then go to one that already has the union." ALJD at 7. The Board has long held unlawful similar employer statements, if made

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<sup>5</sup> Prior to Duncan's posting in September, nobody knew who had authored or issued the leaflet, in spite of the fact that it had been circulated widely in the Employer's facility since the middle of August. Tr. 17, 98-99, 118-119, 193, 200. The leaflet's impact was thus maximized when employees learned that Duncan, the Nurse Manger for two of the nursing home's three units, had posted it. In other words, since the leaflet had not been attributed to or associated with a particular employee or group of employees, Duncan's posting and adoption of this threatening leaflet was particularly significant.

to union supporters or in the context of discussions about the union, because they imply that supporting the union is incompatible with continued employment and thus constitute implicit threats of discharge. *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (after noting to employees at an anti-union meeting that an outspoken employee “seem[ed] unhappy here”, employer unlawfully remarked to the employee, “Maybe this isn’t the place for you . . . there are a lot of jobs out there”); *Rolligon Corp.*, 254 NLRB 22 (1981) (employer unlawfully stated that employees who are unhappy and would rather work in a union shop should find a job elsewhere); *Armstrong Machine Co.*, 343 NLRB 1149, 1151 (2004) (implied threat of discharge where owner stated at anti-union meeting, “. . . if you guys don’t want to work here . . . you could leave . . . that’s one nice thing about the old USA, you can quit and leave any time . . .”); *Paper Mart*, 319 NLRB 9 (1995) (implicit threat of discharge where president advised union supporter that if he was not happy, he could seek employment elsewhere and president would help with the transition); *Stoody Co.*, 312 NLRB 1175, 1181-82 (1993) (implicit threat of discharge where employer stated to a union supporter that he was “so nitpicking” about employer actions and should seek other employment); *Heritage Nursing Homes*, 269 NLRB 230, 231 (1984) (same); ALJD at 19. For the foregoing reasons, exception 10 should be overruled.

#### **Exception 6: Mary Duncan’s Unlawful Surveillance**

Employer exception 6 relates to Union objection 5 and the conduct of Nurse Manager Mary Duncan during Union shift change activities. The Employer disagrees with the ALJ’s finding that Duncan’s conduct in observing Union activities constituted unlawful surveillance. Contrary to the Employer’s assertion, the record evidence and Board law fully support the ALJ’s

finding that Duncan unlawfully changed her routine and acted “out of the ordinary” when she observed employees engaging in organizational activity.

It is well established that employer officials may observe open and public union activity on or near the employer’s premises, so long as such officials do not engage in behavior that is “out of the ordinary.” *PartyLite Worldwide, Inc.*, 344 NLRB 1342, 1342-1343 (2005). In that case, the Board ordered a new election where, on three occasions during the union’s organizing drive, top company officials stood at entrances to the employee parking lot for fifteen minutes during the change in shift and watched the union distribute campaign literature to employees as they entered and exited the lot. The employer was unable to establish a legitimate explanation for the unusual presence of its officials during the union’s activities. *Id.* at 1342. Similarly, in *Eddyleon Chocolate*, a top employer official sat in his car and watched, from 15 feet away, as a union representative handed campaign literature to employees near the entrance to the employer’s parking lot. The employer official spoke on his cell phone and did not leave until the union activity had ceased. The Board reversed the ALJ and held that by engaging in conduct out of the ordinary, the company official had created the impression of surveillance. 301 NLRB at 887-888.

Here, the Union began to hold shift change activities after filing its petition on July 3. Tr. 201. These activities, which were attended by a Union organizer and typically between three and ten employees, were held during the changes in shift, at the entrances to the parking lots of the nursing home and Mount Alverno. Tr. 129, 210. Union supporters talked and promoted the Union to their fellow employees entering or exiting the facility, and distributed literature. Tr. 128. During the months of July and August, the Union held shift change activities one or two days a week. Tr. 213. In September and October, as the election neared, the Union began to

conduct shift change activities approximately five days a week. Tr. 210. These activities were held outside of all three facilities and covered all conceivable shifts, but the Union focused primarily on the 3 p.m. shift changes at the nursing home and Mount Alverno, as they were the busiest. Tr. 201. The 3 p.m. shift change activities typically began a few minutes before 3 p.m. and ended at or shortly after 3:30 p.m. Tr. 29, 129, 204-205.

Mary Duncan was never present at or near the Union's 3 p.m. shift change activities held outside the nursing home or Mount Alverno in July and August. Tr. 32, 47, 132, 206. Prior to September and October, Duncan, a smoker, normally took two daily cigarette breaks of no more than 15 minutes and a lunch break of less than 30 minutes. Tr. 260, 345, 492, 512. She would typically take her first 15 minute break between 11 and 11:30 a.m., her less than 30 minute lunch break between 1:30 and 2 p.m., and her second 15 minute break between 3:30 and 4 p.m. Tr. 487. Duncan would never take a break at or shortly before 3 p.m. because as the nurse manager of both the Briar and Maple Hall nursing units, she had to be inside the nursing home to supervise the change in shift, specifically the arrival of the second shift's workers and the critical "report" on each unit's patients given by the outgoing day shift nurse to the arriving evening shift nurse. Duncan's duties overseeing this report and generally supervising the change in shift necessarily kept her inside the nursing home until between 3:15 and 3:30. Tr. 247-248, 488, 512, 518. As per Duncan's testimony, she was embarrassed by being a smoker, and attempted to smoke where people would not see her. Tr. 482-483, 509-510. For this reason, after the Employer banned smoking on its campus, she regularly took breaks outside of the entrance to Mount Alverno's parking lot, even though the overwhelming majority of her job duties were at the nursing home and it was "a hike" from the nursing home to outside of Mount Alverno. Tr. 482, 485, 509. After hurting her back, she largely stopped making the hike from the nursing

home to outside of the entrance to Mount Alverno's parking lot. Tr. 485, 510-511. Instead, in approximately the fall, she began to take her smoke breaks closer to the nursing home. Tr. 486. Duncan typically exited the nursing home's parking lot through the front entrance, made a left, and headed towards the St. Anthony's Community Hospital emergency room in order to smoke. She never smoked right by the entrance to the nursing home's parking lot, where the majority of other smokers congregated. Tr. 389, 393, 399, 485, 491-492.

During the months of September and October, however, as both the Union and Employer's respective campaigns intensified, Duncan deviated from her normal routine and began to take longer smoke breaks of about 30 minutes, beginning right around the 3 p.m. change in shift. Tr. 30, 130, 203-204. Duncan stood or sat in a chair 20 feet from where employees were participating in shift change activities at the entrance to the nursing home's parking lot, or sat on a bench 40-50 feet from where employees engaged in protected conduct at the entrance to the Mount Alverno parking lot. Tr. 30-31, 130, 205. While she was present in close proximity to these Union activities, Duncan smoked, talked on her cell phone, wrote notes, paid bills, and observed the ongoing employee Union activity.<sup>6</sup> Tr. 30, 68-70, 130, 180, 188-189, 203-204, 212, 485, 512.

As in *PartyLite Worldwide* and *Eddyleon Chocolate*, Duncan's actions can only be described as "out of the ordinary". First, as the ALJ noted, the length of her smoke breaks more than doubled. Second, the timing of her breaks also noticeably changed. Whereas Duncan normally remained inside the facility supervising the change in shift, in September and October,

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<sup>6</sup> Duncan acknowledged smoking, talking on her phone, and paying bills, but denied watching employees engaged in Union activity. The ALJ properly discredited Duncan, as her testimony was internally inconsistent. At several points, Duncan testified that she would turn her back when she encountered Union shift change activity because she knew she was not permitted to observe such activity. Tr. 464, 490-491, 495. Later, however, Duncan denied ever seeing or encountering employees engaged in Union shift change activities. Tr. 520-521; ALJD at 10-11.

she often abandoned her shift change duties and took her smoke break right at 3 p.m., coinciding with the height of the Union's shift change activities. ALJD at 11. Finally, Duncan changed her smoke break locations. Where before she smoked near the hospital's emergency room, away from the entrance to the nursing home's parking lot, in September and October, when employees were engaged in shift change activities outside of the nursing home, she positioned herself to smoke right across from the entrance to the nursing home's lot, in close proximity to the activities. Moreover, by both talking on her cell phone and writing while she was in such close proximity to the Union activities, Duncan conveyed to employees the impression that she was engaged in surveillance of their activity. Tr. 211. This is especially true given that Administrator Mike Deyo created the impression of surveillance during the same period. For the foregoing reasons, exception 6 should be overruled.

#### **Exceptions 7-8: Mary Duncan's Unlawful Statements**

Employer exceptions 7 and 8 relate to Union objections 1 and 4 and Nurse Manager Mary Duncan's unlawful statements. In exception 7, as in exceptions 1 and 3, the Employer takes issue with the ALJ's credibility determinations. Specifically, the Employer claims that the ALJ should not have credited the testimony of employee witnesses Catherine Fink, Valene Dewitt, and Carina Oros over that of Duncan and Acting Director of Nursing Irene Caldwell. The record evidence and Board law, however, fully support the ALJ's credibility resolutions.

As per the testimony of long-term employee Catherine Fink, Mary Duncan typically held huddles once or twice a week in the afternoon; they were brief meetings where she addressed work issues with her staff. Tr. 462. Fink testified about a brief huddle that Duncan conducted one afternoon in August or September with five or six Briar Hall CNA's in the nursing home's

Briar Hall break room/staff lounge. Duncan started this meeting by addressing changes in patient care policies. After discussing these changes, Duncan informed employees that if the Union came in, flexibility in employee shifts would be taken away. Tr. 193-194.

As the October 30 election neared, Duncan made similarly threatening, objectionable remarks to other unit employees. As per the testimony of long-term CNA Valene Dewitt, during the second week of October, Dewitt and Duncan had a disagreement at 11:40 a.m. concerning Dewitt's lunch break. Dewitt requested the intervention of Director of Nursing Irene Caldwell. Caldwell met briefly with Dewitt and Duncan in the nursing home's Maple Hall break room/staff lounge. After Dewitt began speaking about the issue of her break, Caldwell interrupted by stating, "I'm so sick of this Union shit." Dewitt responded, "What does this have to do with the Union? I didn't get a break. I'm tired." Caldwell countered, "I'm sick of you disrespecting Mary." Duncan then inserted herself into the conversation, stating to Dewitt, "You know, if the Union come in here, they're going to take away your ten-hour shifts, and it could drive your salary down to minimum wage." Tr. 120-122, 143-146. At least three nursing employees worked ten hour shifts, from 5 a.m. to 3 p.m., namely Dewitt, Trisch Guy, and Michele Burn. Tr. 317-318. This was a longstanding practice. Tr. 468.<sup>7</sup>

Finally, on the morning of October 28, two days before the election, Duncan entered the Maple Hall break room in order to get coffee. When she encountered CNA Carina Oros taking her morning break alone, Duncan informed Oros that if the Union came in, employees were going to lose their ability to self schedule and have their shifts changed. Tr. 80-82, 103-105.

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<sup>7</sup> While Caldwell could not recall an incident between Dewitt and Duncan, she testified that disputes frequently arose about the breaks of smokers like Dewitt. Tr. 226-227, 233. As the ALJ noted, Caldwell was also not a reliable witness. She twice testified that she said, "I'm sick of this Union shit." Tr. 227, 232. Later she denied uttering these words. Tr. 251. Caldwell also conceded that she had a poor memory and that it was hard for her to recall events that took place during the Union campaign. Tr. 241, 261-262, 264-265.

Under self scheduling, a well established practice, nursing employees were afforded the benefit of selecting which days they wished to work. Tr. 82, 466-467.

The detailed and mutually corroborative accounts of these interactions given by Fink, Dewitt, and Oros were properly credited by the ALJ, who noted that all three of these witnesses provided consistent testimony on both direct and cross examinations. ALJD at 14.<sup>8</sup> In contrast, Duncan's unconvincing testimony consisted primarily of general denials. Tr. 463, 468-469, 474. *See Mr. Z's Food Mart*, 325 NLRB 871, 888-889 (1998), *enf'd in relevant part*, 265 F.3d 239 (4<sup>th</sup> Cir. 2001) ("simple" denials elicited by "suggestive, leading questions...often without so much as a pretense that the witness' independent recollection had been exhausted" entitled to "little or no weight"); *Laser Tool, Inc.*, 320 NLRB 105, 109 (1995). In addition, as the ALJ noted, the Board has long held that the testimony of current employees that is adverse to their employer's interest is apt to be particularly reliable, particularly where it contradicts the testimony of their supervisor. *Farris Fashions*, 312 NLRB 547, 554, n. 3 (1993), *enf'd*, 32 F.3d 373 (8<sup>th</sup> Cir. 1994); *Flexsteel Industries*, 316 NLRB 745 (1995), *enf'd*, 83 F.3d 419 (5<sup>th</sup> Cir. 1996). Moreover, as explained above in connection with exception 1, and as noted by the ALJ, Duncan was a particularly unreliable and incredible witness with an admittedly poor memory. ALJD at 14. For the foregoing reasons, exception 7 should be overruled.

In exception 8, the Employer argues that Duncan's statements, as described by Fink, Dewitt, and Oros, do not constitute objectionable conduct. Specifically, the Employer asserts that Duncan's statements were merely predictions about the effects of unionization. The Board has held that in order to be lawful, employer predictions concerning the effect of unionization

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<sup>8</sup> In its brief supporting its exceptions, the Employer argues that Oros' testimony was particularly incredible because no other witness testified to Duncan approaching them individually to discuss the Union. The record evidence clearly contradicts this assertion, as Duncan herself testified that she frequently communicated with employees about the Union on an individual basis. Tr. 497-498.

must be supported by “objective evidence” presented to the employees. For example, in *Schaumberg Hyundai, Inc.*, 318 NLRB 449, 449-450 (1995), the Board found unlawful the employer’s statement that a union contract would require the shop to be run “strictly by union rules”, where the employer failed to demonstrate that the specific contract referred to was applicable to the employees in question. Similarly, in *Mercy General Hospital*, 334 NLRB 100, 103 (2001), the Board ordered a new election where the employer told employees that if the union came in, it would no longer be able to schedule certain days off and that employees would have to request vacation time further in advance. The Board rejected the employer’s defense that it was simply referring to a collective bargaining agreement that the union had with another employer, as this defense was not supported by credible evidence. *Id.* Here, the ALJ correctly found that Duncan’s statements threatened employees with loss of flexibility in scheduling, changes in shifts, and reduction of wages. Duncan’s comments were in no way lawful predictions, as they were not supported by any objective evidence that she (or anyone else) presented to employees. ALJD at 15. Exception 8 should thus be overruled.

**Exception 9: Thomas Brunelle’s Unlawful Statements**

Employer exception 9 relates to Union objections 1, 4, and 9 and Thomas Brunelle’s unlawful statements. In exception 9, like in exception 8, the Employer argues that Brunelle did not engage in objectionable conduct, as he merely made lawful predictions about the effects of unionization. The record evidence and Board law amply support the ALJ’s findings to the contrary.

On October 27 and 28, Thomas Brunelle, the Employer’s top official, conducted a series of approximately ten meetings where he attempted, for the final time, to persuade employees to

vote against the Union in the October 30 election. Tr. 22, 58. One of these ten meetings conducted by Brunelle during the week of the election was held at around noon and attended by Administrator Mike Deyo, employee Ashley VonHahsel, and approximately ten other employees. At this meeting, Brunelle predicted that the “open door policy would be taken away” if employees voted for the Union. Tr. 22, 59. Brunelle elaborated that if the Union came in, “there would be no casual conversations to resolve any issues” and that management officials “couldn’t be as lenient on us because there would be this third party...” Tr. 59. Brunelle also stated that employees would “lose special privileges like flexibility” if the Union came in. Tr. 22, 60. Brunelle explained to employees that by flexibility he meant schedule adjustments such as instances where employees were permitted to arrive to work a little late or leave a little early in order to see their doctor or attend to a child’s medical situation. Tr. 22, 60, 64.

Similarly, at Brunelle’s October 28 meeting attended by Administrator Mike Deyo, employee Evelyn McSherry, and seven to nine other employees, Brunelle urged employees to vote against the Union. He then stated that it would take years to get a contract if the Union was voted in, that everything would be frozen, that there would be no annual pay raise, and that “you won’t be able to do your flexible schedules anymore.” Tr. 166-167, 173-174.<sup>9</sup>

Contrary to the Employer’s assertion, VonHahsel and McSherry’s accounts of the meetings conducted by Brunelle just prior to the election were properly credited by the ALJ over that of Brunelle. ALJD at 16. Both employees attended only one meeting that week and provided much more detailed accounts of their respective meetings than did Brunelle. Brunelle,

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<sup>9</sup> The Employer has attempted to diminish the unlawful nature or the impact of Brunelle’s statements by highlighting Brunelle’s supposed mild manner and the fact that no employee testified to feeling threatened or fearful. Whether a statement is unlawful, however, is not dependent on subjective reactions of employees, but on whether the statement has a reasonable tendency to coerce employees. *Williamhouse of California*, 317 NLRB 699, 713 (1995); *see also ACORN*, 338 NLRB 866, 870 (2003) (coercive statements are unlawful even where the employees are open union supporters).

on the other hand, conducted a series of ten meetings on October 27 and 28, and could not recall specifically what he or any employees said at any particular meeting. Tr. 443-445. Rather, his testimony was general, based on a composite recollection of what he believed he likely would have said (and not said) at not only the October 27 and 28 meetings, but also at the series of monthly meetings (held over multiple shifts on several days) he conducted over the summer and generally throughout the Union's campaign. Tr. 425, 432-433, 444-450. Moreover, Brunelle conceded that his recollection of the events at issue was "fuzzy", that he had "immediately began to forget things", and that he had not consulted the notes he had prepared in preparation for the meetings in question. Tr. 432-433, 449.

Further, Administrator Deyo was undisputedly present at Brunelle's two late October meetings attended by VonHahsel and McSherry, respectively. Tr. 21-22. 167. Again, however, the Employer inexplicably failed to call Deyo as a witness, even though he was still the Administrator at the time of the hearing. It should thus be inferred that the testimony of Deyo would have corroborated the accounts of both VonHahsel and McSherry. In addition, VonHahsel and McSherry, and Fink, Dewitt, and Oros, all attributed statements to Brunelle and Duncan which are of a common stripe, reflecting a common pattern, and is consistent with themes highlighted in the Employer's campaign literature. *See Liberty House Nursing Homes*, 245 NLRB 1194, 1199 (1979) (testimony of General Counsel's employee witnesses credited as more reliable than the employer's denials where employees attributed statements to the employer reflecting a common pattern of threats of more onerous conditions).

It is well settled that an employer may not threaten employees that unionization would end a beneficial workplace policy or practice. *Guardian Automotive*, 337 NLRB 412, 416 (2002). In that case, the Board affirmed the ALJ's order setting aside the election after the

employer told employees that its self-described “open door policy” would end if the union got in. *Id.* at 413. Similarly, in *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 495 (1995), a supervisor violated section 8(a)(1) by telling an employee that there would be stricter enforcement of the rules if the union came in. In that same case, a different supervisor unlawfully told an employee with attendance problems that if the union came in, it would possibly take away the employer’s flexibility to show lenience with respect to attendance problems. The employer argued that the supervisor’s statement merely amounted to a permissible explanation of the changed relationship which occurs between employer and employee when the employer becomes unionized. The Board affirmed the ALJ’s rejection of this argument and his ruling that the supervisor’s statement that the union would take away the employer’s flexibility to be lenient was tantamount to saying that the arrival of the union would result in stricter enforcement of company rules. *Id.* at 498; *see also Foodland*, 233 NLRB 708, 713 (1977) (election set aside where the employer told a cashier, “if the union comes in, you won’t be able to eat on the job anymore . . . [b]ecause in the union you cannot eat, and you always have to be busy at all times”); *Be-Lo Stores*, 318 NLRB 1, 33 (1995), (statement that if the union campaign succeeded there would be “no slack or being late” unlawful threat of more onerous working conditions); *enf’d in relevant part*, 126 F.3d 268 (4<sup>th</sup> Cir. 1997).

Thus, as the ALJ noted, even if Brunelle’s testimony were credited over that of VonHahsel and McSherry, his comments concerning flexible shifts and schedules would still be unlawful, especially given the context in which they were made. Brunelle testified that he would have informed employees that in a unionized facility, “... things like scheduling and shifts . . . are set in a contract, so it does limit flexibility, yes.” Tr. 447. Brunelle also testified to saying, over the course of several meetings, “where a union contract is in place, . . . there is less .

flexibility in that environment. . . Because what you do for one you have to do for everyone, and it's a matter of making sure that you adhere to the rules...". Tr. 451. The specific nature of the reduced flexibility that Brunelle admittedly addressed in these meetings had been made clear to employees via the Employer's campaign literature, particularly Petitioner's Ex. 8, which was titled "**Flexibility**" and provided the following examples of instances in which Employer flexibility allowed for employees to adjust schedules/assignments: dental and medical appointments; caring for sick children sent home from school; employees taking educational courses; taking extra time off from work; going away for the weekend; and trying to work on a new unit.<sup>10</sup> Mary Duncan's statements threatening ten-hour shifts, self scheduling, and other changes to employees' shifts provided additional context to Brunelle's remarks on how unionization would impact flexibility.

As discussed above in connection with exception 8, the Board has held that employer predictions concerning the effect of unionization must be supported by "objective evidence", in order to convey to employees an employer's belief as to demonstratively probable consequences beyond its control. Here, even crediting Brunelle, the Employer, like the employer in *Schaumberg Hyundai*, introduced nothing to show that Brunelle's predictions of reduced flexibility and strict adherence to rules were somehow based upon any applicable union contract or any other "objective evidence" provided to the employees. ALJD at 18.

Moreover, in his meeting remarks, Brunelle did not frame his prediction of reduced flexibility as the consequence of the give-and-take of collective bargaining. Notably, in his remarks, Brunelle never mentioned the possibility that the Union could have negotiated to

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<sup>10</sup> Patrick Clark, the Director of Human Resources, corroborated that flexibility meant "leaving early to get their children off a school bus, or, you know, leaving early for a PTA meeting, or doctor's appointment, or coming in later because of, you know, a home issue." Tr. 341.

maintain or improve upon the flexibility employees already enjoyed. Instead, employees reasonably understood his words to mean that flexibility would be reduced simply because the employees selected the Union as their collective bargaining agent. *See Federated Logistics and Operations*, 340 NLRB 255 (2003) (employer statements reasonably understood by employees as threats that their wages and benefits were endangered not because of the uncertainties of collective bargaining, but simply because they selected the union as their collective bargaining representative); *Pennant Foods Co.*, 352 NLRB 451, 461 (2008) (unlawful message conveyed that employees' loss of control to the union and loss of benefits were a given if employees voted for the union, since there was little to no discussion of the give-and-take of collective bargaining in the employer's presentation); *Siwalls*, 307 NLRB 986, 1002 (1992) (employer statement made in the context of a threatened loss of existing benefits if the union won the election, absent any suggestions that bargaining is a process in which each side makes its own proposals, that requires mutual agreement, and where existing benefits may be traded away); ALJD at 18-19.

As part of exception 9, the Employer also excepts to the ALJ's finding that Brunelle communicated to employees that selecting union representation would be futile. The record evidence and Board law, however, fully support the ALJ's finding. At the October 28 meeting attended by McSherry and seven to nine other employees, besides threatening employees' flexible schedules, Brunelle stated that it would take years to get a contract if the Union was voted in, that everything would be frozen, and that there would be no annual pay raise. Tr. 166-167, 173-174. In *Federated Logistics and Operations*, 340 NLRB 255, 255-256 (2003), the Board directed a second election after finding that employees reasonably would have understood similar comments to mean that benefits would be lost and that selecting union representation would be futile. In that case, a manager stated that wages would remain the same during

negotiations if the union won, no matter how long they took, that negotiations would take a long time, and that “we wouldn’t get any raises”. The Board found that the comment that wages would stay the same during negotiations lacked context, and pointedly ignored the employer’s historical practice of granting its employees annual merit increases. The Board also noted the manager’s comments were not made in circumstances free from other unfair labor practices. *Id.* Here too, Brunelle’s comment that everything would be frozen and that there would be no annual pay raises (or even crediting his testimony, that wages would remain the same throughout the period of bargaining a contract) lacked context and conveniently ignored the fact that for at least the prior eight years, the Employer had granted employees salary increases on their employment anniversary dates. Tr. 434.

The Employer argues that Brunelle’s statement does not constitute a threat of futility because it does not “evidence personal animosity toward the union”, and also because Brunelle delivered his remarks in an educational, matter-of-fact, non-intimidating tone of voice. This argument is wholly without merit, as whether a statement is unlawful depends much less, if at all, on its tone, as compared to whether the statement’s content has a reasonable tendency to coerce employees. Further, Brunelle’s comment was made in the context of other unlawful statements made by him, Administrator Mike Deyo, and Mary Duncan, including Duncan’s threat that employee Valene Dewitt’s salary could be reduced to minimum wage and her statement that negotiating a contract would take a long time. Tr. 516. Brunelle’s remarks therefore would reasonably have been understood by employees to suggest that selecting the union would be an exercise in futility. For the foregoing reasons, exception 9 should be overruled.

### **Exception 11: The Employer's Bulletin Board Policy**

Employer exception 11 relates to Union objection 8 and the Employer's bulletin board policy. The Employer argues that the ALJ should have found that it lawfully and uniformly applied its posting policy. The record evidence and Board law fully support the ALJ's finding that the Employer both unlawfully promulgated and discriminatorily enforced its prohibition against employees' use of its bulletin boards to post pro-Union literature.

Before the Union filed its petition and began holding open shift change activities in July, the Employer did not have any rule, policy, or restriction concerning employee use of company bulletin boards to advertise or promote non-work information or events. Tr. 27, 53-54, 127, 162-163, 403. Employees routinely posted personal items on bulletin boards in the nursing home, such as ads selling jewelry, Avon products, and Weight Watchers, as well as invitations to food-tasting, candle, and jewelry parties. Tr. 27-28, 48, 127-128. These employee items remained posted for up to months at a time; employees removed them when they were no longer timely. Tr. 28, 128.

In August, Sondra Gomas, the Nurse Manager on the nursing home's Forest Hall, instructed employee VonHahsel to remove Union literature already posted in the Forest Hall break room, and informed her that it was inappropriate and against policy for her to hang Union literature. When VonHahsel asked for the company policy on this subject, Gomas never showed her or described any policy. As a result of her conversation with Gomas, VonHahsel largely stopped posting campaign literature. There were occasions, however, where VonHahsel disregarded Gomas' warning and continued to post Union literature in the break room. When this occurred, Gomas, on several occasions, tore VonHahsel's Union literature off the bulletin board and again warned her not to post it. Tr. 51-55.

After several such confrontations with Gomas, VonHahsel asked about posting Union literature at an anti-union meeting conducted by Administrator Deyo in early October. Deyo informed VonHahsel and the other twenty employees in attendance that posting Union literature was against policy and not permitted. See page 3, *supra*; Tr. 23-26, 55-58.

Similarly, in mid-October, employee Dewitt encountered Nurse Manager Mary Duncan posting Employer campaign literature on a bulletin board in the Briar Hall break room. Dewitt asked Duncan if she, too, could post her fliers. Duncan responded, "No, it's illegal." Dewitt expressed doubt, asking, "Why is it illegal? It's not illegal." Duncan insisted, "Yes, it is." Dewitt shared this conversation with the other employees working in the nursing home that day. Tr. 122-123.<sup>11</sup> The following day, Dewitt observed a notice hanging on the Briar Hall break room bulletin board, along with other Employer campaign literature. This notice, in Duncan's handwriting, stated, "**THERE ARE ONLY POSTINGS ON MATERIAL APPROVED AND INITIALED BY H.R.**" Petitioner's Ex. 2; Tr. 123-126.

As noted above, Gomas did not testify at the hearing. See page 4 n.2, *supra*. VonHahsel's testimony regarding their interactions is therefore uncontroverted. Duncan, in her testimony, denied telling Dewitt that it was illegal to post Union literature on the bulletin board. Rather, according to Duncan, she informed Dewitt that she could hang whatever she wanted to provided she first got authorization from Human Resources. According to Duncan, her response to Dewitt was consistent with her understanding of company policy. Tr. 475-476. Duncan acknowledged that Petitioner's Ex. 2 appeared to be in her handwriting, but stated that she did not recall posting the notice. Tr. 477-478. Duncan also conceded that she removed Union literature posted in the

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<sup>11</sup> As the ALJ noted, Duncan's statement about the illegality of employees posting literature was itself unlawful, independent of the Employer's unlawful promulgation and enforcement of its rule on posting. See *Wal-Mart Stores, Inc.*, 340 NLRB 220, 227 (2003) (finding an 8(a)(1) violation where the employer told employees it was unlawful for them to participate in union activities).

break rooms. Tr. 508, 523. Patrick Clark, the Director of Human Resources, testified that the Employer had long had an unwritten rule that permission from Human Resources or Administration was required for employees to post personal items on the one or two boards in each facility designated as Human Resources or Administration boards, but that nurse managers had discretion as to what policy, if any, would govern the posting of personal items in break rooms on their units. Tr. 353-355, 362-366. Clark also denied that employees had requested permission from Human Resources to post Union literature. Tr. 314-315.

The Board has held that an employer may restrict employees' use of its bulletin boards for Section 7 communications unless those restrictions are promulgated with an anti-union motivation or are discriminatorily enforced. *Loparex LLC*, 353 NLRB No. 126, \*9 (2009), *enf'd* 2009 U.S. App. LEXIS 28754. Here, the credible evidence establishes that the Employer promulgated its unwritten rule restricting employees' use of its bulletin boards in response to the Union's filing of its petition and its initiation of open Union shift change activities. *See Gallup*, 334 NLRB 366 (2001) (in response to the union's campaign, the employer added new rules to its procedures manual, including one limiting the posting of nonbusiness materials on the break room bulletin boards); *Nashville Plastic Products*, 313 NLRB 462 (1993) (shortly before the election, employer unlawfully promulgated new rule prohibiting off-duty employees from being on company property, where the rule was not in the handbook and employees first heard about the rule at the time the employer sought to invoke it).

The ALJ properly credited VonHahsel and Dewitt's testimony that the Employer had not previously mentioned any rule restricting posting. Although Duncan and Clarke testified that there was a longstanding unwritten rule allowing employee postings only with prior approval from management, no employee corroborated their testimony. Even the Employer's own

witness, long-term employee Shannon Allen, was unaware of any rule or policy concerning posting. Tr. 403. Further, the uncontroverted testimony of VonHahsel establishes that neither Nurse Manager Gomas, in her frequent clashes with VonHahsel, nor Administrator Deyo, in his response to VonHahsel's question at the October meeting, articulated the supposed rule referred to by Clarke and Duncan. Moreover, as described at length above, Duncan was far from a credible witness. Clarke's testimony that no employees requested permission to post was contradicted by Executive Vice-President Thomas Brunelle, who testified that Human Resources informed him that it had denied employees' requests for permission to post Union literature. Tr. 430, 452-453. In addition, as the ALJ noted, Clarke's testimony concerning the longstanding existence of such an unwritten rule is suspect. Clarke acknowledged that the Employer's rules were generally reduced to writing so that employees could be made aware of them. Notably, the Employer offered no explanation as to why such a longstanding rule was never communicated in writing and was not included in the Employee Handbook created by Human Resources. Tr. 334-335; ALJD at 24-25.

Moreover, as the ALJ noted, even if Duncan and/or Clark were credited concerning the prior existence of an unwritten rule requiring employees to obtain permission to post notices, the uncontroverted evidence demonstrates that the Employer discriminatorily enforced this rule. As described above, it is undisputed that in August and October, Nurse Manager Gomas and Administrator Deyo denied employee VonHahsel approval to post Union literature. Duncan also denied employee Dewitt permission to post Union literature. Further, as per Executive Vice-President Brunelle, Human Resources also denied employees' requests for permission to post Union literature. Tr. 430, 452-453. Finally, it is undisputed that Gomas and Duncan removed Union literature from bulletin boards in the nursing home's break rooms.

On the other hand, it is also undisputed that the Employer routinely granted permission for employees to post personal items that did not support the Union's campaign. For example, Clark testified that employees were given permission by nurse managers to post notices publicizing garage sales and birthday parties. Tr. 354. Clark himself recalled granting approval for an employee to post an event sponsored by an outside non-profit agency for which certain employees volunteered, as well as permission to post sympathy cards and thank you cards. Tr. 355. Clark could only recall one instance in which he had denied an employee's request to post a personal item, and as to that example, he could not recall specifics. Tr. 356. For her part, Duncan similarly testified that Human Resources approved employees' requests to post personal items, including advertisements for an Avon party and the sale of an employee's used television set. Tr. 475-476, 521. Duncan did not identify a single instance in which an employee's request to post a non-Union related notice was denied. Similarly, there is no evidence that the Employer's agents removed any anti-Union postings that may have been posted without authorization. As the ALJ explained, the Employer's conduct thus consisted of disparate treatment along Section 7 lines and was unlawful. ALJD at 26-27. For all of the foregoing reasons, exception 11 should be overruled.

### **CONCLUSION**

The record evidence and Board law amply support the ALJ's finding that the Employer's conduct interfered with employees' free and uncoerced choice in the October 30 election. The ALJ properly found that this Employer conduct included numerous instances of surveillance, creating the impression of surveillance of employee Union activity, threats of discharge, threats to reduce wages, threats to change flexibility in scheduling and shifts, threats of futility, and the

unlawful promulgation and discriminatory enforcement of a rule prohibiting employees from posting Union literature on the Employer's bulletin boards. Given that the Employer's margin of victory in the election was only two votes, even if only one of the Employer's exceptions is overruled, that would be sufficient to set aside the results of the election. *See Robert Orr-Sysco Food Services*, 338 NLRB at 615 (the Board ordered a new election where the hearing officer failed to sufficiently take into consideration the closeness of the election results). In this regard, it should be noted that much of the Employer's objectionable conduct took place in the days leading up to the election. For instance, both Thomas Brunelle's unlawful campaign speeches and Mary Duncan's threat to eliminate self scheduling were made only two days before the election, maximized their coercive impact. *See Fisher Island*, 343 NLRB 189 (2004) (second election set aside where employer threatened future wage increases in campaign speeches delivered over the two days before the election); *Federated Logistics and Operations*, 340 NLRB 255, 256 (2003).

Further, a relatively great number of employees were directly subjected to the Employer's misconduct. Notably, 20 employees were in attendance for Mike Deyo's unlawful statements in early October, another 20 employees (approximately ten at each meeting) were present for Brunelle's two unlawful campaign speeches in late October, five or six CNA's were present for Mary Duncan's objectionable huddle meeting, and countless employees (the entire first and second shifts) were surveilled during shift change activities outside of both the nursing home and Mount Alverno. Moreover, on those occasions where the Employer's misconduct was targeted or observed by only one employee, there was widespread dissemination of the misconduct. For example, as noted by the ALJ, Duncan's posting of Petitioner's Ex. 1 was

widely disseminated, as was her unlawful statement to Valene Dewitt concerning posting literature on bulletin boards.

For the foregoing reasons, as well as those cited by the ALJ, Petitioner respectfully requests that the Board overrule all of the Employer's exceptions, set aside the results of the October 30 election, and direct the prompt holding of a second election.

Respectfully submitted,



William S. Massey

Gladstein, Reif and Meginniss, LLP  
817 Broadway, 6th Floor  
New York, NY 10003  
(212) 228-7727

Attorneys for Petitioner

Dated at New York, New York  
this 21st day of May, 2010

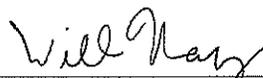
## CERTIFICATION OF SERVICE

Petitioner's Answering Brief Opposing the Employer's Exceptions to the ALJD is being electronically filed today (May 21, 2010) with the Executive Secretary of the National Labor Relations Board. Copies of this brief have been served today via email on all other parties, as follows:

Susan S. Robfogel, Esq.                      [srobfogel@nixonpeabody.com](mailto:srobfogel@nixonpeabody.com)

Robert A. Cirino, Esq.                      [rcirino@nixonpeadbody.com](mailto:rcirino@nixonpeadbody.com)

Celeste Mattina, Regional Director   [celeste.mattina@nlrb.gov](mailto:celeste.mattina@nlrb.gov)



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William S. Massey