

Foundation For Comprehensive Health Services and Union of American Physicians and Dentists and Mid-Level Practitioners Group of Foundation For Comprehensive Health Services and Paula Mills Bertram. Cases 20-CA-14783, 20-CA-14801, 20-CA-15016, 20-CA-15285, and 20-CA-15244

11 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On 31 March 1982 Administrative Law Judge David P. McDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondent filed a brief in opposition to the General Counsel's exceptions.

On 13 December 1982 the Board received a joint motion filed on behalf of the Charging Parties, Respondent, and the General Counsel in which they moved that the Board sever Cases 20-CA-14801, 15016, 15244, and 15285 from Case 20-CA-14783, so that the parties could proceed to settlement on the former. On 28 December 1982 the Board, by Executive Secretary's Order, granted the joint motion and allowed the cases to be severed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

As a result of the severance, we have before us only the issues raised in Case 20-CA-14783 which involve the allegations that Respondent violated Section 8(a)(4) of the Act by issuing disciplinary warnings to Dr. Jerome Lackner and later discharging him because he gave testimony adverse to Respondent's interest in a Board representation proceeding. The Administrative Law Judge in passing on these issues concluded that the General Counsel had not established by a preponderance of the evidence that the warning letters and discharge of Dr. Lackner were motivated by any activity of Dr. Lackner that was protected by the Act and accordingly he recommended that the complaint in Case 20-CA-14783 be dismissed in its entirety.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge with respect to Case 20-CA-14783 and to adopt his recommended Order therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order in Case 20-CA-14783 the recommended Order of the Administrative Law Judge and hereby orders that the complaint in Case 20-CA-14783 be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

DAVID P. McDONALD, Administrative Law Judge: In 1979 and 1980 the Regional Director for Region 20 of the National Labor Relations Board issued a series of complaints charging the Foundation For Comprehensive Health Services, herein called the Foundation or the Respondent, with various unfair labor practices. On October 22, 1979, the Regional Director ordered the first two complaints, Cases 20-CA-14783 and 20-CA-14801, consolidated and on January 3, 1980, a third complaint, Case 20-CA-15016, was consolidated with the first two charges. Thereafter, the above-consolidated cases were tried before me at Sacramento, California, on January 15, 16, 17, 21, 24, 29, and 30 February 4 and 5, 1980. Following the close of the hearing and prior to the submission of briefs, I granted on April 18, 1980, the General Counsel's motion to reopen the hearing and to consolidate cases, with subsequently filed complaints in Cases 20-CA-15244 and 20-CA-15285. These additional complaints were tried before me at Rancho Cordova, California, on May 20, 21, and 22, 1980.

The first complaint, Case 20-CA-14783, was based on a charge filed by the Union of American Physicians and Dentists, herein called UAPD, on August 8, and amended on September 14, 1979. The complaint alleges that the Foundation engaged in certain violations of Section 8(a)(1) and (4) of the National Labor Relations Act, as amended. Case 20-CA-14801 was based on a charge filed by the Mid-Level Practitioners Group of Foundation For Comprehensive Health Care, herein called the Union or MLP, on August 22, which was subsequently amended on September 4 and October 17, 1979. The complaint alleges that the Foundation engaged in certain violations of Section 8(a)(1) and (3) of the Act. The third complaint, Case 20-CA-15016, also arose from a charge filed by the Union on December 6 and amended on December 14, 1979. The third complaint also alleges that the Foundation engaged in certain violations of Section 8(a)(1) and (3) of the Act. The General Counsel explained that the original charge also alleged a violation of Section 8(a)(5) of the Act; however, such a charge is not a part of the complaint and will not be pursued.

Case 20-CA-15244 was based on a charge filed by the Union on March 26, 1980, and the complaint alleges that the Foundation engaged in certain violations of Section 8(a)(1), (3), and (4) of the Act. Case 20-CA-15285 was based on a charge filed by the Union on April 15, 1980, and the complaint alleges that the Foundation engaged in certain violations of Section 8(a)(1) and (5) of the Act.

All parties were given an opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the attorneys for Respondent and the General Counsel on August 14, 1980.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California nonprofit corporation engaged in the medical practice industry, providing medical care at various facilities located within the State of California. It maintains its principal office in Sacramento, California. It further admits that during the past calendar year, Respondent, in the course and conduct of its medical practice, received revenues in the form of direct payments or grants in excess of \$500,000 and purchased and received at its Sacramento facility products, goods, and materials valued in excess of \$5,000 from enterprises located within the State of California, each of which other enterprises had received said products, goods, and materials directly from points outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

Respondent admits, and I find, that Mid-Level Practitioners Group of Foundation For Comprehensive Health Services is a labor organization within the meaning of Section 2(5) of the Act. Respondent denies, however I find, that the Union of American Physicians and Dentists is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues raised by the pleadings in the consolidated complaint are whether Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act by the following conduct:

1. Issuing two warning letters and then discharging its supervisor, Dr. Jerome Lackner, because he testified at a representative hearing in Case 20-RC-14818.

2. In Case 20-CA-14801, by threatening to terminate employees because of their membership and/or activities on behalf of the Union; interrogating prospective employees regarding union membership, activities, and sympathies; threatening to blacklist employees because of their membership in and/or activities on behalf of the Union; telling employees that by unionizing they were limiting their salaries, and talking themselves out of a job; telling employees that their jobs would become extinct, and they would limit their future job opportunities; creating an impression among its employees that their union activities were under surveillance; and warning

employees it would be futile to select the Union for collective bargaining.

3. In Case 20-CA-15016, by interrogating its employees regarding their union membership, activities, and sympathies; and laying off, reducing hours, and eventually discharging employee Mary Baker.

4. In Case 20-CA-15244, by threatening employees with loss of wages because they testified at the NLRB hearing in Cases 20-CA-14783, 20-CA-14801, and 20-CA-15016; threatening employees with loss of wages because of their membership in and/or activities on behalf of the Union; threatening employees with unspecified reprisals because of their membership in and/or activities on behalf of the Union; and terminating Paula Bertram because of her union activities.

5. In Case 20-CA-15285, by failing to give prior notice to the Union and failing to afford the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to abolishing two nurse practitioner positions at the Placerville facility and terminating Paula Bertram and Carol Herrlie.

B. The Facts

1. Foundation For Comprehensive Health Services

The Foundation was established in 1970 by its president, Dr. Len Hughes Andrus, and its secretary-treasurer and legal counsel, Robert Elkus. They along with Bibbero served on the original board of directors. As of July 1979 the board of directors consisted of Dr. Andrus, Elkus, John Working, Florence Wyckoff, Dr. Philip Lee, and Virginia Fowkes. The executive committee is presently composed of Dr. Andrus and Elkus.¹ The board of directors met on a scheduled basis approximately four times a year. It had the ultimate responsibility to set policy and determine major decisions. Since the directors are scattered over a large geographical area and maintain busy personal schedules, it was difficult to have numerous or lengthy meetings. Therefore the executive committee was delegated the authority and responsibility for representing and acting on behalf of the board of directors in most operational matters. If the executive committee determined the problem required action by the directors, a telephone conference was held. Since there are only two members on the executive committee, they do not have regularly scheduled meetings. As members of that committee, Andrus and Elkus confer with each other whenever the need arises, either by phone or in person.

The purpose and goal of the Foundation was and is to promote primary and comprehensive health care services with an emphasis on needy areas. The goal was to be achieved by the utilization of health care teams composed of physicians, family nurse practitioners (FNPs), physician assistants (PAs), and other health care professionals to promote research in health care delivery and education in primary care, with emphasis on socio-economic factors, such as cost containment.

¹ Dr. Bill D. Burr was formerly a member of the board of directors and the executive committee.

Dr. Andrus, who played a major role in the development of the mid-level practitioners concept, explained that the best health care can be delivered by a team of individuals with various levels of training and depth of knowledge, who complement and supplement each others' skills. The ideal team would be made up of a family physician, who has the greatest depth of knowledge; mid-level practitioners, such as nurse practitioners and physician assistants; and other supporting health care professionals tailored to meet the environment of each area by utilizing social workers, home health aides, psychologists, clinical pharmacists, and a variety of health care professionals. The family physician had its roots in the old general practitioner with more emphasis on the comprehensive aspects of health care, including prevention, promotion of health, patient education, and an awareness of the psycho-social and economic factors that are part of the patient's everyday life and world. Under ideal conditions the Foundation's philosophy envisioned these various professionals working as a team of copractitioners and not in a separate parallel practice. Thus, a properly functioning team of copractitioners would provide a community with a perpetual continuity of health care. If one member of the team was unavailable, the remaining members would continue to function. This concept was particularly appealing to medically underserved communities.

Although the Foundation was established in 1970, it did not actually open a facility until 1977. In 1975, Dr. Curtiss Weidmer, the director of health services and the county health officer for El Dorado County approached Dr. Andrus with a request for the University's residents to rotate through El Dorado County. Apparently several near tragedies occurred among the low income obstetrical patients of that area. Since the residency educational requirements of the University of California School of Medicine precluded the use of residents in that manner, Dr. Andrus decided to use the Foundation in an effort to provide the requested service. A monetary grant was obtained from the Robert Wood Johnson Foundation, which was used to establish the Sierra Family Medical Group in Placerville, California, in September 1977, on the western slopes of the Sierras. Subsequently, the Foundation expanded its medical facilities to Colfax and Auburn in the first part of 1978; followed by Clear Lake Highlands, which is a rural area with the highest percentage of individuals over 65 of any county in California; then the River City Medical Group in Sacramento; and, finally, the Santa Rosa family practice, which consist of operating an emergency room. These six medical facilities are operated and managed by the Foundation's central administrative office in Sacramento. Each facility was headed by a physician who was the Medical Director. The function of each facility would vary depending on its location and the needs of the community that it served. As a result the staffs were not identical. Only River City had a social worker; whereas, the other clinics had various combinations of family nurse practitioners, physician's assistants, registered nurses, and various clerical support staff.

2. Foundation personnel

a. Physicians

Dr. Hughes Andrus is nationally recognized for his major role in the development of the mid-level practitioners concept. While he was in private practice he hired the first physician assistant in California and later he hired extensively on the subjects of group practice, rural health care, and mid-level practitioners. In 1970, he became a full professor at the University of California School of Medicine in Davis and the first Chairman of the Department of Family Practice. The Foundation For Comprehensive Health Services was founded by Dr. Andrus in 1970. He has served as its only president and as a member of its board of directors and executive committee.

Dr. David Gordon Daehler is a board certified physician in family practice. From February 1978 until October 15, 1979, he served as assistant professor of medicine, Department of Family Practice, at the University of California, at Davis. On November 4, 1979, he became the Foundation's medical director for the new River City Family Medical Group, located at 3319 J Street, Sacramento.

Dr. Jerome A. Lackner has had a wide and extensive career in the field of medicine. He has received the following degrees from the University of California, Berkeley: B.A. in a special group major (psychology, sociology, and anthropology); M.A.—Sociology and Social Institutions; and, M.D.—School of Medicine. Although he also has received a J.D. from Santa Clara University he has never practiced law. Dr. Lackner was the first medical director for the United Farm Workers, AFL-CIO, and a founding member of the Union of American Physicians and Dentists. Prior to joining the Foundation, he served as the director of health for the State of California from April 1975 through March 1978. Dr. Lackner was hired by Dr. Andrus in June 1978 and was named the medical director of the River City Family Medical Group, Sacramento, in December 1978. He continued to serve as the Foundation's River City medical director until he was terminated on August 2, 1979, effective August 20, 1979.

Dr. Jonathan Lehrman presently specializes in a private family practice in Placerville, California. In July 1977 he signed a contract with the Foundation and began to serve as consultant at the Placerville facility in September 1977. As of December 1, 1977, he became the medical director of the Sierra Family Medical Group in Placerville. Although he served with the title of medical director, his duties were that of a staff physician until December 1978 when he was given the authority of a medical director. He continued to serve in that capacity until he resigned on October 1, 1979.

Dr. Vincent Natali completed medical school in 1973 and completed his residency in 1977 in family practice in Ventura, California. While he was in Ventura he worked in the emergency room for 1 year. Thereafter, he went to Chicago and participated in an unsuccessful attempt to set up a clinic. When he observed an advertisement in the *California Medical Association Journal* for a physician

in family practice, he contacted Dr. Andrus. He was hired by the Foundation and began working at the Placerville facility on September 17, 1979.

Dr. Phillip Reilly is a member of the Woodside Medical Group, Sacramento, California. Although he has never been an employee of the Foundation, he agreed to see their River City patients during the interim period, between Dr. Lackner's termination (August 20, 1979) and the new River City clinic's opening in the early part of November 1979.

Dr. Frank Andrew Weiser maintained a medical practice in Ojai, California, for 18 years before he joined the Placerville's facility on March 26, 1979. At that time Dr. Lehrman was the medical director, until his departure in October 1979. Then Dr. Weiser became the Foundation's medical director for the Sierra Family Medical Group, Placerville, California.

b. Mid-level practitioners

Mary Baker is a registered nurse and a family nurse practitioner. She received her bachelor's degree in nursing from Northeastern University in Boston, M.A. in Health Services from the University of California at Davis, and a certificate as a family nurse practitioner, University of California at Davis. Baker was hired by the Foundation in December 1978 as a family nurse practitioner at the River City Family Medical Group in Sacramento. She was informed by a letter dated December 19, 1979, that due to a lack of work her services were no longer needed as of December 20, 1979. Subsequently, she received a telegram from the Foundation, dated January 14, 1980, which informed her that the layoff of December 20, 1979, was converted to a termination effective January 14, 1980.

Paula Bertram is a family nurse practitioner with a B.A. in nursing from the University San Francisco School of Nursing and a M.A. in Health Science from the University of California at Davis. Bertram was employed by the Foundation at its Sierra Family Medical Group, Placerville, California, as a family nurse practitioner from December 17 until her termination in the latter part of March 1980.

Bonnie Ann Bowman received her nursing degree from St. Francis School of Nursing in 1965 and completed the family nurse practitioner program at the University of California at Davis in 1978. Bowman worked full time for the Foundation at its Placerville facility from January until November 1979. After her resignation, she was hired by Dr. Lackner to work in his Sacramento office.

Carol Herrlie was accepted for the Family Nurse Practitioner program at the University of California at Davis. Paula Bertram was her counselor and faculty instructor. In October 1978 she was accepted by Respondent as part of her 12-month training course at its Placerville site, on a part-time basis. Herrlie received her termination notice on March 24, 1980.

c. Central office staff

Greg Voelm succeeded Gerry O'Brien as the director of the Foundation on April 3, 1979. Prior to that date he

had worked as a consultant to Respondent for 2 years. Voelm was succeeded by Ted Tyson in February 1980.

Ted Tyson was a retired Air Force lieutenant colonel, with 23 years of service, when he was hired by the board of directors on February 11, 1980, to succeed Greg Voelm as the acting director of the Foundation.

Linda Weber Goldsmith was hired on October 1, 1978, by Respondent, as its first operations manager. In that capacity she was responsible for the operations of the Foundation, excluding secretaries and grant management. Her duties were divided into three basic areas. She was in charge of recruiting, hiring, and firing of personnel at the various facilities, including physicians and mid-level practitioners. In the area of finance, she prepared the budgets for each site and was responsible to see that the accounts receivables were handled properly. The third area dealt with patient management. This included the flow of patients once they entered the system to insure that the medical records were properly maintained. On September 6, 1979, her position changed from a full-time employee to an independent consultant through November 15, 1979, at which time her relationship with the Foundation was severed. Thereafter, Goldsmith started her own business as a medical management consultant.

Greta Nord joined the Foundation on March 1, 1979, as operations manager. Upon her arrival the duties of Goldsmith were split in half. Goldsmith continued to recruit physicians and mid-level practitioners, handle publicity, and team development. Nord was in charge of business systems. On July 1, 1979, the responsibilities between Goldsmith and Nord were again redefined on a geographical basis.

3. Foundation employment contracts

Near the latter part of November or the beginning of December 1978, a meeting was held at the Foundation's central office in Sacramento, which was attended by Dr. Andrus, Dr. Lackner, Vi Tara, Sue Wooten, Gerry O'Brien, and Linda Weber Goldsmith. The primary topic for discussion was the future of Dr. Lehrman. However, a crisis had preceded the meeting which deeply disturbed Dr. Andrus. He had learned that Sue Wooten was performing physicals at a nursing home on her own time, which he categorized as moonlighting.² He felt that the money she was receiving should have been funneled back into the coffers of the Foundation. Then his ire was further inflamed when he discovered that Goldsmith was guilty of a similar infraction by assisting faculty members at University of California at Davis to set up a family practitioners practice on weekends. Dr. Andrus announced that he wanted 150 percent of her time and did not want her to utilize her weekends for her own personal gain. To prevent future moonlighting, he proposed that all employees be placed under written contracts with the Foundation.

A meeting then followed at Pava's Restaurant where Dr. Andrus, Dr. Lackner, O'Brien, and Goldsmith discussed the future income of both the mid-level practi-

² Sue Wooten was employed by the Foundation as a FNP at its Placerville facility.

tioners and doctors. As operations manager, Goldsmith was acutely aware that the practitioners were unhappy with their salaries and benefits. The Foundation was also experiencing difficulty with the recruiting of physicians since they offered a starting base salary of \$35,000 plus incentives. During the dinner it was decided to increase the physicians starting salary to \$42,500. The FNP's income was also increased and their benefits improved. Dr. Andrus also designed an incentive plan and authorized Goldsmith to inform the mid-level practitioners of the changes. The salary changes were effective January 1, 1979.

Within a few days, Goldsmith began the task of meeting with the scattered staff, which she completed before the new year. As she met with each individual she explained the changes and informed them of Dr. Andrus' desire to have all employees sign an employment contract. Shortly thereafter, a mid-level practitioner wrote a letter to Goldsmith inquiring as to the status of the suggested contracts. The contracts had not been drafted and since she had neither the authority nor responsibility for drafting the contracts she turned the letter over to Gerry O'Brien. The latter simply altered a physician's contract and submitted it to Elkus for his approval. Prior to March 1979 all contracts for Respondent's employees had been handled exclusively by Robert Elkus and Director Gerry O'Brien. After that date Goldsmith became increasingly involved in the drafting of various contracts, with Dr. Lackner's contract being the one major exception. Shortly after Greg Voelm assumed the duties of the director on April 1, 1979, he informed Goldsmith that he would handle Dr. Lackner's contract. The physician contracts that Goldsmith handled fell into two categories. The first dealt with primary care physicians and the second pertained to the new emergency room doctors. She never became involved in the actual drafting of the mid-level practitioners' contracts.

When the mid-level practitioners' contracts were drafted, Goldsmith was assigned the responsibility to meet with each of them to distribute and explain the contracts. Unfortunately, Goldsmith had not seen the proposed contracts until 2 hours before she met with the mid-level practitioners in the Placerville lounge on February 21, 1979. The group reviewed the document line by line. Goldsmith tried to interpret the various paragraphs and provisions as best she could. With the exception of Sue Wooten, Goldsmith felt the contract was well received by the group. Wooten was very angry and distressed by a clause that prohibited moonlighting. Paula Bertram wanted to know if the contract was final. Goldsmith indicated she thought it was very final and urged them to accept it, since in her opinion it offered many of the items they wanted including both increased salaries and benefits. It represented a giant step forward. If they signed the contract, Goldsmith pointed out that in 6 months to a year it would represent a starting point to renegotiate a better contract. No one signed.

A short time later, Mary Baker, Paula Bertram, Suzanne Wooten, and Bonnie Bowman met for an informal lunch at the Placerville clinic. The discussion centered around clauses, with which they disapproved or did not understand. Two days later Bertram called Randy and

Linda Reed to obtain their views on the contract. Finally, all six agreed on a set of proposed amendments, which they wished incorporated in the final contract. The group took one of the proposed contracts and added their amendments. Bertram testified that they then forwarded the amended contract to Goldsmith, who did not respond. Goldsmith was of the belief that she received the amended contract directly from Bonnie Bowman, at Placerville, approximately a week and a half after she had presented the contracts to the group.

The revised contract contained 7 to 10 minor changes, which either tightened the language of the contract or increased their income. None of the changes related to other benefits, except for continuing education. Goldsmith delivered the amended copy to Dr. Andrus and proceeded to review it with him, line by line. She attempted to explain the thoughts and logic behind the proposed changes, as they had been explained to her by Bowman and perceived by the mid-level practitioners. He listened carefully until she reached the clause dealing with an annual group meeting. Dr. Andrus interrupted by expressing his view that this was collective bargaining and wanted to know if Mary Baker was behind it. Goldsmith answered that she did not think Baker was behind the changes, since she had not been present when the contracts were originally distributed. In fact, it was necessary for Goldsmith to call Mary Baker and tell her that the contract was ready for her to pick up and inspect. When Baker did receive the contract she commented that it looked fine. Goldsmith continued to explain the proposed contract changes to Dr. Andrus, but once he made his comment concerning collective bargaining, she felt he no longer listened. Dr. Andrus even testified that after he listened to the amendments he told her that he did not wish to get involved in negotiating with an organized union of nurse practitioners.

In retrospect, Dr. Andrus was convinced that the Foundation had handled the contracts very poorly. He had personally written many articles on the subject of contracts for nurse practitioners and was on record favoring the advisability of treating the nurse practitioners like all other professionals. They should receive employment agreements and contracts. Unfortunately, Goldsmith was of the mistaken belief that contracts were final and not subject to alteration. Management had failed to inform her that the contracts were simply a proposal. The intention of the Foundation was to share with the employees its initial concept of an agreement. It did not intend to appear inflexible. However, when Respondent received what it considered a very negative reaction from the mid-level practitioners, the executive committee decided to abandon contract concept and utilize an employment manual.

4. Greta Nord's relationship with River City

Greta Nord was appointed operations manager for the Foundation on March 1, 1979. She had been previously employed as an administrator and consultant with a medical group in Sacramento. Upon her arrival Linda Goldsmith's position was divided. Goldsmith remained in charge of recruiting physicians and mid-level practitioners.

and handling publicity, and team development. Nord's responsibility was to monitor the financial status of the clinics, develop and implement cost-effective systems, hire and train personnel when necessary, write job descriptions and office procedures, and assist in setting up new clinics. In general she acted as the liaison between the Foundation and the clinics, including River City.

On March 2, Goldsmith and Nord visited River City to meet Dr. Lackner and his staff. Before entering the clinic, Goldsmith warned that she had been the only individual from central office that had been able to get along with Dr. Lackner. After the introductions were made there was a long pause, and then Dr. Lackner said, "What can you do for us?" After she explained that she would assist him and his staff with business procedures, there was another long pause until Goldsmith initiated a conversation. After 5 minutes they left.

Gerry O'Brien arranged for scheduled meetings at each clinic to explain the new functions of the two operations managers. The prearranged meeting for the River City staff was set for 9:30 a.m. on March 14. Present were Mary Baker, Peggy Davis, Kathy Mead, Rosalind Weddle, and Dr. Lackner. O'Brien opened the meeting by introducing Nord to the staff and explaining the responsibilities of each manager. Before he could complete his comments, Dr. Lackner interrupted and said he knew all about it and he did not need to hear it. Dr. Lackner then stated he only had 20 minutes before he must leave to give a speech, and therefore he did not wish to hear about the division of their jobs. The discussion then turned to O'Brien's and Dr. Lackner's attempt to locate new office space. Near the end of the meeting, Dr. Lackner made a remark that was understood by Nord to mean that Dr. Andrus was running the Foundation in a communistic manner.³ She was shocked. As they drove away in the car, O'Brien was obviously disturbed over what he termed as the arrogant manner in which Dr. Lackner had received them. When Dr. Andrus was informed of the events, he simply stated, "We have got to get a working relationship going with that man."

Nord's typical weekly schedule consisted of 2 days in the office and 3 days in the field. As she visited each site, she would review with the staff the procedures for ordering supplies, billing, and in general checking records. She was able to visit all the clinics except River City. Whenever she attempted to make an appointment, someone was always unavailable. At the April 17 executive committee meeting, she met Rosalind Weddle who told her not to worry, since they had everything under control at River City. Both Weddle and Mead did inform her at the April 17 meeting that they needed a file clerk. They were given permission to search for a clerk and instructed to inform Nord if they found someone. Eventually they found a suitable clerk who started in May.

Early in May, Nord set up a luncheon meeting at the Auburn Restaurant with Weddle and Mead. They first met at the office, where she had an opportunity to glance at a few accounts. Nord asked a few questions concerning when they last billed and offered a few sug-

gestions. At lunch they discussed collection procedures. Kathy Mead mentioned that Dr. Lackner often worked through his lunch hour, but both Weddle and Mead were excused for their lunchbreaks. This presented a problem for both of them and particularly Rosalind, since she would have a difficult time catching up with the work generated by the doctor during the lunch hour. Weddle also noted that if Lackner would arrive on time, they would have less of a backlog. They concluded the time was not utilized in a proper manner. When they returned to the office, Nord provided a written procedure for the front office, primarily dealing with collection procedures. Before departing Nord scheduled a workshop for the entire River City staff for May 11.

Mead's recollection of the conversations at the luncheon differed materially from that of Nord's. The conversation began with Nord introducing herself and expressing a wish that there would be no hard feelings due to the fact that she was taking over for Goldsmith. Instead of hard feelings, she was greeted with support. Apparently, they both felt that their experience with her up to that point had been very favorable. Whenever they had a problem, Nord had responded rapidly to their calls for help and advice. As the weeks passed, this warm relationship and respect diminished. They felt she was no longer responsive to their calls or needs.

In general Mead denied that she had made many of the statements attributed to her by Nord. It was true Dr. Lackner was scheduled to arrive at 10 a.m. and often arrived at 10:30 a.m.; as often as three times a week he would work through his lunch hour; and he often worked until 5:30 or 6 p.m. after everyone else had gone home for the day. However, he never required anyone to work through their lunch hour. In fact, Mead once asked him at a staff meeting whether she was expected to remain during the lunchbreak. He told her absolutely not. Occasionally, if a patient needed a cardiogram, Mead would elect to take a late lunch in order to complete the work. Dr. Lackner's habit of working through the lunch hour did not make her work harder or generate additional work for Mead and she denied ever stating it did.

Dr. Lackner would direct her to reschedule patients due to conflicts in his schedule. These changes were never daily, nor even weekly. They arose when he was delayed at the hospital or when he attended medical meetings, lectures, classes, or delivered speeches. His attendance at these functions were related to the clinic and she could not recall ever rescheduling patients to allow him to attend to personal matters. Naturally when these changes were required it placed an additional burden on the staff and she had expressed her displeasure over the additional work.

Greg Voelm offered to accompany Nord to the May 11 meeting because of the hostility she had previously encountered. The meeting began Friday, late in the afternoon. She handed each staff member an agenda consisting of three topics, along with a survey of customary charges in the Sacramento area by family physicians. When Lackner saw this survey, he threw it on the table and declared it was absolutely worthless. Foundation

³ Dr. Lackner testified that his comment was misunderstood. He never called Dr. Andrus a communist. His recollection of this conversation is set out in sec. 5, e.

management was interested in the survey, since they feared the possibility that the patient flow was not increasing because they may have been charging too much. On the contrary the survey revealed they were in line with the community standards. Since Lackner refused to listen or discuss this area of the agenda, she moved on.

As a walk-in patient arrived, Dr. Lackner would leave the meeting and not hear the discussion. However, when he was present, he dominated the workshop in such a way as to interfere with the agenda. Quite often he would simply discuss the problems of the patient he had just seen.

Although little was accomplished at this meeting in regard to the agenda, Nord was able to observe how poorly the patient flow was handled at River City. The staff failed to follow the procedures which were standard in an organized office. Weddle had told her everything was under control when in fact it was not.

Upon Nord's and Voelm's return to central office they informed Dr. Andrus of the events of the May 11 meeting. They both agreed the meeting was not very productive and they were left with a negative impression. Nord was very upset. She was irritated and offended by the fact that when Dr. Lackner was present, he ignored their agenda and dominated the meeting. When Dr. Andrus ultimately decided to discharge Dr. Lackner the decision was based in part on the events of this meeting.

On June 5, Nord again returned to River City for a scheduled meeting and quickly discovered that the billing had not been completed as Weddle had previously assured her. It simply had not been handled properly. There was no filing system, sections were mixed up with the paid and unpaid bills. Much of the day was spent setting up a proper billing procedure. Weddle assured Nord that in the future she would follow her instructions. Nord advised her that she would return in a few weeks to review the progress. When she returned to central office Nord reported her findings to Dr. Andrus, who asked her to maintain notes on her findings and continue to pursue the problems until they were corrected.

The next meeting was set for June 15, 1979, which appeared to be an ideal day since Dr. Lackner would not be present. Upon her arrival both Weddle and Mead wanted to talk to her and they ushered her into a treatment room. Rosalind initiated the conversation by expressing her concern over the extent that River City was disorganized. She had previously worked for a doctor who handled 40 patients a day and she had no difficulty in completing his filing and transcribing. Both Dr. Lackner and Mary Baker combined were only handling 13 patients a day. Kathy Mead added, "The problem is Dr. Lackner needs a personal secretary. He is placing a lot of demands on us. As a matter of fact, I don't even feel that I have enough time to give to . . . the patients for instructing them on diet," and whatever other educational advice a registered nurse should provide.

Mead felt that Nord had initiated the conversations on June 15. She recalled that Nord wanted to know if Dr. Lackner's lateness was causing problems. Mead testified that his lateness did not present a problem for her since he never rescheduled patients. He simply continued to

see patients until there were none left. Mead also denied she had ever said that his lack of organization generated additional work for her or that she thought he was inconsiderate in his method of practicing medicine. Whatever additional work he produced was all patient oriented. He would have them read medical articles on different illness or methods of handling patients.

5. Bertram—Dr. Andrus confrontation April 21, 1979

Paula Bertram and Dr. Andrus had known each other both professionally and socially for 5 or 6 years. They considered each other good friends. Professionally, they had worked together at the University of California, where they were faculty members on the family practice program. Socially, she had visited the home of Dr. Andrus and Mary O'Hara-Devereaux many times. Dr. Andrus knew Paula's former husband, who was a resident, and he attended her second wedding.

On April 21, 1979, Paula attended a graduation ceremony for one of her students, at the Angelina Restaurant in Emeryville, California. As she circulated around the tables she met Dr. Andrus and Mary O'Hara-Devereaux, who were the coordinators of the family nurse practitioner program. He indicated he wanted to talk to her about "this petition and about this union." Since the ceremony was about to begin, with the presentation of the diplomas, she suggested they talk later. The ceremony was completed about 10 p.m. and their conversation did not end until around midnight.

In his testimony Dr. Andrus voiced his regret that he ever had this April 21 conversation with Paula. He told her that the FNPs were in error and making a serious mistake in trying to form a union at this particular juncture. He had spent many years in building the nurse practitioner program and encouraging its acceptance within the medical community, by addressing nearly every rural medical society in California. Since the physicians would react adversely to unions, the efforts of MLPs could not be in their own best interest. The FNPs could exist and function only when there was a physician who was willing to supervise them. His statements were not in opposition to employment agreements and contracts. He simply felt very strongly opposed to the unionizing of the FNPs. Their efforts had personally hurt him.

No one was present during their conversation, with the exception that O'Hara-Devereaux would occasionally walk into the room and urge Dr. Andrus to go home. Bertram recalled that Dr. Andrus initiated the conversation by stating, "What the hell is going on and what do you people think you are doing?" He expressed the belief that their efforts to organize a union was harmful not only to the Foundation but also to the FNPs, since it was the wrong time for such action. He considered the formation of a union so detrimental to the Foundation that if necessary he would get rid of all the mid-level practitioners in the organization. Paula quoted him as having commented:

If I have to, to make this thing a success, I will get rid of all the mid-level practitioners in the organization. It's well known that only marginal employees form unions and they do this to protect themselves. Don't you f— people want this place to be a success?

The argument continued over the meaning of success. Bertram felt success could not be measured solely by productivity charts and dollars generated for the Foundation. Success meant excellent quality of patient care, community work, time to perform audits, and adequate time for consultations with the physicians. Dr. Andrus replied, "Don't give me any of that damned Sunday School stuff. I know all that stuff and I tell you the only thing that matters is making this a financial success." At this point O'Hara-Devereaux interjected, "Let's go. This isn't getting us anywhere. Paula is not going to budge. You're just wasting your time."

After this conversation Bertram was very upset and was convinced it was not safe to deal with management on a one-on-one basis. She informed her fellow mid-level practitioners of the conversation.

6. Foundation dinner meeting May 7, 1979

Management decided to have an informal dinner with the mid-level practitioner's group in an effort to resolve their differences. Linda Weber Goldsmith favored the idea and was placed in charge of making the dinner arrangements and extending the invitations. She had advised both Dr. Andrus and Voelm not to include the Foundation's attorney, Elkus. When Mary Baker spoke to Goldsmith, the former specifically asked if the dinner had a formal agenda and would Elkus be present. Goldsmith replied that he would not be present and the gathering would simply be an informal get-together. They would be free to discuss any subject matter. All the mid-level practitioners were present, except Wooten. Management was represented by Dr. Andrus, Voelm, Goldsmith, and Elkus.

When the dinner was completed, Dr. Andrus looked at his watch and announced that they better get on with the meeting. The fact that Elkus was present and Dr. Andrus' words sounded like a formal meeting startled Mary Baker. Mary Baker then spoke up and remarked, "I don't understand why you don't just give us formal recognition so that we can bargain collectively with you." After 2 minutes of silence, Elkus explained that such a decision was not theirs and the matter could only be decided by the board of directors. The discussion that followed was primarily between Mary Baker, Elkus, and Dr. Andrus.

Dr. Andrus told the group that the Foundation was willing to meet with them individually or together to discuss their employment contracts. In fact he wanted to review the contracts at that time, with those who were present; however, he was adamant that the Foundation would not recognize them, "as a formal bargaining group, which is a union." Apparently a substantial portion of the meeting went back and forth between Mary Baker asking to be recognized as a collective-bargaining unit and Dr. Andrus' refusal.

The group of mid-level practitioners then began to discuss among themselves whether they should, at this point, discuss the contract and issues generated by the contract. Finally they agreed to review the contract, which consisted of going over the amendments they had previously given Linda Goldsmith. A few specific terms were agreed upon. The main thrust of the discussion remained recognition for the group for the purpose of collective bargaining. Dr. Andrus again explained his opposition to that view. He had wanted a meeting which was sociable and where everyone acted in good faith, in an effort to resolve the difference. The meeting ended and the problems remained unresolved.

7. Dr. Jerome Lackner

a. *Initial employment with the Foundation*

As the director of health for the State of California, Dr. Lackner, met with Dr. Andrus and members of the family nurse practitioners program. They were seeking his assistance in promoting legislation that would facilitate the utilization of the nurse practitioner and to improve their remuneration. Apparently, from this initial encounter, they felt they shared a common philosophy of the need for the family nurse practitioner program and the need to assist the medically underserved.

In his capacity as the director of health, Dr. Lackner had decertified state hospitals for their failure to meet the same standards required of private hospitals. This action jeopardized \$1-1/2 million of monthly Federal funds and resulted in his discharge by Governor Brown. After leaving state government, Dr. Lackner contacted Dr. Andrus in an effort to obtain a teaching position on the faculty of the University of California of Medicine in Davis, California.

Dr. Andrus explained that the income of faculty members was rather low and therefore asked him if he would be interested in working for the Foundation. In mid-June 1978, Dr. Lackner began working for Respondent as the interim medical director at their new Colfax facility until the permanent medical director, Dr. Henry Holmes, arrived in mid-September. In addition to starting up the new Colfax facility, Dr. Lackner was asked to assist in the preparation of a grant proposal for what eventually became the River City Family Medical Group. The grant proposal named Dr. Lackner as the anticipated medical director of the River City facility. The grant proposal was accepted by the administration on aging, HEW. The River City clinic was scheduled to open in January 1979.

In the interim period, Dr. Andrus requested Dr. Lackner to work at the Placerville facility in an effort to determine why it had failed to increase its productivity and income. Prior to this departure for Placerville, Dr. Andrus conferred with Dr. Lackner and informed him that he wanted to know what were the problems in Placerville. Although Dr. Andrus did not specifically state that he wanted to fire Dr. Lehrman, the then current medical director of Placerville, he described Dr. Lehrman as "arrogant, lazy, nonproductive, and a nonteam playing troublemaker." Dr. Andrus wanted to document

that the problems of low productivity and low profits were directly related to Dr. Lehrman's bad influence.

Initially, Dr. Lackner spent his time observing the functions of the Placerville clinic, then he began to see patients and became more of an active clinician than a management investigator. Eventually, he reported back to Dr. Andrus and Gerry O'Brien that he felt that Dr. Lehrman was a fine physician, a good clinician, and team leader. Low productivity was not his fault. The problem was with very bad management at the site. Since the family nurse practitioners were dissatisfied, he recommended that someone else should perform an in-depth interview of each Placerville provider in order to verify Dr. Lackner's findings. He further suggested that Dr. Lehrman should be given greater authority over the operations of Placerville and that the authority be clearly defined between the physician and the business manager. He also recommended that additional FNP's be hired. Dr. Bill Burr, vice president of the Foundation, made a site inspection and agreed with Dr. Lackner's findings.

In December 1978, Dr. Lackner began to work full time on the preparation for opening of the River City medical facility. He interviewed and hired Mary Baker, a nurse practitioner; Kathy Mead, a registered nurse; Peggy Davis, a social worker; and Rosalind Weddle, a receptionist.

Dr. Andrus testified that initially he was very happy with Dr. Lackner's philosophy and work. The interim assignments to Colfax and Placerville were handled to his satisfaction. However, their relationship slowly began to deteriorate under stress. Dr. Andrus became less enchanted with what Dr. Lackner was doing and increasingly more disturbed with what he was saying. Finally Dr. Andrus became convinced that Dr. Lackner was a talker and not a doer. Dr. Andrus was upset because he found Dr. Lackner was uncooperative, disorganized, a poor producer, hypercritical, disruptive, and more of a destroyer than a builder.

Near the end of 1978, Linda Weber Goldsmith urged Dr. Andrus to name Dr. Lackner the medical director for the entire Foundation. Dr. Andrus readily admitted he was somewhat personally sensitive to such a suggestion since he had created the Foundation. In addition, by this time, he was less impressed with Dr. Lackner's administrative abilities. Ultimately, the idea was rejected and Dr. Lackner indicated he was not interested in an administrative position, after having such a position with the State of California for 3 years.

b. Management conference with River City

The River City Medical Group opened its doors for patients in January 1979. Apparently after a few weeks both Dr. Lackner and members of central management felt it was advisable for them to meet and confer on the problems facing the new facility.

Dr. Lackner called Mary Duel and requested a meeting with management. The meeting was set for March 28 and was attended by Linda Weber Goldsmith, Dr. Andrus, Gerry O'Brien, and Dr. Lackner. Voelm did not attend, but occasionally walked in and out of the meeting area. The main topic dealt with billing, productivity, medical charges, and matters that affect these subjects.

The initial reason management sought this meeting was that they had been told Dr. Lackner was not billing. Dr. Lackner did feel there were occasions that a patient should not be billed. In other cases he would not bill a new patient on his first visit, since he was convinced the individual would not return. He viewed the first visit as an opportunity for the patient to inspect the doctor and determine if they would be happy with River City. If they were charged on the first visit, when they received little or no assistance, then they would not return. Therefore Dr. Lackner would often not charge on the first visit and then charge a higher than usual amount on the subsequent visit. Dr. Andrus disagreed with this approach. He wanted to charge for each visit for the services rendered.

It was Dr. Andrus' contention that if Dr. Lackner provided a service, then he should bill a legitimate charge for his efforts. If there was some problem with proper billing, then the River City staff should seek advice from the management team at the central office. Dr. Lackner suggested that since he was a member of the Union of American Physicians (UAPD), that the Foundation could utilize their office management expertise. This idea was totally rejected, and Dr. Lackner was reminded that the central office already had experienced individuals and therefore it was not necessary to look elsewhere to improve the financial status of the River City facility. Again Dr. Andrus complained in his testimony that Dr. Lackner monopolized the meeting, with endless explanations as to why he could not charge a full fee, nor increase the patient load, due to the complicated nature of his elderly patients and the limited space at River City.

Everyone agreed that the River City floor space was grossly inadequate. However, Dr. Andrus testified that based on his experience it was possible for one physician, with one examining room, to handle 20 to 30 patients a day and provide good medical care. He agreed that the ideal office should have three to four examining rooms. At this time, both Dr. Lackner and Mary Baker together were only seeing a total of approximately 10 patients per day. As a result of this low patient count, the River City clinic was unable to improve its financial condition. Dr. Andrus also encouraged Dr. Lackner to better utilize his staff by allowing the RN, family nurse practitioner, and social worker to handle more work, thus freeing the doctor to handle those areas which could only be handled by a physician.

Dr. Lackner raised several topics that he felt accounted for some of the problems that confronted the River City facility. He provided a detailed analysis of the space problem. The office was extremely small and thus interfered with the smooth flow of patients. Time was lost while the doctor stood outside the examining room while the patient disrobed. Due to the elderly nature of his patients he felt they required a greater degree of privacy than other patients. The limited space also prevented both Mary Baker and Dr. Lackner from working to their fullest capacity since they were in each other's way. The fact he dealt with the aging population also decreased the expected productivity. These individuals are not only slower but they have more problems than a younger

population. Often his patients were economically disadvantaged, blind, nonbilingual, mentally ill, and drug addicted. These patients demand more time of the physician who is treating them.

Apparently the meeting resolved very few if any of the problems facing the River City facility. It did reveal that Dr. Andrus' and Dr. Lackner's approach to billing, office management, house calls, and in general the approach to the business aspects of the practice of medicine were very different.

c. Placerville executive meeting

In February 1979, for the first time the various medical directors from each clinic were called to meet with the executive committee. The purpose of the gathering was to search for new methods of improving the communication between the administration and the various sites. Both Dr. Lehrman and Dr. Lackner suggested that there was a need to involve all workers in the executive committee meeting. The committee accepted their idea to rotate the executive committee meetings to the various sites and open them to all employees from janitor through physicians. It was felt an open meeting would give the employees the feeling that they had a part in the actual functioning of the Foundation. The idea was accepted by the executive committee, with the understanding that occasionally their meetings would be closed when dealing with confidential matters. The first open meeting was scheduled for March 20, 1979, at the Sierra Clinic in Placerville, California. There were actually two meetings held on May 20 that preceded the scheduled meeting.

With the exception of Randy Reed, all of the mid-level practitioners met for a dinner meeting. The discussion that ensued quickly revealed that they had a common interest and cause. The draft contracts which they had received from Goldsmith were nearly all the same. The idea began to germinate at this dinner that it may be in their best interest to deal with the Foundation as one group as opposed to individuals. It was decided that Paula Bertram would speak on their behalf at the executive meeting. They wished to be recognized as a group, with common interest, for the purpose of bargaining a contract. They proceeded to the meeting, compelled by their curiosity as to what would happen at the first open meeting and a desire to learn what had happened to their contracts.

Meanwhile, Dr. Andrus, Elkus, Goldsmith, and Nord also had a strategy gathering which preceded the open executive meeting. It was then that Goldsmith heard for the first time that the mid-level practitioners would not receive a contract. Elkus suggested that in lieu of a contract they should receive a letter of intent to hire and an employment letter. In addition, an employee handbook would be developed, which would incorporate common conditions of employment and thus eliminate the need for an actual contract.

The meeting was chaired by Dr. Andrus and Elkus. It was attended by over 35 people. A number of items were on the agenda, in addition to the mid-level practitioners' contracts.

A chart was presented, which outlined the division of authority and responsibility between Linda Weber Goldsmith and Greta Nord. Dr. Lackner attacked the chart as unworkable. He wanted control consistent with responsibility and suggested a serial rather than a parallel graph would be better suited for that task. The chart allowed for an overlap of responsibility between Nord and Goldsmith. He urged that the convoluted organizational chart would lead to further confusion, since it was impossible to determine who should be called for assistance, Nord or Goldsmith. He suggested that one or the other should be in charge. The problem in the past was that Dr. Lackner never knew who he was to deal with at the central office and the proposed chart further confused the situation. Nord felt Dr. Lackner's comments were intended as a direct attack on her.

Dr. Andrus cited Dr. Lackner's reaction to the chart as a perfect example of how Lackner functioned at meetings. He monopolized the time and addressed himself to every issue. Dr. Andrus felt the chart was of relatively little importance to their meeting and yet Dr. Lackner managed to stir a great deal of dissention and problems over it.

The major topic of the evening dealt with a multifaceted problem raised by the midwifery in the Placerville area. The obstetricians and the pediatricians in this area were categorically opposed to home births. The stated position of the Foundation, prior to the arrival of Dr. Lehrman, was that of an open-door policy. They would accept, for prenatal care, patients who wished to have their children delivered in their homes. Dr. Lehrman agreed in principle, that a family should have the right to have alternate birthing experiences in their own homes. The crisis arose due to the fact that there were no adequately trained nurses in the area to act as midwives. The one nurse who handled such births was not trained in obstetrics. As a result a number of tragedies occurred. When complications arose she would send them to an emergency room with instructions not to admit that she had anything to do with the unsuccessful delivery. After a few unfortunate mishaps and tragedies, it became obvious that the physicians were unable to obtain support from the consulting staffs of the hospital, since they were opposed to the home-birthing experience. Dr. Lehrman explained that in the vast majority of cases a family physician can provide the necessary medical care for a delivery. However, there are a percentage of cases where the complications demand expertise beyond the training of a family physician. Therefore, he felt it was wrong for the Foundation to give women the impression that if anything went wrong the Sierra clinic doctors would be there at the hospitals to assist them, when this was a total misrepresentation of the facts. Under those circumstances, at the very most, the Foundation doctor could only act as an agent in an effort to locate a specialist to undo whatever harm had occurred. The physicians of El Dorado County had personally criticized Dr. Lehrman and his colleagues for their involvement in home birthing.

The conflict of opinion concerning home deliveries between Dr. Andrus and Dr. Lehrman predated the March

20 meeting. Soon after his arrival at Placerville, Dr. Lehrman had expressed the opinion that they should withdraw from providing prenatal care for women interested in home deliveries. His fellow clinicians, including Dr. Hertz and the FNPs, were less adamant and believed they could provide some service to these women. When he discussed the issue with Dr. Andrus, the latter felt very strongly that the Foundation should maintain an open-door policy. As a precaution, disclaimer letters were signed by the patients, which outlined that the Foundation staff would not be with them during their home delivery and if any complications arose they would not be responsible. Throughout 1978 Dr. Hertz found himself involved in several stressful situations. Fortunately, there were no deaths but many sick babies. The FNPs became convinced that they were providing a disservice, as they became more familiar with the practice of obstetrics. Finally, everyone at the Sierra Clinic agreed that they should not provide the prenatal care unless the mothers were willing to have the deliveries in the hospitals. Dr. Lehrman informed their OB patients, the heads of the departments of OB-GYN and Pediatrics at the hospital, and Dr. Andrus of the new policy. For a month Dr. Andrus did not respond to the letter. Then a newspaper reporter, who was writing an article concerning home births, questioned Dr. Andrus regarding Placerville's new policy. Although Dr. Lehrman was then the medical director of the Sierra clinic, Dr. Andrus not only criticized the change but told him he lacked the authority to make such decisions. As a result of this confrontation, the midwifery issue was added to the agenda.

Dr. Lackner lent his support to Dr. Lehrman's position. He felt that politics or economics should not enter into the issue. That this was strictly an issue of good patient care, a clinical judgment. He challenged the right of anyone, including the Foundation management, to interfere with the right of a physician to decide whom he will treat.

Dr. Andrus testified that although he may not have agreed with Dr. Lehrman's conclusions, he certainly could accept his method of debate and the presentation of his views. In contrast he saw Dr. Lackner's presentation as a performance, an attempt to take over the meeting. Once again he perceived Dr. Lackner's statements as deliberately divisive. He considered them a vitriolic attack on him personally, as well as the Foundation. On several occasions Dr. Andrus described Dr. Lackner's approach to his patients as "God like." Dr. Andrus felt that a doctor was there to advise and assist, even when the patient failed to heed that advice. Whereas, Dr. Lackner would refuse to care for a patient who had failed to follow his orders to give up alcohol, drugs, or excessive medications.

Ultimately the executive committee supported Dr. Lehrman, since it concluded his assessment was in keeping with the best interests of the Foundation, from a medical and legal standpoint. Dr. Lehrman's analysis of why he received the support of Dr. Andrus was a bit more cynical. It was his belief that Dr. Andrus altered his opinion only after the group explored the dangers of malpractice. Elkus had voiced the opinion that he was

very doubtful that their malpractice insurance covered problems that arose from home birthing.

The meeting had started at 7:30 p.m. and it was 11 p.m. when the group completed the discussion of midwifery. All agreed that the topic had been discussed *ad nauseum*. Dr. Andrus testified that since the meeting had lasted such a long time he started to close the meeting, without discussing the mid-level practitioners' contracts, which was the last item on the agenda. This oversight was an inadvertent result of his desire to close a meeting that had lasted too long and not an attempt to avoid the issue of contracts. As the meeting began to adjourn, Paula Bertram called their attention to the last item on the agenda. She explained that they attended the meeting to learn the status of their contracts. Either Dr. Andrus or Elkus responded that the Foundation was withdrawing the proposed contracts. In place of the contracts, each employee would receive an employee handbook or manual which would cover the same areas previously incorporated in the proposed contracts, along with an employment letter that contained the individual's salary and benefits. Bertram pressed that they wished to negotiate with the Foundation as a group, not only subjects dealing directly with their economic benefits, but also in the area of quality care for their patients. Dr. Andrus announced he reserved the right to negotiate with any one individually, but he refused to recognize them as a group. Goldsmith expressed her shock and displeasure with the withdrawal of the contracts since she had been given the task of presenting them to the FNPs. Now she felt whatever credibility she may have had with the group was destroyed.

d. *The Auburn executive meeting*

The next executive meeting was held on April 17, 1979, in conjunction with an open house at the Auburn facility. Prior to the meeting several mid-level practitioners gathered together to sign a "show interest petition," in order to be recognized for the purposes of collective bargaining. At that time Linda and Randy Reed, Paula Bertram, Bonnie Bowman, and Mary Baker signed. Suzanne Wooten signed the following day.

After the social portion of the meeting was concluded, the executive meeting began. A wide range of subjects were discussed. Voelm testified that Dr. Lackner held the floor for a long time and voiced very strong criticism of the Foundation management. The first topic dealt with the problems caused by Gerry O'Brien's resignation. He had been involved with the various bank accounts utilized by Respondent. Dr. Lackner questioned each bank account and the reason for having such a large number.

Dr. Andrus announced to the audience that the Foundation was interested in expanding the Colfax and Auburn base groups to include the health maintenance organization for the foothills of the Sierras. Dr. Lackner opposed the concept of the HMO, because they were not in the best interest of quality care for the patients and they were not in the best interest of cost containment. Dr. Lackner said he was unhappy to hear of possible expansion at a time when the Foundation had announced

several financial problems and an inability to get the present projects off the ground.

In general the Foundation explained there was a growing financial crisis at the Placerville site, since they were rapidly reaching the day when they would no longer receive financial support from the Robert Wood Johnson fund and they still were unable to be self sufficient. As a result, management had previously instituted what became known as the "speed-up." The family nurse practitioners were informed that they would increase the number of patients seen in the course of a day in order to generate more dollars. A long discussion ensued with management. Both Bertram and Bowman argued that by increasing the number of patients they would not be able to perform the tasks expected of a nurse practitioner, such as educating patients, consultation with the physicians, and the maintenance of a good health care program for their patients. Dr. Lackner agreed with the FNPs.

Dr. Lackner found it difficult to believe that the Placerville clinic was not a financial success. It was financially well-endowed from the beginning; it received free rent and was subsidized by the Federal government with CETA workers. In contrast he knew many physicians who were forced to borrow money to start their practice, pay high rent, and yet they made a very good profit. Dr. Lackner then voiced the opinion that it was just as easy to blame the Foundation management as it was to blame the Placerville staff for its financial failures. In fact, none of the facilities were financially successful and the one thing they all had in common was the Foundation's central management. Therefore, he suggested that outside management consultants should be retained. Dr. Lackner testified, "I was told that was totally out of order. The Foundation has all of the management expertise that it needs to handle this situation. I sensed some unhappy vibrations coming in my directions."

Voelm's recollection of this portion of Dr. Lackner's comments was more caustic. According to Voelm, Dr. Lackner stated that the problems at Placerville were an example of administrative malpractice. That based on the Foundation's past performance, its management was not capable of performing a proper evaluation of itself and therefore needed the assistance of outside consultants.

Dr. Andrus said that Dr. Lackner was correct if he sensed bad feelings from management at this meeting. The final decision to terminate Dr. Lackner was partially based on his conduct at the April 17 meeting. Dr. Andrus testified:

I saw Dr. Lackner's role as a destructive role rather than a constructive role, hypocritical, destructive role, that he was divisive, that he tended to criticize and then dominate meetings as if they were some sort of a platform. He was personal in his attacks. I looked at him as a very negative force in trying to get something positive done.

On the return trip to Sacramento, Elkus said in reference to Dr. Lackner, "That pompous ass. Why do you put up with him?" Dr. Andrus, Voelm, and Elkus all discussed the fact that Dr. Lackner had dominated the

meeting and Voelm decided to time Dr. Lackner at the next meeting.

e. *May 1, 1979*

At Dr. Andrus' invitation, Dr. Lackner joined him for supper at Nicole's Restaurant on May 1, 1979. The dinner and the meeting lasted 1 hour and 15 minutes. Dr. Lackner looked forward to the dinner since he had previously suggested that the two men should meet more often to discuss and explore what was good and bad in the River City operations. This dinner provided him with the opportunity to suggest methods of improving the Foundation. When Dr. Andrus specifically asked if he had any problems working with him, Dr. Lackner responded that his only problem was the fact that Dr. Andrus was too busy to function as the chief director. In fact, he renewed his previous recommendation for Dr. Andrus to take a more active role as the spiritual clinical director of the entire Foundation. In an effort to provide Dr. Andrus with greater insight into the daily problems and operations of the various clinics, Dr. Lackner encouraged him to clothe himself in a white coat and with his stethoscope in hand, stand next to the clinicians as they performed their daily tasks. In this manner he would avoid many personnel problems and would not only gain the insight and perspective of the employees, but would be accepted as a colleague. As in the past Dr. Andrus agreed with the suggestion that he should take a more active role as the director. Unfortunately, his extremely active schedule did not always permit such activity. In the alternative, Dr. Lackner asserted that, if Dr. Andrus could not find the time, then he should definitely appoint someone who could function as a very active medical director.

As a refugee from 3 years of administrative work as the director of health for the State of California, Dr. Lackner testified that he was not interested in the position of director of the Foundation. He recommended Dr. Mondonaro, whom he had brought into state government as the head of the division of substance abuse. From his observation, he concluded that she saved a failing department. In his opinion she was not only a good physician, but possessed exceptionally fine administrative and budgeting skills.⁴

Near the end of the conversation Dr. Andrus expressed his concern over what he perceived was Dr. Lackner's destructive attitude. The latter's derogatory comments seemed to set him against the Foundation. Although he was always talking about bringing River City in the black within 3 months, he simply did not produce. When he attended meetings he seemed to utilize them as a platform, to continue his verbal assault on the Foundation. As an example Dr. Andrus said he was told that Dr. Lackner had called him a communist. Dr. Lackner testified that he was totally flabbergasted by this comment, since Dr. Andrus' political, social, and economic philosophy and life style were totally anything but that of a communist. He responded, "Absolutely not, Hughes.

⁴ Dr. Mondonaro was interviewed by Dr. Andrus and Gerry O'Brien, but was not offered the position of director of the Foundation.

You, a communist? It is like calling J. Edgar Hoover a communist." Then he recalled that during the most recent reorganization of the top management, that Nord and Goldsmith made a visit to the River City clinic for the purpose of redelineating the roles of these two women. The air was full of tension between two competing managers. As the two managers were explaining the changes of the Foundation and the new management styles, Dr. Lackner commented that they were trying to decentralize management and then said, "Hughes has the management style of an aging geriatric Stalinist." When he observed their blank expressions, he realized that the metaphor was outside of their vernacular. He then added, "You know, communist." He was referring to a management style in which there is a superficial diffusion of responsibility and delegation of responsibility, when in reality there is only a structural diffusion. Functionally, it is a very hierarchical strong one person leadership. In reality the power remains central, and only the responsibility for what goes wrong is actually delegated. After he made these comments he realized he had made a *faux pas*. Neither of the managers were familiar with the terminology. Although he felt Dr. Andrus managed in this style, Dr. Lackner did not believe that the comment raised the inference that Dr. Andrus' philosophy of life was that of a communist.

As they left the restaurant, Dr. Andrus turned to Dr. Lackner and said, "Jerome, I beg you. Will you please look at yourself? Please examine yourself and see what you are doing as a negative destructive force." They parted with Dr. Lackner being warned that if he did not like the way the Foundation was administered he should go elsewhere or start his own clinic. It was simply not compatible for him to remain at the Foundation under the present circumstances.

f. Dinner meeting with Dr. Mondonaro

When Dr. Lackner served as the director of health for the State of California, he hired Dr. Mondonaro to head the department's division of substance abuse. They became good friends. On several occasions she expressed a desire to leave state government and enter private practice. Since she lacked practical experience and knowledge needed to open an office, she told Dr. Lackner she would like to meet the members of his staff. In order to accommodate her request, Dr. Lackner arranged for what he thought would be an informal dinner at the Alhambra Restaurant on May 24, 1979. The purpose of the dinner was not to start a new practice with Dr. Mondonaro, although at times Dr. Lackner freely admitted he felt like leaving River City. The members of his staff and their spouses were invited by Dr. Lackner. In attendance was Dr. Lackner, Mary Baker, Peggy Davis, and Kathy and Mike Mead, her husband. Dr. Mondonaro arrived with friends, social workers Andrea Sally Child and the latter's husband.

The party sat at a long table with the doctors sitting at opposite ends of the table. Dr. Lackner sat opposite Mike Mead, who spent the evening describing to Dr. Lackner his interest in real estate, apartments, investments, and inflation. Later Dr. Lackner complained that he was Mike Mead's captive audience on a subject that

did not interest him. As a result of Mead's continuous banter and due to the location of the two doctors, Dr. Lackner was unable to converse with Dr. Mondonaro and could only occasionally hear her questions and comments, concerning the economics of private practice. What type of investment was required to start a practice? How many nurses, secretaries, and receptionists were needed? What were the salaries of such individuals?

Both Kathy Mead and Mary Baker were very surprised that the dinner was not simply a casual friendly dinner. Dr. Mondonaro actually had a written agenda and proceeded to question them at length. Both agreed that while they were in the restaurant Dr. Lackner said very little, which according to Mary Baker was very unusual. Nor could they recall either of the doctors discussing the possibility of taking River City patients with them. Although Dr. Mondonaro raised the possibility of a joint medical practice, Dr. Lackner did not address himself to that subject while in the restaurant.

Mary Baker was seated next to Dr. Mondonaro, who stated she wanted to enter private practice by July. She questioned each member of the River City staff, except Dr. Lackner, as to their salaries and their willingness to work for her. Each staff member, including Peggy Davis, quoted their salaries and showed some interest in the potential openings.

As the group left the restaurant, the conversation continued on the sidewalk. Dr. Lackner mentioned that he did not know any physicians in private practice who were not doing well. The key to success was good management. Therefore the first thing Dr. Mondonaro should do is retain the services of a good consultant. With the group standing around them, Dr. Mondonaro asked Lackner if he were still happy where he was working and would he like to join her in a new practice. He responded, "I don't think I can right now." Apparently the two doctors had an ongoing "fantasy" of some day being involved together in a professional venture. However, on May 24, 1979, Dr. Lackner stated he had no intention of leaving River City. Although it was appealing to think of working with Dr. Mondonaro, he felt it was totally impractical. Her expertise was in pediatrics and his was in the care of adolescence to the elderly. As a result their practices were not compatible. They could not cover for each other on weekends or in the evening. In addition she wanted a practice that would allow her to see patients 20 to 30 hours a week, and devote the balance of her time to research and writing. In contrast he wished to devote the major portion of his time to patient care. Thus her work habits would present an undue burden on her associate. In addition Dr. Lackner felt a responsibility to the social worker, Peggy Davis. If he went into private practice he simply could not afford to pay her.

Mary Baker was very disturbed by the dinner, since she was under the impression that the affair was strictly social. She felt that Dr. Mondonaro had taken unfair advantage of the circumstances. Dr. Lackner assured her he too felt the tone of the meeting was intended to be more casual. They both agreed that Dr. Mondonaro was naive as to the demands of the private practice of medi-

cine. Baker felt it was totally impractical and unrealistic to feel you could maintain a practice on a part-time basis.

Subsequently, after he was terminated by the Foundation, Dr. Lackner did begin his own private practice. Dr. Mondonaro did not join him. In fact she did not leave her position with the State of California.

On June 12, 1979, Peggy Davis informed Greg Voelm that she had attended a dinner meeting with the River City staff, where Dr. Mondonaro and Dr. Lackner discussed the opening of a new medical practice in downtown Sacramento. On the same day Voelm reiterated Davis' comments to Dr. Andrus and Elkus. Since they were about to begin the board meeting where they were discussing the employee unionizational efforts, they did not have time to discuss the May 24 meeting in depth. Dr. Andrus was very upset. He recalled that Voelm had told him the two doctors spoke to the staff of their plans to take over the River City Family Medical Group.

g. NLRB representative hearing

The MLPs filed their petition for certification on May 21, 1979, with Mary Baker as their representative. The hearing was held in Sacramento, California, on June 15, 1979, with Mary Baker, Bonnie Bowman, Paula Mills Bertram, Dr. Lackner, and Greg Voelm in attendance.

Dr. Lackner first learned of the June 15 hearing, some time after the executive meeting in Auburn, April 17, 1979. During the intervening period, he overheard a "running commentary" of the events leading to the organizational efforts of the MLPs. Of course, the River City office was extremely small and it would have been difficult to avoid hearing the conversations of others.

Although Dr. Lackner is also an attorney, he denies that he ever gave any employee legal advice. He had previously provided Mary Baker with the name of an attorney, Ted Costa, whom he felt would be able to furnish her with a list of labor law experts in the area.

On June 14, 1979, Baker invited Dr. Lackner to join her, along with Bertram and Wooten, for dinner at Epaminondas. He arrived late and everyone had finished dinner. They were discussing the hearing which was set for the following day and reviewing the events that had transpired. Since he had never attended a representative hearing he was unable to advise them if they needed legal assistance. In general his advice was limited to, "Just be calm, be relaxed, have in your own mind the history, so you can give a clear consistent picture from your own perspective and everything will be all right."

Dr. Lackner was neither subpoenaed nor requested by anyone in any manner to be present at the June 15 hearing. In fact, no one was even aware that he would attend the hearing. Dr. Lackner explained that his motivation to appear grew out of several factors. During his tenure in government he acquired the habit of attending hearings. In this particular case since he had a personal involvement, knew all the parties, and believed the issues were interesting and vital, he decided to attend as an observer.

The Foundation was represented by Wesley J. Fastiff. When Fastiff called Dr. Lackner as a witness, the latter was surprised. They had never met, nor conferred with each other. After Fastiff completed his direct examination, Dr. Lackner approached Baker and informed her

that he was surprised that they called him as a witness. Mary Baker recalled Dr. Lackner for additional questions.

Later, during the present trial, Dr. Lackner expressed the belief that he was fired because Fastiff had called him as a witness without first asking what were his opinions. He was convinced that his answers, given under oath, made the Foundation very unhappy and resulted in his discharge.

After reviewing over 700 pages of Dr. Lackner's testimony, it is obvious that Dr. Lackner is not only very loquacious, but he also has an excellent command of the language. As a result, his June 15 testimony was bogged down with lengthy semantic distinctions. Apparently, he made a sincere effort to provide exacting testimony, which unfortunately resulted in friction with Respondent's attorney. In answering questions concerning the distinction between "consulting" and "talking" with patients, Dr. Lackner stated: "That is correct. Everybody in the office talks with patients." The Foundation's attorney then responded, "Just try to answer the questions and don't be a wise guy." Finally Dr. Lackner complained, "I am astonished. I have never been shouted at by an attorney from this distance." Later in reference to Dr. Lackner's explanation of the role of each employee at River City facility, Fastiff categorized the doctor's response as, "it's a lot of baloney." As the hearing progressed they continued to spar:

Fastiff: Does the social worker make joint visits with the family nurse practitioners?

Dr. Lackner: I think on one occasion I asked them both for purposes of their own edification to talk to a patient, but that only—

Fastiff: (interrupting) The answer is "Yes"?

Dr. Lackner: Well, in a limited sense.

Fastiff: Is the answer "Yes?" Don't give me that bullshit.

Dr. Lackner: Yes.

Fastiff: Is your answer "Yes?"

Dr. Lackner: Yes, it was.

Fastiff: Now, spit forth.

Dr. Lackner's testimony was limited to describing the functions of various employees throughout the Foundation's clinics, with emphasis on River City. He did not make one critical or disparaging remark concerning the Foundation, Dr. Andrus, or any other member of management.

Greg Voelm was also present and testified. Later that evening he called Dr. Andrus and explained what had occurred and who had attended the hearing. Since he had never attended a representative hearing, he was unable to fully comprehend what he had observed. In general he described the hearing as long, Dr. Lackner's testimony as inconclusive and at times humorous, and the exchange between Dr. Lackner and Fastiff as acrimonious. On the following Monday, June 18, 1979, he repeated his observations to Linda Goldsmith, Mary Duell, Ruth Gomez, Dr. Hank Holmes of Auburn, and Greta Nord. Regarding this conversation Goldsmith testified that she walked into Greg Voelm's office and asked him

what salary figure she should place in Dr. Lackner's contract and he replied that they were not going to mail it out, that Jerome, "had testified in favor of the nurse practitioners."⁵

Voelm denied that he had ever stated that Dr. Lackner testified in favor of the nurse practitioners. In fact he felt the doctor's testimony was inconclusive.

Dr. Andrus' main recollection of his conversation with Voelm was that the hearing was both confusing and humorous. Apparently there was some humor in the fact that Dr. Lackner had not anticipated that he would be called as a witness. Dr. Andrus recalled the questions and answers were lengthy and confusing which also added to the humor. No one told him that Dr. Lackner's testimony was pronurse practitioners. The effect of Dr. Lackner's testimony was to delay his departure. Dr. Andrus insisted that it did not play any part in the decision to terminate. In fact, Dr. Lackner was not fired at that time because Respondent was concerned that such action might be misconstrued as retribution for his having testified.

h. Management meeting with Dr. Lackner, at Sambo's Restaurant June 19, 1979

Dr. Andrus' major concern with Dr. Lackner was not only his low productivity, but also his attitude, contentiousness toward central management, and the vitriolic personality attacks on those with whom he disagreed. Dr. Andrus wished to have one more conversation with him, in an effort to convince him to be more constructive and assist in the success of the River City clinic. It was imperative that productivity be increased in order to insure that the whole operation be viable and economically sound. If he could convince Dr. Lackner to contribute to the increase of productivity, then Dr. Andrus contended he was willing to retain Dr. Lackner.

Both Dr. Andrus and Voelm recalled that their meeting was originally arranged on June 12 for June 14, 1979. At Dr. Lackner's request the meeting was reset for Tuesday, June 19, 1979. Dr. Lackner denies that the meeting was ever set for June 14. It was his recollection that Voelm called him Monday, June 18 and requested a meeting. Since he canceled his patients on the previous Friday, June 15, in order to attend the representative hearing, his schedule for the coming week was very crowded. Therefore he suggested that if the subject matter were not urgent that they meet the following week. Voelm assured him that the meeting was important and that Dr. Andrus wished to confer with him. Since Dr. Lackner lived in Davis, California, and Dr. Andrus was scheduled to teach a class there, it was agreed that they would meet for a breakfast meeting at Sambo's Restaurant.

It was Dr. Andrus' experience that whenever he attended a meeting with Dr. Lackner, that the latter would monopolize the conversation or agenda. At the May 15 executive committee meeting Voelm timed Dr. Lackner, who spoke for 40 minutes during a meeting that lasted 1

hour and 30 minutes. On that occasion Dr. Lackner was not scheduled to speak. With this past experience in mind, Dr. Andrus was determined that he would dominate their meeting in a strong and forceful manner. He readily admitted that in an effort to dominate the conversation he used street language. It was his intention to emphatically impress upon Dr. Lackner how he felt about Dr. Lackner's attitude, low productivity, disorganization, late arrivals, and poor attendance. Dr. Andrus had also observed that whenever anyone questioned or criticized the River City clinic or Dr. Lackner, he would always manage to provide a rationalization for the failures. Dr. Andrus concluded that this was simply a method he had developed to cover his inadequacies, low productivity and poor performance.

Dr. Lackner described Dr. Andrus as having a grave look when they met. Voelm made only an occasional remark as Dr. Andrus proceeded in a loud running, almost uninterrupted tirade. Whenever Dr. Lackner would try to respond to the various charges, Dr. Andrus would answer, in a heated manner, "off that bullshit," "sick rationalization!" Dr. Andrus said, "You are a poor producer. You are lazy. You are a bad team leader. You promised us fiscal viability. You are ripping us off. You are cheating us. You are shooting at us. You are critical of us. You are an unusual combination of a nonproducing shooter. You are not going to rip us off anymore. We are not going to pay you \$45,000 to do this. You don't work well with people." When Dr. Lackner asked with whom he could not work, Dr. Andrus responded, "You can't work with me." Peggy Davis was not mentioned.

Then Dr. Andrus handed Dr. Lackner a two-page document, which was titled, "River City Family Medical Group." The first page was a recapitulation of the first 5 months of 1979. It revealed the number of patients and the revenue produced by Dr. Lackner and Mary Baker, FNP. The second page was a productivity projection for July, August, and September 1979 for the River City clinic. The projections reached through the input and calculations of Dr. Andrus, Nord, and Voelm. The second page began: "Due to the temporary lack of office space and the manifest inability of the River City medical staff to meet initial productivity projections, the projected income expectations have been revised . . ." As Dr. Lackner received these documents he was "informed" this is what we expect, "You will achieve these goals or you are out."

After the meeting Dr. Andrus directed Voelm to compose the following letter which was mailed on June 21, 1979:

Dear Dr. Lackner:

This is a letter of warning regarding your poor performance to date and a demand for specific improvements in the immediate future.

This letter is to document the meetings we had on the 28th of March, 1979 and the 1st of May, 1979 and the verbal instructions I gave you on the 19th of June, 1979. As I told you on the latter date, if your performance does not improve and the production of your office does not increase to the rea-

⁵ The parties stipulated that Goldsmith's affidavit of December 14, 1979, did not contain a reference to her conversation with Voelm, nor did she quote Voelm as having said that Dr. Lackner testified in favor of the nurse practitioners.

sonable levels which I gave you in writing at that time (and which I give you again as an attachment to this letter), then your employment with the Foundation may be terminated.

On March 28, we discussed the financial and productivity problems of your practice. You cited the lack of space and difficult time consuming patients as reasons why your practice team was even then lagging behind the projections you had accepted as reasonable. You were told that you should bill for all the services you provide and make the best use of your temporarily limited space by efficient scheduling. You were offered the help and advice of Foundation Central Services, but you never did make any specific requests for assistance. What technical support Central Services did subsequently provide had to be initiated by Management. Our advice often met with contention rather than support.

As I have told you, we have a highly qualified administrative staff in the Central Office. You have also had available outside consulting from Dr. William Wilson who will be returning for a follow-up visit in three weeks. Because you have not properly used the management help already made available to you, I forbid you to hire additional outside "experts" to review your practice and Foundation business. If you need management help, make a specific request.

On the 1st of May 1979, we met in Sacramento. I told you then that I was not satisfied with your performance as a practice leader, your productivity, or your attitude. The examples I gave of your shortcomings as a leader included your failure to organize your practice effectively. Your productivity deficit was obvious then as it is now. Your bad attitude I illustrated by repeating reliable reports that you had attacked Foundation Management and me personally in meeting with other employees—including the charge that you had called me a Communist. This you denied.

On the 12th of June, 1979, I scheduled a meeting with you to discuss the deficiencies in your performance. This meeting was held on the 19th of June, 1979 in Davis. At that time, I told you of the following areas of poor performance by you and the practice you head which must be corrected immediately:

1. *Poor Productivity*—You and your Nurse Practitioner, Mary Baker, averaged less than seven patients each per day in May.

2. *Failure to Meet the Objectives of the Grant which Subsidizes your Practice*—You have not even begun to establish outreach sites in senior residence facilities, planned for the services of a clinical pharmacist, or utilized the full professional competence of your staff social worker. This grant is a legal contract between the Foundation and the Federal Government. Failure to meet its stipulations jeopardizes both your practice and the Foundation's reputation.

3. *Irresponsible Financial Practices*— You refuse to bill for extensive services you render, and you actually turn away new patients at the same time your office is making less than half of the amount budgeted. Your office staff is way behind in billing and your documentation of services appears chaotic.

4. *Bad Time Management*—You spend days away from your office on business which does not relate directly to the success of your practice. You have been showing up in the morning regularly at 10:30 a.m. or later. You cancel and reschedule patients with unwarranted frequency and have failed to arrange call coverage for yourself in the more than-eight months you have been working on this project.

You must improve your performance now. I am attaching both documentation of your previous productivity and the reasonable levels I will expect you to meet for the next three months. I am using productivity as one initial gauge of your performance because of its objectively quantifiable nature, but I am requiring your improvement in all noted areas as a condition of your continued employment.

Sincerely,

/s/ Len Hughes Andrus, M.D.
President

Dr. Lackner testified that prior to the June 19 meeting he had never been told by anyone that his productivity was lacking, nor had he seen any projected goals for his production. He had seen a projected budget when River City was in the planning stages. However, he felt these projections were mere educated "guesstimates over expenses, and income." Nor had he received any written communications which he would interpret, "by any stretch of the imagination," as an adverse commentary on his production or as a person, either as a professional, team member, or employee. In fact the only letter he received was a commendation letter, dated February 23, 1979, which was voted unanimously by the Foundation's board of directors, at their last meeting. The recognition was "for his outstanding services to the Foundation in starting up both the Colfax and Sacramento practices."

i. *Silva Case*

Dr. Lackner received two independent telephone calls concerning Mr. and Mrs. Silva. The one call was from the Foundation's social worker, Peggy Davis, and the second call was from a visiting nurse. He was informed that the couple was very sick and desperately needed a doctor who was willing to come to their home. Since the couple had such a multitude of medical problems the nurse did not know how to help them. When Dr. Lackner arrived at the Silva home, he found Mrs. Silva on the floor where she had slept. She was unable to stand up and her husband was too weak to lift her. The house was in a total state of squalor. He asked the couple if they wanted him to help them and they said yes. His next step was to seek the aid of Kitty Hughes of the Legal Services for the Elderly and Disabled. Hughes ac-

accompanied him back to the Silva home where he instructed her that it was her duty to represent the interest of the Silva's against everyone, including himself, if their rights had been violated. Hughes' first action was against the landlord.

Although the couple lived in squalor, they had been receiving assistance from various social welfare organizations, visiting nurses and social workers. Dr. Lackner concluded that the assistance they were receiving was ineffectual due to a lack of leadership needed to coordinate the various agencies. In an effort to achieve greater cooperation and to alleviate the Silvas' difficulties, Dr. Lackner had a meeting in his office in May. The meeting was attended by Peggy Davis; Kitty Hughes; Teresa Arcienega, social worker at the Sacramento Medical Center; a supervisor of visiting nurses association; Emily Rowe, adult protective worker; and, the nurse who had attended the Silvas.

Dr. Lackner had the Silvas removed and placed in a nursing home until their home could be cleaned. He took photographs of the filthy and unsanitary conditions. Teresa Arcienega was upset with Dr. Lackner and told him that he had removed the Silvas against their will, they had been perfectly content to live in their home the way it was and he was simply "running roughshod over their lives."

Dr. Andrus first learned of the Silva case in June, from either Teresa Arcienega or Elaine Chaykin, a family nurse practitioner at the Sacramento Medical Center. They complained of how Dr. Lackner had treated them.

As a result Dr. Andrus sent the following memo to Dr. Lackner on July 2, 1979:

Please give me a brief (no more than two pages) written report on your handling of the case regarding Mr. and Mrs. Silva.

I am requesting this report because of complaint I have received from non-Foundation health care personnel about your handling of the matter.

We will discuss this case after I have received your report. I expect this report no later than July 11, 1979.

Dr. Lackner perceived the memo of July 2, 1979, as one of a series of harassing efforts by Dr. Andrus to document some fanciful reason to relieve him of his position. Since he was personally and emotionally involved in the Silva case, he felt it was imperative that someone who was less emotional, should answer the letter on his behalf. For this purpose he retained Irwin Lyons, who was also an attorney and a physician, to handle the correspondence. Dr. Lackner wanted the letter to simply state that he would be happy to respond, if the Foundation would provide a list of complaints. Unfortunately Lyons' letter was sent before Dr. Lackner learned of its content. It contained a brief statement that he had been retained by Dr. Lackner, who was willing to comply with Dr. Andrus' request for information concerning the Silva case, as soon as Dr. Andrus provided a specific set of questions. The letter continued:

It will facilitate matters if you will kindly make the reasons for your inquiry explicit.

Meantime, Doctor Lackner has instructed me to tell you that in his view he regards the difficulties which have arisen between him and you as being fraught with legal ramifications. He wants me to make it crystal clear to you that while he does not seek a fight, neither will he retreat from one should you decide to commence one. He has further instructed me to state to you that, if necessary, he will resist any attempts on your part to discipline or terminate him on the basis of his refusal to respond to your unclear memo or on the basis of the allegations which have been made to and about him in your letter of June 21, 1979. These statements are not intended to constitute a threat; Doctor Lackner merely wishes to make sure that you are aware of these things before you proceed any further. If necessary, which he hopes it will not be, he intends to utilize every legal means at his disposal to protect and defend himself against attack. Please make no mistake about this.

This letter will also serve as a demand upon you that you cease and desist forthwith from further harassment of Doctor Lackner in the performance of his duties.

Although Dr. Lackner disapproved of the letter, he did not inform Dr. Andrus that he had not seen the letter before it was sent, that he disapproved of its contents, or that he disavowed it in any manner. Dr. Lackner explained that by this time their communication was limited to certified mail.

Upon receipt of the Lyons' letter, Dr. Andrus was angry and his immediate reaction was to fire Dr. Lackner. However, after conferring with Voelm he decided to send another letter to Dr. Lackner on July 19, 1979. In general the letter was a followup of their meetings on March 28, May 1, and June 19, 1979; and, an expansion of the warnings and instructions provided Dr. Lackner in the letter of June 21, 1979. Dr. Andrus also outlined specific questions concerning the Silva case. Dr. Lackner responded in writing on July 27, 1979, with a detailed account of his involvement in the Silva case.

Voelm wrote a report to be submitted to the Administration on the Aging, in which he referred to the Silva case in very positive terms as the type of work the Foundation was able to accomplish. During his testimony he explained that the report was prepared before they had received complaints from the University concerning Dr. Lackner's method of handling the case and his treatment of other professionals. Voelm had seen the original photographs of the Silva home and stated that the Foundation did not have a particular problem with this case. The purpose of Dr. Andrus' request for a report from Dr. Lackner was simply to have a full and better understanding of what had happened.

j. Dr. Andrus' consultation fee

The Foundation's board of directors unanimously voted to pay its director, Dr. Len Hughes Andrus, a

consultation fee of \$1,000 per day, up to a maximum of \$21,000 per annum, commencing March 1, 1979. When Dr. Lackner discovered this consultation fee in the minutes of the board of directors of the Foundation, he was shocked and quite concerned. At previous executive committee meetings, the management of the Foundation had stressed that it was in severe financial straits. As a result there had been some discussion for the need to lay off staff members and perhaps cut back on programs which would directly affect patient care. He felt it was incongruous that an organization which was stressing the above consequences caused by financial difficulties would at the same time remunerate its director with a \$1,000 per day consulting fee. As a practical matter he was further concerned as to the source of the funding for the consultation fee. River City was required to pay the central office of the Foundation a monthly fee for management assistance, a sum of \$3,700. If any of the funds from this \$3,700 were used for the consultation fee then the Foundation may well have breached its agreement with the Federal Government. The River City clinic was funded by a grant from HEW. The document which had been submitted to HEW, dated May 1978 and entitled "A Model Medical and Health Care System for the Older Citizens of Sacramento," stated on page 27: "Although no charge will be made for his time, Dr. Andrus' guidance and stature in the medical community will be a valuable asset to the developing Sacramento project." In Dr. Lackner's mind this consultation fee represented a breach of the Foundation's agreement with HEW. Since he was named as a project medical director he felt personally involved. In addition, he felt the consultation fee represented a diverting of funds from its intended purpose of providing medical care for the underserved and the aging population of Sacramento.

Then Dr. Lackner learned that in addition to the consultation fee, management had at its disposal leased cars, credit cards, and expense accounts which all represented a drain on the funds of the clinic. In addition, the minutes revealed that the Foundation had retained a law firm to represent it in regard to the organizational efforts of the MLPs. Dr. Lackner referred to it as "an expensive law firm." He wanted to know if funds were diverted from either the HEW grant or the nonprofit Robert Wood Johnson grant. In order to resolve these unanswered questions Dr. Lackner decided to demand an audit.

In the latter part of May he drafted a letter which was eventually sent on June 5, 1979, to Mary Duel, executive secretary of the Foundation. In drafting the letter he had not consulted anyone. In fact he referred to the letter as "purely Lackner." He did not contact Dr. Andrus concerning the \$1,000 consultation fee, since he felt that by that time the hostility from Foundation management toward him was too great. Thus in effort to resolve these questions dealing with the Foundation's expenditures, Dr. Lackner sent the following letter, to Mary Duel, suggesting an agenda for the *next* executive committee meeting:

Dear Mary:

I am sending you this in advance of the call for agenda items, as I want the Foundation management to have sufficient time before the next Executive Committee meeting, to prepare adequately for this item.

Attached you will find a page from the last Foundation Board meeting during which it was moved, seconded and unanimously voted to pay our director, Dr. Len Hughes Andrus a \$1,000.00 a day in consulting fees up to a total of 21 days per annum.

In terms of relative value, this is roughly twice the annual compensation for our receptionist or back office nurse, or equal to the full annual compensation for the family nurse practitioner.

I am the only employee at River City that makes more, and I make roughly only twice that, in return for exacting direct services exceeding forty hours a week and involving 24 hour-7 day a week on call availability since the opening of the office. I would like very much to have this relative value scale rationalized to us at our next meeting.

Furthermore, may we please have an accounting of all past, present, future authorized and future planned remunerations, rewards, compensations, considerations and amenities of value given or offered to Board members and/or their families, domestic associates or significant others, including but not limited to consulting fees, retainers, salaries, fringe benefits, car leases, rentals, telephone and utility payments, credit cards, gasoline credit cards, per diems, food and travel allowances, etc. Please give the funding source, e.g. grant, etc. for each of the aforementioned.

On Friday, June 8, Mary Duel delivered the above letter to Dr. Andrus. Dr. Andrus testified that he was furious when he read the letter and he could not understand why Dr. Lackner did not call and ask for a verbal explanation. This lack of courtesy was perceived by Dr. Andrus as further proof that Dr. Lackner was acting in a contentious manner.

Between June 5 and July 19 Voelm conferred with Dr. Lackner approximately five times, including once at a board meeting, concerning the \$1,000 consultation fee. Voelm explained to him that the fee would come from account number 10, which was the general administrative account. The monthly \$3,700 administrative fee which each clinic paid, except for Lake County, is also deposited in the number 10 account. The fee would not be appropriated from either the HEW grant, nor the Robert Wood Johnson Fund. In fact the minutes of the board of directors' meeting, where Dr. Lackner originally learned of Dr. Andrus' fee, clearly stated:

It was then brought to the attention of the meeting that Dr. Andrus was devoting approximately 21 days per year to FCHS matters and that he should be appropriately compensated for such services. It was further noted that because of the terms of the grant from the Robert Wood Johnson Foundation

there had been a limit on the amount which could be paid to Dr. Andrus for services rendered to projects funded by the Robert Wood Johnson Foundation grant, but that funds were now available from other sources.

On July 16, Dr. Lackner sent a second message to Mary Duel, which confirmed his telephone request to place on the agenda for the next executive committee meeting the issue of Wesley Fastiff's fees and the source for its payment. In addition he requested a copy of the Foundation's articles of incorporation and bylaws. Voelm verbally informed the doctor that the legal fees paid by the Foundation were none of his business.

On July 19, 1979, Dr. Lackner sent the following letter to Dr. Morton Levitt, Dean of the School of Medicine, University of California, Davis, California:

I am writing you about a matter that has come to my attention and which, I am sure, will be of great concern to you and the University.

I work for the Foundation for Comprehensive Health Services, an organization incorporated as a non-profit foundation under the laws of California. The Chairman of the Board of the Foundation is Len Hughes Andrus, M.D., former chairman of the Department of Family Practice at the University and now full-time Professor of Family Practice and Co-director of the Family Nurse Practitioner Program.

Soon after beginning employment for the Foundation, I became disturbed by certain management practices and problems, and since then I have become increasingly uneasy about the Foundation's management. With regard to many of those issues, I have tried to deal directly with management to produce change for the better, but I have been viewed instead as a "trouble maker".

Some of these practices and problems do not involve the University, but some of them could well be the subject of your legitimate concern, and there is one in particular that I must call to your attention. Enclosed, find attached to this letter a copy of recent minutes of the Board of Directors of the Foundation. Also attached please find a letter of mine dated June 5, 1979, questioning the action of the Board and Dr. Andrus' acceptance of it. Please understand that at the time I wrote my letter, I had already become somewhat disillusioned about the prospects of reform from within the Foundation. The essence of the resolution and Dr. Andrus' gracious abstention from the otherwise unanimous vote is that Dr. Andrus is to receive \$1,000 per day in consulting fees up to a total of twenty-one days per year. I was at first puzzled and intrigued by the number twenty-one, but its significance has become clear to me.

Last Tuesday evening, July 17, 1979, the Executive Committee met and the Executive Manager of the Foundation, assisted by the Secretary-Treasurer (and legal counsel) of the Foundation, explained away any enigma regarding the true sense of the

Board motion. He stated that the reason twenty-one days was mentioned in the motion is because twenty-one days is the maximum number of days of outside employment that the contract of a full-time employed professor at the University permits in addition to full-time University employment. He let it be known that the twenty-one days per year figure in the motion of the Board was a pure fiction, and that, "Dr. Andrus works many more days than twenty-one days per year for the Foundation." An exact quote which I am sure is just the kind of enthusiastic hyperbole that Dr. Andrus demands of his managers is that, "Dr. Andrus works ten times twenty-one days per year for the Foundation." I am also sure that the true number is something between twenty-one and two hundred and ten. Throughout this exposition, Dr. Andrus, who was chairing the meeting, sat silent and did not object to this explanation.

Unfortunately, there was absolutely no attempt to deal with the implication of my further questions regarding many forms in which a non-profit foundation can enrich its Board members and their friends.

I generally favor the concept that insofar as it does not interfere with their major contractual commitment, faculty should be able to devote time in other settings both for the good of the community and for their own development, but that this privilege necessarily must be a discretionary one that is granted by the University to those who do not abuse it.

I am sorry to have to share this matter with you, as it reflects a failure on my part to reason with management for reform from within. All I can say is that I tried the best I could to do so. However, the escalating harassment with which this and other critical observations of mine to management have been met leaves me no other recourse but to seek outside remedies for wrongs management refuses to correct.

If Dr. Andrus is breaching his duties to students, interns, residents and other faculty, then I don't think his breach should be subsidized by a Foundation characterized as non-profit and for the purpose of providing competent medical care to the underserved. The Foundation has grants from the Robert Wood Johnson Foundation and is applying for a Kellogg Foundation grant. There are at least two federal agency grants to the Foundation; none of these entities should subsidize exploitation of an educational institution, its students and its faculty if in fact such is happening.

Dr. Lackner did not send a copy of this letter to Dr. Andrus or any other member of Foundation management.

The ultimate decision to terminate Dr. Lackner was made by the board of directors upon the recommendation of Dr. Andrus. The latter had decided to make the recommendation at the July 27, 1979, board of directors meeting. The meeting was deliberately set for the day after the election, in order to avoid any misconception

that his termination was based on his union activities. Since he anticipated Dr. Lackner's termination would precipitate media publicity, Dr. Andrus went to Dean Levitt on Wednesday, July 25, to warn him of the pending action. It was then for the first time that Dr. Andrus learned of Dr. Lackner's accusations contained in the July 19 letter. Again Dr. Andrus was angered by Dr. Lackner's constant inquiries into the Foundation's expenditures for legal fees, Dr. Andrus' consultation fee, and interference with the grants. This new attack heightened Dr. Andrus' desire to terminate his relationship with Dr. Lackner. He viewed Dr. Lackner's letter as a continued personal vendetta against himself. He was not only disturbed by the content of the charges but also the method used by Dr. Lackner. If Dr. Lackner felt the need to go to Dean Levitt, Dr. Andrus felt it was contemptuous of him not to have at least informed him of his actions and possibly invited Dr. Andrus to be present to discuss the matter and answer the charges.

At the July 27 board meeting, resolutions were passed to terminate Dr. Lackner and to authorize the School of Medicine for the University of California to inspect and audit the Foundation's financial records. Eventually, Dr. Lackner communicated with two Congressmen; the commissioner of administration on aging; Dean Elmer Learn, vice chancellor; and Dr. George Snively, acting chairman of the department of family practice concerning Dr. Andrus' \$1,000 consultation fee.

k. Meeting—Dr. Lackner and Voelm July 30, 1979

The board of directors had already voted to terminate Dr. Lackner. As director of the Foundation Greg Voelm felt compelled to make one last effort to resolve the differences between the Foundation and Dr. Lackner. He wanted to avoid threatening the doctor but he did wish to impress upon him the serious deterioration in the relationship between them. Voelm invited the doctor to join him for lunch at the Arbor Restaurant, on July 30, 1979.

Voelm had mulled over this pending conversation for days and he initiated the encounter by stating: "What do you think is going to happen, Dr. Lackner? What is your best estimate of what's going to happen now? You've taken a number of actions against the Foundation. You have a couple of serious warning letters up against you. You're shooting at us. We're shooting at you. Do you really think this is going to keep—going on like this? What do you think is going to happen?" Dr. Lackner responded, "I'm an existentialist. I just live from day to day. I just every day take whatever that day gives me." Voelm then explained that as a philosophy the doctor's approach was fine; however, as a practical matter the relationship between the Foundation and the doctor was about to explode. Voelm outlined the various attacks Dr. Lackner had made against the Foundation and in particular against its founder and director, Dr. Andrus. He categorized the attacks as personal and vitriolic. Dr. Lackner had demanded at an open executive meeting that they should discuss the propriety of Dr. Andrus receiving a \$1,000 per day consulting fee. He continued the attack by writing the dean of the medical school, without informing Dr. Andrus of his actions. Dr. Andrus was a faculty member at the time and Dr. Lackner in-

formed the dean that Dr. Andrus was improperly seeking funds from the Foundation. Dr. Lackner asked if he was being fired and he was told not at the moment, but he would be wise to begin looking around. As they started to part Voelm added:

You're going to have to go someplace, either into private practice or work for somebody else. Wherever you go, there's a fair chance they're going to call me up or Dr. Andrus up and ask us what we thought about you. Wouldn't it be better for you if you resigned so we could at least be neutral when they did it, instead of having to tell them honestly that we fired you, if that's what you're forcing us to do?

Dr. Lackner expressed considerable reservation that Dr. Andrus would ever be neutral toward him. At this point Voelm assured him that he and not Dr. Andrus is in the office each day, making the daily decisions. Due to his good working relationship with Dr. Andrus, Voelm was confident that Dr. Andrus would ultimately acquiesce to his advice.

In Dr. Lackner's testimony, he asserted that Voelm said if he would leave quietly, then Dr. Andrus would give him a good letter of recommendation. When Dr. Lackner voiced doubt, Voelm said, "Don't underestimate the power I have over Dr. Andrus." Voelm testified that Dr. Lackner's recollection of their conversation, fairly accurately paraphrased his remarks, except he never promised a good recommendation and he did not use the words: "Don't underestimate the power I have over Dr. Andrus."

1. Dr. Jerome Lackner's termination

Shortly after the noon hour, on August 2, 1979, Greta Nord and Dr. Hughes Andrus arrived unannounced, at the River City clinic. Dr. Andrus hand-delivered a letter from Greg Voelm to Dr. Lackner, dated August 1, 1979, which in substance informed him he was terminated from the employment of the Foundation as of August 20, 1979. It also instructed him not to see patients on August 17, and have his personal belongings removed as of noon of that date. On the evening of August 2, Dr. Lackner sent a mailgram to Dr. Andrus, which stated in part:

Dear Hughes, This is a formal grievance letter. I request an appeal from the termination of employment which bears the signature of Greg Voelm as director, dated August 1, 1979 and which you personally served on me August 2, 1979.

I wish this appeal to be heard before the full board of directors of the Foundation.

In response Voelm sent a letter dated August 8, 1979, which stated the position of the Foundation:

... the grievance procedures of the Foundation were not intended to be, nor are they, available as a matter of right to physicians or other supervisory personnel. You do not, therefore, have the right to avail yourself of that procedure.

It has been decided, however, in this instance, that without establishing a precedent or admitting that you have such a right, we will convene a Grievance Committee of the Board.

Your petition for redress of grievance should be in written form including documentary evidence as appropriate.

You will be advised of the composition of the Grievance Committee and the time and place for you to present your grievance in the near future.

After receipt of the August 8, letter, Dr. Lackner spoke to Voelm and requested a copy of the grievance procedure referred to in the letter and the reasons for his termination. Dr. Lackner said without a list of reasons for his discharge it was impossible for him to know what type a defense he should present or what documents he should provide. His request went unanswered and he never received a date for the grievance hearing.

Dr. Lackner posted a copy of his termination letter on the office bulletin board, along with a copy of the letter he had sent to Mary Duel on June 5, 1979, which requested information concerning the financial arrangements that Dr. Andrus and board members had with the Foundation. The staff learned of his dismissal through the posted letter.

8. Interrogation of employees regarding union sympathies

a. *Phil Hasuo Yoshimura*

Yoshimura had extensive background as a lab technician in the Navy. Since the Sierra Clinic anticipated an opening for a lab technician, Dr. Lehrman felt they could use Phil on a part-time basis. At that time Phil was employed by the County of El Dorado Public Health Department, primarily providing patient care to the jails and juvenile halls. Dr. Curt Wideman, the commissioner of public health of El Dorado County agreed to allow Phil to work for the Foundation part time, if they paid half his salary. Vi Tara agreed with the concept. Dr. Lehrman then approached Dr. Andrus with the idea. The latter wanted to know what information they had concerning Phil's sentiments in terms of being pro or con the organizational efforts of the mid level practitioners. When Dr. Lehrman said he had no knowledge of Phil's personal feelings, Dr. Andrus instructed Dr. Lehrman to inquire as to what Phil's leanings were. If Phil was willing to stand up and vote against the Union, then Dr. Lehrman was authorized to hire him; but, if he were in favor of the Union then they should wait and hire him after the election. Dr. Lehrman felt that such an inquiry would possibly jeopardize Phil's future and therefore he informed Dr. Andrus that he personally felt such action was unethical, immoral, and he refused to follow his instruction.

Yoshimura was initially interviewed in early June, by Vi Tara, whom he assumed was "the administrator of the clinic or administrator of the office, manager, or whatever." Her correct title at that time was clinic su-

pervisor.⁶ During this interview she asked him, "How do you feel about unions?" He responded that he, "didn't care one way or another about unions."⁷

Later Phil was interviewed by Dr. Lehrman and he sought the doctor's advice concerning the MLPs organizational efforts. Dr. Lehrman suggested he should confer with the mid-level practitioners and obtain information from them. If he felt he still lacked adequate information to make a decision, then he should abstain until he obtained that information. Dr. Lehrman did not ask him what his feelings were concerning unions or the MLPs organizational efforts.

Phil was hired in June by the Foundation as a physician's assistant and remained until he returned to his former employer, the El Dorado County Health Department, near the end of November 1979.

The election was held on July 26, 1979. About 1 week prior to the election Dr. Andrus visited the Placerville facility. Yoshimura testified that during that visit, Dr. Andrus asked him how he was going to vote in the pending election. He answered that he would probably not vote, since he did not know enough about the situation to vote one way or the other. On cross-examination, he admitted that his affidavit did not mention that Dr. Andrus asked him how he was going to vote. Yoshimura then acknowledged that the following was an accurate portion of his affidavit:

About a week before the election, Andrus came up to the Placerville Clinic. He talked to several employees including myself, he and I were the only ones present when he spoke to me. He said the vote would be next week. I told him I probably was not going to vote because I had not been employed long enough to know all the facts of what was going on. Andrus asked me to vote no. This all I can presently recall of the conversation.

b. *Steven Simon*

Steven Simon was hired by the Foundation as a physician's assistant to take the place of Randy Reed at the Colfax facility. He was initially interviewed by Dr. Andrus, by telephone, on July 14, 1979. The conversation centered around his educational background and past experience at various institutions. Simon was aware that Dr. Andrus was the director of the Foundation, when the doctor asked him how he felt about unions. When Simon answered, ". . . (he) didn't feel it was necessary at times, some unions were good, some were bad," Dr. Andrus responded, "that it wasn't in the best interest for physician assistants to organize at this time because we are a new profession."⁸

⁶ At the hearing Respondent amended its answer by admitting that Vi Tara was a supervisor of Respondent within the meaning of Sec. 2(11) of the Act and an agent of Respondent within the meaning of Sec. 2(13) of the Act, in Case 20-CA-14801. However, this admission did not extend to the periods covered in Cases 20-CA-15244 and 20-CA-15285.

⁷ Vi Tara did not testify in reference to her interview with Phil Yoshimura.

⁸ Dr. Andrus did not comment on Steven Simon's recollection of their conversation. On cross-examination, Simon said that his affidavit was

Continued

Greg Voelm conducted a job interview of Simon, on July 16, 1979, with Linda Weber Goldsmith present. Simon was certain of the date because it was the first day of his vacation. After discussing his background as a physician's assistant, his style of practice and his philosophy of health care, Voelm mentioned that the Foundation was in the middle of a union organizing attempt and asked him what his feelings were towards unions. Simon repeated the same answer he had previously given to Dr. Andrus. Even before Voelm mentioned the Union's organizing efforts, Simon had been told that morning about the election campaign by Randy Reed. He was also of the belief that during his conversation with Dr. Andrus, that the doctor mentioned the mid-level practitioners were having organizational meetings in an effort to form a union.

Greg Voelm's recollection of his conversation with Simon differed in that he denied that he asked him how he felt towards unions. Voelm testified that he used what he felt were permissible comments for management in these circumstances. He simply stated that he personally felt strongly that the Union is not the best thing for either the Foundation or for its employees. Simon then volunteered that he agreed unions were not necessary for professionals. Voelm denies that he interrogated Simon and asserts that the latter's response was purely voluntary. Simon was hired and began work on August 28, 1979.

c. George Randall

George B. Randall was a trained physician's assistant who was seeking employment information for central and northern California. Fine, who was the executive-secretary of the California Academy of Physician's Assistants, advised him to contact Dr. Hank Holmes for an employment opportunity in Forrest Hills. After talking to Dr. Holmes on the telephone, he was invited to come to Sacramento for an interview. On August 30, 1979, Greta Nord met him at the airport and drove him to Auburn and Forrest Hills.

They stopped for coffee and Greta mentioned that the mid-level practitioners either were in the process of or had formed a union. When he heard this information Randall voluntarily replied that he was not interested in participating or becoming part of a union. As a professional person, he simply was not interested in joining a union. He then related his experience as a medical administrator on the Trans-Alaska Pipeline project. The Teamsters Union had made a considerable effort to organize the physician assistants, to which Randall was opposed, since he felt it was an inappropriate movement.

They then proceeded to visit with Dr. Holmes and his staff in Auburn. Randall was informed that the job duties

originally in error when it stated his conversation with Dr. Andrus was in early August. The "early August" was scratched and replaced by "late July." The correction was made after he refreshed his memory by checking his calendar. The affidavit was given on December 13, 1979. Simon also said he was confused when he gave the affidavit, therefore the statement: "Voelm said that there was some Midlevel Practitioners in Placerville that were trying to organize a union and that a vote had been taken as to whether or not all the Midlevel Practitioners were in agreement" was correct up to the phrase: "had been." It should read "was to be taken."

consisted of managing, on a full-time basis, the Forrest Hills Clinic as a satellite operation of the Auburn Clinic. The Forrest Hills Clinic was scheduled to open on November 1, 1979, and if he were hired he was expected in the meanwhile to work at Auburn. On the following day either Mary Duel or Greta Nord called and informed him he was hired. He began working at Auburn on September 10.

Although the Foundation provided the Forrest Hills community with press releases announcing the opening of their new clinic as of November 1, it never opened. Randall continued to work at Auburn; however, after 3 weeks several factors occurred which contributed to a slack in his workload. The patient load itself had diminished and the scheduling was sporadic. Then a husband and wife medical team arrived and were employed as *locum tenens*. They worked as a team, each working only a half day. There were many days when he simply had no work and Dr. Holmes told him he was free to leave the office. He used this free time to order a sign for the Forrest Hills clinic and also to meet individuals in the Forrest Hills community. Later Greta Nord provided him with sporadic work, inventorying medical supplies at the various clinics.

On December 18, he wrote a letter to Greta Nord requesting a clarification of his position. Her answers were contained in a letter dated December 19, in which she expressed regret for the delays in opening the Forrest Hills Clinic and in their inability to provide him with a firm projection as to when they would receive needed funds to open. He was provided with severance pay and departed January 3, 1980.

9. O'Hara-Devereaux and Leona Judson hired to vote against the Union

On several occasions Dr. Andrus asked Goldsmith if she thought Mary Baker was behind the Union's organizational efforts. Prior to the May 7 dinner meeting, she always replied, "No, I don't think so." Approximately one to two weeks after the dinner, Dr. Andrus was in Goldsmith's office and again repeated his question. This time her answer was different. Since Mary Baker had taken such an active and aggressive role on behalf of the Union at the dinner meeting, Goldsmith concluded that perhaps Baker was the driving force behind the Union. Mary O'Hara-Devereaux walked into Goldsmith's office during this conversation and wanted to know who at the Foundation had actually hired Baker. Goldsmith admitted that she and Dr. Lackner had interviewed Baker and decided to hire her because she made a nice appearance and was a heavy producer, which was always a major factor in hiring FNPs. Baker was seeing 25 to 30 patients a day for her former employer. When Goldsmith said Dr. Lackner participated in hiring Baker, the following conversation ensued:

Dr. Andrus: That damn Lackner!

O'Hara-Devereaux: How could you hire her? Don't you know she was a shit disturber in training?

Dr. Andrus: Yes, she was a trouble maker. How did we hire her?

At this point O'Hara-Devereaux asked Goldsmith if she was aware that there was a new hiring protocol. Henceforth, all mid-level practitioners had to be screened and interviewed by O'Hara-Devereaux and Ginny Fowkes. O'Hara-Devereaux added that she had a nose for troublemakers. At this particular time, O'Hara-Devereaux was a friend of the Foundation and not an employee. She had been involved with the team development training at Placerville and was presently working on a grant for the Sonoma County geriatric group.

After the June 15, 1979 representation hearing, Goldsmith was told by Dr. Andrus that the Foundation was going to place Mary O'Hara-Devereaux and Leona Judson on the payroll. He explained that he had two reasons for this action. First, they would both vote against the Union at the election. Second, they had been doing administrative grant development work at the Sonoma Geriatric practice and this was a method of compensating them. In his testimony, Dr. Andrus did not deny Goldsmith's testimony and provided the motive for hiring O'Hara-Devereaux when he stated, "She had been active in Foundation affairs and we wanted her to be recognized as a regular employee and *non-supportive of the union.* (Emphasis added.)

Respondent's computerized payroll for the pay period ending June 15, 1979, lists Judson and O'Hara-Devereaux under the code section "400," which indicates administrative personnel. The payroll for the period ending June 30, 1979, had the code "400" crossed out and the code "900" written in its place. The "900" code designates an employee of the Santa Rosa facility. Apparently, the duties of O'Hara-Devereaux and Judson never changed after they were placed on the payroll. There was no evidence offered to indicate that either of them performed the duties of a mid-level practitioner.

During the third week in June, Goldsmith was working at the Santa Rosa emergency room when she received a message to call Greg Voelm. When she reached him he instructed her to recruit, screen, and hire two nurse practitioners for the emergency room at Santa Rosa, who would not favor the Union and would not later turn against the Foundation. Later on the same day, Dr. Andrus told her she had until July 9 to place the two new employees on the payroll. Goldsmith said she would want to clear the hiring of two nurse practitioners with the hospital administration since the Foundation had agreed to hire and staff the emergency room with physicians for major trauma. Prior to these conversations with Voelm and Dr. Andrus, the Foundation had no plans to hire any nurse practitioners for this major trauma center. The hospital maintained an urgent care center across the street where nurse practitioners were employed. Neither Dr. Andrus nor Voelm denied Goldsmith's recollections of these conversations.

10. O'Hara-Devereaux' expressed opposition to the Union

On June 11, 1979, Mary O'Hara-Devereaux called Paula Bertram at work and proceeded to voice her op-

position to the concept of organizing the mid-level practitioners into a labor organization, since she did not wish to be represented by a union. She wanted the right and freedom to bargain on her own behalf. As a worldwide expert on the subject of nurse practitioners and mid-level practice, she was absolutely convinced that a union would not be in their best interest and would not only be harmful, but would also alienate them from the physicians. Although she was not an employee of the Foundation at that time, she planned to be soon.

On the Monday following the representation hearing, Mary O'Hara-Devereaux made a series of telephone calls to various members of the MLP. When she spoke to Mary Baker, she said, "I understand that you are the leader of this uprising." Mary replied that she represented the majority opinion. O'Hara-Devereaux then explained that in a sense she was wearing two hats, since she was calling on behalf of the program at UC Davis, and she was representing herself as a concerned nurse practitioner and soon to be employee of the Foundation. Up to that time Baker knew that O'Hara-Devereaux had performed consulting work for the Foundation, but it came as a surprise to her that O'Hara-Devereaux was resigning her position with the University to become a nurse practitioner with the Foundation. Baker took issue with the use of the word "union." She did not consider that their efforts were the same as a traditional union and therefore preferred to describe their movement as a group of employees gathered together for the purpose of collective bargaining. O'Hara-Devereaux then proceeded to describe the devastating effect the union would have on the future of not only those who participate in organizing the Union, but also on their fellow nurse practitioners and physician assistants in the Foundation, as well as throughout the State of California and the United States. O'Hara-Devereaux also stated they had received calls from concerned physicians and warned that they were jeopardizing their future employment. Finally, O'Hara-Devereaux concluded the conversation by commenting, "We are going to have to replace nurse practitioners with physicians." When Baker questioned the use of the word "we," O'Hara-Devereaux said, "Well, I mean the Foundation will have to replace nurse practitioners with physicians if this continues. You are going to be talking yourselves out of a job."

When O'Hara-Devereaux said she would like to get together with all the MLPs, to discuss the organizational issue, they tentatively agreed to meet June 26. When Baker checked with her colleagues, she discovered they did not wish to meet with O'Hara-Devereaux. Baker notified her by telephone that they would be unable to meet.

On either June 18 or 19, Bonnie Bowman received a telephone call from O'Hara-Devereaux while she worked at Placerville. Again O'Hara-Devereaux explained that she was speaking on behalf of the faculty of the family nurse practitioner program and on behalf of herself as a reknown expert on the nurse practitioner program throughout the United States and the world. She stressed the MLPs were performing a great disservice to their fellow nurse practitioners and their timing was wrong.

O'Hara-Devereaux warned that physicians had called and expressed their disapproval of the union organizing efforts and as a result, "physicians would not hire those mid-level practitioners who were too involved in the organizing effort." However when pressed for the names of those who had expressed dissatisfaction, she refused to respond. Finally, O'Hara-Devereaux cautioned that the Foundation will be forced to reevaluate their status. When Bowman asked, "What do you mean? Hire physicians in our place?," O'Hara-Devereaux said, "Well, could possibly." Bowman felt that this was an absurd remark since physicians cost the Foundation twice that of a nurse practitioner and generated approximately the same income. Bowman also noted that O'Hara-Devereaux often used the word "we" when referring to the Foundation.

Some time in July, just prior to the election, O'Hara-Devereaux and Dr. Andrus visited the Sierra Clinic in Placerville and spoke to Bertram and Bowman, as well as other employees. In her conversation with Bertram, O'Hara-Devereaux said:

I know it's no use talking to you, that your mind is made up. However, I want to reaffirm to you that I am in complete disagreement with your efforts to organize the mid-level practitioners. That the time is very, very wrong to do this in terms of the viability of the nurse practitioner movement. That she would not ever be a member of the unit.

The election was scheduled for July 26, 1979, and O'Hara-Devereaux visited Bonnie Bowman in the latter's office at approximately 4:30 p.m. on July 23. Again she repeated her view that the MLPs were doing the wrong thing. As in previous conversations she continued to use the word "we" when referring to the Foundation, when she stated:

[W]e will never accept a closed shop. We will hire people that are nonunion people and within a year you will not have a power base. And you will have a much better deal if you're nonunion. I hope you'll take a few hours and sit by yourself and think about this. Do not be led down the path by Mary Baker, Paula Bertram, and Jerome Lackner.

Bowman denied that Lackner had anything to do with the Union.

11. Fowkes' expressed opposition to the Union

Virginia Fowkes is a member of the board of directors of the Foundation and director of the Physicians Assistants Program at Stanford University. In addition, Respondent admitted that she is also a supervisor and agent of the Foundation. Fowkes did not testify at the hearing.

Shortly after the NLRB representation hearing, which was conducted on June 15, 1979, Virginia Fowkes called each mid-level practitioner and invited them to join her for dinner, on June 19, at Tosh Restaurant in Sacramento. She explained that she had just recently learned of "what was going on," and she wanted to take the opportunity to act as a liaison between the mid-level practitioners and the Foundation's board. All of the MLPs at-

tended the dinner. Baker, Bowman, and Bertram remembered Fowkes' comments slightly different.

Bertram recalled Fowkes stated that as an expert in the fields of family nurse practitioners and physician assistants, she expressed concern with their efforts toward organizing a labor organization. From her own experience with the physicians in the community she knew they were a very conservative group and the word "union" was an anathema to them. As a result any of those physicians who became aware of their union activities would not employ them. It was also her opinion that the entire faculty of the family nurse practitioner program and the physician assistants program would be against their efforts to organize a union. When Mary Baker asked her how she knew this, Fowkes answered that she had gained this knowledge through a vote. Later Bertram contacted various faculty members who not only denied that a vote had been taken, but indicated they never heard of this issue.

Mary Baker's testimony was substantially similar to that of Bertram's, with perhaps the main difference attributable to semantics. Baker was struck by the fact that Fowkes' comments were almost verbatim with the telephone conversation she had with O'Hara-Devereaux on the previous day. Fowkes said she felt that their organizing efforts "would be a detriment to physician assistants and nurse practitioner employment in the State of California, if not, the impact would be felt in the United States." She also indicated the faculty was behind in speaking to them on this issue.

Bonnie Bowman recalled Fowkes stated she was not speaking on behalf of the Foundation's board, but for herself and as head of the physician assistants program, when she told them she felt they "would be blacklisted by the physicians in California." If they were part of this union organizational effort, the conservative medical community would not hire them and the job market would be finished. After this meeting they never again saw Virginia Fowkes.

12. Voelm's expressed opposition to the Union July 11, 1979

Greg Voelm made several trips to Placerville in July to discuss the pending election. There is a conflict in the testimony as to the exact date he met with the staff. Bonnie Bowman thought they met on July 5, 1979. It was Voelm's belief that on Friday, July 11, 1979, he started the day by having breakfast with Sue Wooten. They discussed the union and other matters. He suggested to her that since she was a high producer she would do a lot better by negotiating directly with management as an individual. After the conversation he had the feeling she would remain with the union. On December 4, 1979, Wooten's income was raised from \$825 to \$900, retroactive to her employment anniversary date. Voelm made the final determination to grant Wooten a pay raise based on Nord's recommendation. Bertram did not receive a raise at that time. He was not sure how Bertram's part-time position affected her anniversary date.

A staff meeting followed, where he addressed the entire Placerville staff and informed them that the family

nurse practitioners and physician assistants were interested in forming a union. Voelm then stated, "It's their right to try to do this, but I want you to know that management feels strongly that we're better off without a union" Following this meeting he met with Bonnie Bowman, Sue Wooten, and Paula Bertram. The conversation with the three practitioners began with a discussion of the clinic business. He acknowledged they were working very hard and there was improvement. The conversation turned to union affairs and Voelm testified that he told them:

Well, I just said that I didn't think it was in their own best interest to get involved with one, that I thought and also that the Foundation thought that it was a lot better to be able to treat people as individuals. To be honest I think I also said that I, although I was representing, that I personally thought it was better not to be in the union, that I could live with it as a professional administrator either way. I've dealt with unions a lot of my working life. It's not always pleasant but it's just part of what comes with being a modern manager anywhere you are, a lot of places where you are. So I said I wanted them to know how I felt however it came out. Our Board of Directors wanted to have an election to see who was really in the majority. But however it came out, I wanted to go on working with them as a partner.

Voelm had read an article which indicated that initially family nurse practitioners were widely used in Canada, until more family practice doctors were trained. At that point the family nurse practitioners program dwindled. Bowman felt this portion of the conversation occurred at the conclusion of their lunch, attended only by Voelm and Bowman. She recalled that as he left, he said, "Bonnie, I want you to think of one thing. Nurse practitioners in Canada attempted to organize and today they are just about extinct." Voelm denied that he made any statement concerning a union in reference to the Canadian nurse practitioners and insisted his comments were misunderstood and addressed to all three FNPs. The sole purpose of mentioning the Canadian article was to show, by analogy, that new concepts are vulnerable. Voelm asserted that he did not even know if the Canadians were represented by unions.

As he spoke to the three FNPs, he explained that he was aware that Bertram was their president and that both Bowman and Baker were in favor of the Union. He simply wanted them to listen to his views. Voelm and Paula Bertram did not have a private meeting. However, he agreed that he probably expressed to all three nurse practitioners that they could do better as individuals.

After the meeting Voelm and Bowman lunched together. He asked her how she became involved in the union and she explained that she thought it was a good way to improve and gain power *vis-a-vis* the Foundation. Bowman recalled that Voelm had said, "You know, you're limiting your salary by organizing." Then he began to review her productivity and compared it to Mary Baker's productivity. He recalled the comparison

was made in the number of patients seen. Bowman was handling 15 to 18 patients per day, while Baker saw only 5 to 7 per day. Bowman felt the comparison was that she generated \$8,000 per month while Baker produced only \$3,000. In either case, Voelm told her:

Bonnie, you know you're kind of a star as far as in relation to all the other nurse practitioners and physician's assistants. You're just about the highest producer there is. It strikes me as strange that somebody like you would want an organization that would tend to lump everybody together. It seems to me like you could do a lot better negotiating on your own than you could throw in with an outfit that wants everybody to get just the same pay and benefits.

He was convinced he had not convinced her.

Bowman recalled that after he made the productivity comparison he added that "this is not the first time Mary Baker had organized a union. That she was involved in a similar situation in Boston." When Bowman later asked Baker if she had organized another union, Baker not only denied the statement, but explained that at that time she was part of management.

13. The union election

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 20 on June 28, 1979, and a subsequent amendment to Decision and Direction of Election issued on July 12, an election by secret ballot was conducted on July 26 in the following unit:

All regular full-time and part-time family nurse practitioners, physicians' assistants and registered nurses employed by the Employer at its facilities located in Placerville, Sacramento, Auburn, Colfax, Santa Rosa, and Clearlake Highlands, California; excluding physicians, social workers, trainees and all other employees, guards and supervisors as defined in the Act.

The tally of ballots served on the parties at that time showed that there were approximately 14 eligible voters; 1 cast a void ballot; 5 cast ballots for, and one cast a ballot against Petitioner, and there were 5 challenged ballots which could affect the results of the election. Consequently the ballots were impounded and not counted until September 14, 1979. No objections to the election were filed.

Pursuant to an investigation of the challenged ballots made by the Regional Director, the challenges to the ballots of Carol Herrlie and Margaret Davis were sustained. Having sustained the challenges of the two ballots, it was unnecessary for the Region to consider the eligibility of the three remaining challenged voters, Mary O'Hara-Devereaux, Leona Judson, and Hal Tune, all challenged by the Petitioner, as their ballots could not affect the results of the election.

Subsequently, a revised tally of ballots was served on the parties on September 14, 1979, showing that of ap-

proximately 12 eligible voters, there was 1 void ballot, 5 votes cast for Petitioner, 1 cast against Petitioner, and the 3 remaining challenged ballots were not sufficient in number to affect the results of the election. On October 17, 1979, the Regional Director for Region 20 issued a Certification of Representative certifying that the Mid-Level Practitioner Group of Foundation for the Comprehensive Health Service is the exclusive representative of all employees in the above-referenced unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On October 26, 1979, Respondent filed a request for review of the Regional Director's supplemental decision, revised tally of ballots and Certification of Representative; and request for leave to present oral argument with respect to such decisions.

On November 26 and 30, 1979, the Union requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of Respondent's employees.

On November 28, 1979, the Board denied Respondent's request for review of the Regional Director's October 17, 1979, supplemental decision and certification.

On or about December 5, 1979, Respondent refused to recognize and bargain with the Union.

On or about December 7, 1979, Respondent filed with the Board a petition for reconsideration of the Board's Order of November 28, 1979, denying Respondent's request for review.

On or about December 12, 1979, Respondent filed with the Regional Director a motion for withdrawal of certification and dismissal of representation petition in Case 20-RC-14818.

On December 14, 1979, the Union filed a charge in Case 20-CA-15033 alleging that Respondent had refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

On December 19, 1979, the Acting Regional Director for Region 20 denied Respondent's motion for withdrawal of certification.

On January 3, 1980, the Board denied Respondent's petition for reconsideration.

On January 16, 1980, the Regional Director of Region 20 issued a complaint and notice of hearing in Case 20-CA-15033 alleging that Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

14. Pay raise—Rosalind Weddle and Kathleen Mead

Mead and Weddle were initially interviewed and hired by Linda Weber Goldsmith. During the interview, Goldsmith told Mead that after a 6-month probationary period she would be entitled to a raise. Nothing was mentioned concerning an evaluation or the need for an evaluation before a raise could be granted.

Both Weddle's and Mead's probationary period were due to expire in July 1979. Early in July, Mead called Nord and asked her why her paycheck did not reflect the 6-month pay increase. Nord told her that it was necessary for Dr. Lackner to complete a written evaluation

of her performance and receive input from Mary Baker before the pay raise could be given.

Nord testified that at the end of the probationary period, employees are evaluated for a possible wage increase. Although they would normally receive \$50 neither the amount nor the raise were automatic. On July 17, Nord went to River City to confer with Dr. Lackner concerning his evaluation of both employees. He indicated he wanted Mary Baker to also fill out the evaluation form. It was Nord's practice to obtain a written evaluation from the medical director of the clinic and orally confer with the FNP. Since Dr. Lackner insisted on Baker's participation in a written evaluation, Nord agreed. Dr. Lackner proceeded to mark everything excellent and Baker marked everything good. When Mary noticed the high marks the doctor was giving, she erased and changed her good marks to excellent. In evaluating the nurses and FNPs, Nord relied heavily on the medical expertise of the medical directors. However, since her expertise was in the area of office management, she would consider the doctor's evaluation but also relied on her own observations for office workers. When Nord saw that Dr. Lackner was marking Weddle excellent in all categories, she questioned the reliability of his assessments for his nurse, Kathy Mead. From her previous visits to the office, Nord knew that Weddle was struggling and the quality of her work could not be considered excellent. While Baker completed the form, Nord commented that Mead was not very cooperative. Mary Baker said she had been cooperative with her and wrote on the sheet: "very cooperative." After the meeting was complete, Nord informed Mead and Weddle that she wanted to have a meeting with each of them at the central office, in order to make a final evaluation before submitting the pay raise. On July 30, 1979, Nord called River City and spoke to Mead. They agreed that they would both come to Nord's office at noon, on August 3, for the final evaluations. Then, on August 1 Nord spoke to Mead again on some other matters and reminded her of their meeting set for Friday, August 3, and suggested that Mary Baker and Danita should also join them for lunch.

On the following day, August 2, Dr. Andrus and Nord went to the River City clinic and gave Dr. Lackner his written termination notice. Just before leaving the office, Nord spoke to Mead who was working on the lab. She reminded her of their scheduled meeting for the following day. Nord testified that Mead responded, "We are not coming up there. You are going to have to come down here." Nord answered, "No, Kathy, the meeting is scheduled at 12:30 and I would advise that you come up for the meeting." Nord had already been informed that Mary Baker had prior plans, which were firm. Since the main purpose of the meeting was to discuss the evaluations, she also reminded Weddle of their meeting.

Later in the afternoon of August 2, Weddle called and left a message for Nord that Mary Baker could not attend the meeting and they would prefer that the meeting would be held at River City. In anticipation of such a request she had instructed her secretary that if anyone requested a change in the location of the meeting, the re-

quest should be denied. On August 3 no one appeared at the August 6 meeting, for the dual purpose of discussing evaluations, pay raises, and the future of River City. At that point she had not decided to deny Mead's pay raise. Baker and Mead called back on the afternoon of August 3 and said they would not meet with her unless she provided a written agenda. They had been told on the phone the meeting dealt with the evaluations and their future roles in River City. She also informed them that no disciplinary action would be taken if they came late as the result of attending the meeting. Nord did not provide a written agenda and no one came to her meeting. Mary Baker agreed that she had received a call from Nord in regard to a meeting on August 6. The stated purpose of the meeting was to discuss the overall direction of the River City practice following Dr. Lackner's termination. Baker admitted that she requested an agenda for the meeting, but she did not recall that her request for the agenda was a precondition for the meeting. Dr. Lackner, on the afternoon of August 3, left a message with Mary Duell that no one from River City would attend the August 6 meeting.

Kathleen Mead's recollection of the events of August 1 through 3 conflicted with Nord's testimony. Mead insisted that she never refused to attend a meeting at central office or anywhere else, nor did she demand an agenda as a prerequisite to attending a meeting. Early in August she called Nord and requested a meeting to discuss her pay raise and miscellaneous problems arising at the clinic. Nord suggested that they meet for lunch at the central office. This meeting was to include Nord, Weddle, and Mead. Later on the same day, Mead called central office and left a message for Nord, requesting that their meeting be held at River City, since they only had 1 hour for lunch. She was concerned that the travel time would interfere with their opportunity to confer. Nord did not return the call. On August 2, Mead again attempted to reach Nord by telephone and again her call was not returned. Then on an unannounced visit, Dr. Andrus and Nord entered the River City office where they conferred in private with Dr. Lackner. Before Mead could renew her request for the meeting to be held at River City, Nord informed her that the staff meeting would be held the following day at the central office, and she should inform Mary Baker to be there. Mead was surprised by Nord's belligerent manner and her tone of voice. She was nearly screaming. Since Nord had never acted this way in the past, Mead assumed she had done something wrong. Mead was unaware of the fact that Dr. Lackner had just been informed he was terminated. Mead then informed Baker of the meeting. Due to Baker's previous luncheon commitment, she called the central office and explained why she could not attend. After that telephone call, Baker informed Mead that the meeting would be rescheduled. Relying on Baker's statement, Mead did not attend the Friday meeting.

Neither Weddle nor Mead received a pay raise. That decision was made by Nord, not voelm.

15. River City closing

Everyone agreed that from its inception the River City facility was far too small to operate properly. It was

understood by the manager of the property at 2720 Capitol Avenue that the Foundation never intended to remain at this location. From the beginning Foundation employees, including O'Brien and Voelm, made a continuous survey of possible medical sites in this same general area of Sacramento. Since Respondent intended to move as soon as they found a more appropriate facility, they never signed a lease and simply rented on a month-to-month basis.

When Dr. Lackner received his termination letter on August 2, he decided to remain in private practice in the downtown area of Sacramento. Since he was aware that the Foundation did not wish to remain in their present location, he contacted Elvie Bennett, the building superintendent for the Medical Arts Building, and informed Bennett that he wanted to lease twice the space that River City was using. In fact he was willing to lease the River City space if he could obtain the additional space. Bennett informed Dr. Lackner before he could lease the space, his company must give the Foundation the first right of refusal. This conversation occurred after Dr. Lackner had been terminated and before he actually left the clinic. It was then that the property manager first learned of his discharge.

Bennett then contacted Brad Kravitz, the property manager for Dalton Realty Company, and informed him of Dr. Lackner's offer to lease the River City facility. Kravitz spoke to the owners of the building, who instructed him to first offer the Foundation the right to lease the building on the same terms sought by Dr. Lackner, and if they did not accept the lease, then lease the premises to Dr. Lackner.

Kravitz telephoned Greta Nord on August 3 and offered the 1-year lease to the Foundation. She said she could not make such a decision and would call back the following Monday. When she did not return the call, Kravitz again called her. Nord explained they could not sign the lease and wanted to know if Dr. Lackner was seeking the lease. When she was informed that he was seeking a 1-year lease, Voelm called and offered to lease the space for a few months. Kravitz told Voelm it was not long enough since Dr. Lackner was willing to take it for a year. Voelm denies that he was told someone else was willing to sign a 1-year lease until after it was an accomplished fact. On Thursday, August 9, Dr. Lackner signed a 1-year lease and Bennett served a 30-day eviction notice on Respondent. After receiving the eviction notice, Voelm called and offered to sign the 1-year lease, but it was too late. As a result Dr. Lackner signed a lease for room 104 which was the River City space and room 206.

Dr. Lackner told the building manager that if the Foundation needed to remain in room 104 until its new office was ready, he was willing to sublease to them. The record is not clear if this offer was ever transmitted to the Foundation. In fact, it appears that Bennett told Voelm that Dr. Lackner would sue if they were not evicted. Voelm then asked if there was any other space in the building and he was told, "No." It would appear from Voelm's testimony, that he never received Dr.

Lackner's offer to sublease. Regardless, there was no response to Dr. Lackner's offer.

Due to the constant complaints from Mary Baker, Peggy Davis, and Dr. Lackner that the River City space was far too small, Voelm had been busy looking for appropriate quarters. At the time Dr. Lackner signed the 1-year lease, the Foundation was in the final stages of negotiating a lease on their new clinic in Sacramento. Their only alternative was to speed up the move. By expediting building permits and state clinic licensing, they were able to open the doors of the new River City clinic on November 5.

16. River City's transitional period

When Nord's efforts to schedule a meeting with the River City staff failed, she sought Voelm's assistance. He succeeded in setting a staff meeting at the central office on August 10, 1979. The purpose of the August 6 meeting was to deal, in part, with evaluations and pay raises; whereas the August 10 meeting was not set for this purpose. Nord's reason for insisting that the meeting with Weddle and Mead be held at the central office was to avoid interference from anyone from the River City staff, particularly Dr. Lackner.

Voelm announced that they had finally located a new site for the River City clinic, at 33rd and J Street. During the interim period, Dr. Riley and Dr. McIntyre, of the Woodside Medical Group, would handle the Foundation's patients and receive the revenues for their services. By referring all of their patients to one group it was hoped that their patients would remain intact and return to River City clinic in the near future.

It was anticipated that since Dr. Lackner had been terminated he would start his own practice in Sacramento. Voelm reminded the staff that they were cashing the Foundation's paycheck, therefore he expected solid team work and their cooperation. When he asked who intended to remain with the Foundation, both Mead and Baker expressed their intention to remain. Weddle was scheduled for maternity leave and Danita had just started working for Respondent, therefore she had no intentions of leaving.

After Dr. Lackner's departure, Dr. McIntyre actually treated the Foundation's patients at the old River City office. Since the Foundation had received a 30-day notice to vacate and the new clinic was not ready, it was necessary to send their patients to another location. On August 27, Greta Nord met with the River City staff members, Mary Baker, Kathy Mead, and Gerry Nally. Nord informed the staff that the office would be closed after September 15 until their new facility was ready. During this downtime period they were to refer all patients to the Woodside Medical Group, either to their midtown location next door to the old River City facility or to their main facility. Greta instructed both Baker and Mead not to refer patients to Dr. Lackner unless the patient specifically asked for him. Both Baker and Mead expressed concern over the lack of continuity of medical care. Although there was a doctor from Woodside always present at River City, they rotated and the staff was never certain as to who would be there. As a result there was a break in the continuity of care. When Nord

instructed them not to send the patients to Dr. Lackner, Mead stated that she was a patient advocate, her job was patient care. Therefore, she felt she needed to present the options and it was the patients' choice where they wanted to seek their medical care. Baker agreed that her primary role was patient care and her main concern was their welfare.

17. Mary Baker's termination from the Foundation

Since Dr. Lackner gained possession of the old River City office in mid-September, the Foundation closed its operation from September 15 through November 5, 1979. During the August 27 meeting, Nord explained to both Mary Baker and Kathleen Mead that they would be laid off during this interim period. However, Nord did ask Baker if she would be interested in working part-time at its Auburn facility. Baker replied that she would be interested in the part-time work and they discussed mileage expenses, hours, and other details concerning the Auburn clinic.

On August 30, 1979, Nord met and interviewed George Randall for the position of physician's assistant for their planned new clinic at Forest Hills. When Nord informed Randall that the mid-level practitioners were in the midst of organizing a union, Randall expressed his personal view that professionals should not join unions and therefore he was not interested. He also related his opposition to the Teamsters' efforts to organize PAs in Alaska, where he had been employed as a medical administrator. On the day following this conversation he was hired as a PA for the new Forest Hills site. Since Forest Hills was not yet opened, he was assigned the part-time work at Auburn, just a few days after the position had been offered to Mary Baker. As a result, Nord told Baker on September 4 or 5, that they had hired Randall and therefore she would be laid off until the new office was opened.

In April or May 1979, Dr. David Gordon Daehler asked Dr. Andrus if the Foundation had any openings for a physician. At that time Dr. Andrus informed him they did not anticipate an opening for about a year. Voelm testified that in May Dr. Andrus told him he was thinking of Dr. Daehler as a possible replacement for Dr. Lackner. Dr. Andrus hesitated to pursue Dr. Daehler at first because Dr. Daehler was important to the University's family practice department. Finally, the Foundation contacted Dr. Daehler in August as Dr. Lackner's replacement. He began working at the new River City clinic on November 4, 1979.

Peggy Davis and Mary Baker also returned to work on November 4. The patient flow was very low in early November. Mary Baker and the physician were only seeing 3 to 19 patients per day. Once again the River City clinic was faced with limited revenues due to the lack of patients. The funds for the grant were also dwindling according to Respondent. Consequently, the Foundation argued that it became imperative to cut cost in order to save the facility. On November 30, 1979, Greg Voelm visited the new River City facility and delivered the following memorandum to Peggy Davis and Mary Baker:

Since the patient load at our new River City Family Medical Group practice is often less than ten a day, we cannot afford to maintain a staff which includes a full-time physician, family nurse practitioner, and social worker. Effective December 10, 1979, your hours will be reduced until such time as our patient load builds up. This reduction in time is made necessary by the dislocation and negative growth in our practice caused by the events of last year. It is the reasonable expectation of the Foundation that a family nurse practitioner can see two patients and a physician three patients per clinical hour. Current production at River City is only 25% of this amount.

Effective on the above date, Ms. Baker will be employed on a two-day-per-week and Ms. Davis will work four days per week. Since Ms. Davis provides social work support to Dr. Daehler who will remain on full-time status and *since her services are an integral part of the special nature of the practice*, she will be assigned for 16 more hours a week than Ms. Baker.

The Foundation asserted that they obviously could not cut the hours of the physician, since he is an indispensable part of the facility. The supporting grant required the utilization of a social worker, therefore, they felt they would not conform to the grant if they severely cut Peggy Davis' work schedule. Thus, the only alternative was to cut Mary Baker to 2 days in an effort to save money. At this time there were not a sufficient number of patients to keep Dr. Daehler busy. With Baker's hours cut, the doctor would be able to increase the number of patients he could see. The General Counsel points out that the grant also calls for the utilization of mid-level practitioners and financially it would have been beneficial to the Foundation to further cut Peggy Davis' schedule and keep Mary Baker at full time. This reasoning is based on the fact that the Foundation was not allowed to bill for a social worker's services, but they can bill for the services rendered by a mid-level practitioner at the same rate that is billed for a physician's services. The General Counsel also disputes the assertion that River City was facing dwindling grant money since on September 9, 1979, the Administration for the Aging renewed the grants and Respondent received \$94,500 for its continued operation. During November, Baker generated \$2,197 in patient fees, which Dr. Daehler, the new medical director generated only \$1,801 in patient fees. Of course since they could not bill for Peggy Davis' services, she did not generate any income.

The Foundation continued to experience a lack of patients in December. In an effort to further reduce cost, it cut central administration staff and terminated janitorial services. On December 19, 1979, Baker was informed that Nord would meet her at 4:30 p.m. Upon her arrival she explained that there was not a sufficient amount of work to justify an FNP at the River City clinic and handed her a letter which stated, in part:

I am sorry to inform you that in evaluating the situation at River City Family Medical Group we find

that we are unable to afford to keep you on our staff due to lack of work. Therefore, your services will no longer be required as of 12/20/79.

In mid-December the average patient flow for both Dr. Daehler and Mary Baker combined was only eight. Dr. Daehler was certainly capable of handling all of those patients. In fact, at the time Dr. Daehler testified, on January 30, 1980, he was seeing 25 patients per day.

Dr. Daehler agreed to write a reference letter for Mary Baker. He was of the impression Mary intended to seek employment elsewhere, although he did not believe she was terminated on December 19, but simply laid off, pending an increase of patients. Mary Baker left a note on Goldsmith's door stating she had been terminated. Goldsmith then asked Ruth Gomez, who was Dr. Andrus' personal secretary, if Mary had been terminated. Gomez confirmed that Baker had indeed been fired. Margaret Alton was a patient of Mary Baker and was scheduled for a medical appointment with Baker on December 26. Upon her arrival at the River City clinic, Alton was told by a clerk and a nurse that Baker no longer worked there. Since Alton wanted to keep Baker as her medical adviser, she asked how she could contact Mary. Alton was informed that Mary was looking for another job and to call back periodically. When Baker located a new job, they would give her the telephone number.

In mid-January, while preparing for this trial, the Foundation reviewed signed authorization slips, which were used to transfer patients to Dr. Lackner. Those medical records did not contain Dr. Lackner's name and there was no indication that Dr. Lackner had ever seen these patients, who had been treated by Mary Baker at the old River City site. Respondent concluded that Mary Baker had deliberately transferred her patients to Dr. Lackner in direct insubordination to the Foundation's orders. The survey revealed that at least 43 patients fell into this category. At random 12 of these patients were called. Seven patients stated that they had been asked or told by Mary Baker to go to Dr. Lackner, without their first asking for a referral to the doctor. Based on these findings the Foundation sent Mary Baker a telegram on January 14, 1980, which informed her she was terminated for having referred patients to Dr. Lackner instead of the physicians who had been designated by the Foundation.

Greg Voelm participated in the decision to terminate Mary Baker in January based on the Foundation's discovery that she had transferred a large number of patients to Dr. Lackner. He also admitted that when he gave his affidavit to the Board in September that he was aware that Baker had transferred patients to Dr. Lackner, but he claimed he was not aware of the magnitude. However, in his affidavit he refers to losing thousands of dollars in patient revenue due to the transfer of Foundation patients to Dr. Lackner by Mary Baker and Kathy Mead.

Debra Stockel began working at the new River City clinic as a back office medical assistant on November 5, 1979. She acknowledged that she had told patients who were seeking Mary Baker after December 20 that Mary

was no longer there and that when she found out her new telephone number she would give them the number. She also told Margaret Alton that she did not think Mary would return to River City, although the Foundation had told the River City staff that Mary had simply been laid off. The staff was also told that Baker would be reviewed in the first of January. A few weeks before Christmas, Baker and Stockel were lunching together and talking about the lack of patients, poor productivity, and low revenues. Baker commented that Dr. Daehler would receive the same treatment that Dr. Lackner received from the Foundation if the situation did not improve, because the Foundation got upset with Dr. Lackner when the money was not coming into the clinic.

After the opening of the new River City clinic, Stockel spoke to approximately 20 patients who told her that they had never gone to Dr. Lackner after they had signed the authorization forms which transferred their records to him, and they wanted to remain patients of River City. Mary Baker denied that she had ever urged a patient to sign an authorization card who had not first requested Dr. Lackner. None of these patients ever told Stockel that Mary Baker had asked them to go to Dr. Lackner or to sign the transfer authorization forms.

18. Kathleen Mead's departure from the Foundation

During the August 27 River City staff meeting, Kathleen Mead also inquired as to possible employment during the 1- to 2-month shutdown period. Since she was aware that the Foundation would channel the River City telephone calls to the central office, she requested permission to work at the central office to handle these calls. She was familiar with the patients and felt that by personally answering the calls she could perform a useful service. Nord's initial response was that she would check. Later Nord said she could answer the telephones and then a short time later changed her reply again, stating that Greg had said "No."

Before the River City facility closed on September 15, Dr. Lackner asked Mead if she would like to work for him. She agreed with the understanding that she would give him 2 week's notice before she returned to the Foundation. When the facility was closed there was no announcement as to how soon the new facility would be ready. Mead then called Nord and informed her that she was working temporarily for Dr. Lackner and she would need 2 week's notice before she could return to the Foundation. Nord replied, "Why don't you just stay with Dr. Lackner? You like him." Mead explained that the Foundation was able to offer more benefits. During the same conversation Mead again asked about her pay raise. Since Mead was about to leave on her vacation, she said she would contact Mead upon her return. Nord never again contacted Mead concerning the raise.

On or about October 26, Mead received a notice from Nord which instructed her to return to the new River City facility on November 5. The letter did not allow her sufficient time to give the promised 2 week's notice to Dr. Lackner. Mead decided to remain with Dr. Lackner and she notified the Foundation of her decision.

19. Cases 20-CA-15244 and 20-CA-15285 Sierra Family Medical Group in Placerville

a. Background

Prior to joining the Foundation's Placerville facility on March 26, 1979, Dr. Weiser had maintained a private medical practice in Ojai, California, for 18 years. He was drawn to this new medical group by the fact he liked Dr. Lehrman, the Sierra medical director, and was impressed with the latter's assertions that it was a "wonderful practice." It was not until after he arrived that he learned of the bleak financial condition of the clinic, its labor law problems, and the fact that Dr. Lehrman was negotiating to leave and enter private practice. When Dr. Lehrman resigned, Dr. Weiser was named the medical director in October 1979.

The Sierra Clinic was not self-sustaining. From its inception it received monetary grants from the Robert Wood Johnson Fund. In addition, it had the benefit of virtually free rent from El Dorado County for a wing of an old hospital and Federal assistance through the use of CETA workers. Unfortunately, even with all of this economic assistance the Placerville site was only beginning to hover at a break-even point.

During the executive committee meetings of February 11 and March 13, 1980, each site was reviewed for operational considerations and economic conditions. The composition of the Sierra work force was discussed. Particular attention was given to the Sierra, Auburn, Colfax, and Forest Hill areas, since these were the clinics where foundation funds were beginning to run out. The crucial and essential economic problem facing the Sierra Group was its inability to survive without continued infusion of financial support from the Robert Wood Johnson fund, El Dorado County, and the Federal Government (CETA workers).

The original projection for the Sierra Clinic called for one or two physicians supported by FNPs. It was felt that the Sierra Clinic would realize a substantial patient flow in 1 or 2 years and become self-sustaining thereafter. When these projections were not achieved, Elkus concluded that the Foundation's principal mistake was its failure to build a stable physician practice before adding the mid-level practitioners (FNPs). A National Service Corps study concluded that initially one, two, or possibly three physicians should have been hired before adding mid-level providers. The Foundation's approach had been backwards. It was not economically feasible to start with mid-level practitioners and then build a physician's practice on top of that.

At the February 11 meeting Voelm recommended that for economic reasons the Foundation should consider the closing of the Sierra, Auburn, and/or River City sites. Dr. Andrus was opposed to closing any clinics.

During the meeting Ted Tyson was hired to replace Voelm as acting director of the Foundation. Tyson had recently retired from the Air Force as a lieutenant colonel with 23 years' service. He had heard of this job opportunity through Nord, who was an old family friend. Tyson readily admitted that he lacked educational training or prior experience in the fields of medical facilities,

the delivery of health service, or writing grants. Dr. Andrus was satisfied that his prior experience was sufficient to qualify him as the administrator.

Tyson was directed to survey and inspect each site in order to assess their possible options to maintain the delivery of high-level health care services, while improving the financial position of each clinic. He was to report his findings at the next executive committee meeting on March 13, 1980, with particular emphasis on Sierra, Auburn, Colfax, and Forest Hill. His principal assignment was to make recommendations as to whether a site should be closed; and, if not, then what action should be taken to insure its economic success. A budget was needed which would include suggestions on how to increase the patient load, improve staff efficiency, and reduce costs. The staff had already been reduced throughout the Foundation.

Tyson's inspection of the Sierra Clinic consisted of one or possibly two visits for approximately 2 hours. Although he met and spoke to Dr. Natali and several other employees, his primary conversations were with Dr. Weiser. After reviewing records, documents, ledgers, and conferring with members of the central office staff, executive committee, and Sierra Clinic, Tyson concluded that a third physician should be hired at Placerville in an effort to restructure the Sierra Clinic to a more physician oriented practice.

In arriving at his recommendation, Tyson did not submit a written cost analysis. He made the mathematical calculations in his head, based on information he obtained from Dr. Weiser and the central office staff. The projected salaries for Bertram, Herrlie, and the third doctor were \$21,600, \$18,500, and \$42,500, respectively. If both part-time FNP's were terminated the arrival of a third doctor would increase the annual budget by only \$2,400. This slight additional cost was considered cost effective because the new *full-time* doctor would perform services that the *part-time* FNP's were neither capable nor allowed to perform.

Tyson's conversation with Dr. Weiser had convinced the former that a third physician was desperately needed to relieve Dr. Weiser of his heavy workload. It should be noted that at this same time Dr. Natali did not have a full work schedule. Tyson had not conferred with Dr. Natali. Prior to his joining the Foundation staff Dr. Weiser had maintained a substantial obstetrics practice for 18 years. Since he was tired of this area of medicine, he and Dr. Andrus had a verbal agreement that Dr. Weiser would not handle OB patients. At that time Dr. Lehrman accepted 3 or 4 new OB patients each month. When Dr. Lehrman resigned, Dr. Weiser began to share the OB patients with Dr. Natali. In addition to the Sierra Family Group there was only one other doctor in the area who accepted medical obstetrical patients. As a result the number of OB patients increased to approximately 10 per month.

In his conversation with Tyson, Dr. Weiser explained that the care of the OB patients was a major factor in his exhaustion. This was due to the nature of work, which is very time consuming both during and after office hours. In fact, it tends to interfere with other areas of the medical practice. The problem was further complicated since

most of their OB patients were covered by medical. These individuals often had limited education and were financially and medically underprivileged. Their pregnancies were plagued with a higher percentage of complications in delivery than those patients in the private sector.

The FNP and the physician provided the OB patient with routine care on an alternating monthly basis. However, in the latter stages of the pregnancy the helpfulness of the FNP diminished. They were not permitted to admit or attend patients at the Marshal Hospital. Therefore, when a patient entered labor the FNP had no further role, since the deliveries were in a hospital setting. As a result Dr. Weiser and Dr. Natali were forced to share the on-call duties on alternate nights and weekends, without any relief or assistance from any other physicians. There did exist a "major weekend OB call schedule" available to doctors in the Placerville area. However, it was Dr. Weiser's position that they could not utilize this call system since it would interfere with the continuity of care for their patients. It also breached the clinic's obstetrical contract to handle the patient through delivery. By hiring a third physician, Dr. Weiser's and Dr. Natali's oncall schedule would be reduced to every third night and every third weekend, which Dr. Weiser felt would substantially alleviate his exhaustion. The FNP's could not provide this relief, only a third doctor.

At the March 13 executive committee meeting, Tyson brought to the committee's attention that there was only \$36,000 remaining in the Robert Wood Johnson grant. When those funds were spent, it would become critical for those clinics receiving benefits under the grant to be self-supporting. To attain this goal the executive committee tentatively accepted Tyson's recommendation to restructure the Sierra clinic to a physician-oriented practice. The following is an excerpt from the minutes of the executive committee:

Placerville: It was noted that the Placerville site was now approximately at the break even point that some reduction and/or change in staff was still required, based on current patient load and practice characteristics. Personnel problems were also discussed, with particular reference to the possibility of hiring a third physician and restructuring the practice to include three physicians and one full-time family nurse practitioner until patient volume justified additional mid-level providers. It was decided that if there was to be a reduction in support staff it would be accomplished by termination of the part-time Family Nurse Practitioners.

Nord was instructed to intensify the search for a third physician and ask Dr. Weiser for recommendations. It was anticipated that a third physician would be available and hired in mid-July or the first of August after the completion of their residency program. At that time a final determination would be made as to the appropriate ratio between physicians and the FNP's. Therefore as of March 13, 1980, the Foundation intended to retain the two part-time family nurse practitioners, Paula Bertram

and Carol Herrlie, until the arrival of the third physician in July or August. At that time, a final decision would be made as to the need for their termination to complete the restructuring of the Sierra clinic to a physician oriented practice.

b. *Carol Herrlie*

Carol Herrlie applied and was accepted for the Family Nurse Practitioner program at the University of California at Davis. Paula Bertram was her counselor and one of her faculty instructors. Part of the program required clinical experience or work at a preceptorsite. Dr. Lehrman referred her to Gerry O'Brien, who was the director of the Foundation at that time. She was interviewed by O'Brien and Dr. Andrus. In October 1978, she was accepted by Respondent for a 12-month training course at the Placerville site, on a part-time basis of 20 hours a week, at \$500 per month. Dr. Lehrman was her preceptor until his departure in October 1979.

Upon Dr. Lehrman's departure, Dr. Weiser agreed to become her preceptor while she completed her internship. At that time her hours were increased to full time and her income rose to \$1,000 per month.

Herrlie first became aware of the Union's organizational efforts when she was invited by Bertram to attend a mid-level practitioners meeting, which was scheduled immediately preceding the Foundation's executive committee meeting. The purpose of the meeting was to discuss the proposed contracts. She simply listened to the discussion and did not participate.

As the election approached, Bertram informed her that since she was a student her vote would be challenged. During the week of the election both Dr. Andrus and Mary O'Hara-Devereaux visited the Sierra Group. At one point O'Hara-Devereaux entered Herrlie's office and asked if she had a few minutes to talk. O'Hara-Devereaux suggested they converse in an examination room where it was quiet and they were alone.⁹ O'Hara-Devereaux wanted to know what she knew about the pending election. Herrlie answered that the mid-level practitioners were interested in organizing a group in an effort to discuss subjects such as patient policies, contracts, wages, and events that would affect the running of the Foundation. She felt it was important for the FNP to organize as a group since their efforts to negotiate and amend the proposed contracts had been blocked by the Foundation. O'Hara-Devereaux then asked her if she realized such a group would be a union and would result in a third party being present during bargaining. Herrlie responded that was not the intent of the group since they were only organizing in their own entity and not associated with any larger union or organization. After the O'Hara-Devereaux conversation was concluded, Dr. Andrus entered and asked the same questions, to which Herrlie provided identical answers.

On the morning of the election Nord called Herrlie and urged her to vote, but to vote carefully. Nord ex-

pressed her opinion that without the Union there already existed good negotiations and that it was not necessary to have a third party involved in negotiations.

The Placerville facility was quite large and Dr. Weiser's office was in the North wing, at an inconvenient distance from Herrlie's work area. As her preceptor, he believed it was imperative for them to work in close proximity to each other. Therefore, he invited her to move into his office so they could confer and see patients together. She declined the offer because of his very heavy smoking habits. When he offered to quit smoking at least in the office, she continued to decline. Herrlie explained that, although he was sincere, she was doubtful that he could stop smoking. In addition she felt that as medical director he needed a private office. They mutually agreed to maintain separate offices. However, in order to work closer to Herrlie, he moved into Dr. Lehrman's former office.

Dr. Lehrman's procedure was to review charts with Herrlie on a daily basis, either at the lunchbreak or at the end of the day. Since she had not previously worked with Dr. Weiser, they initially agreed to review the charts and discuss the patient as each patient was seen. As their schedules increased they found less time to discuss the patients and their diseases. Dr. Weiser candidly admitted that he was willing and capable of demonstrating the skills needed for assessment and diagnosis from the bedside, but he lacked the didactic skills of Dr. Lehrman. Therefore, she would have to acquire the academic portion of her training from textbooks and magazines. The doctor's candor was disappointing. She felt the discussion of patients and a review of her recordkeeping by her preceptor was essential to her training. During the first 2 months they worked together, they did not even have a set time to review charts. She was increasingly frustrated by this lack of training and vented her displeasure of Dr. Weiser with her fellow workers. Finally, in November they mutually agreed to review charts each afternoon at 3:30. By January, they slipped back into their old methods and spent less time reviewing charts. In February he made a greater effort to spend more time with her.

Herrlie was scheduled to complete her internship on March 31, 1980. Near the end of February, she asked Nord if her status would change to that of a full-time permanent employee. Nord asked her how the internship was progressing and how was she doing with Dr. Weiser. Herrlie told her that at first it was difficult to adjust to Dr. Weiser and the 4 months since Dr. Lehrman left had been very bad. In the beginning she did not have a real smooth relationship with Dr. Weiser, but she felt he probably had a lot of problems in his personal life and the preceptorship was simply one additional burden. However, from the middle period of her internship, he became more active as her preceptor, and their problems were being solved. Then Greta mentioned Bonnie Bowman had left the Foundation and Herrlie was under consideration for Bowman's former position, in the 1980 budget. There was no definite commitment for a job, but simply an understanding that Herrlie's production would

⁹ At the time this conversation occurred, Herrlie was still a student and she knew O'Hara-Devereaux and Dr. Andrus as codirectors of the Family Nurse Practitioner program at the University of California. In addition Herrlie was aware that O'Hara-Devereaux and Dr. Andrus lived together. She had been invited to attend an open house at their home.

be observed over the next 6 weeks before a final offer could be made.

Dr. Weiser consistently praised Herrlie's professional skills. On one occasion in the latter part of November 1979, he assured her he was happy with her and her work. As far as he was concerned she would be a full-time employee upon the completion of her internship. There was however one area in their relationship that irritated and displeased him. On numerous occasions he observed her seeking the advice and assistance from Bertram. As her preceptor he was responsible for her and thus felt she should look to him as the source of her education and assistance. He never specifically instructed her not to seek advice from Bertram concerning patient problems, but he did inform her she was going to Bertram far too often. In her testimony she admits conferring with Bertram. In fact, she had Bertram come into the examination room to look at patients. As a fellow FNP she felt it was appropriate to seek instruction and advice from Bertram. However, she agreed that in some situations it would have been more appropriate for her to seek the advice of her preceptor.

c. Paula Bertram

Dr. Weiser worked predominately with Sue Wooten, while Dr. Natali worked generally with Paula Bertram. Dr. Weiser praised the professional skills of both Wooten and Bertram. Dr. Natali did not comment on Wooten's skills, but testified Bertram was very talented and an excellent clinician. In each case the doctors expressed an uncomfortable feeling when they worked with the other FNP. When Dr. Weiser moved his office to be near Herrlie, he also was closer to Bertram and further from Wooten. For everyone's convenience Dr. Weiser then worked with Bertram and Dr. Natali worked with Wooten. Since Dr. Natali felt uncomfortable working with Wooten he soon returned to his former office and resumed working with Bertram.

Although Dr. Weiser praised Bertram's skills, he also testified she was disloyal to him and he felt uncomfortable working with her. This uncomfortable feeling was based partially on her relationship with Herrlie, but also on a long string of events, beginning with the period just preceding his acceptance of the Sierra medical directorship.

Paula Bertram had readily admitted that she and Dr. Lehrman were very close personal friends. When the Foundation initiated a search for his replacement, she along with Bonnie Bowman expressed their concern to Voelm that Dr. Weiser should not become the next medical director. In order to avoid having her comments reach Dr. Weiser through a third party, she approached him in the latter part of 1979 and told Dr. Weiser "I have some qualms about you being the medical director because I don't think you like meetings. I don't think you like some of the organizational stuff that goes into making a clinic." Dr. Weiser testified that from the time he became medical director until Bertram's termination their relationship remained cool and strained. Although she felt Dr. Weiser would experience difficulties and would not be able to handle the position of medical director, she accepted him as her supervisor once he was

appointed. There was an apparent difference in their approach to the practice of medicine. He not only loathed meetings, he considered them a luxury that the Foundation could ill afford considering its financial position. In contrast Bertram liked to organize a lot of staff and educational meetings with graphs, charts, and suggestions for patient education. He simply preferred to treat acute problems as opposed to long ongoing problems and felt the actual practice of seeing the patient was more important than staff meetings.

On Friday, January 25, 1980, Bertram observed Dr. Weiser reading a newspaper, which was lying on his desk. The article dealt with Bertram's testimony and, in particular, her recollection of a prior conversation she had with Dr. Andrus. After Dr. Weiser inquired in general terms as to what was happening at the trial, he then asked her why she was at the trial for so many days. Bertram had been under subpoena and had attended all of the previous hearings in January and February, except for the last day and a half. She explained that the General Counsel had informed her that as a principal organizer of the Union it was necessary for her to be present and assist during the trial. When she then told him that he looked "mad," he denied it. Then Dr. Weiser replied in a very loud and emphatic voice:

... yes I am mad. I'm mad because I just think this is a terrible thing that's going on. I think that this is very divisive to the clinic, it's destructive to the nurse practitioner movement, that you're endangering nurse practitioner movement and nurse practitioner jobs, that I'm getting a lot of flak or questioning from the doctors at the Marshall Hospital, ... doctors don't like this kind of thing. . . . [T]his whole thing was just a personality conflict between Dr. Lackner and Dr. Andrus.

He was convinced that FNPs were being used in a personality struggle and that a lot of lies were being told at the hearing. Bertram was disturbed by his comment because most of the article dealt accurately with her testimony concerning her conversation, she felt Dr. Weiser was not in a position to judge its accuracy.

Dr. Weiser did not deny or disagree with Bertram's recollection of their conversation, which in his opinion was simply a reflection of how he perceived the hearings and the surrounding publicity. He did not hesitate to express his dislike for unions. This personal animosity was deeply rooted in his own personal background and experiences. His father had been a physician, and he himself had practiced medicine for nearly 20 years. As a group he described physicians as conservative and generally opposed to unions.

Although he was opposed to organizing the FNPs into a formal labor group, the evidence is uncontradicted that he fully supported the concept of FNPs. During his 18 years of practice in Ojai, California, he was the first physician in the community to use a FNP. Initially, the medical community fought him strenuously. They warned him of possible malpractice lawsuits and that he would be denied access to local hospitals. Eventually, through his steady support and persistence, the FNPs

were not only accepted in the Ojai medical community but several former opponents now utilize FNPs in their practice. When Dr. Weiser arrived in Placerville, he was confronted with similar distrust, fear, and opposition to the FNPs within the local medical community. The local doctors referred to them as mini-doctors and complained that they had too much freedom.

Based on his personal background and experience, he was convinced that the FNPs were harming their own cause by organizing a union. Because of the physician's traditional opposition to labor organizations, he felt the FNPs' organizing efforts could only delay and hinder the day when they would be fully accepted in the medical community. In holding this philosophy, Dr. Weiser was convinced that the widely publicized hearing was particularly harmful to the FNPs' movement, and he stated:

Well, I feel very strongly pro-nurse practitioner, first of all, and I feel that the medical profession, in general is very anti nurse practitioner. They're afraid of them and I feel strongly that in order for the nurse practitioner movement to be a truly viable thing, they have to have the support of the medical profession and you don't get the support of the medical profession by fighting, by causing all this ruckus in the papers.

The Foundation held a press conference on January 30, 1980. When Bertram discovered the location of the meeting she tried to gain entrance but was blocked by Voelm, which upset her. She then proceeded, in what she described as a clowning manner, to pound on the window, cry, and yell for Dr. Weiser or Wooten to open the door. On the following day, Bertram reenacted the whole episode in front of the lab technicians at Placerville. As Dr. Weiser walked by she tried to joke with him and asked him why he had not admitted her to the press conference. He remained silent and stern as he walked pass. Dr. Weiser suffers from a hearing deficiency and stated he did not ignore her question or jesting. He simply did not hear her. She then followed him into his office and asked what had actually happened at the press conference. To which he explained the Foundation simply showed a series of charts and graphs and then broke for lunch.

During the hearings, Bertram discovered that her co-worker, Wooten, had received a pay raise in November 1979. Since their productivity was similar and they started working for the Foundation approximately the same time, Bertram felt she should also be entitled to an increase.¹⁰ Bertram testified that when she expressed this view Dr. Weiser replied, "I think you'll get whatever you have coming." The doctor said he would not use the phrase "have coming" and believes he said, "I think you will get what you deserve." When asked if he made any other comments, she testified that Dr. Weiser also said something to the effect: "don't be naive to expect people to be nice to you after what you've done, or what you're doing." Dr. Weiser was not questioned concerning this statement, therefore he neither admitted nor denied its

¹⁰ Dr. Weiser could not recall recommending a raise for Wooten. He felt her work was outstanding, and she was very loyal.

accuracy. He also claimed that he had already recommended a pay raise for her to Greta Nord. A few days later she approached Dr. Weiser with a stack of her productivity charts, but he said it was not necessary to review them since he knew her productivity was fine. As she started to depart, he asked her if she thought they could work together. He told her she was afraid of him and disloyal, and concluded his remarks by stating "you're uncomfortable with me." She denied she was afraid of him, and he recalled she said, "I think sometimes I am uncomfortable with you and you're uncomfortable with me. We're not the same kind of people. We'll probably never be the best of friends. We don't always practice the same kind of medicine."

Although Dr. Weiser denies the Foundation directed him "to take a look at her," Bertram claims that during this same conversation he told her that the Foundation had instructed him to look at her work, to see if they could work together. The testimony is uncontradicted that Dr. Weiser felt uncomfortable working with Bertram and that he preferred to work with Wooten; however, he was very impressed with Bertram's abilities as a clinician.

Dr. Weiser was aware that Bertram was a close friend of Dr. Lehrman. He asked her if she intended to join Dr. Lehrman in his practice. She admitted the two of them fantasized over that possibility but they did not have any plans. Dr. Lehrman and Dr. Santiago were partners. The latter was not in favor of the nurse practitioners. Therefore, until Dr. Santiago changed her mind or departed, it was unlikely that Bertram would ever work with Dr. Lehrman.

During the January and February hearings, some employees discovered that their personnel files were not complete and some contained adverse comments and letters from physicians. Since Bertram wanted to know the content of her personnel file, she called the Foundation's central office and asked to speak to Greta Nord. Nord was out of the office. Bertram left a message with Jerry Nalley that she wanted an appointment with Nord for the purpose of reviewing her personnel file. Greta returned the call and initially set up a meeting in Placerville for February 20. Due to an emergency Greta was unable to keep the appointment which was then reset for February 22. When they finally met, Greta assured Bertram that all employees were informed and aware of any adverse comments which may exist in their files. In addition she explained that she had never heard an adverse comment concerning Bertram, whom she described as an excellent clinician. They inspected the file together. After Nord assured Paula that to the best of her knowledge the file was complete, Paula asked her to initial each document. She complied but was offended by the request. At this point Greta suggested that "we should let bygones be bygones . . . and have a little more trust in each other."

Since Sue Wooten had received a raise on her employment anniversary, Bertram felt she was entitled to the same treatment. Greta agreed that she deserved a raise but questioned the extent of making it retroactive. Approximately a week later, after Greta had conferred with

the central office, she advised Bertram that her pay raise was approved and it was retroactive but not to the date of Wooten's raise. They were standing in the hallway and Bertram said she did not find the offer satisfactory, but she did not wish to discuss the raise in a public area. It was Bertram's position that the raise should be an automatic step increase and not negotiated. Nord disagreed.

On February 22, 1980, Nord, Bertram, and Herrlie again discussed the number of hours each would work in the future. Bertram wished to increase her schedule from 50 percent to either 60 or 75 percent, while Herrlie sought full-time employment. Since Bertram had seniority she was given first choice as to the number of hours she would work. If she chose a full schedule there would not be sufficient amount of work to retain Herrlie. However, Bertram did not want to work full time, nor did she wish to interfere with Herrlie's potential employment. After discussing various options and the problem with low patient load, they all agreed that both Bertram and Herrlie would work 60 percent or 24 hours per week. Herrlie was told that eventually as the patient load increased her hours would increase.¹¹

On Friday, March 14, 1980, a staff meeting of the clinicians was held in the staff lounge of Placerville. Various individuals may have entered the lounge and even participated in the discussions. The primary participants were Dr. Weiser, Dr. Natali, Herrlie, Wooten, Carol Paulsen, and Bertram. The latter presented a graph to the group which set out health maintenance procedures.¹² They discussed methods of increasing patients. She suggested that the doctors could generate an increase in business if they would refer patients to the nurse practitioners for health maintenance procedures such as a regular checkup, EKG, or pap smears. As these health maintenance procedures became repetitive and routine, the patient load would increase. Wooten stated that, "every time I refer a patient to one of the doctors, I never get them back," and then related an anecdote of an encounter that occurred that morning with a former patient, whom she had previously referred to Dr. Weiser. As the patient passed her in the hall she whispered to Wooten that she missed her. Bertram expressed her view that the doctors were not doing a good job in referring patients to the nurse practitioners. Bertram urged doctors to be more conscientious in their utilization of the nurse practitioners. She felt they would all have more work and would provide a better quality of health care if the doctors who were treating a patient with a chronic disease would refer the individual to a nurse practitioner for followup procedures in the nature of health maintenance, such as a physical. Dr. Weiser complained he was working very hard, and he preferred seeing fewer patients and was therefore more than will-

¹¹ Herrlie believed this meeting occurred in the first week of March.

¹² Dr. Natali testified that Dr. Thorp had conducted an audit of the office and pointed out the inadequacies of their pap smear's procedures. These findings served as a catalyst for a discussion on preventive care. Bertram was often the driving force behind these biweekly meetings. Dr. Natali felt she was an excellent clinician, very talented, thorough, and responsive to the needs of the patients. It was her chart that outlined a method for continued health maintenance procedure for the patients to educate and keep them healthy.

ing to refer more patients to FNP. Bertram was unaware that Dr. Weiser responded in a shocked manner or perceived her comments as an accusation that he was stealing patients from the FNPs. In fact, Bertram denies that she ever accused Dr. Weiser of stealing her patients. Herrlie could not recall anyone accusing the doctors of stealing patients. Dr. Natali recalled an off-hand comment made by Bertram to the effect that when the FNP referred patients to the doctors, they are never referred back to the nurse practitioners. Dr. Natali did not take offense to her comment nor did he feel it was made in an accusatory or disrespectful manner.

Apparently no one actually accused the doctors of stealing patients from the FNP. However, both Carolyn Paulsen and Dr. Weiser felt such an accusation was the obvious meaning and intent of Bertram's statement. In fact, Dr. Weiser told Bertram, "You made me feel like I'm stealing your patients." Paulsen was disturbed by Bertram's tone of voice because she seemed to infer that Dr. Weiser was deliberately not returning patients.

After the meeting, Dr. Weiser telephoned Nord and requested that she come to Placerville as soon as possible, since he was experiencing some staff difficulties. He added that Bertram wanted to discuss her retroactive salary and an increased work schedule. His final comment was that he was damned unhappy in regards to his relationship with Paula. They agreed to meet the following Tuesday, March 18, 1980, the same day of the scheduled community advisory group meeting. Before she left the central office she repeated Dr. Weiser's complaints to Ted Tyson, the new administrator of the Foundation.

Upon Nord's arrival she had a preliminary meeting with Dr. Weiser at 11 a.m. He reiterated the substance of the March 14 meeting and stated, "Paula as good as accused me of stealing patients." Although he admitted she never actually used the word "stealing," he felt that was the intended inference and therefore he considered her comments a personal attack. He also complained that he did not feel comfortable nor supported by either Bertram or Herrlie. As an example, he explained that when he was heavily booked they did not offer to take some of his patients; however, when they were heavily booked Dr. Weiser would help them. His relationship with Wooten was totally different, since they always assisted each other when needed. It also annoyed him that Herrlie would often confer and seek advice from Bertram. All of these factors convinced him that neither Bertram nor Herrlie were supportive or loyal to him.

At 11:30 a.m., Dr. Weiser, Nord, Bertram, and Herrlie met to discuss salaries and schedules. He quickly pointed out that he did not feel the setting of work schedules and salaries were part of his functions as medical director. Since their schedules were unimportant to him, he was agreeable to whatever hours they preferred. When Bertram and Herrlie mentioned they wanted an increase in their work schedule, Nord reminded them that just 3 weeks earlier they all agreed to a 60-percent schedule. Their hours could not increase until Dr. Natali had a full schedule. Nord explained that the Sierra clinic was approaching a point where it was necessary for it to become self-sufficient, since the funds from the Robert

Wood Johnson fund was nearly depleted. Therefore if they absolutely needed additional hours they should look elsewhere. Bertram and Herrlie accepted the 60-percent. The discussion then turned to how they would work the 60-percent schedule. They preferred working 3 full days as opposed to the previously suggested 4 half days and 1 full day. Nord was agreeable to this suggestion if it would correspond to the doctor's schedules. Again Bertram said she was entitled to a raise retroactive to November, but Nord disagreed. Although voices were not raised, Nord felt the atmosphere was very uncomfortable. She was very disappointed because she felt they had resolved the problems of schedules and salaries on her previous visit.

The community advisory board meeting began at 12:30 p.m., with Nord, Dr. Weiser, Dr. Natali, Bertram, Herrlie, Vi Tara, Marian McAdams, and Dr. Weidmer in attendance. The meeting was conducted by Dr. Weidmer, the public health officer for El Dorado County and chairman of the community advisory board. Nord announced that Vi Tara had been promoted to the position of medical service representative, effective December 1, 1979. In her new capacity she would visit various businesses in the community in an attempt to increase the volume of patients. Then Nord displayed a financial chart and explained that the Sierra clinic hovered around the break-even point. She did not contemplate any other personnel changes. Only Bertram testified that Nord had told Dr. Weidmer that the Foundation did anticipate personnel changes since they wanted to hire the CETA workers.¹³

Bertram then addressed the group and complained that she did not feel there existed a team effort or copractice in Placerville. Dr. Weiser agreed with her conclusion and placed the blame directly on Bertram's failure to support him. Nord viewed Bertram's public comments as very disrespectful to Dr. Weiser, since he had been emphasizing in the community the importance of copractice. After the meeting Dr. Weiser and Nord again conferred. He was depressed over the fact he had not gained the respect of either Bertram or Herrlie and stated, "I just don't feel they're loyal. I know if Paula was offered a job with Dr. Lehrman, she would drop this job immediately." Nord claimed that before she left the Sierra clinic on March 18 she told Dr. Weiser that Bertram and Herrlie should be terminated and he responded, "Do whatever you think is right." Dr. Weiser denied that Nord mentioned anything to him concerning their termination. He assumed she would return to the central office and discuss the schedules and salaries. In fact, Dr. Weiser stated he did not learn of the termination until March 24, after the decision had been finalized. No one consulted him. Nor did Nord inform either Bertram or Herrlie that she was upset and considered terminating them. As she left Placerville on March 18 she was convinced that the conflicts which existed between Dr. Weiser, Bertram, and Herrlie could not be resolved due to their demands and attitude.

¹³ Dr. Natali and Herrlie agreed that Nord had stated that she did not anticipate any personnel changes.

Upon her return to Sacramento, Nord reported the events that had occurred at Placerville on March 14 and 18. Tyson testified that she was visibly upset by the experience. From his observation he felt it was readily apparent that Bertram's and Herrlie's demanding attitude, the accusation that Dr. Weiser was stealing patients, the tenor of their conversation, and the overall atmosphere left a very deep impression upon Nord. She was very disappointed since she felt that the strain and tension which may have existed during the January and February trial had dissipated. It was her expressed hope that everyone would cooperate and let "bygones be bygones." This positive feeling was reinforced when she left Placerville on February 27, when, for the first time in a long time everyone agreed on the work hours and something was actually accomplished. However, the meetings and statements made on March 14 and 18 convinced Nord that the ill-will that existed between Dr. Weiser, Bertram, and Herrlie was beyond reconciliation. After listening to Nord, Tyson in effect said, "Get rid of them." Apparently Nord had made a recommendation for their termination, and she was in complete agreement with Tyson's decision. If Tyson had the sole authority he would have fired them immediately. Since he lacked that authority, he called for a meeting of the executive committee. Dr. Andrus was unavailable until Monday, March 24, when he received Tyson's verbal recommendation. The same recommendation was made to Elkus. The recommendation for termination was accepted. On the same day, March 24, 1980, Nord prepared and hand-delivered the following letters:

Paula Bertram, F.N.P. Sierra Family Medical Group 935 Spring Street Placerville, CA 95667

Dear Paula:

A decision was made by the executive board to change the method of the Sierra Family Medical Group practice to a more physician oriented practice. Therefore, your services will no longer be required after March 28, 1980.

Should you prefer to spend this week looking for other employment while still on the payroll, arrangements will be made for your patients to be seen by another provider at Sierra Family Medical Group.

Carol Herrlie, F.N.P. Sierra Family Medical Group 935 Spring Street Placerville, CA 95667

Dear Carol:

A decision was made by the executive board to change the method of the Sierra Family Medical Group practice to a more physician oriented practice. Therefore, we are unable to offer you a position after your internship has been completed as of March 31, 1980.

I hope you will find employment to your liking.

When Nord arrived at Placerville she informed Dr. Weiser of the Executive committee's decision to terminate. He had not been consulted, nor asked his opinion

regarding the terminations. Although he had never recommended the terminations, he accepted the Foundation's decision without question. It was his opinion that decisions concerning terminations could only be made by the Foundation since they alone were in a position to fully comprehend the financial implications.

In Dr. Weiser's presence, Nord summoned Herrlie and handed her the termination letter. Herrlie described herself as stunned since she had accepted a 60-percent employment offer the previous week. Nord explained that the executive board had determined her services were no longer needed when her internship was completed on April 1. The decision was final. For the first time Herrlie heard Dr. Weiser state she was unloyal. Later that afternoon he walked into Herrlie's office and said he was very sorry that she had been fired and he would be happy to write a good recommendation. In addition, he voiced the opinion that he had no problems with her as a nurse practitioner and was certain she would have no difficulty in obtaining new employment.

Bertram was then summoned and given her termination letter. Nord proceeded to explain that due to a decision of the executive board to make the Sierra Clinic a more physician-oriented practice, her services were no longer needed. Bertram asked Dr. Weiser what he thought of the Foundation's decision and he responded, "I always been uncomfortable with you and I feel that you're not loyal to me." She was convinced that her termination was based on her union activity and not on a strained relationship. Whatever differences existed between them, she felt had been resolved by a mutual understanding that although their approach to medicine was different their knowledge and experience complimented each other. Both Nord and Dr. Weiser recalled Bertram then exclaimed, "I don't have to like you to be able to work with you." Bertram disagreed with their recollection of her response. She said she simply commented they would never be the best of friends.

Later in the afternoon Dr. Weiser told Bertram that he felt terrible over her discharge and that in reality he was not in charge. He denied any participation in the decision and asserted he had no control over the termination. Then he repeated that both Bertram and Herrlie had performed in an excellent manner and he would write recommendations for them.

On the following day, March 25, Bertram returned to the Sierra clinic to gather her personal belongings. She confronted Dr. Weiser with the fact that his wife, Lynn Weiser, had submitted an application for the family nurse practitioners program at Davis and warned that she would be very resentful and unhappy if his wife were hired by the Foundation. When he first started with the Foundation he had an agreement, but not a guarantee, with Dr. Andrus that his wife would be hired as a FNP when she completed her education. In light of Bertram's dismissal and the Foundation's announced plans to make the Sierra clinic physician oriented he was uncertain as to what effect it would have on his wife.

Then Bertram approached Vi Tara who was standing at the appointment desk. Although Bertram knew Tara had been promoted and was no longer a supervisor at the Sierra clinic, Bertram testified she felt the promotion

made her even more a representative of management.¹⁴ Regardless of her title or position within the Foundation, Vi Tara learned of the terminations from fellow employees after the discharges were reality. She had not been consulted. Tara lamented the discharges and was convinced they did not make sense. Bertram responded that it made good sense to her. The terminations could not be economic nor based on the quality or quantity of care. Therefore the only logical explanation for her termination was her union activities. In a very soft, but audible voice, Tara agreed.

At the hearing Vi Tara, in unequivocal terms, denied Bertram's version of their conversation of March 25. Although she may have told Bertram she was sorry she was leaving, she never said that the termination was based on union activity, that she was sick and disgusted with the events occurring at the Foundation, that she never felt that Bertram would be terminated, nor that she (Vi Tara) would be next.

On Wednesday, March 26, Vi Tara entered Herrlie's office and expressed her sorrow that Herrlie was leaving. Herrlie testified that when she commented that Vi Tara knew the reason for the dismissal, the latter responded, "... yes ... too bad that you got drug in along with this." Again Vi Tara denied uttering this statement. In fact, Vi Tara testified that in her opinion neither Bertram nor Herrlie were terminated for their union activities, including testifying at previous hearings.

The Foundation asserts that the decisions to discharge Bertram and Herrlie were for cause. There was a need for a third doctor to relieve the burden caused by the increase in OB patients. The executive committee had tentatively approved Tyson's plan to restructure the Sierra group to a physician-oriented practice. At the March 13 meeting they considered terminating the two part-time FNPs, but postponed that decision until the arrival of a third doctor in July. At that time they would reconsider the economic status of the Sierra group before making the final decision to terminate. The premature discharges were precipitated and hastened by the events of March 14 and 24, 1980. Both Nord and Tyson were of the opinion that the strain and incompatibility in the relationship between Dr. Weiser and Bertram and Herrlie dictated that the decision be made immediately.

¹⁴ Vi Tara was the Placerville clinic supervisor for the Foundation until December 1, 1979, when she became the medical service representative. She maintained her office at the Placerville site but she no longer had authority to hire, fire, recall, lay off, discipline, promote, reward, nor direct the work force. As medical service representative she did not exercise any of the above-enumerated authorities. Her new position required her to act as a community relations person in an attempt to acquire new industrial accounts through favorable publicity. The promotional efforts included all of the Foundation sites and were not limited to the Sierra-Placerville clinic. The December 1979 minutes of the community advisory group meeting indicated that at an open meeting, which Bertram attended, the Foundation announced Vi Tara's new job and that her former supervisory position would not be filled. As of May 1, 1980, she was promoted to administrative assistant to Tyson.

Neither Vi Tara nor Nord told anyone that she no longer had supervisory authority. It was felt such information was implicit in the announcement of her new position.

C. Analysis and Conclusions

1. Termination of Dr. Jerome Lackner

As the medical director for the Foundation's Sacramento River City Medical Group it was agreed by all parties that Dr. Lackner was a supervisor, as defined in Section 2(11) of the Act. The complaint (Case 20-CA-14783) dealing with Dr. Lackner's discharge is narrowly drafted. It alleges that Dr. Lackner was issued warning letters on June 21 and July 19, 1979, because he testified at a representation hearing on June 15, 1979 (Case 20-RC-14818), and that he was thereafter terminated on August 20, 1979, because he gave such testimony. It is further alleged that Respondent's actions thus violated Section 8(a)(4) and (1) of the Act. Section 8(a)(4) of the Act provides as follows:

It shall be an unfair labor practice for an employer—to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act

The 1947 amendments to the National Labor Relations Act narrowed the definition of the term "employee" by excluding "any individual employed as a supervisor." In *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 654-655 (1974), the Supreme Court recognized the practical effect of the 1947 amendments was to free "employers to discharge supervisors without violating the Act's restraints against discharges on account of union membership."

Despite the general exclusion of supervisors from coverage under the Act, the Board, with court approval, has held that in certain circumstances the discharge of a supervisor for having given testimony adverse to an employer's interests in a prior Board proceeding is a violation of the Act.¹⁵ The Board has also held that an employer violates Section 8(a)(1) of the Act where its actions in disciplining or terminating a supervisor is "an integral part of a pattern of conduct aimed at penalizing employees for their union activities and ridding the plant of union adherents";¹⁶ or where the employer's action constitutes an important element in its total strategy to rid itself of a union;¹⁷ or where the employer's action is motivated by a desire to discourage employees' concerted activities in general rather than a concern about the supervisor's participation in these activities.¹⁸ Therefore, an employer violates Section 8(a)(1) of the Act when it discharges or otherwise discriminates against a supervisor because he has given testimony under the Act, not because there is an interference with the rights of the supervisor, but because fallout from such activity has the necessary and inevitable effect of coercing others who do enjoy the protection of the Act. *Professional Ambulance Service*, 232 NLRB 1141, 1151 (1977).

¹⁵ *Bedford Discounters*, 204 NLRB 509 (1972); *Better Monkey Grip Co.*, 115 NLRB 1170 (1956), enf'd. 243 F.2d 836 (5th Cir. 1957); *Modern Linen & Laundry Service*, 116 NLRB 1974 (1948); *Dal-Tex Optical Co.*, 131 NLRB 715 (1959), enf'd. 310 F.2d 58 (5th Cir. 1966).

¹⁶ *Fresno Townehouse*, 246 NLRB 1053 (1979).

¹⁷ *East Belden Corp.*, 239 NLRB 776 (1978).

¹⁸ *Fort Vancouver Plywood Co.*, 235 NLRB 635 (1978).

The rationale underlying the protection afforded supervisors in these situations appears in *Better Monkey Grip*, *supra* at 1170-1171. There the Board held:

We agree with the Trial Examiner that the Respondent discharged Whaley [a supervisor] because he gave testimony adverse to its interests in an earlier Board proceeding We find, as did the Trial Examiner, that this conduct interfered with, restrained, and coerced rank-and-file employees in the exercise of their self-organizational rights within the meaning of Section 8(a)(1) of the Act. In our opinion, the net effect of Whaley's discharge was to cause nonsupervisory employees reasonably to fear that the Respondent would take the same action against them if they testified against the Respondent in a Board proceeding to enforce their guaranteed rights under the Act. Clearly inherent in the employees' statutory rights is the right to seek their vindication in Board proceedings. Moreover, by the same token, rank-and-file employees are entitled to vindicate these rights through the testimony of supervisors who have knowledge of the facts without the supervisors risking discharge or other penalty for giving testimony under the Act adverse to their employer. For these reasons, we find that Whaley's discharge violated Section 8(a)(1) of the Act. [Footnotes omitted.]

Thus, it is the vindications of employees' Section 7 rights, not protection of supervisors engaging in union or concerted activity that is the basis for finding that a given respondent has violated Section 8(a)(1) of the Act. *Brothers Three Cabinets*, 248 NLRB 828 (1980).

The General Counsel has urged that the protection of Section 8(a)(4) has been extended to supervisors. The Board has looked to *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972), for a broad and liberal interpretation underlying Section 8(a)(4). In *Scrivener*, the Supreme Court found that 8(a)(4) protection extends beyond the precise wording of the statute, which protects an employee who has filed charges or given testimony under the Act. The Court held that Section 8(a)(4) also protected an employee who gave a written sworn statement to an NLRB field examiner investigating an unfair labor practice charge filed against the employer, even though the employee did not file a charge, nor give testimony as prescribed by Section 8(a)(4). It was the intent of Congress to permit employees with pertinent information to be completely free from coercion against providing that information to the Board. This complete freedom is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB*, 89, 191 F.2d 483, 485 (D.C. Cir. 1951). Although the employees in the *Scrivener* case were not 2(11) supervisors, the Board relied on Chief Justice Black's findings in *Nash v. Florida Industrial Commissions*, 389 U.S. 235, 238 (1967), as quoted in the *Scrivener*, 405 U.S. at 121 case, to extend the protection of Section 8(a)(4) to all employees:

Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8(a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges.

In *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980), enf. denied 660 F.2d 910 (3d Cir. 1981), a supervisor received only one-half of an expected \$1,000 Christmas bonus. When the supervisor threatened his employer that he would seek redress with the NLRB, he was fired. The Board found that the employer violated Section 8(a)(4) of the Act by denying the supervisor access to the Board's process. By following a liberal interpretation to Section 8(a)(4) and relying on its decision in *General Services*, 229 NLRB 940 (1977), enf. denied 575 F.2d 2981 (5th Cir. 1978), the Board held that any person seeking to invoke the Board's processes will be protected, including a supervisor who is not otherwise covered by the Act.

For the General Counsel to prevail, I must find Dr. Lackner's testimony at the representation hearing was adverse to the Foundation's interest, and the Respondent issued two warning letters and/or terminated Dr. Lackner's employment based on said testimony.¹⁹ After several careful reviews of the June 15 representation hearing transcript, I find it highly unlikely that Dr. Lackner's testimony resulted in the issuance of the two warning letters and/or his termination. The record indicates no one realized that Dr. Lackner would attend the hearing as either a witness or an observer. In fact, the doctor was very surprised when the Respondent's attorney called him as a witness.

At the outset of the June 15 hearing Respondent's attorney asserted the appropriate unit should include: "all regular full time and part time family nurse practitioners, physician assistants, social workers, and trainees" The Union took the position that the unit should be limited to family nurse practitioners and physician assistants. Peggy Davis was the only social worker employed by the Foundation. It was generally assumed she was not in favor of the Union.

Dr. Lackner's testimony was a bit confusing and occasionally the exchange of words between Dr. Lackner and Fastiff were acrimonious. However, Dr. Lackner did not utter one critical or disparaging remark concerning the Foundation, Dr. Andrus, or any other members of management, nor did he speak in favor of the Union.

On direct examination Dr. Lackner testified that his entire office staff comprised the "overall team." Within the "overall team" was the "clinical team" consisting of himself, the family nurse practitioner, and the registered nurse. On cross-examination he used the phrase "health care team" instead of "overall team," and "medical team" instead of "clinical team." Peggy Davis had a master's degree in social work, but she was not a licensed clinical social worker nor was she qualified to give social psychological counseling to patients. As a

social worker they could not bill for Davis' services. Dr. Lackner acknowledged Davis was a part of their "health care team" but not part of the "medical team."

Greg Voelm testified at the same hearing and stated the health care team at River City consisted of the physician, nurse practitioner, and social worker. He further stated:

Many people do not understand that the term health care is not the same as the term medical care. Health care includes all the aspects of helping a patient that would relate to maintaining that patient's health, including social aspects of maintaining that patient's health. That is why the final member of the health care team currently employed in the River City practice is a social worker, but she like the physician and the nurse practitioner is a member of the health care team.

Dr. Lackner's definition of health care team was simply broader and included everyone in the office, since he felt they all rendered a service to the patient. Voelm made a distinction between "health care" and "medical care," but did not define the latter. It would appear from reading his definition of "health care," he would not include the social worker in the medical care team. Thus, Voelm's and Dr. Lackner's definitions of health care teams and medical care teams are similar.

Dr. Andrus acknowledged that he may have read the transcript from the representative hearing and he discussed Dr. Lackner's testimony with Greg Voelm the day of the hearing. At some point he did read the transcript and then understood why Voelm found the testimony confusing. Dr. Andrus firmly denied that Dr. Lackner's testimony had any bearing on his termination, other than to delay the date for his discharge. Thus, Dr. Lackner's final discharge was postponed to avoid any appearance that it was connected with his testimony at the representative hearing.

It is true that Dr. Lackner did address himself to the duties and functions of all the members of the River City Medical Group; including Peggy Davis, the social worker. The main issue was the composition of the appropriate unit for collective bargaining. The Foundation favored including the social worker in the unit. Ultimately, Dr. Lackner concluded that the social worker was part of the "health care team" which included everyone in the office, but she was not a part of the "medical care team." Of course, it is possible that the Respondent perceived Dr. Lackner's final conclusion to be adverse to its interest. Assuming, *arguendo*, that indeed Dr. Lackner's testimony was adverse to the interest of the Foundation, I find, after taking into consideration all the other events and factors that occurred before and after the representation hearing, that his testimony was not the motivating factor that led to the issuances of the two warning letters and/or his termination.

In the present case, the threshold question becomes what were the actual motivating factors which prompted the Respondent to discharge Dr. Lackner. The General Counsel labels the Foundation's asserted legitimate business reasons as pretextual. I disagree.

¹⁹ See fn. 14, *supra*.

The Board in a recent decision, *Wright Line*, 251 NLRB 1083 (1980), enf. granted 662 F.2d 899 (1st Cir. 1981), provided a clear explanation as to the distinction that must be maintained between "pretext" and "dual motive." It is pretextual when the evidence reveals that what the employer had advanced as a legitimate business reason for its action is in fact a sham, in that the purported rule or circumstances advanced by the employer did not exist or was not in fact relied on.

Obviously, Dr. Andrus' recommendation to the board of directors to terminate Dr. Lackner was based on a long list of complaints, extending from the March 14 staff meeting where Nord misunderstood Dr. Lackner to have called Dr. Andrus a Communist on through the July 25 meeting with Dean Levitt, where Dr. Andrus discovered Dr. Lackner had raised the question of the propriety of a faculty member receiving outside consultation fees which may interfere with his teaching. It would appear that the Respondent's decision to exercise its rights to discharge a supervisor was not based on a sham, but on what it considered a sound business judgment, and therefore was not pretextual.

In a "dual motive" case there are two facts to be considered. First, was there a legitimate business reason for taking action against the employee and second, in the instant case, was the Employer's reaction also based on the fact that its supervisor gave testimony adverse to the Foundation's interest in the June 15 representation hearing. The General Counsel meets its burden of proof and makes a *prima facie* case by presenting evidence "sufficient to support the inference" that Dr. Lackner's giving adverse testimony was a "motivating factor" in the Employer's decision. Once this is established, the burden will shift to the Employer to demonstrate that the same action would have taken place even in the absence of Dr. Lackner's giving adverse testimony.

The record is replete with a long list of events advanced by the Respondent justifying its actions in dismissing Dr. Lackner. In reviewing this lengthy testimony, it must always be kept in mind that Dr. Lackner was a supervisor and does not enjoy the protection of the Act that is extended to employees as defined in Section 2(3) of the Act. Therefore, unless the events of this case fall within the purview of the above-enumerated proscribed exceptions, the Foundation was free to discharge Dr. Lackner for good reason, bad reason, or no reason at all without violating the National Labor Relations Act, as amended.

The record provides a fairly comprehensive professional biography of both Dr. Andrus and Dr. Lackner. They each had impressive and distinguished careers, although quite distinct. Initially, Dr. Andrus was very happy with Dr. Lackner's philosophy and work. They shared a mutual interest and support of the family nurse practitioners program. There were also some major differences in their background and beliefs. Dr. Andrus freely admitted his dislike for unions. In contrast Dr. Lackner was a founding member of the Union of American Physicians and Dentist and the first medical director for the United Farm Workers. Dr. Andrus' approach to the management of the Foundation was more akin to that of a traditional businessman. Since he was faced

with the pragmatic problems of the Foundation's financial solvency, he was acutely aware of the need for each facility to become self-supporting before the funds from its supporting grants were depleted. Perhaps he best expressed his philosophy concerning the Foundation, patient care, and community work, when in a heated exchange with Paula Bertram, he replied, "Don't give me any of that damned Sunday School stuff. I know all that stuff and I tell you the only thing that matters is making this a financial success." Certainly, Dr. Lackner was also interested in the financial success of the Foundation and in particular the River City Medical Group. However, his desire for financial success was tempered by other factors. The Foundation preferred to limit house calls because they were not profitable. Dr. Lackner agreed such calls were not profitable but they were cost effective for the health care industry as a whole. He provided an example of an elderly woman who entered the medical center one to three times per year for severe congestive heart failure. On one occasion her hospital bill for 4 days was \$4,000. Since she was unable to come to the clinic, he felt justified in visiting her home, which lessened the need to be hospitalized. Such home visits were not profitable to the Foundation but were cost effective to the patient and the health care industry. Their different personalities and fundamentally different approach to the practice of medicine eventually led to a series of events which fermented into hostility between these two doctors.

It is difficult to pinpoint the exact moment when the friction between Dr. Andrus and Dr. Lackner began. However, there were a long series of events occurring prior to June 15, which gradually increased the hostility between Dr. Lackner and the Foundation. Its origin may have been as far back as the latter part of 1978, when Goldsmith suggested that Dr. Lackner should become the medical director for the entire Foundation. Dr. Andrus acknowledged he was sensitive to such a recommendation from a personal standpoint since he had founded and organized the Foundation. In addition to not wishing to turn over the Foundation to another individual, he was also becoming less impressed with Dr. Lackner's administrative expertise. In fact, he became convinced that Dr. Lackner was uncooperative, disorganized, a poor producer, hypercritical, and a destroyer rather than a builder. Dr. Andrus became annoyed with what he claimed as the manner in which Dr. Lackner made very personal and vitriolic attacks upon members of the Foundation management, dominated meetings, and interfered with agenda, challenged the authority of the central office, and in general his rude, arrogant, and divisive attitude. As reports from various central office personnel, concerning their experiences with Dr. Lackner, filtered back to Dr. Andrus his displeasure with Dr. Lackner's work performance was reinforced.

Gerry O'Brien scheduled a meeting with Dr. Lackner and the River City staff for March 14, 1979. Shortly after their arrival Dr. Lackner announced he could only give them 20 minutes because he was scheduled to deliver a speech. Since the staff meeting had been scheduled in advance this announcement annoyed Nord. During

the brief meeting Dr. Lackner made a reference to Dr. Andrus, which Nord understood to mean that Dr. Andrus was a Communist. Dr. Lackner actually attacked Dr. Andrus' method of management as that of an "aging geriatric Stalinist." When O'Brien and Nord returned to the central office they told Dr. Andrus that Dr. Lackner treated them with arrogance, rudeness, and had called Dr. Andrus a Communist. Obviously, Dr. Andrus who had testified he was conservative did not appreciate the accusation.

Approximately 35 people attended the open Placerville executive meeting on March 20. When the meeting was concluded, Dr. Andrus observed that Dr. Lackner had once again dominated the meeting, was divisive, and had challenged his employer's authority. Initially, Dr. Lackner used a great deal of time criticizing a chart. Dr. Andrus described the chart incident as a perfect example of how Dr. Lackner addressed himself to each issue, monopolized the time, and managed to stir a great deal of dissension over a minor issue. The very long discussion which followed dealt with "midwifery." Both Dr. Lehrman and Dr. Lackner opposed the Foundation's policy on "midwifery." Dr. Andrus testified that he could accept normal constructive criticism of Dr. Lehrman.

Apparently by this time both management and Dr. Lackner desired a conference, which was set for March 28. Dr. Andrus disagreed with Dr. Lackner's approach to billing patients, since the former was convinced that River City was failing to bill some patients and improperly billing others. Dr. Andrus' approach was simple and direct. The Foundation should bill for all services that are rendered. Again Dr. Andrus was left with the impression that Dr. Lackner monopolized the meeting with lengthy explanations concerning his concepts of billing, the problems with limited space, and the reasons for low productivity. Mary Baker and Dr. Lackner together were handling a total of 10 patients a day. Dr. Andrus was convinced that one physician could handle 20 to 30 patients per day in the same limited quarters, with the same types of elderly patients who experienced the same complex problems. Instead of resolving the problems facing the River City facility, the meeting only increased Dr. Andrus' displeasure with Dr. Lackner as an employee. It also clearly revealed their very different approach to billing, office management, house calls, and in general their approach to the business aspects of the practice of medicine.

At the next open executive meeting in Auburn, April 17, Dr. Lackner proceeded to question the necessity for the Foundation maintaining a large number of bank accounts. Then he attacked as physically unsound the Foundation's announced intentions to expand the Colfax and Auburn facilities. When management raised the need for Placerville to become financially self-sustaining by increasing the number of patients and income, Dr. Lackner expressed that it was difficult for him to understand why the Placerville clinic was not a financial success. It had free rent, was well-endowed by the Robert Wood Johnson fund, and was subsidized by the Federal government with CETA workers. Since none of the Foundation's facilities were a financial success and the only thing they all had in common was the Foundation's central manage-

ment, Dr. Lackner suggested that outside management should be retained. Dr. Lackner testified, "I was told that was totally out of order. The Foundation has all of the management expertise that it needs to handle this situation. *I sensed some unhappy vibrations coming in my direction.*" (Emphasis added.) It was Dr. Lackner's opinion that it was just as reasonable to blame central office for the financial failures as it was to blame the various facilities.

At the May 1 dinner Dr. Andrus expressed his concern with Dr. Lackner's destructive attitude, his utilization of meetings as his personal speaking platform, his failure to produce when he had assured everyone that River City would be in the black in 3 months, his derogatory comments against the Foundation, and his labeling Dr. Andrus a Communist. Dr. Lackner assured him that he had never called him a Communist. However, Dr. Lackner apparently did not mention that he had referred to Dr. Andrus' managerial style as that of "an aging geriatric Stalinist," which was simply misunderstood. As they left the restaurant, Dr. Andrus suggested that Dr. Lackner should examine himself to see how he had become a negative destructive force within the Foundation. If he could not do something constructive for the Foundation then he should go develop his own foundation. His attitude was "incompatible with him continuing in the Foundation." I credit Dr. Andrus' recollection of the events and comments made at the May 1 dinner. Dr. Lehrman did not specifically deny Dr. Andrus' recollection of the May 1 dinner, although in general he stated he had not been disciplined or warned of his deficiencies prior to the June 19 breakfast meeting. The May 1 dinner was a quiet discussion of the problems that Dr. Andrus was experiencing with Dr. Lackner and the River City facility. In crediting Dr. Andrus, in regard to the May 1 dinner, I have reached this conclusion by considering his demeanor, their testimony, weighed the established facts and considered the reasonable inferences drawn from the record.

Another River City staff meeting was arranged for May 11, 1979. When Nord presented a fee survey, Dr. Lackner rejected it as worthless and threw it on the table. During a major portion of the meeting he left the room to care for unscheduled patients. When he was present, he dominated the discussion and interfered with Nord's agenda. From management's viewpoint little was accomplished. Again the events of the day were reported to Dr. Andrus.

Dr. Andrus was furious when he received Dr. Lackner's letter of June 5. It was beyond his comprehension that Dr. Lackner lacked the courtesy to call and ask for a verbal explanation of his \$1,000 consultation fee. The letter convinced Dr. Andrus that Dr. Lackner was once again acting in a contentious manner. The letter represented a direct challenge and demand by a supervisory employee (Dr. Lackner) that the employer provide an accounting of its expenditures, at a meeting open to the public. In addition, the letter in essence raised the question and demanded an explanation as to the relative worth or value of its president and founder to the Foundation; in contrast with the relative worth or value of a

River City receptionist, back office nurse, or Dr. Lackner to the Foundation. The letter was not well received. Dr. Andrus' inclination was to fire Dr. Lackner immediately.

On June 12, Peggy Davis told Greg Voelm that at Dr. Lackner's invitation she attended a dinner with Dr. Mondonaro and other members of the River City staff. During the dinner the doctors discussed the opening of a joint medical practice in Sacramento. On the same day Voelm related the incident to Dr. Andrus and Elkus. Again Dr. Andrus was furious since he was of the belief that Dr. Lackner would take over the River City practice. Although Davis' information was not accurate, in that Dr. Lackner had not agreed to start a medical practice with Dr. Mondonaro, Dr. Andrus accepted the information as true.

The hostilities continued to increase. When they met for breakfast on June 19, Dr. Andrus immediately and forcefully denounced Dr. Lackner for his attitude, low productivity, disorganization, poor attendance, and tardiness. He handed him a two-page document. The second page was the Foundation's productivity projections for July, August, and September 1979 for the River City clinic. As he handed Dr. Lackner the projections, Dr. Andrus gave him an ultimatum, "You will achieve these goals or you are out." Shortly after this meeting, Dr. Andrus sent a letter to Dr. Lackner which served as a warning letter concerning his poor performance and a demand for specific improvements in the immediate future.

When Dr. Andrus sent a brief memo to Dr. Lackner requesting a written report on how he handled the case of Mr. and Mrs. Silva, Dr. Lackner turned the letter over to attorney Irwin Lyons, who promptly sent a scathing letter to Dr. Andrus. In brief, the letter agreed to provide the requested Silva information upon receipt of a specific set of questions. It went on to state Dr. Lackner was not seeking a fight but would not retreat if one were commenced by Dr. Andrus. The letter concluded by demanding that Dr. Andrus "cease and desist forthwith from further harassment of Doctor Lackner in the performance of his duties." Dr. Andrus' reaction was predictable, he wanted to fire him immediately. Instead, he followed Voelm's advice and sent another letter to Dr. Lackner on July 19. It was a followup warning letter and also contained specific questions concerning the Silva case, which Dr. Lackner promptly answered. Dr. Lackner had not seen Lyon's letter before it was sent. Although Dr. Lackner also disapproved and was shocked by Lyon's letter, he did not disavow its content to any member of the Foundation management. He testified that by that time the contact between him and Dr. Andrus was reduced to certified mail. As a result Dr. Andrus had every reason to believe that Dr. Lackner's retained attorney acted with his full authority and approval.

On July 16, Dr. Lackner sent a second message to Mary Duel requesting that the issue of the source and the amount of Fastiff's fee be placed on the next executive committee meeting. In addition he requested a copy of the Foundation's articles of incorporation and bylaws.

Voelm informed him that the legal fees paid by the Foundation were none of his business.

I credit Dr. Andrus' testimony that the decision to recommend Dr. Lackner's termination was based on a series of many events, which extended to a period prior to the June 15 representative hearing. Several times Dr. Andrus' reaction after one of their many confrontations was immediate discharge. Finally in July he made a firm decision to recommend Dr. Lackner's termination at the July 27 board of directors meeting. Since he anticipated such action would precipitate publicity, he decided to forewarn the dean of the University of California School of Medicine. It was at this conference on Wednesday, July 25, that Dean Levitt revealed to Dr. Andrus the content of Dr. Lackner's letter of July 19. The letter represented the final challenge to Dr. Andrus' position as president of the Foundation. It is interesting to note that in this letter Dr. Lackner acknowledges that, "*Soon after beginning employment* for the Foundation, I became disturbed by certain management practices and problems . . . I have tried to deal directly with management to produce change for the better, but I have been viewed instead as a 'trouble maker.'" In his own words, it is clear Dr. Lackner had problems with the Foundation from the inception of his employment. After stating his efforts to reform management had failed, he indicated he had "no other recourse but to seek outside remedies for wrongs management refused to correct." Then he raised the inference that the amount of time spent with the Foundation may breach Dr. Andrus' duties to students, interns, residents, and other faculty. Obviously the letter raised some very serious charges as to Dr. Andrus' integrity and had the potential of jeopardizing his position with the University of California School of Medicine at Davis. This new attack was seen as another example of an unending personal vendetta and heightened Dr. Andrus' determination to quickly end his relationship with Dr. Lackner.

Even if one assumes that Dr. Lackner's testimony at the representation hearing was adverse to the Foundation's interest, it pales by comparison to the long list of other confrontations that occurred between Dr. Lackner and the Foundation before and after June 15, 1979.

Having considered the foregoing, I find that even if Respondent's decision to discharge Dr. Lackner was motivated by the fact that he testified at the representation hearing, Respondent has met its burden by demonstrating it would have reached the same decision absent his testimony. In sum, I find that Respondent has established that Dr. Lackner was discharged for work-related and incompatibility reasons, and that the General Counsel has not established by a preponderance of the credible evidence that the two warning letters and the discharge of Dr. Lackner were motivated by any activity of Dr. Lackner that was protected by the Act. I shall therefore recommend that the complaint in Case 20-CA-14783 be dismissed in its entirety. See *News Herald*, 247 NLRB 979 (1980).

2. Interrogations

When interrogation takes place in the context of job application interviews, the Board, in those circumstances, has found such interrogations to be "inherently coercive." *Bighorn Beverage*, 236 NLRB 736, 751 (1978), 614 F.2d 1238 (9th Cir. 1980). In *Clear Pine Mouldings v. NLRB*, 632 F.2d 721 (1980), the Ninth Circuit granted enforcement of the Board's Order and found that although the manager's questions may have been vague they supported the conclusion that the questions carried the clear implication that the answers given by the job applicant affected his chances of employment. The absence of direct threats by the company does not alter the conclusion, that when a personnel manager asks questions concerning the applicant's union sympathies or urges the individual not to join a union, that an inferred coercion exists.

In *Eastern Main Medical Center*, 253 NLRB 224 (1980), enf. granted 658 F.2d 1 (1st Cir. 1981), husband and wife graduates of respondent's nursing school were asked during an interview how they felt about unions. Apparently at that particular time registered nurses were picketing the medical center. The applicant replied that he had not made up his mind about the matter. Louise Moreshead, the head of the nursing department, replied that she agreed with some of the things that the nurses were trying to do, but not the way they were doing them. The First Circuit (658 F.2d at 7) upheld the Administrative Law Judge's finding:

The context here was an employment interview, not a casual conversation. The interviewee could have been expected to take seriously what was said. Union activity, in the form of picketing, was literally on the scene, as was anti-union activity in the form of a pending or impending decertification petition.

. . . [the applicants] could not have been expected to shrug off the comments and inquiries of the head of the nursing department. Other than the at best ambiguous statement that her sympathy for the nurses' concerns did not extend to their tactics, Moreshead said nothing to diminish the apprehension her remarks might have caused, compare *NLRB v. Garland Corp.*, 396 F.2d 707 (1st Cir. 1968) (repeated employer assurances of neutrality), nor does the hospital suggest a legitimate purpose for her queries. These facts provide substantial evidence to support the ALJ's decision that the objective effect of Moreshead's questions and comments in such a charged atmosphere was coercive and therefore a violation of § 8(a)(1).

Obviously, the present case is very similar factually to the *Eastern Maine Medical Center*, *supra*.

a. Phil Hasuo Yoshimura

Dr. Andrus did not deny that he had instructed Dr. Lehrman to determine what Yoshimura's leanings were regarding the organizational efforts of the mid-level practitioners. In fact, he openly told Dr. Lehrman that if Phil was willing to stand up to the Union and vote against it, they would hire him immediately. If he favored the Union then they would hire him after the election. When Dr. Lehrman refused to comply with these orders, Vi Tara interviewed Yoshimura early in June. Respondent admits that Vi Tara was a supervisor at the time of the interview. She asked him, "How do you feel about unions?" He responded, "didn't care one way or another about unions." He was hired in June as a physician's assistant, prior to the July 26 election. At the time of the hearing, Vi Tara was still an employee of the Foundation. She testified on other matters and did not deny Yoshimura's recollection of the job interview. Respondent failed to provide any explanation as to how Vi Tara's questions may have had a legitimate purpose, nor was there any indication in the record that Vi Tara may have attempted to diminish the apprehension her remarks may have caused. Under the circumstances, I find the interrogation of Yoshimura during his job interview was coercive and therefore a violation of Section 8(a)(1) of the Act.

b. Steven Simon

Steven Simon was interviewed on the telephone by Dr. Andrus on July 14, 1979. Simon was aware that Dr. Andrus was the director of the foundation when the latter asked him how he felt about unions. Simon replied that he "didn't feel they were always necessary and there were good and bad unions." Then Dr. Andrus said, "[I]t wasn't in the best interest for the physicians assistants to organize at this time because we are a new profession." During Dr. Andrus' testimony he neither denied, nor commented on Simon's recollection of their telephone conversation. I fully credit Simon's recollection concerning this conversation.

Ten days prior to the election he was interviewed by Greg Voelm, who stated that the Foundation was in the midst of a union organizational attempt by the mid-level practitioners. He recalled the exact date because it was the first day of his vacation. Simon recalled the conversation was almost identical to his previous conversation with Dr. Andrus in that he was asked how he felt about unions and he gave the same answer. Voelm denied that he asked Simon how he felt about unions. Voelm stated he followed what he believed to be permissible comments for management to make in these situations. He stated he personally felt that the Union was not the best thing for the Foundation, nor its employees. He insists that Simon then volunteered that he agreed unions were not necessary for professionals. Obviously, a job applicant will listen closely to his interviewer's statements. It is of little consequence whether the comments are phrased in the form of a question or a direct statement. In either case, within the confines of a job interview such comments invite responses. Under those circum-

stances a response can hardly be called voluntary. It was the intention of the Foundation to determine the leanings of each applicant regarding the Union. Dr. Andrus and Voelm conferred almost daily.

In neither conversation did Respondent provide any explanation as to how these inquiries by Dr. Andrus and Voelm had any legitimate purpose, nor was there any indication in the testimony of Dr. Andrus and Voelm that they attempted in any way to diminish the apprehension their remarks may have engendered. Having considered the previously discussed cases and the circumstances surrounding these conversations, I find the interrogation of Simon by Dr. Andrus and Voelm were coercive and therefore a violation of Section 8(a)(1) of the Act.

c. George Randall

On August 30, 1979, Greta Nord, who was an admitted Foundation supervisor, drove George Randall to the Auburn site for the purpose of interviewing him for the position of physician assistant. During a stop for coffee, Nord related that the mid-level practitioners were either forming or had formed a union. Randall immediately voiced his strong personal opposition to unions for professionals and related his own personal experiences with a similar organizational drive by the Teamsters Union in Alaska, which he opposed. Apparently he asked one brief question concerning the organizational drive and did not fully understand Nord's answer. There were no further comments concerning the Union during the rest of the day. Nord testified after Randall, but failed to deny Randall's recollection of the interview. I fully credit Randall's testimony.

The fact that this conversation occurred after the election does not make it any less coercive. The statements of Nord were made within the frame work of the interview. At first glance her comment may even appear as an innocent isolated statement over a cup of coffee. However, in order to fully evaluate an interrogation's tendency to coerce, it is necessary to examine all of the surrounding circumstances. Actual coercion is not necessary, but, rather, the true test is whether the questioning tends to be coercive. *Cagle's Inc. v. NLRB*, 588 F.2d 943 (5th Cir. 1979), 234 NLRB 1148 (1978). Certainly Nord's comments may appear to be innocent, until you examine all the circumstances. The record indicates that Dr. Andrus had told Dr. Lehrman that he should determine Yoshimura's feelings toward unions before they would hire him. This same approach was taken with Simon and Randall. It is clear that Nord raised the subject of the Union for the sole purpose of determining that Randall's leanings were in this regard. She invited him to express his beliefs. As previously noted that such inquiries during a job interview are "inherently coercive." *Bighorn Beverage, supra*. Respondent failed to provide any explanation as to why Nord's comments may have had a legitimate purpose, nor was there any indication in the record that Nord made any attempt to diminish the apprehension her remarks may have raised. Therefore, under the circumstances surrounding his job interview, I find the inquiries of Randall were coercive and therefore a violation of Section 8(a)(1) of the Act.

3. Packing the unit

After the June 15 representation hearing, Dr. Andrus told Goldsmith that the Foundation was going to place both Mary O'Hara-Devereaux and Leona Judson on the payroll as family nurse practitioners. He stated two reasons for the hiring. First, they would both vote against the Union at the pending election. Second, they had been doing administrative grant work at the Sonoma Geriatric practice and this was a way of rewarding them. Dr. Andrus was very open and candid in his testimony when he provided his motive for hiring O'Hara-Devereaux: "She had been active in Foundation affairs and we wanted her to be recognized as a regular employee and non-supportive of the Union." Late in June, Voelm called Goldsmith and gave her instructions to quickly hire two nurse practitioners who were not in favor of the Union. Later the same day she received similar instructions from Dr. Andrus. Prior to these conversations the Foundation had no plans, nor business reasons for hiring two additional nurse practitioners at the Santa Rosa emergency room.

Obviously Respondent attempted to pack the unit in an effort to defeat the Union. The primary purpose in hiring O'Hara-Devereaux and Judson was to dilute the strength within the ranks of the family nurse practitioners and physicians assistants. The Board has held that where an employer intentionally hires new and unnecessary employees during the pendency of a representative election it is a violation. See *Suburban Ford*, 248 NLRB 364 (1980). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when it hired Mary O'Hara-Devereaux and Leona Judson.

4. Mary O'Hara-Devereaux as an agent for Respondent

Dr. Hughes Andrus and Mary O'Hara-Devereaux are the codirectors of the family nurse practitioners program at University of California of Davis, California. In addition, they are Codirectors along with Virginia Fowkes of the physician assistants program at Stanford University. Both Mary Baker and Bonnie Ann Bowman completed the family nurse program and Paula Bertram received her M.A. in health service at the University of California at Davis. Bertram, a close personal friend of Dr. Andrus was also a faculty member of the family nurse practitioners program, with Dr. Andrus and O'Hara-Devereaux. She had the opportunity to know him both professionally and socially. In fact, she had stayed at the home of Dr. Andrus and Mary O'Hara-Devereaux on a number of occasions.²⁰

As a result of both professional and social contact, Baker, Bowman, and Bertram knew that Dr. Andrus and Mary O'Hara-Devereaux co-authored and published several articles jointly, traveled and lectured together

²⁰ In 1978 Bertram was present when O'Hara-Devereaux was speaking to Dr. Andrus concerning an unpleasant experience she had with Dr. Lehrman, while she conducted a team consultation function at the Sierra Family Medical Group in Placerville. In referring to Dr. Lehrman she stated, "I will not be made a fool of by that little shit head. We don't need him here. Get rid of him." Dr. Lehrman was not discharged, he resigned October 1, 1979.

around the world, lived together, and shared a deep interest in the family nurse practitioners program. Although, prior to June 1979, she had not been employed as a full-time employee of the Foundation, it was commonly known that she had done some consulting work for the Foundation. In fact, one of the reasons Dr. Andrus gave for placing her on the payroll was based on the fact that "she had been active in Foundation affairs." Although the record is unclear as to the exact date O'Hara-Devereaux became an employee of the Foundation, its payroll records indicate she was listed as an employee for the pay period ending June 15, 1979.

The Foundation employed a relatively small staff of professional and clerical individuals. Dr. Andrus' relationship with O'Hara-Devereaux was well known within the small circle of family nurse practitioners. This was particularly true with Bertram, Bowman, and Baker. I find that in the eyes of the Foundation employee O'Hara-Devereaux was sufficiently allied with the Foundation management to make her its representative. When you consider their close personal living arrangement, her highly visible position within the hierarchy of Foundation management, her free use of the word "we" when referring to the Foundation, and her nearly identical anti-union comments as expressed by Dr. Andrus, it is understandable that the employees looked to her as a part of management. *Town & Country Supermarkets*, 244 NLRB 303, 306 (1979). In these circumstances when she expressed opinions toward the Union or the employees' union activities, those listening employees would be likely to conclude that Mary O'Hara-Devereaux was expressing the views of Dr. Andrus and management, and that she was in fact management's voice. Respondent argues that during her telephone calls to various nurse practitioners, O'Hara-Devereaux always identified herself as a spokesperson of the family nurse practitioner program at UC Davis and for herself, as a concerned nurse practitioner and a soon to be employee of the Foundation. She did not identify herself as a representative of Respondent. The Board has held that even if a statement is phrased as a personal opinion, "The chilling effect on employee Section 7 rights of such coercive statements made by an individual known or reasonably believed, to be privy to management policies cannot be disputed . . ." *Ace Tool Engineering Co.*, 207 NLRB 104 (1973); *Capitol Foods*, 241 NLRB 855 (1979). Accordingly, after considering all the surrounding circumstances, I find that Mary O'Hara-Devereaux was an agent of Respondent within the meaning of Section 2(2) of the Act.

O'Hara-Devereaux never testified during this trial. In a series of telephone calls she proceeded to warn the nurse practitioners of the dangers they would face if they voted for the Union. On June 11, she called Bertram at work and informed her that she was opposed to mid-level practitioners organizing because it was very harmful to their cause and physicians would be alienated by the thought of organizing. On Monday following the representation hearing, she called Mary Baker and told her of the devastating effect their union organizational efforts would have on the nurse practitioners movement everywhere. She claimed that she had already received calls from concerned physicians and warned they were

jeopardizing future employment. In *Brownsboro Hills Nursing Home*, 244 NLRB 269 (1979), the Board found that management had violated Section 8(a)(1) of the Act when they threatened their employees with inability to find employment at another nursing home because of their union activities. See also *St. Mary's Infant Home*, 258 NLRB 1024 (1981). O'Hara-Devereaux then stated "We are going to have to replace nurse practitioners with physicians." When Baker questioned the use of "We," O'Hara-Devereaux corrected herself and stated: "Well, I mean the Foundation will have to replace nurse practitioners with physicians if this continues. You are going to be talking yourselves out of a job." On the same day, O'Hara-Devereaux called Bowman and repeated similar threats that she had voiced to Baker. That is, physicians would not hire FNPs who were active in the Union's organizational efforts, the Foundation would re-evaluate their status and the possibility of hiring physicians to replace the FNPs. Then on July 23, 3 days prior to the election, O'Hara-Devereaux visited Bonnie Bowman in her Placerville office. She again repeated her opposition to the Union's organizational efforts and warned they would hire nonunion people and within a year the union would have no power base.

I fully credit the testimony of Mary Baker, Bonnie Bowman, and Paula Bertram regarding their recollection of the conversations they had with Mary O'Hara-Devereaux. At the time of the trial, O'Hara-Devereaux was still an employee of the Foundation. Respondent neither called O'Hara-Devereaux nor disavowed her statements as recalled by Baker, Bowman, and Bertram. Accordingly, I find the above threatening comments of O'Hara-Devereaux were made in violation of Section 8(a)(1) of the Act.

5. Ginny Fowkes

Ginny Fowkes is the codirector, along with Dr. Andrus and O'Hara-Devereaux, of the physician Assistants Program at Stanford University and a member of the board of directors of the Foundation. After the June 15 representation hearing, she invited each mid-level practitioner to dinner, for the purpose of discussing the Union's organizational efforts.

Fowkes was not called as a witness by the Foundation, nor did Respondent disavow her statements made at the dinner and credibly recalled by Bertram, Bowman, and Baker. She expressed concern regarding their organizational efforts. Although all the witnesses did not recall if she actually used the word "blacklist," the essence of her statement was that physicians were conservative and therefore they would not hire any mid-level practitioner who had participated in the organization of a union. Mary Baker was struck by the fact that Fowkes' comments were substantially identical to those comments of O'Hara-Devereaux made on the previous day.

If Fowkes' comments stood alone, one might assume they were nothing more than an isolated personal opinion. However, when considered in the context of the Foundation's efforts to defeat the Union in the pending election and the fact that her comments were nearly identical to those of Dr. Andrus' and O'Hara-Dever-

eaux's, it becomes apparent that her comments were not an innocent, isolated opinion. Fowkes' warning that those who participated in the Union's efforts to organize would not find jobs with physicians was a clear threat, which was intended to coerce the employees in the exercise of their Section 7 rights. See *Electric-Flex Co.*, 238 NLRB 718 (1978); *Boyer Ford Trucks, Inc.*, 254 NLRB 1389 (1981). Accordingly, I find that the threatening statements made by Ginny Fowkes were in violation of Section 8(a)(1) of the Act.²¹

6. Dr. Andrus' threat to Paula Bertram

Respondent asserts that in analyzing the discussion between Dr. Andrus and Paula Bertram, which occurred on April 21, 1979, that their very close personal friendship must be taken into consideration. It is urged that Dr. Andrus spoke as a friend and a fellow faculty member and not as employer to an employee. Thus, he was expressing directly and frankly his viewpoints, as was his right under Section 8(c) of the Act. Respondent further argues that when the conversation is analyzed in this manner, Dr. Andrus' statements cannot be considered threatening or intimidating that her job was in jeopardy. I disagree.

Dr. Andrus testified after Paula Bertram, which gave him ample opportunity to deny her recollection of their discussion. He did not deny her testimony. Instead, he voiced his regret that he had ever had the conversation, by testifying: "As she testified, it was a long meeting. I sincerely wish I had not had that conversation." This comment was consistent with a statement he made a few days after April 21, when he told Goldsmith that he and Paula got into a real bad fight and that he blew it.

The Board has held that threats and interrogation are no less coercive merely because it comes from a friend, *Cagle's Inc., supra; Agri-Seeds, Inc.*, 237 NLRB 911 (1978). In the instant case, Dr. Andrus presented his views in a very forceful manner. He felt so strongly opposed to the concept of the mid-level practitioners organizing into a labor organization that he stated:

If I have to, to make this thing a success, I will get rid of all the mid-level practitioners in the organization. It's well known that only marginal employees form unions and they do this to protect themselves. Don't you f— people want this place to be a success?

This is an extraordinary statement from a man who had devoted much of his professional career to the advancement of the family nurse practitioner concept. He was willing to abandon the concept, if it meant he would be required to deal with a union. Obviously, Paula Bertram perceived his statement as threatening. She was convinced that the only safe way to deal with Respondent was as an organized group and not on a one-on-one basis. Indeed, she immediately informed all of the mid-level practitioners of this conversation. I find that Dr. Andrus' comments to Paula Bertram represented a threat

²¹ Respondent admitted in its answer that Ginny Fowkes is a supervisor and agent of Respondent within the meaning of Sec. 2(11) and (13) of the Act.

to her employment in violation of Section 8(a)(1) of the Act.

7. Voelm—Bowman

On or about July 6, Greg Voelm visited the Placerville facility for the purpose of introducing himself and expressing his opinion concerning the pending union organizational drive. He explained to the assembled staff that MLPs had a right to try to organize a union, although he and management felt strongly that "we're better off without a union." As a professional administrator he said he could live with a union and therefore regardless of the outcome he wanted to go on working with them as a partner.

Later he and Bonnie Bowman had a casual lunch. After a brief general conversation concerning the weather, he began to compare her production with that of Mary Baker. The comparison revealed that Bowman was a top producer among all the mid-level practitioners and she was substantially higher than Baker. Bowman recalled that Voelm said, "You know, you're limiting your salary by organizing." Voelm testified that he had said:

Bonnie, you know you're kind of a star as far as in relation to all the other nurse practitioners and physician's assistants. You're just about the highest producer there is. It strikes me as strange that somebody like you would want an organization that would tend to lump everybody together. It seems to me like you could do a lot better negotiating on your own than you could throw in with an outfit that wants everybody to get just the same pay and benefits.

When considered in the total context of their conversation, it is obvious that Voelm was emphasizing Bowman's personal productivity. As the high producer, he asserted that she as an individual could negotiate a better wage than if she were lumped together in a group with lower producers. There is no indication that during this conversation he ever said or inferred that the mid-level practitioners as a group would limit their salaries. The conversation was friendly and occurred in the atmosphere of a relaxed lunch. There was no indication that his observations were accompanied by any direct or implied threats or promises.

After the lunch, a reference was made by Voelm that he had read an article that indicated that nurse practitioners had been widely used in Canada until more family practice doctors had been trained. As a result of the increased doctors, the nurse practitioners program dwindled away. Bowman remembered the remark as, "Bonnie, I want you to think of one thing. Nurse practitioners in Canada attempted to organize and today they are just about extinct." Voelm denied that he made such a remark and explained that he could not have made the remark because he did not even know if the Canadian nurse practitioners ever had a union. In regard to this particular conversation, I find that both Bowman and Voelm appeared to have testified in a credible manner. There is a distinct possibility that Voelm's remarks were misunderstood. Of course the General Counsel has the

burden of proof. Since I have reservations as to Voelm's exact statement concerning the Canadian nurse practitioners, I find that the General Counsel has failed to meet that burden. Accordingly, I do not find that Respondent violated Section 8(a)(1) of the Act in regard to the above conversation between Voelm and Bowman; therefore, I shall recommend that this particular charge be dismissed.

8. Kathleen Mead's wage increase

The initial factual background as to the pay raise for Kathleen Mead and Rosalind Weddle are not in dispute. When Goldsmith hired Mead, she was informed that she would receive a \$50-raise after 6 months if her work was satisfactory. After Mead had completed her 6-month period in July, Goldsmith was no longer in charge of reviewing the work performance of the River City staff. When Mead did not receive an automatic increase in her July pay, she called Nord, who explained it would be necessary to review her performance with Dr. Lackner. On July 17, Nord observed Dr. Lackner mark the evaluation sheet for Mead and Weddle as excellent. Since Nord had personal knowledge that Weddle's performance was something less than excellent, she began to question in her own mind the validity of Dr. Lackner's evaluation of nurse Mead. On the same day she informed both Mead and Weddle to be in her office at noon on August 3 for the purpose of a final evaluation. Thereafter, Nord reminded Mead of their meeting, during telephone calls on July 30 and August 1.

The confusion as to the sequence of events arose on August 3. Nord had been present when Dr. Lackner received his letter of termination. When she emerged from his office, Mead asked if their meeting on August 3 could be held at River City instead of the central office. Nord was tense and apparently misunderstood the request to be a demand. Her response was rather belligerent in tone, as she informed Mead that the meeting would be at the central office. During the trial Nord explained she did not want to conduct the evaluation conference at River City because she wanted to avoid any interference from anyone, particularly Dr. Lackner, who had just been terminated. Nord never agreed to change the August 3 meeting. In fact, she gave instructions to her secretary that if anyone should request changing the location of the meeting, the request should be denied. No one attended the August 3 meeting. Nord then attempted directly and through her secretary to set up a meeting for the following Monday, August 6. In the meantime, the staff of River City had learned of Dr. Lackner's termination and were beginning to fear that the meeting with Nord may have been for disciplinary purposes. Mary Baker requested an agenda for the Monday meeting, but was not provided with an agenda. On Friday, August 3, Dr. Lackner left a message with Mary Duell that no one from River City would attend the Monday meeting. He was correct in his predication. Neither Mead, Weddle, nor Baker came to the scheduled evaluation meeting set for August 6. Other attempts to set up an evaluation meeting also failed.

Mead was laid off when the old River City facility was closed on September 15. A short time after that date

Mead called Nord and again asked about her pay raise and informed Nord that she was temporarily working for Dr. Lackner. Nord said she was going on a vacation and when she returned they would discuss her evaluation. Nord never again contacted her concerning the pay raise. Mead resigned sometime between October 26 and November 5.

Mead's participation in the Union was minimal. In fact, she was not even aware she would be included in the unit until after the June 15 representation hearing. Prior to that time, she was never included nor did she attend any of the organizational meetings. Her only activity on behalf of the Union was to act as an observer at the election when she challenged Peggy Davis' vote as not being a member of the unit. On July 24, Nord called Mead and urged her to vote against the Union. Mead did not respond how she would vote, she simply insisted she did not want to talk about the election. On the day of the election, Voelm urged her to vote against the Union. Again, she did not respond how she would vote, but simply stated she would be glad when it was all over and everything would return to normal.

The General Counsel argues that Mead did not receive her wage increase because she was known by Respondent to be a supporter of the mid-level practitioner group. This seems to ignore several factors. First, her contact with the Union was minimal. She had not participated in its organization and was surprised when she learned that she was part of the unit. Second, she was not the only employee who failed to receive a 6-month pay increase. Since Nord was never able to set up an evaluation meeting with Weddle, she never received a raise. Weddle was neither a part of the unit nor did she participate in the formation of the Union. When Peggy Davis completed her 6 months she did not receive a raise. Davis was not a member of the Union and was considered by everyone as promanagement. It appears from the record that Respondent was following the procedure that was announced by Goldsmith. The 6-month pay raise is received only after management has determined that the work was satisfactory. In order to make that evaluation Nord set up two meetings. Although Nord had told Mead and Weddle that the purpose of the meetings were to review their evaluations for the purpose of determining their wage increase, they chose not to come. Respondent never denied Mead her raise, the matter was simply never resolved before she resigned. In all the circumstances, I am not convinced that the General Counsel has established that Mead was denied a pay raise because of her union activities. Therefore, I shall recommend that portion of the charge dealing with Mead's pay raise be dismissed.

9. Mary Baker's termination

Throughout his testimony, Dr. Andrus was quite candid as to his strong personal opposition to the Union. As a founder, member of the board of directors, and director of the Foundation, his personal views were translated into the policy of Respondent. Perhaps the best way to fully comprehend the depth and intensity of his opposition and dislike for the Union is to briefly review

his April 21 confrontation with his close personal friend Paula Bertram. Dr. Andrus devoted a major portion of his professional career attempting to advance the acceptance of the family nurse practitioner concept. Within the medical community there had been major opposition to the mid-level practitioners. Some physicians referred to them as mini-doctors. In an effort to convert that opposition, he wrote and lectured extensively. In fact, Dr. Andrus testified that over the years he had addressed nearly every county medical society in the State of California, in an effort to promote the family nurse practitioner program. The Foundation itself was developed around the concept of a team practice, where physicians and mid-level practitioners would work together in a complementary manner. However, when faced with the reality that he may be forced to deal with the mid-level practitioners as an organized union, he stated to Bertram, "If I have to, to make this thing a success, I will get rid of all the mid-level practitioners in the organization." This comment was clearly made in the context of his opposition to the Union. I fully credit Bertram's undisputed recollection of their April 21 conversation. After all those years of promoting the concept of the family nurse practitioner program, he was willing to dismiss the program, if it meant he would be required to bargain with a union.

Although their number may have fluctuated, there were only six mid-level practitioners during the initial organizational period. With such a small group it was not difficult to determine who was actively supporting the Union. As early as March, Dr. Andrus suspected Mary Baker of attempting to impose collective bargaining upon the Foundation. He reached this conclusion when Goldsmith read that portion of the FNP's suggested contract changes, which dealt with an annual group meeting with management. He interrupted, declaring that it was collective bargaining and wanted to know if Mary Baker was behind this amendment. Goldsmith said she did not think so. When Dr. Andrus testified, he said that as he listened to Goldsmith read the amendments and he told her he did not wish to get involved in negotiating with an organized union of nurse practitioners.

Dr. Andrus' suspicion that Mary Baker was an active participant in the organizational drive of the MLPs' was confirmed at the May 7 dinner meeting. As he opened the business portion of the meeting, Mary Baker demanded, "I don't understand why you don't just give us formal recognition so that we can bargain collectively with you." Again, Dr. Andrus stated his position that he was willing to meet with them individually, but he would not recognize them as a formal bargaining group. A substantial segment of the meeting consisted of Baker demanding recognition and Dr. Andrus refusing to grant her request. After this meeting O'Hara-Devereaux, in the presence of Dr. Andrus, confronted Goldsmith with, "How could you have hired her? Don't you know she was a shit disturber in training."

Baker continued a high profile as one of the leaders of the Union. She was the named representative of the RC petition, which was filed with the NLRB, and thus the named party on all resulting communications between Respondent, the Union, and the NLRB. In addition, she

was the spokesperson on behalf of the Union at the June 15 representation hearing. A few days after the hearing, O'Hara-Devereaux called Baker and said, "I hear you are the leader of this uprising." On November 26, Mary Baker, on behalf of the Union, sent a telegram to Respondent demanding that Respondent bargain pursuant to the Certification of Representative issued by the NLRB. On November 28, the Board sent a telegram to Respondent and Baker, upholding the Regional Director's certification of the Union. On November 29, Mary Baker sent another telegram to the Foundation demanding that they begin collective bargaining.

The General Counsel argues that George Randall was hired during the shutdown period to preclude Mary Baker from working. I do not believe the sequence of events can support this theory. If it was the intent to deny Baker work during the shutdown period, why would Nord have even asked Baker if she would like to work at Auburn. Further, the General Counsel urges that, "it is easily inferred that Randall was hired in order to preclude Baker from working during the shut-down. After he was 'rushed' to Auburn, in fact was little or nothing for him to do." Such an argument does not support the General Counsel's theory. After all if there was not enough work for Randall, then it follows that there would not have been enough work for Mary Baker. The credible evidence would indicate George Randall was hired for the Forrest Hill facility, which was scheduled to open in the near future. While they waited for the opening, he was assigned to the Auburn site.

On November 5, 1979, the new River City facility was opened with Dr. David Daehler as the physician replacing Dr. Lackner. Both Mary Baker and Peggy Davis returned to work that day.

On November 30, which was the day after Mary Baker had sent a second telegram to the Foundation demanding it bargain with the Union, Greg Voelm visited the new River City facility and delivered a memo to Davis and Baker, which was titled: "PART-TIME EMPLOYMENT." The memo explained that since the patient load was often less than 10 per day, the Foundation could not afford to maintain a full-time staff of a physician, nurse practitioner, and a social worker. Therefore, Davis, the social worker, was reduced to 4 days per week, and Baker, the nurse practitioner, was reduced to 2 days per week, effective December 10. Davis was pro-management. The memo also provided a further explanation for the disparity in the reduced hours between the social worker and the nurse practitioner: "Since Ms. Davis provides social work support to Dr. Daehler who will remain on full-time status and since her services are an integral part of the special nature of the practice, she will be assigned for 16 more hours a week than Ms. Baker." On December 19, 1979, Nord met with Baker and explained that the amount of available work was not sufficient at that time to justify a FNP at River City clinic and then handed her a letter, which stated in part:

I am sorry to inform you that in evaluating the situation at River City Family Medical Group we find that we are unable to afford to keep you on our

staff due to lack of work. Therefore, your services will no longer be required as of 12/20/79.

Both Dr. Daehler and Debra Stockel, the back office medical assistant, testified that they were told that Baker was simply laid off on December 19. However, when patients called and asked for Baker, Stockel would tell them Mary was no longer with River City. In fact she did not think Baker would ever return. Mary Baker understood she was terminated. Respondent contends that it did not terminate Baker in December, but simply laid her off until the patient flow increased. I find that, considering all the surrounding circumstances and the clear language of the letter, Mary Baker was first terminated as of December 20, 1979.

It is the position of the General Counsel that the separate reduction in hours and the subsequent discharge on December 20, 1979, of Mary Baker were motivated by Respondent's desire to rid itself of the Union and in particular the Union's most vocal supporter. The justification for the Foundation's action was provided mainly through the testimony of Greg Voelm. The decision was based on his business judgment, that it was imperative to cut the cost of operating the Foundation and in particular the River City site. The patient flow just prior to the reduction of hours was as low as 3 to 10 patients per day for both Dr. Daehler and Mary Baker. He as concerned that supporting funds from the Federal grant were rapidly diminishing. In considering where to cut expenses, it was obvious the facility could not exist without the physician. Since he had prepared the initial grant application to the Government, he explained that it was his opinion the grant would end without the presence of the social worker. Therefore, any decision to cut the social worker's hours would have to be minimal. In addition, the social worker worked closely with the physician. Thus, the only area that he claimed he could cut was that of the nurse practitioner. He did not feel she was as essential to the grant, and her patients could easily be handled by Dr. Daehler.

I agree with the General Counsel that the above justification for Respondent's conduct was pretextual. See *Wright Line*, 251 NLRB 1083 (1980). Instead of hovering on the brink of financial disaster, the Foundation had just received a grant in the amount of \$94,500, from the Administration on Aging (HEW), for the period of September 30, 1979, through September 29, 1980. Neither Baker nor Davis received any pay prior to November 5, 1979. The remainder of the new River City staff, including Dr. Daehler, began their employment for the Foundation as of November 5, and presumably were not compensated prior to that date. Apparently, there was no need to use any portion of the \$94,500 for payroll until after November 5. Mary Baker was compensated for her work from November 5 through December 20, a period of less than 7 weeks. It would seem unlikely, with nearly 10 months remaining on the grant, that it was necessary to terminate Baker for financial reasons. In addition, if the Foundation was experiencing or anticipating financial difficulties, it is illogical that they would reduce Baker's hours or terminate her without first reducing the hours of the social worker to a like amount. The social worker could

not bill for her services. In contrast Baker not only produced income through the billing for her medical services, but she generated \$2,197 in patient fees during the opening month of November; while Dr. Daehler only generated \$1,801 in patient fees during the same period. It must also be remembered that River City was starting up its business after being closed approximately 6 weeks. It was reasonable to anticipate that in a few months the business would continue to grow. Indeed, Dr. Daehler was seeing 25 patients per day by January 30, 1980. I have carefully read the original grant covering the period from September 30, 1978, through September 29, 1979; and the second grant covering the period from September 30, 1979, through September 29, 1980. The first proposal provided:

The proposed project would employ the full services of physicians specializing in geriatrics, mid-level practitioners with advanced training in this field, clinical pharmacist services and social health care support workers.

Throughout the proposal, the duties and importance of each of the above professionals are discussed. The importance of the social/health care support workers are not emphasized as more important or less dispensable to the purpose of the grant than the mid-level practitioner. In fact, the proposal stresses the need for a team practice between the physician and the mid-level practitioner. Voelm asserted that he feared the Foundation would be in noncompliance if they did not continue to employ a social worker; yet, as of the time of Baker's termination in December, the Foundation had not secured the service of a clinical pharmacist as proposed.

Assuming, *arguendo*, that Respondent's action were not pretextual, the question remains what was the motivating factor in reducing Mary Baker's hours and later in December dismissing her from Foundation employment. As previously discussed, in a "dual motive" case there are two factors to be considered. First, was there a legitimate business reason for taking the action against the employee; and second, was the employer's reaction also based on the employee's engaging in union or other protected activities? In the present case the General Counsel has met its burden of proof and has made a *prima facie* case by presenting evidence sufficient to support the inference that protected conduct was a "motivating factor" in the Employer's decision. Once this is established, the burden shifts to the Employer to demonstrate that the same action would have taken place even in the absence of Mary Baker's union activities. See *Wright Line*, *supra*.

The record is abundantly clear that Dr. Andrus believed Mary Baker was the leader of the Union's organizational efforts. It is equally clear that he was determined to defeat the Union by his threat to Paula Bertram to get rid of all the mid-level practitioners in the organization. A review of all the foregoing credible evidence unmistakably indicates that Baker's union activities were "motivating factors" in the Employer's actions against her. Having considered all of the foregoing reasons advanced by Respondent as legitimate business reasons for its actions against Baker, I find Respondent has failed to

meet its burden to demonstrate it would have reached the same decision absent the protected conduct. In light of the above, I find that the preponderance of credible evidence supports the allegations that the Foundation violated Section 8(a)(1) and (3) of the Act when it reduced Mary Baker's hours in November and terminated her in December 1979.

It is undisputed that the River City staff, including Mary Baker, was instructed not to transfer any patients to Dr. Lackner, unless that patient specifically requested the doctor. On January 14, 1980, the Foundation sent Baker a telegram informing her that she was terminated for having referred Foundation patients to Dr. Lackner, instead of the physicians designated by the Foundation. Mary Baker denied she ever made such transfers.

Although Respondent claims that in September, Voelm suspected the circumstances surrounding the preparation of some of the release forms used to transfer patients to Dr. Lackner, he accepted Baker's loyalty to the Foundation and did not pursue the matter. It was not until the Foundation's final preparation for the trial that it claims it discovered evidence that Mary Baker had suggested to a number of patients that they should go to Dr. Lackner, rather than the Foundation's designated provider. It is further argued by Respondent that it terminated Baker in January 1980 based on this newly discovered evidence that she was disloyal to the Foundation.

Even if I should find that Mary Baker was insubordinate, disloyal, and had indeed transferred Foundation patients to Dr. Lackner, I would still find under the circumstances of this case that the rationale advanced by Respondent for terminating her in January 1980 was totally pretextual. In arriving at this finding, it is important to look at the time sequence leading to the January dismissal. Greg Voelm, the Foundation's director, admitted he participated in the decision to terminate Baker in January based on the fact she had transferred patients to Dr. Lackner. On cross-examination, Voelm admitted he had knowledge of Baker's participation of the patient transfers as far back as September, but did not take action against her because he did not realize the magnitude of the loss. Voelm gave the NLRB his affidavit on September 27, 1979, which does not support his testimony. A portion of his affidavit is as follows:

We have lost thousands of dollars in patient revenue most of which is going to Lackner who has set up an office near our old location. Patients are being encouraged to transfer to Lackner by Foundation employees Mary Baker and Kathy Mead. I know this because I've had Gerry Nalley interview some of the patients. Nalley was the front office girl at River City. We have also had record transfer orders with the signatures of Baker and Mead on them. Someone stole our patient appointment records for the past six months. Only office personnel would have had ready access to this material. This could be used to contact patients. We have received about 50 requests for patient record transfers to Lackner within the last three weeks. We had about 400 active patients at River City within the last six months prior to our eviction. In at least one in-

stance Baker's signature was on one of our record transfer forms which had been clumsily whited out to substitute Lackner's name for that of practice. The transfer form is signed usually by a patient when he or she goes to a new doctor to request the patient's records. Apparently some of these were being signed right within our own office. Baker, Mead, Davis and Lackner all received copies of reports of the weekly progress.

The record does not reveal that the information gathered in January concerning the transfer of patients and the loss of revenue was of a greater magnitude than what Voelm already knew in September. His affidavit of September 27 refers to the loss of thousands of dollars, which he attributed to Baker and Mead transferring patients to Dr. Lackner. If such acts of insubordination and disloyalty justified termination in January, surely it would have been even more justified when the discovery of the loss of thousands of dollars was first discovered. Just a few months later in November and December, Respondent reduced Baker's hours and then terminated her because of River City's financial status. If the Foundation were actually in a severe financial condition, it would appear unlikely that it would not react to the loss of thousands of dollars in September. The Foundation did not take action against Mary Baker until after she continued her demand for collective bargaining in her two telegrams of November 26 and 29, 1979. Respondent's assertion that it terminated Baker in January after they discovered the magnitude of the patient loss is totally pretextual. The Foundation possessed that knowledge in September. The termination was motivated by the Foundation's desire to stifle the Union and one of its most active leaders. Therefore, I find that the preponderance of credible evidence supports the allegation that the Foundation violated Section 8(a)(1) and (3) of the Act when it terminated Mary Baker on January 14, 1980.

10. Paula Bertram's termination

Dr. Frank Andrew Weiser did not hesitate to express his own personal dislike for unions. His father had been a doctor and he had practiced medicine for nearly 20 years. As a group he described physicians as conservative and generally opposed to unions. The record is clear that Dr. Weiser was an early and strong supporter of the family nurse practitioner concept. However, based on his personal background he was absolutely convinced that nothing was more harmful to the FNP movement than for them to organize as a labor union. It had been difficult to gain support for the FNP concept within the medical community and if they organized into a union they would be harming their own cause, since FNPs can not exist without the support of the physicians in the community.

Paula Bertram was one of the primary organizers of the Union and became its president just prior to the June 15 representation hearing. Although she only testified on January 15 and 17 and May 20, 1980, she was under subpoena and remained at the trial during most of the hearing, assisting the General Counsel.

The General Counsel contends that the Foundation violated Section 8(a)(1) and (4) of the Act, based on alleged threatening remarks made by Dr. Weiser to Paula Bertram on January 25, 1980. On that date he allegedly threatened her with the loss of wages because she testified at the NLRB hearing in Cases 20-CA-14783, 20-CA-14801, and 20-CA-15016; and, because of her membership in and/or activities on behalf of the Union. The content of this conversation is not in dispute. Dr. Weiser felt he had simply voiced his own opinions as to how he viewed the hearings and the surrounding publicity. Since the hearing was receiving wide coverage in the media, he felt the publicity was harmful to the Foundation and to the FNPs.

On Friday, January 25, Bertram noticed Dr. Weiser had a newspaper article on his desk, which dealt with her testimony. Dr. Weiser, who had not been to the hearings, asked in general terms what was happening and why was she at the trial for so many days. She first explained that she was under subpoena and had no choice. Then he mentioned that in his experience it was unnecessary to remain there all the time, since it was possible to work out an arrangement with the court and lawyers to be on call. In response, she said the General Counsel had told her that as a principal organizer of the Union it was necessary for her to be present and assist. At this point Bertram mentioned to him that he looked "mad," which he initially denied. Finally, in a rather loud and emphatic voice he stated:

. . . yes I am mad. I'm mad because I just think this is a terrible thing that's going on. I think that this is very divisive to the clinic, it's destructive to the nurse practitioner movement, that you're endangering nurse practitioner movement and nurse practitioner jobs, that I'm getting a lot of flak or questioning from the doctors at the Marshall Hospital, . . . doctors don't like this kind of thing . . .

Having read the newspaper articles, he also mentioned that he felt that a lot of lies were being told at the hearing. Bertram resented this observation, since the article dealt with her private confrontation with Dr. Andrus. Since no one else was present, she did not feel he was in a position to judge the accuracy of her testimony.

On January 31, 1980, Bertram followed Dr. Weiser into his office and asked what had happened at the Foundation's press conference, which was held the previous day. After a brief discussion, she mentioned that while listening to testimony at the hearings she learned that one of her colleagues, Sue Wooten, had received a pay raise. Since they started working for the Foundation at nearly the same time and they both maintained high productivity, she felt she was also entitled to a raise. Bertram recalled that Dr. Weiser responded, "I think you'll get whatever you [have] coming." Dr. Weiser admitted he made a similar statement, but he believed he probably said: "I think you will get what you deserve." Bertram testified that Dr. Weiser also added, "don't be naive to expect people to be nice after what you've done, or what you're doing." Dr. Weiser was never asked if he made

this last statement. I credit Bertram's recollection regarding their conversation of January 31, 1980.

Respondent asserts that Dr. Weiser's comments of January 26 and 31, 1980, were protected by Section 8(c) of the Act. I disagree, inasmuch as that section of the Act expressly excepts from the free speech protection expressions containing a "threat of reprisal or force or promise of benefits" and, even though such statements may be expressions of opinions, "if their reasonable tendency is coercive in effect, they are violative of Section 8(a)(1)." See *NLRB v. Kingsford Motor Car Co.*, 313 F.2d 826, 832 (6th Cir. 1963); *International Paper Co.*, 228 NLRB 1137, 1141 (1977).

To determine whether Dr. Weiser's comments had a reasonable tendency to be coercive, it is necessary to consider the relationship between Bertram and the doctor; the events that preceded his statements; the content of the statement; and the atmosphere surrounding their meeting. Although Dr. Weiser felt Bertram was an excellent clinician, he did not feel she was loyal to him. In fact, before he was promoted to the position of medical director, Bertram had not only informed the Foundation management, but also told Dr. Weiser that she felt he could not handle the position. As previously noted, he was opposed to unions in general and the MLPs' union in particular. Bertram was president of the Union and obviously her participation in the present hearing was well known to Dr. Weiser. He was present at the Placerville open executive meeting when she inquired on behalf of the FNPs as to the status of their contracts.

Both conversations occurred in his office. The January 25 statement was certainly not made in a friendly atmosphere or casual surroundings. His demeanor was that of an angry supervisor, who complained of her participation in the Union in a loud and an emphatic voice. He admitted he was "mad." His remarks were clearly in reference to the trial and her participation, since he was convinced that the testimony on behalf of the Union was filled with lies and created adverse publicity for the Foundation and the family nurse practitioners. Of course, Bertram had been threatened by Dr. Andrus that he would rid the Foundation of family nurse practitioners. Dr. Weiser's comments were nearly identical to many of the remarks that were made by Dr. Andrus, O'Hara-Devereaux, and Fowkes to Paula Bertram on previous occasions.

After considering all the surrounding circumstances, I find Dr. Weiser's comments represented a continued effort on the part of the Foundation to undermine the support for the Union. His comments that her participation endangered the family nurse practitioners and their jobs had a reasonable tendency to be coercive and suggested a loss of income and employment. Dr. Weiser's response to Bertram's inquiry concerning a pay raise for herself, was also phrased in such a way to constitute a coercive threat. Accordingly, I find Dr. Weiser's comments made on January 25 and 31 were threats and had a reasonable tendency to coerce Paula Bertram, in violation of Section 8(a)(1) of the Act.

It is the position of the General Counsel that Paula Bertram was terminated by Respondent on March 24,

1980, as part of an ongoing campaign to rid itself of all employees who supported the Union and who assisted the NLRB in this case. Respondent defends its action by asserting that Bertram was terminated because of her alleged improper conduct occurring on March 14 and 18, 1980. Thus as in the case of Baker, "dual motives" were advanced by the parties to provide the "motivating factors" which led to Paula Bertram's ultimate discharge.

Robert Elkus testified that at both the February 11 and March 13 executive meeting they discussed the financial status of each facility. The Sierra Group at Placerville had reached a break-even point. However, fear was expressed that it would not be self-sufficient when the final funds from the Robert Wood Johnson Fund were exhausted. Having read a National Corps' study, Elkus was convinced that the Foundation had made a fundamental mistake when Placerville was initially started, by retaining too many FNPs and not enough physicians. That is, it was not economically feasible to start with mid-level practitioners and then build a physicians practice on top of that.

During the February 11 meeting Ted Tyson was hired to replace Greg Voelm. His first assignment was to survey all of the facilities and return with recommendations for improving their economic position. Without any prior educational training or experience in field of medicine, medical facilities, or the delivery of health care services, Tyson began his survey. At Placerville his inspection consisted of one or possibly two visits for a total of 2 hours. Although he met and spoke very briefly with Dr. Natali and several other employees, his primary conversations were with Dr. Weiser. In fact, Tyson did not ask Dr. Natali any questions concerning staffing, he simply introduced himself and left. There is no indication in the record that Dr. Weiser ever discussed with Tyson the business need to change the ratio between doctors and FNPs. Dr. Weiser did stress the need to provide relief for Dr. Natali and himself in the handling of after-hour OB patient calls.

After inspecting Placerville, conferring with Dr. Weiser, the central office staff, and the executive committee, and reviewing unidentified records, documents, and ledgers Tyson concluded and recommended that a third physician be hired and the Placerville clinic be restructured toward a more physician oriented practice. At the March 13 executive meeting, Tyson's recommendation was tentatively accepted and Nord was instructed to begin a search for a third doctor. The final decision to change the ratio was postponed until late July or early August, when they anticipated the arrival of the new doctor. It was also discussed that if there were a reduction in support staff it would be accomplished by the termination of the part-time FNPs. Bertram and Herrlie were the only part-time FNPs at Placerville.

At approximately the same time the Foundation was discussing the possible future discharge of the two part-time FNPs, it was also agreeing to a pay raise and an increase in the hours for Bertram. Nord also told Herrlie that since Bonnie Bowman had departed that Herrlie was being considered in the 1980 budget as Bowman's replacement.

In its brief, Repondent asserts that in July or August a determination would have been made as to whether to lay off Bertram and Herrlie until such time an increased patient flow warranted additional support staff. However, due to Bertram's conduct on March 14 and 18, Tyson was prompted to terminate her immediately. Thus, it is argued that Bertram was terminated for cause and not because of a restructuring of the Sierra Clinic to a more physician-oriented practice.

During the March 14 meeting at Placerville, Sue Wooten stated that, "everytime I refer a patient to one of the doctors, I never get them back," and then she related an anecdote of an encounter that had occurred that morning with a former patient whom she had previously referred to Dr. Weiser. As the patient passed her in the hall she whispered to Wooten that she missed her. Dr. Weiser did not take offense to Wooten's comments, but when Bertram added that she did not feel the doctors were doing a good job in returning patients to the FNPs, he was offended. Dr. Weiser told Bertram that he felt she was accusing him of stealing patients. Dr. Natali did not take offense to what he considered an off-handed comment. He did not feel Bertram's comment was made in an accusatory or disrespectful manner. After the meeting Dr. Weiser called Nord and related the substance of Bertram's comment. He expressed that he was unhappy in regard to his relationship with Bertram. Nord agreed to return to Placerville and assist him and again discuss Bertram's pay raise and the change in their work schedules.

Upon her arrival on March 18, Dr. Weiser reiterated Bertram's comment concerning the doctor's failure to return patients. He felt he had failed to gain the loyalty and support of either Bertram or Herrlie. Later in the day they all attended the committee advisory board meeting, where Bertram publicly complained that she did not feel there existed a team effort or copractice at Placerville. Nord felt the comment was disrespectful to Dr. Weiser.

Based on the foregoing, Respondent asserts that Paula Bertram was terminated.²² Although there was a strained relationship between Dr. Weiser and Bertram, it was not so severe as to likely result in discharge. Dr. Weiser felt terrible when he learned of the Foundation's decision. He told Bertram that he had not participated in the decision, nor was he even asked for his opinion. Dr. Weiser did not hesitate to state that she was an excellent clinician and he offered to write a letter of recommendation. Such an endorsement would hardly come from a supervisor, if the strain was as severe as Nord related. Their working habits and approach to the practice of medicine differed, but they shared the same goal of providing high quality medical services. Obviously, Dr. Weiser appreciated her professional skills, but preferred to work with Sue Wooten. In contrast Dr. Natali felt uncomfortable working with Wooten and preferred working with Bertram. Whatever personality difference which

²² Nord notified Bertram she was terminated because the executive committee had decided to make the Placerville facility more physician oriented. Nord did not mention that the termination was based on the alleged misconduct on March 14 and 18.

may have existed could have been rectified by simply allowing Dr. Natali and Bertram and Dr. Weiser and Wooten to work together. There was no credible evidence in the record that would indicate that Dr. Weiser agreed with the discharge of Bertram.

As required in a "dual motive" case, the General Counsel has met its burden of proof and has made a *prima facie* case by presenting evidence sufficient to support the inference that protected conduct was a "motivating factor" in the Foundation's decision to discharge. The record is replete with example of Dr. Andrus' and Respondent's determination to rid the Foundation of the Union and its members. In their heated argument, Dr. Andrus warned Bertram that he would get rid of every nurse practitioner. This threat was made in the context of his expressing his total opposition to the organizational efforts of the FNPs. Other threats were repeated by Fowkes and O'Hara-Devereaux. A review of the record indicates that Bertram's union activities and her participation in the hearings were "motivating factors" in the Employer's actions against her. Having considered all of the foregoing reasons advanced by Respondent as legitimate business reasons for its actions against Bertram, I find Respondent has failed to meet its burden to demonstrate it would have reached the same decision absent the protected activities. Accordingly, I find that the preponderance of credible evidence supports the allegations that the Foundation violated Section 8(a)(1), (3), and (4) of the Act, when it terminated Paula Bertram on March 24, 1980.

11. Alleged 8(a)(5) violation

Nord's letter of March 24, 1980, informed Paula Bertram that her services were no longer needed after March 28, since the executive board decided to change the Sierra Family Medical Group practice to a more physician-oriented practice. I have rejected Respondent's argument that its actual motive for discharging Bertram was for cause and have found that she was terminated because she testified in a Board hearing and because of her union activities in violation of Section 8(a)(1), (3), and (4) of the Act.

Although Bertram was informed that she was being discharged because of a restructuring of the Placerville facility, the minutes of the March 13, 1980, executive committee clearly indicates that such a decision was tentatively adopted. The final decision to change the ratio of doctor to nurse practitioner would not have been made until after a third doctor arrived in July or August. At that time the Foundation intended to reanalyze the patient volume. If the volume was sufficiently high the family nurse practitioners may have been retained. Therefore, I find that as of March 24, 1980, Respondent had not abolished the two-family nurse practitioner job positions. It simply had unlawfully discharged Bertram, and her unit position remained a part of the Sierra Family Medical Group staff. Accordingly, it was not necessary for Respondent to bargain with the Union over these two job positions, since they were not eliminated and therefore Respondent did not violate Section 8(a)(5) of the Act. However, if at a future date the Foundation chose to eliminate those unit jobs, it would have

had a legal obligation to bargain with the Union concerning such a decision. See *Oil Workers v. NLRB*, 547 F.2d 575 (D.C. Cir. 1976); *Awrey Bakeries v. NLRB*, 548 F.2d 138 (6th Cir. 1977).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondent, as set forth above, occurring in connection with its operations, described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Mid-level Practitioners Group of Foundation for Comprehensive Health Services and the Union of American Physicians and Dentists are labor organizations within the meaning of Section 2(5) of the Act.

3. By the following conduct Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act:

(a) By interrogating applicants for employment concerning their union membership and sympathies.

(b) By hiring extra employees to dilute the strength within the ranks of the Union during the pendency of a representative election.

(c) By threatening loss of income, inability to find future work, and termination of their employment because of their union activities.

(d) By threatening employees that by their union activities they will limit their salaries and talk themselves out of a job.

(e) By threatening employees that it is futile for them to select a union as their collective-bargaining representative.

4. By reducing Mary Baker's hours on November 30, 1979, effective December 10, 1979, Respondent has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

5. By discharging Mary Baker on December 20, 1979, and January 14, 1980, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. By threatening Paula Bertram with loss of income and employment, and thereafter discharging her on March 24, 1980, effective March 28, 1980, because she engaged in union activities and because she gave testimony under the Act, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3), (4), and (1) of the Act.

7. Respondent did not violate the Act by discharging Dr. Jerome Lackner, nor did it engage in any other unfair labor practices except as found herein.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section

8(a)(1), (3), and (4) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully reduced the hours of Mary Baker, and unlawfully discharged Mary Baker and Paula Bertram, I shall recommend that Respondent be required to offer them full reinstatement to their former positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of their termination. Backpay with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).²³

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²⁴

The Respondent, Foundation For Comprehensive Health Services, Sacramento, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating applicants for employment concerning their union membership and sympathies.

(b) Hiring extra employees for the purpose of diluting the strength within the ranks of the Union and impeding the election process under the Act, and thereby preventing or aborting the exercise by employees of their rights under the Act to bargain collectively under the Act.

(c) Threatening employees with the loss of income, inability to find future work, and termination of their employment because of their union activities.

(d) Threatening employees that by their union activities they will limit their salaries and talk themselves out of a job.

(e) Threatening employees that it is futile for them to select a union as their collective-bargaining representative.

(f) Discharging, reducing work hours, laying off, furloughing, or failing to reinstate or rehire any employee because she or he has joined a union, gave testimony under the Act, or exercised any other right or engaged in any lawful activity under the Act.

(g) 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 deemed necessary to effectuate the policies of the Act:

(a) Offer to Mary Baker and Paula Bertram immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole

²³ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

²⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its places of business in Sacramento, Placerville, Colfax, Auburn, Clear Lake Highlands, and Santa Rosa, California, copies of the attached notice marked "Appendix."²⁵ Copies of said notice, on forms provided by the Regional Director for Region 20 shall, after being signed by an authorized representative, be posted as herein provided, immediately following receipt thereof, and be so maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act other than those found above.

²⁵ In the event that 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize themselves
- To form, join, or assist any union
- To act together for collective bargaining or other mutual aid or protection
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants for employment concerning their union membership and sympathies.

WE WILL NOT hire extra employees for the purpose of diluting the strength within the ranks of the Union and impeding the election process under the Act, and thereby preventing or aborting the exercise by employees of their right under the Act to bargain collectively under the Act.

WE WILL NOT threaten employees with the loss of income, inability to find future work, and termination of their employment, because of their union activities.

WE WILL NOT threaten employees that by their union activities they will limit their salaries and talk themselves out of a job.

WE WILL NOT threaten employees that it is futile for them to select a union as their collective-bargaining representative.

WE WILL NOT discharge, reduce working hours, lay off, furlough, or fail to reinstate or rehire any employee because he or she has joined a union,

gave testimony under the Act, or exercised any other right or engaged in any lawful activity under the Act.

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 offer to Mary Baker and Paula Bertram immediate and full reinstatement to their former job or, if their jobs no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

FOUNDATION FOR COMPREHENSIVE
HEALTH SERVICES