

Damon House, Inc. and Peter Deykerhoff and William Maldonado. Cases 22-CA-11765 and 22-CA-11789

30 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 18 July 1983 Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a reply to the General Counsel's exceptions and exceptions with a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

Contrary to the judge, we find that the counselors were addressing matters which had a direct impact on their job interests when they protested against "Arbitrary Administrative Practices," embracing promotions, demotions, and continuing threats of discharge, and that this portion of their activity was, therefore, protected by Section 7 of the Act. Nevertheless, we agree with the judge's ultimate conclusion that the General Counsel failed to establish that the counselors were discharged for engaging in protected concerted activity. Despite the reference to arbitrary administrative practices, the overwhelming majority of concerns expressed in the letter were not directly related to job interests. The letter opened with the assertion that the "whimsical, arbitrary, irrational and unethical administrative practices" of Director Gregory Marra had a "devastating impact on the welfare of the residents, the morale of clinical/social service staff members, and the overall functioning and integrity of Damon House." The letter went on to accuse Marra of using adolescent residents to repair his

¹ Chairman Dotson would exercise the Board's discretion under Sec. 14(c)(1) of the Act to decline jurisdiction over this Employer. He would return to the rule explicated in *Ming Quong Children's Center*, 210 NLRB 899 (1974), and *Cornell University*, 183 NLRB 329 (1970), that the Board will not exercise jurisdiction over nonprofit charitable institutions except where it finds that a particular class of such institutions has a "massive impact on interstate commerce."

The Board's jurisdictional rule announced in *St. Aloysius Home*, 224 NLRB 1344 (1976), was not based on any evidence of the impact on interstate commerce of operations such as the Employer's in this case, and the Board has yet to consider evidence which could establish "massive impact." See the dissenting opinion of Chairman Dotson in *Alan Short Center*, 267 NLRB 886 (1983); dissenting opinion of then Chairman Murphy and then Member Penello in *St. Aloysius Home*, 224 NLRB 1344, 1346 (1976).

own home without adequate compensation; arbitrarily promoting, demoting, and threatening to discharge counselors; sending adolescents out "for long hours without supervision and with little food"; and charging expensive meals and drinks on his business credit card. The letter closed with a plea to the board of directors to take action "to put an end to the obviously unethical and unconscionable practices of the Executive Director." Despite the reference to arbitrary demotions and threats to discharge, the overall thrust of the letter is an attack on Marra's ethics and his impact on the adolescent residents. An attack which, as the judge found, expressed a genuine concern for the residents' living conditions but was not directly related to the employees' working conditions.

In these circumstances, we must conclude that the portions of the letter that are job related are outweighed as factors leading to the discharge and that the Respondent, therefore, has established that it would have discharged the employees for unprotected concerted activity even in the absence of their protected activity.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. Upon a charge filed on July 21, 1982, by Peter Deykerhoff, and a charge filed on August 5, 1982, by William Maldonado, a consolidated complaint was issued on September 30, 1982, by the Regional Director for Region 22 of the National Labor Relations Board, on behalf of the General Counsel. The complaint, as later amended, alleged that Damon House, Inc. (the Respondent) violated Section 8(a)(1) of the the National Labor Relations Act, by having:

- (a) Discharged Peter Deykerhoff on July 19, 1982
- (b) Suspended John Zambri and William Maldonado on July 26, 1982
- (c) Discharged Zambri on August 2, 1982
- (d) Discharged Maldonado on August 4, 1982

The Respondent's answer, filed on October 12, 1982, averred that it is not an employer within the meaning of the Act and denied that the Respondent had engaged in any unfair labor practices. The hearing was held before me on March 21, 22, and 31, 1983.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a nonprofit corporation of the State of New Jersey which provides drug rehabilitation and related services to individuals at its facilities in New Brunswick, New Jersey, Paterson, New Jersey, and Brooklyn, New York. It annually receives funds in excess of \$250,000 of which \$208,000 were received by the Respondent in 1982 from the State of New York at the Respondent's principal office located in New Brunswick, New Jersey, for use in connection with the Brooklyn facility. I find that the Respondent's operations meet the applicable jurisdictional standard set by the Board.¹

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent treats over 100 drug and alcohol abusers, many of whom are minors and on parole. They, for the most part, reside at the New Brunswick and Paterson facilities and take part in various vocational programs, operated by the Respondent, one of which has to do with the performance of construction work and uses the trade name, Damon Enterprises.

The residents undergo an 18-month treatment program which is aimed at encouraging them to develop a positive outlook on their lives by the use of a combination of self-help, counseling, and peer pressure. New residents are said to be in "Peer 1"; as they progress in their attitude and treatment, they move to "Peer 2" where they are more on their own; as they come toward that end of the program, they are in "Peer 3."

The Respondent's executive director is Gregory Marra. He is responsible for all aspects of its operations. In mid-1982, Ted Del Guercio held the title, director of residential services. In that capacity, he appears to have run the day-to-day operations as he was director of residential services at New Brunswick and Paterson and also handled the negotiations for the contract which provided for the opening of the Brooklyn facility.

Most of the funding for the Respondent's operations comes from public sources and from private donations. A not insignificant part, however, also comes from raffles held on tickets sold by residents from May to October each year.

B. *The Accusation Against the Respondent's Executive Director*

The three alleged discriminatees in this case, Peter Deykerhoff, John Zambri, and William Maldonado were employed by the Respondent as counselors when they were discharged in the summer of 1982. All dates hereafter are for 1982 unless noted otherwise.

Deykerhoff had worked for the Respondent for about 1-1/2 years until his discharge, at which time he was screening new residents as the "intake coordinator," and also counseling outpatients. He testified that in May al-

leged discriminatee Zambri had complained at a staff meeting that residents assigned to him were being used in the Damon Enterprises program on a regular basis to repair Executive Director Marra's house and that those residents were at the entry level, Peer 1. It appears that Peer 3 residents normally are used in the operation of Damon Enterprises. Deykerhoff related that Zambri reported then that he had problems dealing with those residents when they returned to the Paterson facility after being in the field all day.

Zambri's account was detailed. He testified that six residents assigned to him were working for Damon Enterprises for weeks at a time so that he barely saw them. Zambri related that he took his job seriously and that that arrangement made his job very difficult.

Another matter discussed among the staff counselors pertained to the sale of raffle tickets. Deykerhoff, Zambri, and Maldonado had talked at various times about the fact that many residents, including those in Peer 1, were sent to shopping malls and other public areas to sell those tickets. According to the testimony offered they held Executive Director Marra responsible for those assignments. Those residents were reportedly assigned to those locations for 12 to 14 hours a day, 3 days a week and that they were unsupervised. The accounts of Deykerhoff, Zambri, and Maldonado indicated that they believed that those residents were also not given enough food or money for their meals during those excursions and, just as important, they were being exposed to a great deal of adverse pressures. In particular, the testimony of the alleged discriminatees indicated that the Peer 1 residents were being placed in locations where they readily could be charged with shoplifting or with "acting out sexually" (as it is phrased) or with other improper behavior and that that environment was "emotionally draining" on the counselors.

Another subject discussed among Deykerhoff, Zambri, and Maldonado was their view that the Respondent's executive director Marra created morale problems by regularly threatening counselors, directly and indirectly, with discharge, often times without merit.

At various points, the three alleged discriminatees had discussed bringing to the attention of the Respondent's board of directors their complaints as to the abusive practices of Executive Director Marra. Deykerhoff testified that about 2 weeks before he wrote to the Respondent's chairman, as related next, he told Zambri that such an approach might get something done with "the program" and Zambri agreed they should try. On July 14, Deykerhoff sent a long letter with attachments to Philip Befumo, chairman of the Respondent's board of directors. It appears that he did not inform Zambri or Maldonado just before he sent the letter out, that he had prepared it or that he was going to send it. Copies however were mailed to all counselors including Zambri and Maldonado. In addition, Deykerhoff sent copies to the parents of all the residents and copies also to various state and county offices.

The Respondent's director of residential services Ted Del Guercio had given Deykerhoff the names and ad-

¹ See *East Oakland Community Health Alliance*, 218 NLRB 1270 (1975).

dresses of the parents of the residents so that he could mail them copies of his letter.

C. The July 14 Letter

The opening paragraph reads:

I have worked as a counselor, outreach coordinator and program director at Damon House's Paterson residential facility for the past one and one-half years. During that period of time, I have thoroughly enjoyed my work with adolescent polysubstance abusers and hope to continue the same type of work in the future. However, I feel very strongly that, at this point in time I cannot continue that work at Damon House and maintain any semblance of personal and professional integrity while this agency remains under the administrative direction of Mr. Gregory Marra. His often whimsical, arbitrary, irrational and unethical administrative practices have had and continue to have a devastating impact on the welfare of the residents, the morale of clinical/social service staff members, and the overall functioning and integrity of Damon House. I would like to express what I feel are very grave concerns that demand some form of immediate redress.

The remainder of Deykerhoff's letter is divided into four parts. The first part contains the allegation that Marra used adolescent residents to repair his own house and that he did not give them "adequate compensation." He was accused of having committed an "obvious violation of the Therapeutic Communities of America Code of Ethics."

Deykerhoff, as a second point in his July 14 letter, asserted that Marra was guilty of "Arbitrary Administrative Practices." In particular, the letter stated that Marra had appointed him, Deykerhoff, to a responsible post, but provided him with no training for or guidance in handling those responsibilities and then summarily and "arbitrarily" demoted him, from that post. Deykerhoff then related in his letter that various staff memos issued by Marra exemplified Marra's "arbitrariness." Attached to the July 14 letter was a memo of March 29 signed by Marra warning the Paterson counselors that they may be looking elsewhere for work in 30 days. Deykerhoff's letter noted that Deykerhoff's work for March was praised by a "regional supervisor." Again, Deykerhoff's letter referred to a memo from Marra also in March which was apparently critical of the operation in that month of the admissions program, an area for which Deykerhoff had a measure of responsibility. Deykerhoff's letter notes that, if Marra had any knowledge of what he was talking about, he could easily have seen that for that month, the retention rate was the highest in the preceding 2 years.

The third point in Deykerhoff's letter pertained to his complaint that adolescents had been sent out in 1980 and 1981 to push the sales of raffle tickets, "perhaps" to raise money to "pay (Marra's) salary; finance his numerous 'business trips,' or pay for the construction work on his house." Deykerhoff stated in his letter that Marra sent out the adolescents for long hours, without supervision

and with little food which resulted in "numerous problems . . . (i.e.—use of drugs, arrest)."

In the fourth part of the letter, Deykerhoff accused Marra of having referred to several staff members as "incompetent, fat slob"; of having been intoxicated while vacationing in San Francisco, at which time Marra allegedly had ruined the engine of a rented car; and of charging an expensive meal with drinks on his business credit card, in violation of the Respondent's rules.

His letter concluded with the following observation:

One could continue on *ad infinitum* regarding Mr. Marra's egocentric, condescending and completely disrespectful personal behavior—including repeated attempts to interfere in the personal lives of certain staff members.

In closing I can only implore the members of the Damon House Board of Directors to take some form of definitive action to put an end to the obviously unethical and unconscionable practices of the Executive Director. I, for one, have spoken to representatives of outside agencies regarding this matter and will continue to do so.

The Respondent asserts that the July 14 letter contained willful, malicious falsehoods. Relevant thereto, it adduced evidence that Marra had sent a memorandum to the staff in early 1982 stating that new residents were not to be sent out on raffle sales. The testimony however is uncontroverted that the practice of assigning new residents to such sales continued after Marra's memo had been sent and it appears that Marra himself was directly responsible for the functioning of the raffle program.

The Respondent separately contends that Deykerhoff's letter was not part of a concerted action by employees. Relevant to that contention, Deykerhoff answered, in the affirmative, in the course of his cross-examination, when asked if he had written the July 14 letter "in his own behalf." I do not construe that answer as a denial that it was written in behalf of other counselors. On redirect examination, Deykerhoff noted that the complaint as to Peer 1 residents working on Damon Enterprises could not have affected his own duties as intake counselor; the testimony of Zambri relevant to that aspect of the July 14 letter has been noted above.

D. The Discharge/Suspensions

On July 19, Deykerhoff was told by Marra that he was discharged for writing and sending copies of his letter to the parents of the residents at Paterson. Deykerhoff has stated that he would not work for the Respondent so long as, in effect, Marra was in charge.

On July 18 Zambri received his copy of the July 14 letter. He then telephoned about 20 parents of the residents. Most of them informed him that they had already received copies of the letter. Zambri urged them to write their own letters to the Respondent's board of directors urging support for the views expressed by Deykerhoff. On July 19, Zambri was suspended for 1 week for having left work early.² On July 27 he was present at a

² That suspension is not alleged as a violation.

meeting of the Respondent's board of directors. He had been told that he would be asked at the board meeting about the matters set out in the July 14 letter. Instead, he was asked only about the reasons behind his suspension 19 July. He was informed on July 27 that he could report back to work on August 2. The General Counsel alleges that the failure by the Respondent to reinstate Zambri on July 27 constituted a discriminatory suspension which culminated in his discharge on August 2. On August 2, the Respondent's program director William Bryant asked him about the discussions he had held on July 19 with the parents of the residents at Paterson. He replied that he had urged the parents to write to Philip Befumo, the Respondent's chairman. He was thereupon discharged. His discharge had been authorized by the Respondent's board of directors.

On July 22, Maldonado had shown his copy of the July 14 letter to two residents at the New Brunswick facility, both of whom were about 26 years of age. Maldonado was told on July 26 that he was suspended pending a decision of Respondent's board of directors. Later that day, he was told by the Respondent's chairman Philip Befumo that the accusations against him were that he had held a sitin at the Brooklyn facility, that he had spoken to residents about the July 14 letter, and that he had held clandestine staff meetings. Befumo told him that he would be told later the status of his suspension. On August 9 he telephoned Befumo to inquire as to his status and was told then that he was discharged because his interests were no longer those of the Respondent's.

Respecting the "sit-in" referred to by Befumo on July 26, the only evidence that seems related to that matter is the testimony of the Respondent's executive director Marra that there had been a sitin staged at the Respondent's facility in Brooklyn by people living in the vicinity of that facility, that the sitin was their way of protesting the location of the facility there and that the Respondent's "information was that a staff member over there was responsible for inciting these people against Damon House" and that Maldonado had been assigned "2 days a week . . . to New York (where he) spent most of his time working on some kind of newspaper route."

The clandestine meeting Befumo referred to may have to do with a meeting Maldonado attended at the Wooden Nickle restaurant in the vicinity of the Respondent's facility in New Brunswick. Maldonado testified that he and several other counselors met there in June and discussed the complaints they had against Marra, which essentially paralleled most of those discussed in the July 14 letter. Maldonado testified in essence that they discussed "possible alternatives to replace" Marra as executive director. At one point in his account, Maldonado indicated that this subject had been discussed on several occasions with the apparent hope on his part and of the others present that the Respondent's board of directors would replace Marra, possibly with Del Guercio.

The Respondent presented two witnesses, Alvin Wynn and Michael Kerton, who testified that Maldonado told them in July that there would be some changes made when Respondent's board of directors would replace Marra and others in the administration and that Maldon-

ado expressed the view that Maldonado, Deykerhoff, et al. would then be in charge. Insofar as their testimony may be said to conflict with that of Maldonado's, I reject their version as the counselors did not impress me as being particularly concerned with personal aggrandizement. It seems unlikely to me that they would then or ever have seriously entertained any idea of there being a massive transfer of administrative personnel.

E. Analysis

The evidence clearly establishes that Deykerhoff, Zambri, Maldonado, and others discussed among themselves the complaints they had about Marra, and that they discussed the feasibility of Deykerhoff's reducing those complaints to writing for submission to the Respondent's board of directors. The evidence shows that Deykerhoff then drafted the letter and sent it to Befumo, the parents, to other counselors, to state and county officials and to others. The Respondent urges that since Deykerhoff did not review directly that letter with any other employee prior to his sending it out, the General Counsel has failed to prove that the alleged discriminatees were engaged in a concerted endeavor. Taking the sending of the letter in context, including the matters that preceded its issuance and those subsequent, and noting particularly Zambri's efforts to solicit parental support and Maldonado's attempts to involve the residents, it seems clear to me that the alleged discriminatees were engaged in concerted activities, of which the letter was a part.³

The Respondent separately contends that the General Counsel has not shown that the Respondent had knowledge of the fact that the alleged discriminatees acted concertedly. This contention overlooks the reference in the July 14 letter to staff morale and to the disparate treatment allegedly accorded staff personnel and overlooks too, the contemporaneous, supportive acts of Zambri and Maldonado on which the Respondent predicated their suspensions and, later, their discharges. I find that the General Counsel has sustained the burden in that regard.⁴

There remains for consideration whether or not the activities of these three individuals is protected. There are two aspects to that issue. The first has to do with the Respondent's contention that the three counselors were concerned only with their own personal advancement under a new executive director of their own choice, i.e.—Del Guercio. I find it difficult to accept that contention. Individuals, such as these counselors, who wait around to collect urine samples from drug abusers and who have chosen to spend their adult lives working with parolees and others classified as "incurables" would not likely weave such an elaborate, unprincipled conspiracy as the Respondent would have me find. Under all the circumstances of this case, I find that the July 14 letter could be at most "rhetorical hyperbole" and that it was not thereby removed from the Act's protection.⁵ I

³ *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979).

⁴ See *McDonnell Douglas Corp.*, 260 NLRB 1354 (1982).

⁵ See *Mount Desert Island Hospital*, 259 NLRB 589 (1981); *Richboro*, supra.

find instead what seems to be obvious—that the counselors were genuinely concerned for the welfare of their charges and that they believed that Marra's performance as executive director was not in the best interests of the residents. Insofar as the General Counsel may be urging that the main purpose of their actions is to promote their own working conditions, I must also reject that contention. The language of the July 14 letter and the tenor of the testimony given by the General Counsel's witnesses themselves make it clear that the perceived impact of Marra's policies on the working conditions of the counselors was an ancillary concern. That fact does not thereby render their activities unprotected. The essential question is whether the General Counsel has proffered evidence that connects (a) the "philosophical" or policy differences the counselors had with management with (b) their working conditions, while noting that mere assertions that managements policies place an "undue burden" on the counselors would be insufficient to make such a connection.⁶ The activity must have a direct impact on their job interests.⁷ The phrase "job interests" clearly embraces more than the immediate employment relationship as otherwise the Section 7 phrase "other mutual aid or protection" would be read out of the Act.⁸ The question of whether or not concerted activities by employees to protest the selection or termination of a supervisor is protected "depends on the facts of each case."⁹ Activities to protest the retention of a supervisor, as in the instant case, should in my view be subject to the same concept as retention is but another facet of a supervisor's tenure, as are obviously his selection or dismissal.

Board cases provide some guidance as to what constitutes protected activities in this area and what does not. Thus, in one case, it was held that a strike by employees to protest the discharge of a working supervisor was protected as the production work performed by that supervisor had an obvious, immediate effect on the work done by the employees themselves.¹⁰ That concept was later extended to a strike to protest the discharge of a line foreman where the evidence disclosed that the line foreman himself had made an extra effort beyond the more customary supervisory responsibilities to establish a rapport with the employees who later sought to aid him.¹¹ The Board however has declined to extend that concept to an employee protest as to the discharge of a supervisor and as to related concerns where the evidence disclosed only that the employees viewed those actions as placing an "undue burden" on them and that there was no other connection between their protest and their working conditions.¹² Where a low-level supervisor is identified by employees as supportive of their interests against those of "top management," a strike by these employees in support of that supervisor "had an identifiable

direct impact on the employees' own job interests."¹³ On the other hand, an effort to remove "top management" in order to resolve a broad community problem unrelated to working conditions was held unprotected.¹⁴ Very recently, the Board found unprotected repeated criticisms by two employees as to their own supervisor's asserted ability to manage a grant of state money, even though the employees complained that the supervisor in question, by his mismanagement made their jobs "more difficult."¹⁵

In the case before me, the counselors' activities challenged the Respondent's retention of Marra as its executive director, that is, these activities sought "to effect a change in top management," to use the Board's language.¹⁶ Yet, the basic question seems to remain the same¹⁷—whether their activities were nonetheless *directly* related to their job interests and the merits thereof depend on the facts of this case. It is necessary then to make as detailed an analysis of those facts as is possible. In doing so, I shall examine into the specific matters complained of in the July 14 letter in deciding whether or not they are directly connected with the counselors' job interests. The opening paragraph has a reference to staff morale. In my judgment, that statement is too vague for it to be given significant weight.

The first charge made against Marra in the July 14 letter is that he engaged in "resident exploitation." There is no reference under that heading of employee working conditions. While Deykerhoff observed that staff members were discharged in the past for exploiting residents, he obviously is not objecting to that but rather is urging that Marra be shown the same courtesy. It seems to me that that protest is indirectly related to the working conditions of the counselors, at best.

The second section of the letter is headed, "Arbitrary Administrative Practices." The discussion thereunder pertains to managerial indiscretions on Marra's part: (a) by his allegedly making personal assignments without providing appropriate training first and (b) by his allegedly misusing statistical data to support his demand that the counselors satisfy his work demands. Again, that area of concern seems to me to be indirectly related to working conditions.

The third point in the letter relates to the sale of raffle tickets. The opening sentence thereunder cites the alleged overall detrimental impact those sales "have had on the treatment process." Deykerhoff next observes that Marra had on May 18 irrationally cut the food and drink budget for adolescents while out on ticket sales and Dey-

⁶ The principle is set out in the opinion of the panel majority in *Phase, Inc.*, 263 NLRB 1168 (1982).

⁷ *American Federation of State, County and Municipal Employees*, 262 NLRB 946.

⁸ *G & W Electric Specialty Co.*, 154 NLRB 1136, 1138 (1965).

⁹ *Puerto Rico Food Products Corp.*, 242 NLRB 899, 900 (1979).

¹⁰ *Plastilite Corp.*, 153 NLRB 180 (1965).

¹¹ *Puerto Rico Food Products Corp.*, supra.

¹² *Phase, Inc.*, supra.

¹³ *Mead Corp.*, 211 NLRB 657 (1974). See also *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), and *Dobbs Houses, Inc.*, 135 NLRB 885 (1962).

¹⁴ *New York Chinatown Senior Citizens Coalition Center*, 239 NLRB 614 (1978). See also *Retail Clerks Local 770*, 208 NLRB 356 (1974).

¹⁵ *Good Samaritan Hospital & Health Center*, 265 NLRB 618 (1982).

¹⁶ *New York Chinatown*, supra.

¹⁷ I note that in *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980), it was observed that protests about low-level supervisors may be protected but not those against "top management." I construe that statement as a general proposition based on experience but not as a rule of law as the cases cited for that proposition apply the same balancing test as I have found applicable and as there are too many other cases where protests against top management have been found to be protected, e.g., *Philander Smith College*, 246 NLRB 499 (1979); *Richboro*, supra.

kerhoff concludes with the observation that Marra has put his own personal welfare ahead of the educational needs of the residents. Again, I note that the expressed concern for the residents' well being, however laudable, is a matter at best from the General Counsel's point of view, one step and perhaps further removed from the job interests of the counselors.

In the last part of Deykerhoff's letter, Marra is accused of having at times made derogatory comments about his "administrative staff; and concludes with descriptions of two incidents, one in which Marra allegedly became intoxicated in San Francisco while on vacation and another in which he used a Damon House credit card in New York City to pay for an expensive dinner." that aspect of the letter seems to me to have only an indirect relation to the job interests of counselors, at best.

Under the applicable case law, I find that the evidence is insufficient to establish that the counselors' complaints as to Marra's performance was a matter directly related to their job interests and hence the General Counsel has failed to establish that their activities are protected by Section 7 of the Act. The evidence in the record that Marra's alleged misfeasance or malfeasance resulted in the counselors' work being made more difficult is inadequate, under the cases discussed above, to bring their activities within the protection afforded by the provisions of Section 7 of the Act. In the circumstances of this case, I do not see that that determination places "an undue premium on (the counselors) ability to assess accurately complex legal issues at a time when they are acting spontaneously," particularly as the counselors were "unorganized employees."¹⁸ Had the July 14 letter articulated clearly the particular job interests of the counselors that were adversely affected by the various

¹⁸ The quoted material is taken from *Puerto Rico Food Products Corp.*, supra at 900.

management policies with which they disagreed and had the related activities of the three counselors been consistent with that approach, presumably the evidence would be sufficient to find that their acts would then have been protected; and, presumably also, they would not have been disciplined therefor.

The General Counsel alternatively asserts that the Respondent's suspension and discharge of Maldonado were violative of the Act in that the reason proffered therefor was that he also was responsible for a "sit-in" in Brooklyn and for holding clandestine meetings. These were obviously afterthoughts and in any event the evidence is insufficient to establish that the alleged sit-in was a protected act or that the clandestine meeting referred to one other than that pertaining to discussions bearing on the same matters contained in the July 14 letter. I find no merit in that alternate contention.

CONCLUSIONS OF LAW

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

2. The Respondent did not violate Section 8(a)(1) of the Act by discharging Peter Deykerhoff, William Maldonado, or John Zambri or by suspending Maldonado or Zambri about July 29.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The complaint is dismissed.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.