

**Lancaster Fairfield Community Hospital and Debbie A. Lefebure.** Cases 9–CA–27521 and 9–CA–28248

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On March 12, 1992, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and 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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, only to the extent consistent with this Decision and Order.

1. Job application

We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it refused to consider Charging Party Debbie Lefebure for promotion to the position of dietary supervisor because of her union activities. We therefore find no merit in the Respondent's contention that it did not process Lefebure's application for the position because she did not satisfy a minimum requirement for the job.

The Respondent operates an acute care hospital in Lancaster, Ohio. Its employees are not represented by a union. In June 1988, Lefebure was hired by the Respondent as a probationary dietary attendant. She was promoted to a regular part-time attendant in October 1988.

Lefebure signed an authorization card for the Union<sup>2</sup> in March 1989 and began wearing a union button next to her name tag on her apron. The judge found that Lefebure's union activity increased in early February 1990<sup>3</sup> when she began drafting, signing, and posting pronoun statements on the employees' bulletin board. The postings urged the value of unions in "clarifying" employee rights through collective bargaining.

On February 20, Lefebure submitted an application for a full-time dietary supervisor's position. The fol-

lowing day Hospital President McKelvey issued a memorandum to all employees which faulted the Union for not proceeding with a representation election (the Respondent had filed an RM petition) and claimed that the Respondent was wasting time and effort responding to unfair labor practice charges, posting union propaganda, and dealing with the disruptive behavior of some union supporters. Lefebure replied to McKelvey's comments on February 22 in a memorandum to employees which was posted on the employees' bulletin board. The memorandum (in which Lefebure identified herself as a "Union Supporter") stated that because the American Hospital Association—of which the Respondent was a member—had obtained a Federal court injunction against the NLRB's health care unit rules, no elections were being conducted in hospitals, and therefore the Respondent's February 21 memo was "propaganda."

Lefebure met with Personnel Manager Thomas on February 23 regarding Lefebure's application for the dietary supervisor's position. Thomas asked Lefebure how she thought she could be "both union and management." When Lefebure responded that she did not view the dietary supervisor's job as a management position, Thomas asked her if she would follow Dietary Manager Pearson's directions without question. Lefebure replied, "Yes, as long as it did not violate any hospital or labor relations law."<sup>4</sup> Thomas then returned the completed application to Lefebure and stated that further processing would be unnecessary because Lefebure did not meet the minimum qualifications for the job.<sup>5</sup> This was affirmed on the face of the application where Thomas wrote, "[T]his Promotion request cannot be processed further, *Successful* [emphasis in original] candidates for management positions must be supportive of management philosophy." The three other applicants for the job each were interviewed by Pearson, and one—Larry Reams—was awarded the job on March 19.

The judge rejected the Respondent's assertions that Lefebure's application was not processed because she lacked good interpersonal skills in dealing with Manager Pearson, supervisors, and other employees and had failed to support the decisions of Pearson and other supervisors. The judge found, and we agree, that

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

<sup>2</sup>Bus, Sales, Truck Drivers, Warehousemen and Helpers Local Union No. 637, affiliated with the International Brotherhood of Teamsters, AFL–CIO.

<sup>3</sup>All dates are in 1990, unless stated otherwise.

<sup>4</sup>Member Oviatt notes in this regard that he does not find either of Thomas' questions to be unlawful. He also would not construe a concern about Lefebure's responses to those questions as necessarily indicative of unlawful motive by the Respondent. Accordingly, Member Oviatt does not rely on this exchange between Thomas and Lefebure in finding a violation for not processing Lefebure's application for the dietary supervisor's position.

<sup>5</sup>The decision to reject Lefebure's application was in accord with Dietary Manager Pearson's views. Prior to February 23, Pearson had told Thomas that Lefebure would not be a candidate for the supervisory job because Lefebure "continued to be contentious, at times argumentative with me, and really just did not support the management team."

these asserted reasons are “entirely pretextual.” Instead, as the judge found, the “real and only reason” Lefebure was denied consideration for promotion to the dietary supervisor’s job was because she actively advocated unionization, most recently in her February 22 reply to McKelvey that was posted on the employees’ bulletin board.

In its exceptions, the Respondent argues that Lefebure was not qualified for the dietary supervisor’s position because she lacked a minimum requirement for the position, namely, “excellent interpersonal skills.” The Respondent reiterates its contention that Lefebure did not satisfy this requirement because she constantly questioned management’s decisions. Even assuming the existence of such a “minimum requirement,” we find no merit in the Respondent’s contentions because, as explained below, the Respondent’s asserted grounds for finding that Lefebure lacked the requisite interpersonal skills amounted to penalizing her for the very kinds of expressive activities that a strong union advocate is likely to engage in during an organizing campaign.

Initially, we note that the job description for the dietary supervisor’s position does not state that one of the minimum qualifications for the job was to possess “excellent interpersonal skills.” In any event, on Lefebure’s October 1989 evaluation she received “above average” ratings in the categories of job knowledge and dependability/reliability and “satisfactory” ratings in productivity, quality of work, and attitude/cooperation with others and supervisors. The judge noted that according to the printed language on the evaluation form, a satisfactory rating in the last category means the employee “[s]upports decisions without dispute; may not be a team leader but follows directions well; never disobeys orders; does extra work when asked.”

The only specific instances of allegedly inappropriate behavior by Lefebure between the October 1989 evaluation and February 23 cited by the Respondent concerned her frequent visits to Personnel Manager Thomas to complain about “problems” and her persistent pursuit of an in-house grievance.<sup>6</sup> Thus, even the Respondent’s claimed reasons for concluding that Lefebure did not satisfy the purported minimum requirement of “excellent interpersonal skills” for the dietary supervisor’s job all relate to her protected concerted activities. Reduced to essentials, every reason proffered by the Respondent as to why Lefebure was not a legitimate candidate for the position pertains to her activities on behalf of unionization and other group concerns. Clearly, in these circumstances, the Respondent’s asserted reasons for its refusal to process

<sup>6</sup>The Respondent does not argue that these activities were disruptive to its operations.

Lefebure’s application constitute a proper basis for an inference of unlawful animus.

In arriving at his conclusion that the Respondent’s refusal to consider Lefebure for the promotion was discriminatorily motivated, the judge found that the “management philosophy” referred to in the written reason given to Lefebure for the rejection of her application includes the Respondent’s opposition to unions stated in its policy manual issued to all employees.<sup>7</sup> Thus, the judge concluded that when the Respondent took the view that Lefebure was unwilling to adhere to “management philosophy,” the Respondent improperly presumed that because Lefebure was a union activist she would not adhere to the Respondent’s lawfully implemented antiunion policies.

The Respondent contends, inter alia, that the judge erred in relying on the Respondent’s policy statement against unions as a basis for finding unlawful animus with respect to Lefebure’s union activities. In support, the Respondent cites *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990), in which the court held that an employer’s noncoercive expressions of opposition to unionization in general were permissible statements of views, argument, or opinion under Section 8(c) of the Act, and therefore the Board could not rely on these expressions as a basis for finding an unfair labor practice.<sup>8</sup> However, even if we were to follow the approach of the court in *Holo-Krome* and not rely on the Respondent’s general antiunion position, we would still find that there is substantial evidence of animus based on the particular statements directed specifically to Lefebure. As discussed above, the record reveals that the Respondent looked on Lefebure with disfavor because of her protected concerted activities, characterizing her as someone who raised too many work-related “problems” and was “contentious” and “argumentative.”<sup>9</sup> Regardless of whether each of these comments about Lefebure is itself a violation of Section 8(a)(1), they are, taken as a whole, highly probative evidence for finding that, in refusing to consider Lefebure at all for the position, the Respondent was motivated by her tendency to engage in union and other concerted activities.<sup>10</sup>

<sup>7</sup>The Respondent’s labor relations policy states that any organization which imposes the threat of labor disputes and the possibility of walkouts, shutdowns, or strikes is not consistent with the hospital’s mission and has no place in the hospital.

<sup>8</sup>On remand 302 NLRB 452 (1991), enf. denied 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992).

<sup>9</sup>We do not, however, regard as evidence of animus the February 23 exchange between Thomas and Lefebure in which Thomas asked, with regard to Lefebure’s application for a supervisory position, how she thought she could be “both union and management,” and whether she would follow the directions of the dietary manager.

<sup>10</sup>We find that the Respondent’s prior unlawful refusal to consider a union activist for a transfer, and instead transferring him to its boiler room, because of that individual’s union and protected activities, further supports the judge’s finding of antiunion animus in this

Accordingly, for all these reasons, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) in refusing to process Lefebure's application for the dietary supervisor's position.

As the remedy for this violation, the judge recommended that the Respondent be ordered to offer Lefebure the dietary supervisor's position and to give her backpay in the amounts she would have received had she been awarded the job given to Reams on March 19. The judge found that the record shows that Lefebure was at least minimally qualified for the job and that any doubt as to whether she would have been given the job in competition with other applicants was created by the unlawful discrimination practiced against her. In view of the Respondent's animus against Lefebure, the judge concluded that merely giving her the opportunity to be considered for the next dietary supervisor opening would probably be ineffectual and would not make Lefebure whole for the Respondent's past wrongdoing.

We find merit in the Respondent's exceptions to this recommended remedy. We conclude that the appropriate remedy is to order the Respondent to consider Lefebure for the next opening for which she is minimally qualified, including a dietary supervisor's job. The record demonstrates that by any objective measure, Lefebure was not the most qualified applicant for the dietary supervisor's position, and we find that the Respondent has proven that she would not have been chosen for the job even absent the discrimination against her and had her application been fully processed and considered. Reams, the applicant chosen for the supervisor's position, clearly had superior qualifications to those of Lefebure. See *Postal Service*, 275 NLRB 244 (1985).<sup>11</sup> Thus, we decline to require the Respondent to offer Lefebure a dietary supervisor's position or to award her backpay.

## 2. The conference report

Lefebure continued to wear her union pin to work, and in the spring of 1990 she engaged in informational picketing in front of the hospital. On May 3, she submitted another prounion memorandum for posting. On May 8, Dietary Manager Pearson issued to Lefebure a document titled, "Conference Report." This multipage report contained a cover sheet and eight attached pages, each of which documented a separate incident involving Lefebure which the Respondent claimed demonstrated a "disruptive" pattern of behavior "of continuing to question Management operational deci-

sions." The cover letter to the report stated that Lefebure's conduct normally would subject her to disciplinary action in the form of an oral reminder, but that the Respondent had "chosen not to proceed to this step of the formal disciplinary process because we believe that this problem can be resolved by simply drawing it to your attention." The cover sheet directed Lefebure to "discontinue this disruptive behavior immediately" in order to avoid a "formal oral reminder under the first step of the disciplinary process."

The incidents documented in the conference report were reported by various supervisors as occurring on specific dates between April 10 and 28. As set forth in detail by the judge, the reports essentially involve complaints raised by Lefebure about various employment conditions. We agree with the judge's finding that the Respondent's issuance of the conference report to Lefebure violated Section 8(a)(1), because it was meant to inhibit Lefebure's protected right to criticize management at proper times and places and in an appropriate manner in support of a union organizational drive. We find that, in the circumstances here, the conference report issued to Lefebure constituted a threat of future reprisal for her protected concerted and union activities. There is no claim or evidence that in expressing any of the enumerated complaints, Lefebure was disrespectful or imposed any significant adverse effect on the Respondent's operations. By directing Lefebure "to discontinue this disruptive behavior immediately," Pearson was in effect telling her to refrain from complaining about working conditions and even making suggestions for improvement.

The judge also found that the issuance of the conference report to Lefebure violated Section 8(a)(3) because it was "a first step in Respondent's formal disciplinary machinery." We do not agree. In our view, issuance of the conference report constituted nothing more than counseling and no discipline was being imposed. The record indicates that receipt of a conference report does not result in adverse action against an employee. The General Counsel has failed to prove that the conference report is part of the Respondent's formal disciplinary procedure or that it is even a preliminary step in the progressive disciplinary system. As used by the Respondent, the conference report merely warns an employee of potential performance or behavior problems.<sup>12</sup> Because the issuance of the conference report to Lefebure did not affect "any term or condition of employment" within the meaning of Section

case. *Lancaster-Fairfield Community Hospital*, 303 NLRB 238 (1991).

<sup>11</sup> The evidence that Lefebure was not the most qualified applicant distinguishes the instant case from *Missouri Portland Cement Co.*, 302 NLRB 395 (1991), enf. denied 965 F.2d 217 (7th Cir. 1992), cited by the judge.

<sup>12</sup> *Trover Clinic*, 280 NLRB 6, 16 (1986), cited by the judge, is distinguishable. The reprimands in issue in that case were found to be "a foundation for future disciplinary action" and were subsequently relied on by the employer in discharging the employee.

8(a)(3), we reverse the judge's finding of a violation of that provision of the statute.<sup>13</sup>

### 3. The written warning

In mid-January 1991, the Respondent was experiencing staffing problems and when needed would call in higher classification employees to work as dietary attendants. On January 13, 1991, Dietary Manager Drew mentioned the problem to Lefebure and commented that she almost had to schedule part-time clerk Betts. Lefebure replied that she and other workers were concerned about higher classification employees being paid higher wages to work as attendants. She also stated that she had spoken to Personnel Manager Thomas and Dietary Manager Flynn about her concerns and that she would file an in-house grievance if Drew scheduled Betts to work. Drew said that she would seek clarification from Flynn.

Shortly thereafter, Drew questioned Betts about her authorization to work as an attendant. Betts replied that she was so authorized and asked why Drew was inquiring. Drew recounted the earlier conversation with Lefebure. Betts became very upset because she believed that Lefebure had prevented her from working.

The following day, Flynn and Drew discussed the incident, and Flynn wrote a memorandum to Thomas about it. No action was taken against Lefebure at that time.

Betts worked as a dietary attendant on January 16, 1991, and several regular dietary attendants complained to Lefebure. Lefebure then went to the kitchen, put her arm around Betts' shoulder, and asked whether she was there voluntarily. When Betts replied affirmatively, Lefebure told Betts that she and the other attendants did not think that it was fair that Betts was working and that she planned to speak to Flynn and, if necessary, file a grievance.

Betts went immediately to the personnel office. She described herself as "steaming mad." She complained that Lefebure was harassing and intimidating her, and stated that she wanted it stopped. Betts also inquired

about filing harassment charges against Lefebure. Betts then departed to the dietary manager's office where she recounted the story to Flynn, who promised to look into the situation and get back to her.

Lefebure, Drew, and Flynn met at 2:30 p.m. on the same day to discuss the situation. At the beginning of the meeting, Lefebure stated that she and the other attendants were concerned about the inequity of higher classification employees working as attendants. She then described the alleged inequity. Flynn asked Lefebure about her comments to Betts, and Lefebure asked him to get a clarification from Thomas about the alleged disparate pay issue.

At the end of her shift, Flynn gave Lefebure a written warning which stated that she had acted improperly by confronting Betts and Supervisor Drew regarding the assignment of Betts as a dietary attendant and by threatening to file an in-house grievance over the matter. The warning stated if Lefebure engaged in similar conduct again, she would be subject to further disciplinary action.

The judge found that the reasons given by the Respondent for issuance of this written warning were entirely pretextual. Accordingly, the judge inferred that the actual reason for the warning was an unlawful one, i.e., to penalize Lefebure's union activism and to discourage Lefebure and others from testifying at the next day's hearing before the judge concerning Lefebure's previously filed unfair labor practice charges discussed above.

The judge found that Lefebure's January 13, 1991 conversation with Drew was not confrontational or disrespectful, nor did Lefebure interfere with Drew's scheduling prerogatives. The judge noted that Drew did not admonish Lefebure at the time the incident occurred, and that Drew's contemporaneous memo to Flynn did not mention any problems with Lefebure's behavior, but merely asked for clarification regarding Betts' eligibility to work as an attendant. Further, the judge found that Lefebure's contact with Betts on January 16, 1991, was not shown to have been "disruptive of . . . efficient work flow" (as alleged in the written warning) nor was this contact "upsetting" to any employee other than Betts. In the latter regard, the judge found that the statement in the written reprimand that employees other than Betts complained of being harassed by Lefebure was not supported by credible evidence. The judge found that although Betts was emotionally upset when she complained to the personnel office and Thomas about Lefebure's conduct, Betts was not physically intimidated by this conduct but instead was concerned about her ability to earn extra income.

The judge found that the written warning issued to Lefebure violated Section 8(a)(1), (3), and (4), because it was discriminatorily motivated and that the warning

<sup>13</sup> Member Devaney would find that the Respondent also violated Sec. 8(a)(3) by issuing the conference report as the report was, in his view, disciplinary in nature. On its face, the document indicates that the conduct addressed in the conference report was considered by the Respondent to violate its rules and that Lefebure would "normally be subject to disciplinary action" as a result. Moreover, the Respondent's then-Production Manager Belin testified that "[i]f the kinds of things that are talked about in the conference report continue to be in evidence, then it's possible that the specifics of the conference report could be used" in evaluating an employee's performance. Likewise, Personnel Manager Thomas testified that, if the conduct addressed in a conference report was repeated, the Respondent would consider the fact that a conference report had been issued in determining whether to impose discipline. Under these circumstances, Member Devaney would find that the conference report was a first step in the Respondent's disciplinary process and that by issuing the report to Lefebure the Respondent violated Sec. 8(a)(3).

also independently violated Section 8(a)(1), because it infringed on the employees' rights to act in concert for their mutual aid and protection.

We agree that the issuance of the written warning violated Section 8(a)(1), but only to the extent that the warning was based on Lefebure's communication of the expressions of concern of her fellow employees about an employment condition, namely, the assignment of dietary attendant duties to higher paid employees. To this extent, the warning would tend to interfere with Lefebure's (or any other employee's) protected right to express those concerted concerns.

We do not, however, find that the warning was unlawful insofar as it addresses Lefebure's conduct toward Betts. We find that the Respondent had a reasonable basis for believing Betts' claim that she had been harassed and intimidated by Lefebure, and that the Respondent legitimately could warn Lefebure on the basis of Betts' report to management officials. There is no suggestion that Betts' complaint was made in bad faith. Nor is there evidence that the Respondent failed to follow its established procedures for investigating incidents of this kind. We cannot conclude, therefore, that the reasons for the written warning were "entirely pretextual." Accordingly, we also find that the warning did not violate Section 8(a)(3), because it was not motivated by Lefebure's union activities. In addition, we reverse and dismiss the 8(a)(4) allegation regarding the written warning issued to Lefebure. On this record, the General Counsel has not demonstrated that there is a causal connection between the written warning and Lefebure's participation in the Board's unfair labor practice hearing.<sup>14</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Lancaster Fairfield Community Hospital, Lancaster, Ohio, its officers, agents, successors, and assigns, shall

<sup>14</sup> Chairman Stephens agrees that the written warning was based on Lefebure's protected concerted activities, rather than her union activities or her participation in Board proceedings. Accordingly, he concurs in the dismissal of the 8(a)(3) and (4) allegations on the ground that there is insufficient evidence to support them.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by prohibiting Lefebure from wearing a union button in the assembly room on May 10. In doing so, however, we disavow the judge's reliance on the purported consistency between Lefebure's credited testimony about her conversation with Dietary Manager Pearson on May 10 and a statement she made in an affidavit given shortly after that date. This affidavit states that Pearson told Lefebure that she would be written up if she wore the union button in the hallway outside of the assembly room. It appears from the record that this affidavit concerns a different conversation between Lefebure and Pearson, one that occurred a week after the assembly room incident testified to by Lefebure and found unlawful by the judge.

1. Cease and desist from

(a) Refusing to consider Debbie Lefebure, or any other employee, for promotion because he or she supports or engages in activities on behalf of Bus, Sales, Truck Drivers, Warehousemen and Helpers Local Union No. 637, affiliated with the International Brotherhood of Teamsters, AFL-CIO or any other union.

(b) Threatening employees with reprisal by issuing them a conference report because of their protected concerted and union activities.

(c) Issuing employees written warnings because of their protected concerted activities.

(d) Prohibiting employees from wearing buttons or other insignia in support of the named or any other union, on hospital premises except, when provided by appropriate rule or regulation, in areas normally frequented by patients.

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

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

(a) Reevaluate and consider Debbie Lefebure for the next dietary supervisor position, or for any other supervisory position for which she is minimally qualified, on a nondiscriminatory basis.

(b) Remove from its files any reference to the conference report issued to Debbie Lefebure on May 8, 1990, and the written warning issued to Lefebure on January 16, 1991, and notify her in writing that this has been done and that the report and warning will not be used against her in any way.

(c) Post at its hospital in Lancaster, Ohio, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the 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
- To form, join, or assist any union
- 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 refuse to consider Debbie Lefebure, or any other employee, for promotion because he or she supports or engages in activities on behalf of Bus, Sales, Truck Drivers, Warehousemen and Helpers Local Union No. 637, affiliated with the International Brotherhood of Teamsters, AFL-CIO or any other union.

WE WILL NOT threaten you with reprisals by issuing you a conference report because of your protected concerted and union activities.

WE WILL NOT issue you a written warning because of your protected concerted activities.

WE WILL NOT prohibit you from wearing buttons or other insignia in support of the named or any other union, on hospital premises except, when provided by appropriate rule or regulation, in areas normally frequented by patients.

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 reevaluate and consider Debbie Lefebure for the next dietary supervisor position, or for any other supervisory position for which she is minimally qualified, on a nondiscriminatory basis.

WE WILL remove from our files any reference to the conference report issued to Debbie Lefebure on May 8, 1990, and the written warning issued to Lefebure on January 16, 1991, and notify her in writing that this has been done and that the report and warning will not be used against her in any way.

LANCASTER FAIRFIELD COMMUNITY  
HOSPITAL

*Mark Mehas, Esq.*, for the General Counsel.  
*Richard F. Shaw and G. Roger King, Esqs. (Jones, Day, Reavis & Pogue)*, of Washington, D.C., for the Respondent.

## DECISION

## STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. The charge in Case 9-CA-27521 was filed on May 16, 1990, the complaint issued on July 24, and the trial was in Lancaster, Ohio, on January 17 and 18, 1991. In Case 9-CA-28248, the charge, as amended, was filed on January 31, 1991, and the complaint issued on March 20, 1991. Pursuant to my order dated April 2, the cases were consolidated dated April 2, 1991, and trial in Case 9-CA-28248 was in Columbus, Ohio, on May 9 and 10.

At issue is whether Respondent prohibited part-time dietary attendant Debbie Lefebure from wearing a union button in a nonpatient care area in violation of Section 8(a)(1) of the National Labor Relations Act and whether it also discriminated against her in violation of Section 8(a)(3) by subjecting her to a "Conference Report," by denying her an interview for the job of dietary supervisor, and by giving her a written warning. The latter is also alleged to be in violation of Section 8(a)(4).

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

## FINDINGS OF FACT

## Analysis

The Respondent, a corporation, operates an acute care hospital in Lancaster, where it annually receives revenues in excess of \$250,000. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Bus, Sales, Truck Drivers, Warehousemen and Helpers Local Union No. 637, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## Background

Lefebure was hired by Respondent on June 6, 1988, as a "probationary" dietary attendant. Two months later she received her first evaluation. Therein, she was rated above average in various categories, including job skill, cooperation, attendance, and compatibility. In the latter category, her then supervisor inserted a handwritten note as follows: "Considerate person, gets along with everyone, works well with others." In October, her new supervisor (Dietary Manager Leanne Pearson) "bumped her" up to regular part-time status.

In March 1989, Lefebure signed a union card and appeared at work wearing a union button on her apron next to her name tag. This development apparently did not affect the annual evaluation rating issued to her in October. Pearson then rated her above average in job knowledge and dependability/reliability; and satisfactory in quality of work,

productivity, attitude/cooperation with others and cooperation with supervisors. According to printed language on the form, a satisfactory rating in the latter category means she "Supports decisions without dispute; may not be a team leader but follows directions well; never disobeys orders; does extra work when asked."

In early February 1990, however, she became more active in support of unionization and began to author, sign and post pronoun positions on an employees' bulletin board. Typically, these postings urged the value of unions in clarifying, through collective bargaining, "gray areas of employee rights not covered by current Personnel Policies and Procedures Manuals."

#### Job Application

On February 20, 1990, Lefebure submitted a multipage application for a full-time position as dietary supervisor.

On February 21, she and all other employees received a memorandum wherein Hospital President Joseph D. McKelvey, after faulting the Union for not proceeding to an early election, went on to say: "In the meantime, we continue to waste time and effort in preparing responses to unfair labor practices, posting union propaganda and dealing with disruptive behavior by some union supporters." On the following day, Lefebure prepared and submitted to the personnel office for posting on the employee bulletin board a reply which reads as follows:

TO ALL . . . EMPLOYEES  
FROM DEBBIE A. LEFEBURE  
UNION SUPPORTER

On Feb. 21, like all . . . employees I received a letter in my timecard . . . [which] stated that [the hospital] . . . [is attempting through an RM petition] to force the Union and the NLRB to proceed with an election.

ISN'T THAT SPECIAL

Unfortunately, THE AMERICAN HOSPITAL ASSOCIATION, of which [the hospital] is a member, is the same ASSOCIATION that found a Federal judge in 1989, who placed a junction [sic] on the NLRB's ruling on what constitutes an appropriate bargaining unit within a Health Care or Hospital facilities [sic]. At present that junction [sic] is still in effect. It will be in effect until a higher court judge overrules the lower court's decision. . . . SO . . . [the hospital] can file all the petitions they want calling for an election. Waste time and effort calling for something you know you can't get.

Did I read the word PROPAGANDA somewhere???

Lefebure was called into the office of Personnel Manager Carol Thomas on February 23. Referring to her application for the position of dietary supervisor, Thomas asked Lefebure how she thought she could be "both union and management."<sup>1</sup> When Lefebure replied that she did not view the job of dietary supervisor as management, Thomas inquired if she would do without question whatever Dietary Manager Pearson told her to do. Lefebure answered "Yes, as long as it did not violate any hospital or labor relations

<sup>1</sup>Thomas denied making any mention of the word "union" during the job interview. I have credited Lefebure in this regard, finding the attributed quotation consistent with the record as a whole.

law." With that, Thomas returned the complete application to Lefebure stating that further processing would be unnecessary because she did not meet minimum qualifications for the job.<sup>2</sup> That statement was amplified on the face of the application where she had written: "This promotion request cannot be processed further. *Successful* [emphasis in original] candidates for management positions must be supportive of management philosophy."<sup>3</sup>

There were three other applicants, each of whom were accorded interviews with Pearson, and one (Larry Reams) was awarded the job on March 19.

The issue is not whether Lefebure was the most qualified applicant. Rather, the complaint simply alleges that she was disqualified from consideration for an unlawful reason. I find that to be the case.

Thomas claims that the sole reason for rejecting the application was her lack of good interpersonal skills in dealing with Manager Pearson, supervisors, and other employees and that she regularly failed to support decisions of Manager Pearson and other supervisory personnel. I regard those reasons as entirely pretextual. They were not the written reason she gave Lefebure, i.e., not being "supportive of management philosophy." That expression includes the antiunion position stated in Respondent's policy manual; and coming on the heels of Lefebure's written response to Hospital President McKelvey's letter of February 21, rejection of her application appears clearly in retribution for that act as well as for her consistent and vocal support of unionization.

Moreover, the only specific instances of claimed inappropriate behavior by Lefebure occurring prior to February 23 concern the frequency of her visits to Thomas complaining about "problems" and her persistence in pursuing an in-house grievance through several levels of review. There is no allegation that those activities or other conduct of Lefebure were disruptive. Indeed, Thomas admits having encouraged Lefebure to visit anytime she felt a need to talk things over; and while she complained that Lefebure bypassed Supervisor Pearson in filing the grievance directly with her, she did not regard that transgression as serious enough to warrant return of the document.

I conclude that the real and only reason Lefebure was denied consideration for promotion was because she actively supported unionization and, for that reason, was perceived as unable or unwilling to adhere to "management philosophy," including its policy against unions, in the event she was promoted to a higher level position.

An employee cannot lawfully be denied a promotion (or, as here, consideration for promotion) solely because he or she engaged in protected union activity. *Products Unlimited Corp.*, 280 NLRB 435 (1986); *Keeler Brass Co.*, 262 NLRB

<sup>2</sup>The decision to reject the application received prior concurrence of Pearson who told Thomas that "Debbie would [not] be a good match with the rest of the supervisors in that she continued to be contentious, at times argumentative with me, and really just did not support the management team."

<sup>3</sup>Respondent's labor relations policy is stated in a manual issued to all employees, as follows:

Any organization which imposes the threat of labor disputes and the possibility of walk-outs, shut-downs or strikes is not consistent with the hospital's mission. Such an organization has no place in hospitals where the care of patients depends upon the stability and continuity of the work force.

180 (1982); *Virginia Electric & Power Co.*, 260 NLRB 408 (1982). That result is no different even if a managerial position is involved. While an employer can insist that persons holding such positions support company philosophy, including lawfully implemented antiunion policies, it cannot assume that a union activist will be a disloyal supervisor. If otherwise qualified, the individual is entitled to be considered, hired if warranted, and then given the opportunity to display managerial qualities, including loyalty. *Advanced Mining Group*, 260 NLRB 486, 503 (1982); *Little Lake Industries*, 233 NLRB 1049, 1057 (1977).

The Conference Report

Lefebure continued to wear her union pin, and in the spring a hospital security guard video-filmed her walking an informational picket line in front of the hospital. On May 3 she submitted another prounion memorandum for posting.

Dietary Manager Pearson called Lefebure into her office on May 8. There, in the presence of Production Supervisor Belin who took notes, she handed Lefebure a multipage document denominated as a "Conference Report" containing a cover sheet and an eight-page attachment each page of which details separate incidents involving Lefebure. The cover sheet reads as follows:

The attached concerns have been given to me by our Department Supervisors. I share these concerns regarding your behavior patterns of continuing to question Management operational decisions. This behavior is disruptive to our Department running smoothly.

This pattern of behavior constitutes improper job performance because it goes beyond the scope of your duties as a Dietary Attendant. As a result, you would normally be subject to disciplinary action in the form of an oral reminder (p. I-8 of the Employee Handbook). We have chosen not to proceed to this step of the formal disciplinary process because we believe that this problem can be resolved by simply drawing it to your attention. It is extremely important, however, for you to discontinue this disruptive behavior immediately, thus avoiding a formal oral reminder under the first step of the disciplinary process.

The attachments to the conference report are considered below.

(1) This page is a photocopy of two entries by Lefebure in a book made available in the kitchen for comments and suggestions of employees. Both are signed by Lefebure. The first is dated April 10 and reads as follows:

More girls would write comments in this book, but now some don't like to because it is in the Supervisor's office and the girls are afraid to. Also, some Supervisors ask what is being written and the girls are afraid they will get in trouble for what they wrote. How about putting it out of the office and into the Kitchen area . . . .

A "NO" appears below that comment.

Her second entry, dated April 14, immediately follows and reads:

Then when any employee writes in this book, they should not be subjected to harassment by their Supervisors, Right? Please explain.

The record contains no indication that Respondent ever responded to the latter inquiry.

(2) This page contains a brief memo concerning a meeting on April 18 between Pearson, and Lefebure (again with Belin present) held to discuss Lefebure's complaint that she was assigned less hours than other kitchen attendants. Therein, Pearson states: "I explained to her I am not required to schedule hours based on seniority."<sup>4</sup> The memo also notes that "she brought up the issue of my discussion with Kathy Marshall." In testifying, Pearson explains the latter comment as indicating an attempt by Lefebure to tell management how to run the department by intruding on a disciplinary matter involving another employee.

(3) This page deals with an incident also occurring on April 18. It consists of a memo by Belin describing a discussion between Lefebure and another dietary attendant (Rhonda Estelle) concerning the sequence in which porters delivered carts to nursing units. As he explains in the memo, some porters had switched the prescribed order by combining cart deliveries to the third floor so as to include the critical care unit (CCU) on that floor, thereby saving an extra trip. He writes that Estelle was against any change in the 10-year-old system, while Lefebure was for change if it would save time and there was no good reason against it. He quotes himself as commenting: "I just don't know if there was any logic to the prescribed system, but I will find out and a decision will be made." And he goes on to state that Lefebure "took it upon herself" to inquire of a nurse in the CCU who told her the unit preferred the prescribed schedule. He concludes by stating: "This information was communicated to all those involved in the discussion."<sup>5</sup>

(4) This is a note by Belin recording another incident on April 18 wherein he cites Lefebure for saying to him: "I don't see why . . . [Jack] should be able to stay until 2:30 when I'm supposed to be training him and I'm only staying until 12:30." Belin testified that by complaining that her trainee was getting more hours than she, Lefebure was intruding on his prerogative to schedule working hours.

(5)-(6) Items on these pages were reported by Dietary Supervisor Trish Ricker on April 19. The former item cites an incident on April 10 in which Ricker asked Lefebure to check each floor for any meal trays not picked up in normal service (i.e., "late trays"). At the time Lefebure was cleaning the dish machine, and she responded that picking up late trays was not in her job description. When Ricker showed her that it was included, Lefebure complied but told Ricker

<sup>4</sup>Lefebure testified, and I credit her, that Pearson said: "Lancaster hospital doesn't have a union, Lancaster hospital will never have a union. We do not have to recognize your seniority."

<sup>5</sup>According to Belin's notes Lefebure took issue with the statement that she "took it upon herself," saying: "John, you told me to go up and ask the nurses, you said you wanted to get all the information before you made a decision." He quotes himself as responding: "Debbie, the decision . . . was not mine to begin with, therefore I did not feel I should change someone else's decision." That reply falls short of a contemporaneous unequivocal denial; and in resolving the conflict of testimony on this matter, I credit Lefebure.

“that she strongly felt it was a waste of time and would bring it up further by writing in the department communications [kitchen comment] book.” She spent about 15 minutes going to the floors but found no trays; and later in the shift she made an entry suggesting that time would be saved if dietary attendants called the floors (or vice versa) concerning late trays. The second item faults Lefebure for suggesting to employee Michelle Argyle that she avoid delay by making her own medical appointment under workers’ compensation without waiting for personnel to do so, thereby “essentially counseling Michelle against following instructions of the hospital.”

(7) This consists of two brief items. The first is dated April 28 and states that Lefebure mentioned at a meeting in front of other employees that Supervisor Linda Kemmerling had clocked out early. The second is dated April 18 and apparently faults Lefebure for telling Linda to make sure other attendants melted the ice in the salad bar and for calling Linda’s attention to an unemptied grease bucket.

(8) This is dated April 27 and records that an employee told a supervisor who told Pearson that Lefebure bragged she was able to take extra breaks by hiding on an outside landing dock.<sup>6</sup> The memo concludes by stating that supervisors were told to monitor Lefebure more closely.

There is no claim that any of the cited instances of “fault” were accompanied by disrespect or had any significant adverse effect on hospital operations. Indeed, and as stated in the cover sheet, the major vice appears to be Lefebure’s failure—viewed by Pearson as “disruptive”—to unquestioningly accept operational decisions of the hospital. That message, coupled with the nature of the citations (e.g., complaining about perceived unfair scheduling and inquiring about what employees are permitted to do) is overly broad as applied to a nonsupervisory employee. And by directing Lefebure “to discontinue this disruptive behavior immediately,” Pearson was in effect telling her to refrain from complaining about working conditions and even making suggestions for improvement. Accordingly, I find that the conference report was meant to inhibit Lefebure’s protected right to criticize management at proper times and places and in an appropriate manner in support of a union organizational drive. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

Respondent, however, argues that issuance of the conference report was not discriminatory under Section 8(a)(3) because Lefebure was merely being counseled and no discipline was imposed. I disagree. Under Respondent’s procedures, documents of that type are retained in the personnel office and are used in preparing evaluations. They are also used to establish “patterns of behavior” under Respondent’s progressive disciplinary system. In addition, Lefebure was specifically advised of that fact in Pearson’s cover sheet. Further, she was told that she would receive a verbal warning in the event her “disruptive conduct” continued. In these circumstances, I find the conference report to be a first step in Respondent’s formal disciplinary machinery. She was now under the sanction of either modifying her behavior or risking the next step of a process leading to greater sanctions, including eventual discharge. *Trover Clinic*, 280 NLRB 6, 16 (1986).

<sup>6</sup>Lefebure states without contradiction that she called in sick on April 27 and did not report that day.

### The Button Incident

On May 9, 1 day after Lefebure received her conference report, President McKelvey issued a memorandum in which he advised to all employees that a court decision made likely a further delay in having an election and expressed his concern that union “supporters will not use it to continue their disruptive actions.”

May 10 was Lefebure’s day off, but she was called in to work from 1:30 to 10 p.m. as a special cook for a dinner honoring hospital supporters in the community. The event was held in the “assembly” room.

At about 9 p.m., and after all the guests had left, Pearson called Lefebure and told her to leave the kitchen and help clean the assembly room. As Lefebure entered that room and began to clean the head table, she noticed Pearson and Belin sitting beside each other in a corner area. There were no patients in the room. Pearson promptly called her over and, looking at the union button displayed on Lefebure’s apron, told her: “You can’t wear that in here.” When Lefebure protested that the “policy book” did not refer to the assembly room, Pearson replied: “I’m telling you . . . [t]his is a patient care room, and you are not allowed to wear that pin in here . . . I’ll have to write you up if you don’t remove it.” Lefebure complied.

Prior to this incident Lefebure had worn the button in the assembly room on numerous occasions, including meetings with supervisors present, without being told to remove it. The written policy in effect at the time forbade wearing of badges or pins in designated patient care areas, including the hallway outside the assembly room, and it also specified areas where such items could be worn. The assembly room was not mentioned at all in the policy statement.

Pearson did not specifically deny making the quotation attributed to her. Instead, and without stating what she said, she claims that in her conversation with Lefebure she meant only that Lefebure could not wear the union button in the hallway leading to and from the assembly room; and Belin, who was sitting next to her, claims not to have heard the conversation. I have credited Lefebure’s testimony concerning the conversation on May 10—finding it candid, consistent, and in accord with an affidavit account given shortly after that date.

As noted, the assembly room was not mentioned in the hospital policy concerning where pins and badges could or could not be worn. In this circumstance, and since no patients were present, Lefebure had a right to wear the union button in that room.<sup>7</sup> Accordingly, I find that Pearson’s proscriptive action against her doing so was unlawful under the Act. *London Memorial Hospital*, 238 NLRB 704 (1978).

### Written Warning

As noted, the complaint in the initial proceeding issued on July 24, and the case was assigned for trial beginning on January 17, 1991. Sometime in December, Lefebure received a subpoena ordering her to appear. Under then prevailing hospital policy employees were entitled to paid leave for complying with a subpoena or a summons to jury duty. She promptly applied, and the request was approved by Pearson’s

<sup>7</sup>This interpretation accords with that adopted in a memorandum to all employees by Personnel Director Thomas on August 2.

successor as dietary manager, Steven Flynn. However, in a memorandum dated January 9, he advised her that similar requests would not be honored in the future because hospital policy had been changed so as to permit paid leave only in instances where employees are "subpoenaed directly by the hospital."<sup>8</sup>

In a casual conversation at about 1:30 p.m. on January 13, Dietary Manager Anne Drew volunteered that due to a staffing problem she had almost called a part-time clerk (Marcia Betts) to work as a dietary attendant on the morning shift. This touched a raw nerve in Lefebure since she had met in August with Personnel Director Thomas and Dietary Manager Steven Flynn and told them she and other attendants were concerned about employees in higher classifications being paid their higher hourly rates while working as attendants. Lefebure mentioned that meeting to Drew and told her that she would file the "biggest" grievance (i.e., in-house fair treatment complaint) if Betts ever was called in to do attendant's work at clerk's pay. Taken aback, Drew said she'd write a note to Flynn seeking clarification. The conversation ended at that point.

Shortly thereafter Betts assertedly telephoned Drew at the hospital "for a personal reason." Although the call was brief, Drew availed herself of the occasion to ask Betts if she was allowed to work in the kitchen. Betts replied "yes, as far as I know." At 7:30 p.m., Betts appeared at the hospital (assertedly to go out to dinner with Drew) and again Drew asked if she could do attendant's work. When Betts replied: "Yes, why?", Drew recounted the earlier conversation with Lefebure. Betts became very upset having gained the erroneous impression that she had lost money because, absent Lefebure's intervention, she would have been called in to work as an attendant on the morning shift. She canceled the dining engagement, and later that evening told her husband that if it hadn't been for Lefebure "they would have called me in, I could have 40 bucks in our pockets . . . that's another bill [paid]."

Drew had the following day off. Flynn called her at home asking about her written inquiry as to whether Betts could work as an attendant, whereupon Drew told him what Lefebure had said and Betts' reaction. After telling her to document the "incident," he wrote his own memorandum to Thomas about it. That document is entitled "Possible Debbie issue." Thomas read it later that day but took no action.

On January 16, several attendants approached Lefebure and complained that Betts was scheduled to work as an attendant that morning. They were irate that she would be paid at a clerk's higher hourly rate; and they asked her to find out what was going on. One (Rhonda Estelle) explained that she didn't have the "guts" to complain to management and that Lefebure was someone who knew the policy book and was a "leader." Another (Stephanie Springer) expected that Lefebure would raise the issue with management. And, true to form, Lefebure acted. At 10:30 a.m., she went to the kitchen and, putting her arm around Betts' shoulder, asked

<sup>8</sup>The policy change is not alleged to have been unlawfully motivated, and I make no finding in that regard. However, in light of the timing and in the absence of evidence to the contrary, an inference is warranted (and taken) that the change was prompted by Lefebure's request.

whether she was there voluntarily.<sup>9</sup> On receiving an affirmative reply, Lefebure told her she and other attendants didn't think it was fair and that she was going to see Flynn about it and if necessary file a grievance. Betts said "Do what you think is necessary," and walked away. Lefebure promptly asked Production Supervisor Belin for a meeting with Flynn that day.

For her part, Betts went straight to the personnel office. According to her own description she was "steaming mad." Thomas was not there and an assistant (Jim Berry), after trying to calm her down, asked: "What's wrong?" Betts replied: "They all know that I am allowed in the kitchen, but they keep bugging me about that. I want them off my back. She [Lefebure] said she was going to file a grievance." At about that point Thomas arrived and, after telling the obviously distraught Betts to relax and take deep breaths, she listened as Betts repeated the same account; and, in response to Betts' inquiry as to whether she could file harassment charges against Lefebure, Thomas encouraged her saying that harassment can occur when an employee perceives that another employee is making the working environment hostile or unfriendly.<sup>10</sup> On Thomas' advice, Betts then went to the dietary manager's office where she recounted the story to Flynn.

At 11:45 a.m., Flynn came to the kitchen and told Lefebure that he'd meet with her in his office at 2:30 p.m. Lefebure arrived at the appointed time. Drew was there but said nothing throughout the meeting on instructions from Flynn. He had also told Drew that Thomas wanted her there as a witness, and in that capacity she took notes. Lefebure opened by telling them she was there to express her concern and that of several other attendants about a pay inequity she had talked to Drew about last Sunday and to Betts that morning; and she proceeded to describe the perceived inequity at length. Flynn let her go on, interrupting only when she mentioned talking to Betts. He asked what she had said to Betts and followed up by asking her whether she thought the hospital should reduce Betts' hourly rate when she worked as an attendant. The meeting concluded with Lefebure asking him to get a clarification from Thomas about the disparate pay issue and he replying that he'd get back to her.<sup>11</sup>

When Lefebure ended her shift at 5:15 p.m., Flynn called her into his office. There, with Drew present, he gave her a written warning which had been signed by him but composed

<sup>9</sup>Lefebure explains that she viewed her relationship with Betts as friendly having helped her file a fair treatment complaint several months earlier.

<sup>10</sup>Betts' best recollection was that Thomas told her "no one needed to work in an environment which made me feel uncomfortable, that harassment was whatever made me feel uncomfortable." Weighing the probabilities, I have credited Thomas' account in this regard.

<sup>11</sup>I have accepted Lefebure's account of the meeting finding it more credible than that of Flynn or Drew. In particular, Flynn's testimony was characterized by frequent hesitations and evasive answers; and he gave every sign of being afraid of giving an "incorrect" answer. And although he claimed, in response to a leading question, to have initiated the meeting and set the agenda, when asked whether he was told that Lefebure that day asked for a meeting to discuss the out-of-classification issue, he responded with far less certainty saying: "No, I—I don't think so." Further, he does not dispute Lefebure's claim that he never told her the meeting was to investigate her conduct toward Drew and Betts or that she argued the classification issue at length.

by Personnel Director Thomas. The warning, in relevant part, reads as follows:

We have received a complaint from Marcia Betts that on January 16, 1991, you inappropriately confronted her regarding the reason she was working as a dietary attendant. You told her that she should not be functioning in that job and that if she did so in the future, you would file a grievance.

This behavior demonstrates improper job performance due to the following:

1. Your duties do not include scheduling or assigning work to other employees. There is no reason or excuse for you to give instructions to others unless specifically directed by your supervisor or manager to do so.

2. Unnecessary meddling in the affairs of others such as this is disruptive of the efficient work flow of our department and upsetting to the other employees who complained of being harassed by you.

3. Also, on January 13, 1991, you confronted the supervisor on duty, Anne Drew, that [sic] she should not schedule Marcia Betts as a fill-in dietary attendant. You confronted Anne that [sic] if she scheduled Marcia Betts as a fill-in attendant, you would file a grievance. Despite the oral reminder disciplinary action you received on September 27, 1990, the behavior described above has occurred. Improper job performance such as this should not occur again. Failure to correct this behavior is subject to further disciplinary action.

On the following day, Lefebure appeared at the trial and testified in support of allegations arising from her previously filed charges.

I find entirely pretextual the reasons given for issuance of the written warning.

There is no indication that Lefebure's casual conversation with Drew on January 13 was in any way confrontational or disrespectful. Indeed, Drew concedes that Lefebure was not talking loudly or being insubordinate and that under hospital policy she had a right to file a fair treatment complaint. In these circumstances, the claim that Lefebure interfered with Drew's scheduling prerogatives is unpersuasive. Drew didn't so advise Lefebure at the time the incident took place; and in her contemporaneous memorandum to Flynn she simply asks for clarification regarding Betts' eligibility to work as an attendant.

Similarly, Lefebure's brief contact with Betts on January 16 is not shown to have been "disruptive of . . . efficient work flow." Neither was it "upsetting" to any employee other than Betts.<sup>12</sup> Betts, however, was not concerned and did not contemporaneously complain about physical intimidation.<sup>13</sup> She states that Lefebure "simply laid her arm around my shoulder" and spoke in her normal tone of voice. Rather, Betts' admitted concern was that by filing an official grievance Lefebure would jeopardize her ability to earn extra in-

come by working as an attendant. And that concern was solely responsible for her being emotionally upset. Thomas' remaining objection that Lefebure was "unnecessarily meddling" by "instructing" Betts also is unpersuasive. Lefebure did not tell Betts to do anything. She is shown to have done nothing more than advise Betts of what she and other attendants perceived as unfair scheduling, a situation she intended to bring to the attention of the hospital by filing an in-house fair treatment complaint.

Having found that the stated reasons for issuance of the warning were false, an inference is warranted, and taken, that the actual reason was an unlawful one. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). In light of the record in this proceeding, the real reason is not hard to find. Respondent viewed Betts' excessive emotional response and claimed harassment as an opportunity to demonstrate its displeasure at Lefebure's union activism and to discourage her and others from testifying at the Board proceeding on the following day. Accordingly, I find that the warning was issued in violation of Section 8(a)(1), (3), and (4), as alleged in the complaint.

I also find an independent violation of Section 8(a)(1) because the warning infringed on the basic right of employees to act in concert for their mutual aid and protection. In her conversation with Supervisor Drew, Lefebure mentioned the prior occasion when she had acted as spokesperson for other attendants before Managers Thomas and Flynn; and the matter at issue (i.e., perceived unfair pay practices) clearly related to conditions in the workplace. *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). And Lefebure's conversation with another hourly employee (Betts) patently was preparatory for group action. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). And this is so even though Lefebure's attempt to enlist Betts' support was unsuccessful. *Jhirmack Enterprises*, 283 NLRB 609 (1987).

#### CONCLUSION OF LAW

Respondent violated Section 8(a)(1), (3), and (4) of the Act in the particulars and for the reasons stated above. Those unfair labor practices and each of them affected, are affecting, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found Respondent engaged in unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain routinely required affirmative action designed to effectuate the policies of the Act, including notice posting.

In this case, however, Respondent's unlawful act in peremptorily refusing to consider Lefebure for the position of dietary supervisor calls for a tailored remedy. In Respondent's personnel hierarchy there are a number of dietary supervisors each reporting to the dietary manager. When Lefebure applied for that job, she had worked in the dietary department over 20 months, on occasion had acted as dietary supervisor, and trained other attendants, and had been complimented on her job performance; and Production Supervisor Belin concedes that she had the technical skills, includ-

<sup>12</sup>The statement in the written reprimand that employees other than Betts complained of being harassed by Lefebure lacks credible evidentiary support.

<sup>13</sup>At the trial, and in response to an egregious leading question (Tr. 162), Betts claimed she felt intimidated when Lefebure put an arm around her shoulder.

ing supervisory experience, for the job. In these circumstances, I conclude that she was at least minimally qualified and that any doubt as to whether she would have been given the job in competition with other applicants was created by the unlawful discrimination practiced against her.

In light of the animus here found to have been directed against Lefebure, a remedy which merely awarded her the opportunity for consideration when the next opening occurs would be ineffectual in all probability and it would not make her whole for Respondent's past wrongdoing. Instead I will resolve the doubt by ordering Respondent to offer her the job

and to award her backpay for the amounts she would have received had she been given it on the date (March 19, 1990) it was filled by another applicant. *Missouri Portland Cement Co.*, 302 NLRB 395 (1991). Backpay is to be computed on a quarterly basis from that date to the date of a proper, unconditional, offer of the job of dietary supervisor, less any net interim income received by Lefebure as an attendant, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]