

**The Hospital of the Good Samaritan and American Federation of Nurses, Local 535, Service Employees International Union, AFL-CIO, CLC.**  
Cases 31-CA-19912, 31-CA-19961, and 31-RC-7050

December 16, 1994

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

The issues in this proceeding are whether the judge correctly found that the Respondent: violated Section 8(a)(1) of the Act on several occasions; violated Section 8(a)(3) of the Act by eliminating a desirable unit-based educator program because of the Union; and engaged in objectionable preelection conduct which interfered with the results of the election.<sup>1</sup> 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,<sup>2</sup> and conclusions,<sup>3</sup> to adopt the recommended Order as modified,<sup>4</sup> to set aside the

<sup>1</sup>On April 27, 1994, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent and the Union filed exceptions and supporting briefs. The Respondent filed an answering brief to the Union's exceptions.

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

<sup>2</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 all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup>There are no exceptions to the judge's recommended dismissal of several complaint allegations of 8(a)(1) violations.

The Petitioner has excepted to the judge's failure to sustain objections to the Respondent's campaign propaganda and to the use of Relief House Supervisor Ronald Masson as an election observer. We find no need to pass on these objections in light of our adoption of the judge's conclusion that the election should be set aside based on the unfair labor practices committed by the Respondent during the critical preelection period.

<sup>4</sup>We will modify par. 1(b) of the judge's recommended Order to additionally reflect his finding that the Respondent violated Sec. 8(a)(1) by telling employees that the unit-based educator program was being discontinued because of the Union.

The Respondent asserts in exceptions that changed circumstances in its operations make inappropriate the judge's recommended affirmative remedy requiring restoration of the unit-based educator program. In support of this argument, the Respondent offers the affidavit of one of its officials. We reject the affidavit, which is not a part of the record in these proceedings. We shall, however, modify the recommended Order to provide explicitly that reestablishment of the unit-based educator program will be required unless the Respondent establishes in the compliance stage of this proceeding, based on evidence unavailable at the time of the unfair labor practice hearing, that this remedy is inappropriate. *We Can, Inc.*, 315 NLRB 170, 174-177 (1994).

results of the election affected by the Respondent's conduct, and to direct a second election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Hospital of the Good Samaritan, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) Discontinuing the established and functioning unit-based educator program because of the advent of the Union, and telling employees that the program has been discontinued because of the Union.”

2. Substitute the following for paragraph 2(a).

“(a) Reestablish the unit-based educator program and resume its functioning consistent with the prior implementation of the program, unless it can show at compliance, on the basis of evidence that was not available at the time of the unfair labor practice hearing, that reestablishment is no longer appropriate.”

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

[Direction of Second Election omitted from publication.]

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 restrict employees' rights to engage in union activity by revoking the practice of permitting nurses to visit each other's units during breaktime.

WE WILL NOT interfere with our employees' right to engage in union activity by searching nurses' bags or belongings for union material when they enter work, or by engaging in surveillance of their union activity outside the hospital, or by warning them that they will be reprimanded for bringing union materials into the hospital.

WE WILL NOT advise employees that we are discontinuing the unit-based-educator program because of the Union.

WE WILL NOT discontinue the unit-based educator program because of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL reestablish the unit-based educator program and implement it in the manner previously formulated, unless we can show in compliance proceedings before the Board, on the basis of evidence that was not available at the time of the unfair labor practices hearing, that reestablishment is no longer appropriate.

#### THE HOSPITAL OF THE GOOD SAMARITAN

*Ann Reid Cronin, Esq.*, for the General Counsel.

*Robert M. Stone, Esq.* and *Douglas R. Hart, Esq.* (*Musick, Peeler & Garrett*), of Los Angeles, California, for the Respondent.

*James Rutkowski, Esq.* (*Van Bourg, Weinberg, Roger & Rosenfeld*), of Los Angeles, California, for the Union.

#### DECISION

##### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Los Angeles, California, on October 19, 20, and 21, and November 8, 9, 10, and 18, 1993. The charge in Case 31-CA-19912 was filed on April 29, 1993, by the American Federation of Nurses, Local 535, Service Employees International Union, AFL-CIO, CLC (the Union), and was amended on June 28, 1993. The charge in Case 31-CA-19961 was filed by the Union on June 1, 1993. On July 29, 1993, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing in both captioned cases, alleging violations by the Hospital of the Good Samaritan (the Respondent or the hospital) of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The complaint was amended at the hearing. In its duly filed answer to the consolidated complaint, the Respondent denies that it has committed the unfair labor practices as alleged.

On February 25, 1993, the Union filed a petition in Case 31-RC-7050 requesting an election in a unit consisting of all full-time and regular part-time registered nurses employed by the Respondent here. A representation election was conducted on May 6 and 7, 1993. Thereafter, the Union filed timely objections to the election. On August 24, 1993, a revised tally of ballots was issued, which showed that of approximately 575 eligible voters, 554 ballots were cast, of which 277 were cast against the Union, 236 were cast for the Union, 41 ballots remained challenged, and 1 ballot was void. Thereafter, on September 2, 1993, the Acting Regional Director determined that certain objections filed by the Union raised substantial and material factual and legal issues, and consolidated the election objection with the aforemen-

tioned unfair labor practice consolidated complaint for the purposes of hearing, ruling, and decision by a duly designated administrative law judge; and that thereafter Case 31-RC-7050 be transferred to and continued before the Board in Washington, D.C.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Respondent, and counsel for the Union. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent is a California nonprofit corporation engaged in the operation of an acute care hospital and facility located in Los Angeles, California. In the course and conduct of its business operations the Respondent annually purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of California and derives gross revenues in excess of \$250,000. It is admitted, and I find, that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Issues*

The principal issues in this proceeding are whether the Respondent has engaged in various violations of Section 8(a)(1), (3), and (4) of the Act, and whether it has engaged in objectionable election practices and misconduct sufficient to require that the previously conducted election be set aside and another election directed.

###### B. *The Facts*

###### 1. Background facts

The Respondent operates a large metropolitan acute or tertiary care hospital in Los Angeles, California, and employs approximately 1100 employees, including over 500 full- and part-time registered nurses who comprise the appropriate bargaining unit here. The Union commenced an organizing campaign among the nurses in about January 1993<sup>1</sup> and filed a petition for election with the Board on February 25.

<sup>1</sup> All dates or time periods hereinafter are within 1993 unless otherwise specified.

## 2. February 25 warning to Nacorda

At about 1 p.m. on February 25, a group of about 25 nurses went to the executive offices of Dr. Mirion Bowers, the Respondent's president and chief executive officer, for the purpose of requesting recognition. In Bowers' absence, they spoke with Margaret Vosburgh, vice president for patient care services, who was in charge of some nine departments or administrative units, including nursing. Among the nurses in this group who presented Vosburgh with a petition or letter requesting recognition was Sussette Nacorda, a registered nurse in the coronary care unit (CCU).

Nacorda, employed by the hospital since 1983, had been wearing a union button on her uniform for at least several days prior to February 25.<sup>2</sup> Nacorda testified that she returned to her coronary care unit (CCU) shortly after the presentation of the petition to Vosburgh. Thereupon, the secretary in CCU advised the CCU clinical director, Evelyn Donevant, that Donevant had been summoned to attend an emergency meeting. Donevant returned from the meeting about an hour and a half later, and said that she wanted to have a little talk with Nacorda. She brought Nacorda into a small utility room, and said that Nacorda should tell her friends from CSU (cardiothoracic surgical unit) to stop coming to see her in CCU, and that if they continued to do so both Nacorda and her friends could be in a lot of trouble. Donevant went on to say, "And if they don't stop coming, we could be terminated and the Union can't do anything for us, to protect us."

Nacorda replied that her friends from CSU were on their breaks and were not doing anything improper; rather, they were just stopping by to see if Nacorda could go on a break with them. Donevant said that she just didn't want Nacorda to get into trouble with her friends. That evening, Nacorda phoned four of her friends from CSU, all registered nurses, and told them that they would have to stop coming to CCU on their breaks because Nacorda could be in trouble if she was found talking to them.

The incidents that precipitated this discussion had occurred on Monday, February 22, and Wednesday, February 24. On Monday afternoon, two CSU nurses stopped by Nacorda's unit and waited for her in the hallway outside a patient's room for 4 or 5 minutes to see if Nacorda had time to take a break with them. Both nurses, as well as Nacorda, were wearing union buttons. Nacorda was expecting them and it had been prearranged that they would try to take their breaks together that afternoon and discuss the Union. They left after Nacorda told them that she would be unable to take a break with them as she was busy with a patient. When they left, Nacorda overheard Donevant ask the charge or resource nurse, who is in charge of the unit in Donevant's absence, why the CSU nurses were there. Donevant, after being told that the nurses were not there on hospital business, said that she knew they were there "because of the Union." However, Donevant did not say anything about this to Nacorda.

On February 24, at about the same time in the afternoon, a similar incident occurred. Again two nurses from CSU, who were wearing union buttons and had prearranged to take a break with Nacorda for the purpose of discussing the

Union, waited for Nacorda in the CCU kitchen for several minutes; again, as CCU is customarily very busy in the afternoon, Nacorda was attending to a patient and was unable to take a break with them. Donevant, who was present, did not say anything to Nacorda about this visit from the nurses.

Nacorda testified that prior to February 25, Donevant had never criticized or counseled her when nurses from other units would come to CCU and wait to see if she was available to take a break with them. It was the practice, according to Nacorda, for nurses from other units to drop by in the afternoon to say "hi" or to take a short break in the CCU kitchen or lounge, or, in the event Nacorda had time for a longer break, to leave the unit and go to the cafeteria. Similarly, Nacorda would sometimes go to see her friends in other units during her break.

Gles Gardoce-Padeo has been a registered nurse in CCU since 1988. Donevant was her clinical director. Gardoce-Padeo testified that she was counseled by Donevant on the day Donevant saw her talking in CCU with two nurses from CSU. Donevant told her that she did not want her to be in trouble, and that she and her friends should not discuss "things" in the CCU. Garduce-Padeo replied that she and her friends had not been "discussing" anything, but had merely been talking. Gardoce-Padeo did not recall the date when she was counseled by Donevant.<sup>3</sup>

Gardoce-Padeo corroborated the testimony of Nacorda regarding the practice of permitting nurses from other units who were on break to enter the CCU unit and wait for CCU nurses to go on break with them, or to visit with CCU nurses for a short time in the CCU hallway or lounge in the event they did not have time to take the allotted 15-minute break.

Donevant testified that she became aware that the Union had filed a representation petition after being so advised during a discussion in the hospital's board room on the afternoon of February 25.

Donevant recalled that she counseled Nacorda and Gardoce-Padeo about "traffic control within the unit" on two successive days, namely, February 23 and 24, respectively, and denies that she counseled Nacorda on February 25, the day the representation petition was filed. Her recollection of these events was assisted by assignment sheet records which show that the only day Gardoce-Padeo worked in CCU that week was on February 24, and she recalled that she counseled Nacorda the day before she counseled Gardoce-Padeo; thus, she deduced that Nacorda's counseling must have occurred on February 23. The counseling was verbal only, and she did not make a memorandum of it.

CCU is a critical care unit and customarily there is one nurse assigned to one or two patients. Donevant testified that she told Nacorda that nurses who are not involved in patient care should not be in the unit, and that socializing and personal business should be conducted during break or lunch time or off duty hours. This, according to Donevant, was the established policy.<sup>4</sup> Donevant denies that she said anything about the Union to Nacorda during the counseling. Nor did she mention the possibility of termination, as this was "a simple verbal counseling" and "it would have been very inappropriate to have mentioned termination." Further, she did

<sup>2</sup>The union button, which many nurses wore on their clothing, is a large red button, about 2 inches in diameter, with the following wording in large letters: "Vote Yes for Quality Care—AFN 535."

<sup>3</sup>This incident is not alleged as a violation of the Act.

<sup>4</sup>The Respondent called no witnesses to corroborate the testimony of Donevant in this regard.

not observe that Nacorda was wearing a union button prior to the time she was counseled.

### 3. Abolishment of "unit-based educator" positions

Jil Lima has been a registered nurse in the neonatal intensive care unit (NICU) since 1988. Her immediate supervisor is Sally McGann, the clinical director of that unit. From the outset of the union organizational campaign, Lima was an outspoken supporter of the Union and advised Clinical Director McGann of her opinion that, collectively, the nurses would be more powerful with union representation. She wore a union button at work, and was among the 25 nurses who presented the petition or request for recognition to Vosburgh on February 25. In addition, she testified in support of the Union's position in a Board representation hearing in March.

The Respondent maintains a "communications book" in each unit which contains current memoranda or notices for the unit personnel. The nurses are required to read the material in the communications book. In January, the Respondent placed a memorandum in this book announcing that new hospital-wide "unit-based educator" positions were being created. The Respondent's continuing education program of updating the knowledge and skills of the nurses, and orienting new personnel within the units, had been administered by Melody Davidson, the Respondent's director of education; up to this point, however, this educational process had apparently been conducted sporadically or within only certain units. The new positions of unit-based educator would be filled by nurses within each unit, who would work 1 day a week as educator for the unit, and would care for patients for the remainder of the workweek.<sup>5</sup>

Lima was interested in applying for the unit-based educator position for her unit and obtained an application form from Clinical Director McGann. Two other nurses from her unit also applied. In late January or early February, Lima was interviewed for the position by both Davidson and McGann, and during the interviews expressed her thoughts regarding what she would like to attempt to accomplish if selected as her unit's unit-based educator. Sometime in March, McGann told Lima that she and Sarah Currie, another applicant, would "split" the position within their unit.

Lima testified that on April 1, she and Currie attended an 8-hour training session along with approximately 20 to 30 other nurses who had been selected to become unit-based educators in their respective units. The training, conducted by Director of Education Davidson, included theories of adult learning principles and methods for developing assessment tools for educational needs that would be individualized for each unit so that the format of education and instruction could be tailored to the specific needs of the unit personnel. Course material was distributed to all the attendees, with a cover sheet bearing the heading "Unit-Based Educator Orientation." Davidson said that the nurses would immediately begin functioning in their educator positions, and gave them an assignment to develop the aforementioned assessment tool for their respective units. Another meeting was scheduled for the following month.

After conferring with and receiving permission from McGann, a particular day, denominated as "education day,"

<sup>5</sup>The regular workweek for all of the full-time nurses at the hospital consisted of three 12-hour days.

was set aside on the weekly schedule for Lima and Currie to work on the development of the educator position within their unit. On education day, Lima and/or Currie, who were to "split" the position, would not perform their patient care duties. On April 6, a scheduled education day, Lima and Currie were working together in a conference room to prepare materials and discuss the method by which the educator position would be divided between them. After a while they went to the cafeteria for a break. Peggy Vosburgh, vice president for patient care services, who had been instrumental in promoting the concept of unit-based educator, happened to see them in the cafeteria and asked Lima, who was dressed in street clothes and was wearing a lab coat with a union button attached, who she was and what she was doing in the hospital. Lima told her that they were developing an assessment tool for the unit-based educator position in NICU, and she and Vosburgh then engaged in a short discussion of the assessment tool. During the conversation, Lima observed that Vosburgh was staring at her union button. Then Lima and Currie returned to the conference room to continue their work.

An hour or so later, McGann came by the conference room and said that she had just received an e-mail on her computer advising her that the unit-based educator positions were being placed on hold. McGann also said that she thought it was because of the union activity in the hospital.

About a week later Vosburgh held a meeting of the nurses who had been selected as unit-based educators. About 10 or 12 nurses were present at the meeting that Lima attended. Davidson was also at the meeting. Vosburgh, according to Lima, referred to some paper she had in front of her and said that the hospital could not go through with the educator positions because there had been "a charge from the NLRB against a director." Lima and another nurse asked to see the paper and Vosburgh said she could not show it to them.<sup>6</sup> Vosburgh said that the National Labor Relations Board was very partial toward the Union, and Lima asked how a governmental agency would be permitted to show partiality. Vosburgh simply replied that Lima should educate herself. Since that time the unit-based educator program has been rescinded and has not been functional.

According to Lima, the unit-based educator positions would not immediately entitle the nurses in those positions to additional compensation. However, the fact that the nurses effectively occupied those positions would be a favorable component of future evaluations.

Clinical Director McGann testified that she first heard about the position of unit-based educator from Vosburgh and Davidson at a supervisors' meeting in January. The clinical directors were instructed to ascertain how many such educators they needed, and to so advise Davidson. McGann then placed a memorandum regarding the position in the communications book, and requested that nurses contact her if they were interested in applying. She then interviewed the applicants and referred them to Davidson. Later, Lima and Currie, who had been selected for the position from McGann's unit, attended a class for this purpose conducted by Davidson. Thereafter, McGann received an e-mail notifying her that the

<sup>6</sup>While the record does not show what paper Vosburgh may have been referring to, a Decision and Direction of Election was issued by the Regional Director on April 9.

unit-based educator position was being “placed on hold.” On contacting Vosburgh about the matter, Vosburgh told her two things: that Davidson had not been given final approval to hold the orientation class, and that the NLRB could look on the unit-based educator positions unfavorably. McGann then immediately relayed this information to Lima and Currie.

Vosburgh, vice president for patient care services, began working for the Respondent in August 1992. She resigned 1 year later, in August 1993. Vosburgh testified that in about October 1992, shortly after her employment began, she introduced the concept of unit-based educators because the hospital was a very large facility and although there were “budgeted positions that were unfilled” there was only one nurse educator for the entire division of nursing, namely, Educational Specialist Melody Davidson. Explaining, Vosburgh testified that “we had dollars for positions, and the way we wanted to allocate them was to have an educator for each of the specialties like medical surgical nurse, critical care, obstetrics. So that was our goal to fill those positions with experts in those clinical areas.”

According to Vosburgh, the educational specialist has a masters degree and is an expert in curriculum design and adult learning theory, and is authorized to grant nurses continuing education units on the completion of courses. The unit-based educator would supplement the work of the educational specialist as follows:

A unit based-educator is a very good staff nurse that—in nursing that’s a phrase where you start as a novice and become an expert. Well, these are nurses that are on the pathway to becoming experts, and they’re assigned to a unit, and they’re used in this concept.

They would be the people that, when a new staff member came on board, the [specialist] educator would do the formal classes, and then, as they come into the unit and are integrated into the structure of the unit they would have a preceptor, and this preceptor would be the unit-based educator.

So they would be almost like a buddy, a person that would help them learn the techniques, would mentor them through the system, and then, if they had specific learning needs, would either get them articles or do a little in-service for them or identify to the education specialist that there were major learning needs, and at that time it’s turned over to the educational expert.

At the same time, according to Vosburgh, the establishment of additional new positions, that of assistant clinical director, was under consideration for each of the units. It was “envisioned,” among other possibilities, that the positions of unit-based educator “would be subsumed” in the role of assistant clinical director. Both of the aforementioned new positions were in the conceptual stage, and were introduced by Vosburgh as “just a germination of ideas.”

Vosburgh spoke to her immediate superior in the hospital, Roxanne Spitzer-Lehmann, the Respondent’s chief operating officer and executive vice president, who was enthusiastic about the concept, but cautioned her that it would cost a lot of money. Ongoing conversations were also held with Davidson and some of the nurse administrators. Everyone, accord-

ing to Vosburgh, understood that the role of unit-based educator could not be implemented until it was budgeted in the next fiscal budget, beginning in September 1993. Thus, as the unit-based educators would be spending a significant portion of their time “out of count,” meaning that they would not be available for patient care, the funds for the employment of additional staff nurses at added cost to the hospital would have to be budgeted.

Vosburgh testified that because the positions of unit-based educator were still in the conceptual stage and had not been budgeted, she was “aghast” when she read the memorandum issued by Davidson on January 20, to all the clinical directors, with copies sent to Vosburgh, Spitzer-Lehmann, and others. The very detailed two-page memorandum sets out specific criteria and responsibilities for the position of unit-based educator, and states, inter alia, as follows:

In order to meet the educational needs of our staff I’ve considered an alternative method for nursing education at HGS. One option is to develop a position in each unit for an educator. This person would work one twelve hour shift per week in the educator position. Their primary responsibility would be to meet the bedside educational needs of the unit.

. . . .

Please discuss this role with your staff and encourage anyone who is qualified and interested. I have attached a questionnaire for applicants to complete and return to me. If possible, I would like to implement this role in early February.

Vosburgh immediately had a meeting with Davidson, and advised her that the memorandum was premature, unauthorized, “terribly incomplete,” and could only lead to confusion. She asked Davidson why she issued it, as “it was so preliminary.” Davidson really didn’t have an explanation for her actions, and Vosburgh admonished her and told her that:

I was very concerned that somebody with her level of responsibility and, you know, the fact that she was an educator, that she would put a document out like this that was so incomplete . . . I reminded her that we had talked about incorporating this role into the assistant clinical director role . . . the more I went through this with her the more concerned I became . . . I said, “Melody, I don’t want you to send out anything to the clinical directors for anything, any projects or any programs without me seeing it first. Are you comfortable with that?”

However, Vosburgh did not instruct Davidson to send out a retraction of the January 20 document, and, as testified to by Lima, the application process, interviews, awarding of the positions to the best-qualified applicants, and the initial April 1 orientation meeting for those selected occurred thereafter.

On January 21, Vosburgh received an e-mail from Loretta Tolentino, a clinical director, under the heading “Unit-Based Educators.” The e-mail is as follows:

HI, YOUR APPROVAL FOR UNIT BASED EDUCATORS ONE SHIFT A WEEK IS VERY MUCH APPRECIATED! THANK YOU! LORETTA

Vosburgh responded to this thank you note as follows: "It is my pleasure to serve!" Vosburgh testified that this note from Clinical Director Tolentino simply meant that word about the position of unit-based educators was getting out to the clinical directors where it needed to be, and that there was a lot of work to do to bring the concept to fruition. Thus, Vosburgh maintains that she gave no such approval to Clinical Director Tolentino.

On January 26, Spitzer-Lehmann, Vosburgh's supervisor, sent the following memorandum to Davidson, with a copy to Vosburgh:

I was really impressed with your plan regarding the unit based educators. I am excited to see this approach and believe it is the most effective and viable both in terms of cost efficiencies and unit based learning. Congratulations for a good plan. I look forward to the implementation and positive outcomes that can be achieved by "on site" concurrent education.

Vosburgh testified that at round table open forums with the staff, held on February 16, 18, and 19, she gave a slide presentation setting out the way that the nursing division would be reorganized in many respects, and emphasized that the reorganization, including the new positions of unit-based educator and assistant clinical director, would not be instituted until after the beginning of the new fiscal year. However, there is no written memoranda nor anything on the slides which would corroborate such testimony, or which indicates that the unit-based educator program would not be implemented until September 1993.

Vosburgh testified that she first became aware that Davidson had failed to follow her specific instructions and had implemented the unit-based educator program when she happened to encounter Lima and Currie in the cafeteria on April 6. She inquired why they were in street clothes, and they said that they were unit-based educators for NICU, that they had attended a unit-based educator orientation class on April 1, and that Davidson had given them this assignment to create an assessment tool for their unit. As a result of this chance meeting with Lima and Currie, later that day Vosburgh asked Davidson what she had done. Vosburgh testified that: "I told [Davidson] at that point that I was very disappointed, that I didn't understand why she would go ahead with this and that I wanted her to absolutely stay out of the role of dealing with the unit-based educator." Also, however, Vosburgh directed Davidson to prepare an "implementation plan" by the following day.

Davidson sent a memorandum to Vosburgh the following day, April 7, with the heading "Unit-Based Educator Implementation Plan." Attached to the memorandum is a "Unit-Based Educator Roster," which lists the names of 17 unit-based educators and their respective units. The memorandum begins as follows: "The following steps have been planned for implementation of the unit-based educators." Then the memorandum sets forth in some detail what had been accomplished up to that point, namely, the conducting of "base line education day" for all the unit-based educators on April 1, and the assignment to them of the preparation of a needs assessment for each of their respective units. The memorandum continues as follows:

3. Meetings with all the unit-based educators will be set up every two weeks initially starting April 21. The needs assessment that the educators are developing will be finalized at the first meeting and distributed to the staff at that time. Analysis of the results and prioritization of needs will occur at the next meeting. Development of the unit-based education calendar for the rest of the year will also be completed.

4. Follow-up on nursing orientation by the unit-based educators will begin immediately.

5. There are four options for budgeting. (1) The unit-based educators can be absorbed by their units knowing that this would be a variance. (2) The cost can be charged to the Nursing Education department knowing that this would be a variance. (3) The cost can be split between the unit and the Nursing Education department to decrease the variance for each department. (4) The cost can be budgeted out of the CES [Clinical Educational Specialist] positions that are currently open. With the new budget cycle, the cost can be budgeted through the Nursing Education department or their unit as a line item.

Again, on seeing this memorandum, which Vosburgh had directed Davidson to prepare the preceding day, she faulted Davidson for its contents, telling her that she [Vosburgh] "was not comfortable with her communication" and that "to do a program where we have no money and just run a variance is irresponsible." Vosburgh then asked Davidson how she had selected the attached list of 17 unit-based educators, "because some of the clinical directors told me that they didn't have any input into that position." Vosburgh told Davidson to schedule a meeting of everyone involved in the unit-based educator program.

This meeting was held within 2 weeks thereafter. Vosburgh told Davidson that she would try to "protect her integrity," but she would have to point out to those assembled "that we jumped the gun." She told the unit-based educators in attendance that neither the orientation class they had attended nor the work they had done up to that point in time nor the position for which they had been selected had been approved by anyone. However, she said that she "still had tremendous hopes for the unit-based educator role at the hospital, but at this point we needed to put it on hold." Vosburgh also told them the following:

I also told them that I had a fear at this point we were in the middle of a union campaign, that I wouldn't be able to defend implementing this because we had no goals; we had no objectives; we had no criteria for selection; that it wasn't really a program, and it should not have gone on, so that I was going to put it on hold, but I was still committed to the concept.

Vosburgh testified that even though she was "aghast" and terribly disappointed with Davidson's aforementioned unauthorized conduct, Vosburgh merely "counseled" her on several occasions but did not give her a written reprimand, which is the second step of the Respondent's disciplinary procedure; and she took no other disciplinary measures against her.

At the time of the hearing here, neither Vosburgh, Spitzer-Lehmann, nor Davidson had remained in the Respondent's

employ. Spitzer-Lehmann apparently left some time in April, Vosburgh left in August, and Davidson left sometime later. The Respondent has made no representations on the record for its failure to call either Spitzer-Lehman or Davidson to corroborate Vosburgh's testimony. However, Davidson directly reported to Peggy Sterbenz, assistant vice president for nursing, who, in turn, reported to Vosburgh. According to Vosburgh's testimony, Sterbenz was knowledgeable regarding all of the foregoing unit-based educator matters.

Sterbenz was called as a witness in this proceeding by the Respondent. She testified that she worked for the Respondent from February 5, 1990, until June 1993. She reported to Vosburgh, and was responsible for the overall management and coordination of clinical units, for which she also had financial responsibilities; the clinical directors as well as clinical nurse specialists reported to her. Sterbenz testified at length regarding another issue in this proceeding, and was asked no questions regarding the matter of unit-based educator. Thus, she did not corroborate any of the testimony given by Vosburgh.

In addition to the documents described above which were subpoenaed from the Respondent by the General Counsel, another document, entitled "Position Description" for the position of "Unit-Based Educators" was introduced into evidence by the General Counsel. This undated two-page position description contains a detailed description of the job qualifications, job summary, and performance criteria for the position of unit-based educator. The job summary is as follows:

The Unit Based Educator, under the supervision of the Clinical Director and in collaboration with the Clinical Education Specialist, is responsible for unit based education in an assigned area. Major areas of responsibility include: employee orientation, preceptor support, coordination of performance-based staff development, development/facilitation of unit based in services.

The Unit Based Educator works collaboratively with the Clinical Director and Clinical Education Specialist to accomplish his/her goals and reports to the Clinical Director.

#### 4. The position of assistant clinical director

Lima is a resource nurse in NICU. The position of resource nurse (also commonly referred to as "charge nurse") is a rotating position within the unit, and each of the resource nurses occupy that position during approximately nine shifts per month, or 75 percent of the time. During these shifts the resource nurse is in charge of his or her respective unit; during the remaining shifts, the nurse functions as a regular staff nurse and a different resource nurse is in charge. All nurses report to the clinical director of each unit.<sup>7</sup>

<sup>7</sup>On April 9, the Regional Director issued a Decision and Direction of Election in which he determined, contrary to the position of the Respondent taken at a representation hearing, that the resource nurses were not supervisors within the meaning of the Act, and were included in the appropriate collective-bargaining unit. The Respondent filed a request for review with the Board, and its request for review was denied.

Lima testified that at her unit's resource nurse meeting in late April,<sup>8</sup> conducted by Clinical Director McGann and attended by Lima and four other NICU resource nurses, McGann said that the hospital was going to create new positions called "assistant clinical director," and that the five resource nurses would fill those positions. McGann explained that in their new positions the nurses would become managers, and would receive a salary rather than the hourly pay they were then receiving. Essentially, the assistant clinical directors would be performing the same work that they had been performing for the past year as resource nurses, but would have certain additional responsibilities such as evaluating nurses' work performance and dealing with budgetary matters. According to Lima, McGann said that the new positions would be created if the Union were voted out.

Lima's affidavit regarding this meeting is as follows:

McGann told us that the hospital had plans for what would happen after the union election, and stated that if the Union was not voted in, the hospital was going to create the position of assistant clinical directors hospital-wide, and that there would be four positions in the NICU, two on days and two on nights.

McGann said that there would be an increase in our pay and we would be salaried, the position would include evaluations, paperwork, and being in charge of the unit while on duty. It was my assumption that the positions would go to the resource nurses. McGann said the positions would be created once the union question was resolved. McGann did not tell us the specific amount of the pay increase.

When questioned on cross-examination regarding whether McGann said that the new positions would be created "if the Union was not voted in," or whether McGann said that the "positions would be created once the union question was resolved," Lima testified that she believed that McGann made both statements. When asked by the General Counsel what McGann "indicated" would happen with respect to the position of assistant clinical director, Lima's answer to this question was that McGann said the positions would be created if the Union was voted out.

Clinical Director McGann testified that she held a regularly scheduled resource nurse meeting on April 27. At the conclusion of the meeting one of the nurses happened to ask about the position of assistant clinical director, and McGann replied that there would be two such positions on days and two on nights, and they would become effective in September 1993, to coincide with the new fiscal year budget. There was no other discussion about the position, and McGann did not refer to the Union during this brief colloquy.

Fravina Aquipel, a NICU resource nurse who has been employed by the Respondent since 1988, testified that about halfway through the resource nurse meeting on April 27, McGann said that the position of assistant clinical director would become effective next year, and had been budgeted. McGann did not say how many positions would be available, and said that anyone who wanted to apply for the position was welcome to do so. The Union was not mentioned.

<sup>8</sup>This meeting occurred after the unit-based educator program had been discontinued.

Aquipel testified that she was a union supporter during the union campaign, and wore a union button.

Marina Bridgeman, a NICU resource nurse who has been employed by the Respondent since 1989, testified that McGann, at a resource nurse meeting in April, “mentioned about they’re going to be opening a position of permanent charge, but it has to depend on the next year’s budget.” Nothing else was said about the position, and there was no mention of the Union. On cross-examination Bridgeman stated that she believed the meeting she was describing took place sometime after the election, and admitted that she was unable to recall the month that the discussion took place. Further, Bridgeman recalled McGann stating that there would be about four such positions of assistant clinical director established, and that being appointed to this position would constitute a promotion and would be accompanied by an increase in salary. She was unable to recall receiving any anti-union literature from McGann or from the hospital, and testified that McGann said nothing about the Union at any of the meetings she held with the staff.

Tipawan Ormzubsin has worked for the Respondent since 1989. She attended the resource nurse meeting in question. Ormzubsin testified that McGann said, pursuant to an inquiry by one of the nurses, that “they may have some permanent charge nurse job coming in the next fiscal year meeting.” Someone asked how many positions there were going to be, and Ormzubsin first testified that McGann said that she could not discuss this at that time; later in her testimony, she testified that McGann said that maybe there would be two on days and two on nights, but that she really didn’t know. McGann did not indicate that the new position would be a promotion, or that it would include a salary increase. Further, McGann said nothing about the Union at this meeting.

##### 5. Alleged 8(a)(1) violations by Dr. Bowers

Within several weeks prior to the May 6–7 election, Dr. Mirion Bowers, the Respondent’s president and chief executive officer, held some 22 meetings with the nurses in the voting unit here. The last meeting prior to the election was conducted by Bowers on May 1. About 10 nurses were in attendance, including Marietta Breganza and Carole Huyck.

Breganza, an ICU nurse, began working for the Respondent in 1984. She was a member of the Union’s organizing committee and active union proponent, and wore a union button during the campaign. Breganza was unable to remain for the entire April 1 meeting, but was present for most of the meeting. Breganza testified that Bowers at first reviewed his background with the Respondent, and said that there were many problems that needed to be addressed. He said that he was “willing to work with us, work out our problems, through meetings such as the one we were having.” He said there were programs which he was “trying to bring in from UCLA, and that there were other programs in the planning stages, and that those programs could possibly be jeopardized if we brought the union in.” Bowers asked the nurses to give him a chance to work everything out and to trust him and not bring the Union in, “and that if we voted the Union out, he could work with us; however, if we voted the Union in, he won’t work with us.” He also said “that if we voted for the Union, he would take it as a personal attack upon him.”

At another point in her testimony, Breganza testified that Bowers said: “He could work with us as it was, with meet-

ings such as that one; however, he could not work with us if there was a union.”

The first question asked Bowers was why he couldn’t work with the nurses just as well across the negotiating table as in group meetings. Bowers replied that he felt that unions were not good for anybody, and that they would make the hospital unstable, and that the threat of a strike alone makes the atmosphere very unstable.

Another nurse asked why he disliked the Union so much, and Bowers stated, according to Breganza, as follows:

that he felt the Union can do nothing for us employees; they could neither solve our problems nor guarantee us anything. He further added that everything that we wanted would have to be brought to the bargaining table and be negotiated, and that he and the hospital were not obliged to negotiate anything with us, in which case we would have to strike for anything that we want.

Bowers, according to Breganza, stated that other tertiary hospitals in the area were having financial problems and had closed or were closing, and that the Respondent was having revenue problems as well. He stated that the Respondent could go the same route of those other hospitals, and possibly might have to be closed as well. And he kept repeating that perhaps that was what the nurses wanted, to close the hospital. Finally, he said, “maybe that would be best for everyone, just to close the hospital.” Breganza spoke up and said that nobody wanted the hospital to close.

During the meeting there was colloquy between various nurses, and Carole Huyck, another staunch union supporter, answered a nurse’s question and advised her that the nurses would have to make a list of their demands and negotiate this with the hospital. Breganza did not recall whether Bowers responded to this response of Huyck.

Huyck has been working for the Respondent since 1980. She is a staff nurse in ICU. Huyck remained for the entire meeting conducted by Bowers. She testified as follows: Bowers reviewed his recent history with the Respondent as its chief executive officer, and described the problems facing the hospital on his assuming that position. He said that one of the “projects” that he had not yet had a chance to work on were the problems relating to the employees, and that the “Union came on board” prior to the time he was able to address these problems. According to Huyck, Bowers said:

he did not like unions. He didn’t feel he personally could work with a union. He didn’t feel that a union was good for the hospital. He definitely didn’t feel it was good for the nurses, the employees. He was totally against the idea of unions. He said he could work with the nurses in group meetings like we were in that very day—small groups sitting in a room, just like we were that day—and work out all of our problems and all of our differences, and get everything resolved.

Bowers further stated to the nurses:

Let me put it to you this way . . . . If you vote the Union into place, you will come to us to the negotiating table with a list of your demands and your requests. He said: We don’t have to listen to those demands and re-

quests. We don't have to negotiate with you. And he went on to say, in fact, that we will not negotiate with you . . . if you vote the Union in, you come to us with your demands, we will not meet your demands because we don't have to meet your demands, and the end result is that you will end up on strike.

Huyck testified that during this discussion about negotiations, Joyce Gentle, one of the nurses, said she would like to address a question to the pronoun nurses, namely, what could the Union guarantee her if she voted for it. Huyck responded, stating that the only thing that could be guaranteed is the right to come to the negotiating table and bargain to obtain a contract. Gentle replied that, in other words, the Union could not guarantee anything. At that point, Bowers interjected, "That's just the point . . . . If you vote the Union in, you're going to come to the bargaining table, and we don't have to give you anything. We don't have to work with you. We don't have to give you anything. And . . . the end result will be that you'll be on strike." When asked again about this part of the meeting, Huyck testified that Bowers stated:

Let me put it to you this way. If you vote this Union in to place, then you will come to the bargaining table. You will come to the bargaining table with a list of demands and a list of things . . . that you want. That does not mean that we have to give you those things. That does not mean that we have to negotiate with you . . . . In fact, I will not negotiate with you. I will not work with you because I will not work with a union. I will not work with a union on board . . . I will work with you like this, in small groups, the nurses and the administrator, or me. But I will not work with the Union on board. And the end result will be that you'll have to go on strike . . . even to get the negotiations started.

One of the nurses went on at great length telling Bowers that his real problem was with the middle managers. Bowers said that if that was the problem, he would take care of it "after this union thing is over and gone."

Bowers said, according to Huyck, that there was an overabundance of tertiary care hospitals which are very expensive to operate because of their high overhead as a result of the need to utilize the latest available technology, and that in the next couple of years he anticipated that perhaps 50 percent of such hospitals would close. Bowers said that he wanted the Respondent to be one of the hospitals that remained in business.

Toward the end of the meeting he said:

Maybe you nurses are right. Maybe what we should do is just close the hospital. Maybe you guys have the right idea. Maybe we shouldn't continue to try to fight this thing out. Maybe we shouldn't continue to try to keep our doors open and keep our long history . . . . Maybe we should just close the hospital.

At another point in the meeting, Bowers stated, according to Huyck, that the hospital had a number of contracts pending with other entities, and he mentioned Delta Airlines and Cigna Hospital. He said that the Respondent was attempting

to obtain contracts with these entities to use the Respondent's services, and continued as follows:

that he could not say that we would not get the contracts if we had a union, but he said that certainly having a union on board was considered a destabilizing factor in a hospital because at any time the employees could be out on strike, and that's not a pleasing idea for doctors, or for patients, or for entities that are looking to contract with a hospital.

Huyck made notes of this meeting about a week or two after the meeting. The notes were furnished to Respondent's counsel prior to cross-examination.

Bowers testified that he held about 22 small group meetings with the staff nurses. Each of the meetings lasted about 1-1/2 hours. He had met with his "advisors" on several occasions prior to this series of meetings, and had been advised that there were definitely certain things he should not say. He really didn't see the meetings as union meetings; rather, he was there to introduce himself to the nurses, discuss the hospital's problems, and answer the nurses' questions. Bowers testified that the meetings "were really to let the people know me, where I came from, explaining the situation, answer questions that they have. A lot of the meetings that we had was more about the hospital than the Union. So it wasn't a question of the Union this and the Union that." One of the purposes of the meetings, however, was to explain why he believed the nurses should not vote for the Union.

Bowers testified that the particular meeting in question "was the most difficult of all the meetings" and was "extremely hostile." After introductory remarks regarding his history with the hospital and the various problems confronting him at that time, Bowers was interrupted by one of the nurses who said, "Look, Dr. Bowers, we're not interested in your background. We want to deal with some other issues." Then, one of the nurses said, "Look I think the big problem is are you going to fire Peggy Vosburgh." Bowers replied that he could make no promises of that sort because it was against the rules or guidelines that prohibited him from trying to sway their vote.

Regarding negotiations with the Union in the event it prevailed in the election, Bowers told the nurses that the negotiations could "go freely" and the parties would "come together," or if there was no agreement the vehicle that the Union had would be the power to strike. Bowers could not remember whether he said anything more about union negotiations.

Bowers recalled that at the meeting certain pronoun nurses maintained that the Union would not strike. Bowers disputed this, saying that there had been a strike at Kaiser Hospital. He said nothing further about striking. He did say that if hospital services were interrupted by a strike, then there was a possibility that the hospital could suffer permanent damage as a result of loss of its patient and physician base.<sup>9</sup> However, he did not say anything about the closing of the hospital.

<sup>9</sup>Bowers testified that while he did not so advise the nurses, the hospital was then in negotiations with a large hospital insurer group to provide health care for the individuals insured by that group, and that the group had expressed concern as to whether the Respondent could "guarantee continuity of services." Bowers stated that this

Bowers specifically denied that he made remarks to the effect that the hospital would not have to negotiate with the Union; that the Union would have to strike to even get the hospital to the negotiating table; that the employees would be out on strike if they voted for the Union; that the nurses had the hospital in their hands and that maybe they were right and the hospital should be closed; that he would prefer to work with the nurses in groups rather than through the Union; or that the facility would or might close if the Union was voted in. He is not too sure that he said that he didn't like unions, "because that would be a presumptuous statement," and he "would not imagine I would say that." He did not say that the situation would be unstable if the Union came in; and he was not too sure that he asked the nurses to trust him.

Bowers did tell the nurses that if they truly felt the Union was in their best interest, then they should vote for it, and that if they felt it was not, they should vote against it. He did tell the nurses that he believed the Union was not in the best interest of the hospital, and, in response to a nurse's question, that the Union was an outside source because it had a power structure outside of the hospital's internal structure. Further, he did mention the contract with Delta Airlines, and said that unionization may have an impact on that contract, "which was a very prized contract." He was attempting to share with the nurses his concerns about the future of the hospital with or without a union.

Leonarda McClarity, a staff nurse in ICU since 1987, attended the meeting in question. It was the only meeting she attended. McClarity appeared to have a good recollection of the meeting and testified as follows:

It started with Dr. Bowers just telling us a little history about himself and how long he had been in his position, which was six months, and his goals for the hospital, and that he was relatively [sic] here to hear the issues of the nurses because he had mostly been concentrating on the other areas of administration and dealing with some things that was [sic] happening with the doctors, and he had left the issues that the nurses had to his people under him, to the administration under him, but since things weren't getting resolved, he was having these forums so that he could firsthand hear what our issues were.

McClarity testified that Bowers opened the floor for discussion, and asked the nurses what was on their minds. "It just seemed to be a very heated meeting, very hostile," although Bowers remained "business-like." Regarding negotiations and strikes, Bowers said, according to McClarity, that he did not like working with unions and preferred not to work with them, but made no reference as to how he wanted them to vote. He asked the nurses to give him a chance to "solve their issues." McClarity testified further as follows:

Concerning union negotiations, he was saying that the administration would have to negotiate with the Union in fair labor negotiations, and that in the negotiations, the Union couldn't guarantee that all the issues would

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contract would be a "significant revenue producer" for the Respondent.

be resolved. He said that within the negotiations, the nurses might get what they want, they might get more than they wanted, they might get less of what their issues were sought [sic]. He said nothing was guaranteed, that the Union [couldn't] guarantee the nurses anything, and that if the union couldn't get the nurses what they wanted, then their ultimate weapon was to take the nurses out on strike.

Regarding the future of the hospital, Bowers stated the following:

What he said about tertiary hospitals was that there are a lot of tertiary hospitals around, especially in our area. He said that there was not enough patients to go around; there was just too many patients for the amount of hospitals that were opened in conjunction with the way health care was going. He said that since there wasn't enough patients, somebody would have to close. Some hospital would have to close and hopefully it would not be Good Sam that would be one of the hospitals that would have to close because at our hospital, we're hopefully giving the best quality of care and we would be one of the hospitals that would be staying open.

According to McClarity, Bowers said the hospital would have to negotiate in good faith with the Union. He did not say that the Union would have to strike just to get the hospital to start negotiating, or that the employees would be on strike if they voted for the Union. He did say that the ultimate weapon of the Union would be to take the nurses out on strike. He did not say that the hospital was in the nurses' hands and maybe the best thing to do would be to close it.

Joyce Gentle has been a staff nurse in the orthopedic unit since 1990. Gentle wore an antiunion button for about 2 days just before the election. Gentle testified that Bowers stated to the nurses at the May 1 meeting that he would rather work with the nurses personally than through a union, and that he didn't like unions. Gentle testified that Bowers introduced himself and spoke about his history with the hospital. He went on to outline some of his plans for the hospital. Regarding union negotiations and strikes, Bowers stated:

He said that if there was a union in the hospital that, although he did not like the idea of having a union, he would rather not have a union; that the nurses had a right to their choice of having a union there, and if there was a union, he would negotiate with them in good faith. Related to a strike, he did say that a strike is an ultimate weapon. The truth about a strike is that it's an ultimate weapon used by unions if negotiations sometimes don't go the way the union had hoped it would go.

Gentle further testified that Bowers did not say that the hospital would not have to negotiate with the Union, or that the nurses would have to go on strike just to get the hospital to start negotiating with the Union, or that the employees would be on strike if they voted for the Union. He did not say that the hospital was in the nurses' hands, and that maybe the best thing to do would be to close the hospital. He did not say that the hospital may be in an unstable posi-

tion if the Union was voted in. Gentle had no recollection of Bowers stating that the hospital would or might close, and admitted that she was not focusing on Bowers' discussion regarding the future of tertiary care hospitals. Gentle recalls making a statement that she would rather have the nurses deal with the administration through their own nursing body rather than the Union; one of the prounion nurses responded and explained why she was prounion.

#### 6. The events of May 3

On May 3 and 4, several days prior to the election, several union representatives and nurses congregated across the street from the hospital and distributed buttons, campaign literature, address booklets, and boxes of fortune cookies containing prounion slogans to the nurses who were going to work. This union activity took place during shift change in the morning at about 7 a.m., and in the evening at about 7 p.m., on a public sidewalk across the street from the hospital property, adjacent to the hospital's parking garage.

Braganza was distributing such materials on that day; it was one of her days' off. Braganza testified that as Vosburgh, vice president of patient care services, was leaving the parking structure on her way to work, Braganza offered her an address booklet, and Vosburgh refused. Vosburgh crossed the street and, according to Braganza, proceeded toward the main entrance of the hospital where she happened to meet one of the staff nurses, Elsa Yui, who was coming off duty. Braganza observed that Vosburgh began wagging her finger at Yui, and Yui began wiping her eyes, as if crying. She also observed Vosburgh giving Yui a hug. After about a minute, Braganza proceeded across the street to investigate the situation. She approached the two of them and asked if everything was okay. Neither Vosburgh nor Yui said anything at first. She then asked Yui if she was okay, and Yui replied that everything was okay. Braganza did not leave; she gave Yui an address booklet, and said, "Happy Nurses Week." Vosburgh then told Braganza to stop harassing her nurses. Braganza said she was doing no such thing. Then Vosburgh asked Braganza who she was and where she worked. Braganza gave her name and displayed her hospital badge. Vosburgh said that Braganza was on hospital grounds, and that she could do her campaigning across the street but not on hospital grounds. She said this three times. Braganza testified that she "just kind of stood rooted there and stared at [Vosburgh]," not knowing what to do. At that point, one of the security guards came over and told her to leave. Vosburgh told him to "please escort this nurse out of here." The security guard accompanied Braganza across the street.

When Yui came across the street she told Braganza that she had been very upset about what had happened the night before, as a result of a conversation regarding the Union she had with Peggy Sterbenz, an assistant vice president. Yui said that she had been so upset that she removed her prounion button. Yui did not testify in this proceeding.

Billie Jean Stull has been employed by the Respondent since 1991. She works in the obstetrics unit. Union representatives and nurses were handing out union material on the morning of May 3, adjacent to the parking structure, where Stull had parked her car. Stull testified that she and another nurse who happened to be entering the hospital lobby at the same time were stopped by the security guard who

asked if they had any union material with them. The other nurse was wearing a nurses' uniform; Stull was wearing street clothes. The other nurse replied no and went on, and the guard again asked Stull, prior to the time she had been able to show him her hospital identification, whether she had any union material with her. She said no. The guard stepped in her path, directly in front of her, and after she had displayed her hospital identification, said, "Well, if you have any union material with you and you take it in with you, you will be written up." Stull, in a louder than normal tone of voice, advised him that she had already said that she had no such material. As she proceeded to walk around him and into the hospital lobby, she made some remark to him about not being able to enter the hospital without being bothered. As she was walking through the lobby she saw Bowers and Vosburgh standing nearby in front of the gift shop.

Vosburgh had apparently seen the incident or had overheard Stull's comment, and approached her and asked what had happened. Stull told her, and Vosburgh said that the guard should not have done that and that she would take care of it. Then she walked back toward the lobby.

Denise Kennedy began working for the hospital in May 1989. She works in NICU. Kennedy testified that on the evening of May 3, as she was walking from the parking structure to the main door of the hospital, she observed Bowers standing outside the main door searching a nurse's large white cloth bag. As she approached the main door of the hospital and was within 3 feet of Bowers, she observed that Bowers was looking into the bag of a different nurse: he had both of his hands in her bag, and Kennedy overheard him ask the nurse what she had in the bag. Kennedy was surprised to see this, believing it was an invasion of privacy. A security guard was sitting in a chair about 3 or 4 feet away.

Thanhloan Ho has worked in the cardiothoracic surgery unit since December 1992. On the evening of May 3, at about 6:30 p.m., Ho was handing out union materials to nurses who were going to work. Large boxes of fortune cookies were being distributed to some nurses. The boxes were the size of a donut box—about 8 by 12 by 3 inches—and nurses were given the boxes for the purpose of distributing the fortune cookies to other nurses in their units. Ho observed that a hospital security guard was standing on the opposite side of the street. One nurse, who had been given a box of fortune cookies, was stopped by the security guard after she crossed the street; then the nurse walked into the hospital. Ho, asked by one of the union representatives to follow the nurse and find out what had happened, entered the hospital lobby but could not locate that nurse. However, while she was in the lobby of the hospital she saw another nurse with a box of fortune cookies standing near the elevators. She observed Bowers and a security guard approach the nurse, and overheard Bowers say that he wanted to see what was in the box. The nurse opened the box for him. Bowers said something to the effect that the box just contained cookies and not flyers. Then Bowers said "fine," and walked away. Ho then returned to the group across the street.

Later, when Ho entered the hospital to begin her shift, she was carrying some union flyers. The guard stopped her and told her that if she passed out those flyers she would be written up. Ho said she "had a right" to those flyers and pro-

ceeded to walk past the guard into the hospital. She distributed the flyers in the hospital to other nurses.

Marianne Jenny, a CCU nurse who has been employed by the Respondent since 1989, was assisting the Union in distributing materials outside the hospital on May 3. On the evening of that day, at about 6:30 p.m., Jenny saw Bowers standing outside the entrance to the hospital and observed him stopping a nurse who was carrying a box of fortune cookies that had been given to her by the union supporters. Bowers opened the box and went through them with his hands. Then the nurse entered the hospital.

Leila Valdivia, an organizer for the Union, testified that she observed a security guard stop a nurse who had been given a box of fortune cookies; the guard reached his hand in the box and was rummaging around. The nurse then continued walking toward the hospital entrance and was again stopped, this time by Bowers. Bowers looked through the box and then the nurse proceeded to walk into the hospital.

The union supporters again assembled across the street from the hospital on the following day, May 4, in the morning and evening, and distributed the same materials to the nurses, including the boxes of fortune cookies. Valdivia was there on each of the four separate occasions, namely, both the morning and evening of May 3 and 4, and testified that she did not observe that any of the nurses were stopped by anyone on May 4.

Carole Huyck testified that on the evening of May 3, she was helping the union supporters pass out the various materials, and observed Bowers and Vosburgh near the entrance to the hospital. During the evening, a security guard walked across the street to where the union activity was taking place, and asked if he could look inside one box of fortune cookies. He looked inside, and closed the box. The guard remained on that side of the street near the periphery of the group of union supporters, within hearing distance of their conversations with the nurses who were arriving at work, for about 45 minutes; then another guard relieved him, and also remained and observed the union activity for about 45 minutes.

The record evidence clearly shows that throughout the preelection period union literature was handed out in the hospital by the nurses in the various lounges on breaktime, and was posted on bulletin boards in the lounges. There is no contention that such activity was prohibited.

Bowers denied that he stopped any nurses outside the hospital on May 3, and looked into boxes or bags they may have been carrying, or that he questioned them about the Union or anything related to the Union. He testified that on a Monday evening (May 3 fell on a Monday) at about 6 p.m., as he was leaving his office on the way to his car, a security guard approached him in the lobby of the hospital and said, "Sir, would you come with me." Bowers thought this was a little strange and that there must be something going on. The guard said, "Would you stand here, sir." Bowers stood in the hallway next to the elevators, and the guard asked an individual, probably a nurse waiting for the elevator, to open her bags. Bowers stood about 10 feet away. The lady opened her bag and the guard said, "May I look in the bag." The guard looked in the bag, and when that was completed the nurse got in the elevator and Bowers went to the physicians' parking garage and left the premises; he did not exit out the main entrance of the hospital.

Bowers testified that he did not ask the security guard why he stopped the lady or why the guard wanted him to observe the searching of her bag, and does not recall the name of the security guard. Vosburgh, according to Bowers, was not present. Bowers further testified that prior to this incident he had not been advised by anyone and did not know that any union supporters were distributing materials and fortune cookies outside the hospital that day. Further, neither the security guards' supervisor, nor any security guard, ever spoke to him about how they intended to deal with the union activity at the hospital.

Neither Vosburgh nor any security guard testified regarding the matter of stopping nurses on May 3, searching their bags or boxes of fortune cookies, or warning them about distributing union literature in the hospital. Vosburgh, however, did testify about the May 3 incident involving Elsa Yui.

#### 7. The alleged April 22 threat of Clinical Director Tolentino

Sharon Eilat is a nurse in ICU and has been employed since 1989. Eilat testified that on Thursday, April 22, Clinical Director Loretta Tolentino approached her in the ICU unit, introduced herself as a fifth floor clinical director, and asked Eilat how her job was going. Eilat said that things were not going very well for her, and added that she was proud because of this. Tolentino said that the Union couldn't help her and was not good for the hospital. Tolentino had some papers with her in a notebook, and the top paper had to do with nurses at Kaiser Hospital. Tolentino said, according to Eilat, that when the Kaiser contract was up, the Kaiser nurses were going to lose their 12-hour shifts, and that she knew that a lot of the Respondent's nurses had second jobs and families. She "kind of patted" the Kaiser flyer and again said that the Kaiser nurses were going to lose their 12-hour shifts.

Eilat replied that she didn't have a second job to lose, and there ensued some further discussion: Eilat "adamantly" supported her position that the Respondent would not switch to an 8-hour shift, saying that she didn't think this was economically feasible, that there were not enough nurses to fill three shifts, and that if the hospital had to hire more nurses it would cost them more for benefits. Tolentino replied to her arguments by trying to convince her that, in fact, it was economically feasible. Tolentino ended the discussion by again saying said that the Union couldn't help her and it wasn't the way to go. Eilat said that she was going to vote for the Union anyway, and Tolentino thanked her very much and said it was nice to have met her.

Eilat testified that working a 12-hour shift 3 days a week is beneficial to most nurses. It enables Eilat to have a family life and to spend more time with her small child, and also makes it possible to have a second job during the off-duty days. In addition, the 12-hour shift translates into more money for the nurses, as the last 4 hours of each shift are paid at time-and-a-half.

Tolentino was not called as a witness by the Respondent.

#### 8. The May 27 termination warning to Efren Devera by Assistant Vice President Barbara Brown

Efren Devera has been an ICU nurse since 1987. He was an active union proponent and wore a union button at work

prior to the election. Devera was suspended for a period of time, and in conjunction with this disciplinary action his clinical director, Ann Bramhall, required him to attend a meeting with an employee assistance counselor on May 26. On May 25, Devera advised Bramhall that he was scheduled to work in ICU on May 26, and requested that she make the employee assistance appointment on a day that he was not scheduled to work. Bramhall denied this request and said that time could be found for the appointment during the workday on May 26. Devera did keep his appointment with the counselor on May 26, as scheduled. The appointment lasted about an hour, and Devera was paid for his time.

Devera also worked on the following day, May 27. On that day he happened to be talking to another nurse, Edna Marki, who casually mentioned in passing, apparently to someone else, that she had been canceled from working her shift on May 26. When Devera overheard this he "approached her" and told her that he had been willing to voluntarily take off work on May 26, and had offered to do so, but that Bramhall had denied his request. Marki, according to Devera, appeared disappointed.

Later that day, Bramhall approached Devera and asked him to come to her office. Barbara Brown, vice president of nursing, was present. Bramhall said that Marki had complained that she, rather than Devera, had been canceled on May 26, although Devera had asked to be canceled that day. Brown said that she was running out of patience with Devera, that this wasn't the first time he had made such comments that could create trouble in ICU, and that such comments would "add to more trouble in an already troubled unit." Brown said that he should consider this to be a final warning, and that one more such comment of this nature would result in his termination.<sup>10</sup> Devera asked Brown to put this in writing. Brown refused, and told Devera to just consider it a counseling.

Nurses are canceled with some frequency, depending on the "census" or number of patients needing care on a particular day. A work schedule is made a month in advance. Cancellations are made at about 5 a.m. on the day of the cancellation. At the time Devera requested to be canceled for his May 26 shift, namely, at about 2 p.m. on May 25, there was no way for Bramhall to know whether he would be needed or not. It has been a long standing practice that cancellations are customarily done by rotation, so that a particular nurse does not receive excessive cancellations. According to Devera, cancellations are common, sometimes as many as two times within a pay period of six scheduled workdays. Devera testified that he simply made a casual statement of fact to Marki and was not attempting to cause dissension within the unit.

<sup>10</sup> Devera had previously been given a final warning relating to his performance and his attitude as a result of an incident a few weeks earlier when he had removed a pencil and paper from a patient in his care who had just had throat surgery. The following day he was suspended for 3 days for refusing to accept a transfer patient into his unit. On May 17, when he returned to work, he was given 3 months' probation and was required to attend a session with the employee assistance counselor, as mentioned above.

## 9. The Respondent's campaign literature

During the course of the preelection campaign, the Respondent distributed various letters and leaflets to the nurses or to other employees of the hospital. The complaint alleges that four such pieces of literature contain statements which are violative of the Act.

A letter dated April 15 was sent by the Respondent to employees other than bargaining unit employees. It is addressed to "Dear Good Samaritan Employee," and is signed by Dr. Bowers. It urges the employees to let the registered nurses know how they feel about the Union, as "the outcome of the election could have a dramatic impact on everyone who works at Good Samaritan, including yourself." The letter states, in pertinent part:

As you know, we rely on physicians from other hospitals to refer their patients to Good Samaritan for specialty services. No one can predict the future, but the threat of a union strike might cause these physicians to send their patients to other, more stable hospitals. We are already struggling, and any drop in census could hurt everyone.

If we look at what this union is doing at Kaiser, we can see how everyone's job security can be threatened. *For example, Kaiser officials recently said that the union's threat of strike could have a "long-lasting and devastating effect" and "result in significant layoffs."* We do not want even the chance of that here. [Emphasis in original.]

A letter dated April 22, addressed to "Dear Good Samaritan Nurse," sets forth a quotation from a union publication stating that the law requires the employer to bargain in good faith over wages, hours, and working conditions, but does not require the employer to agree to the Union's bargaining proposals. The letter goes on to state:

With Local 535, you put your 12-hour shifts, the weekend differential and your current wages all at risk. *The law is clear, it is just as likely that you could end up with less after bargaining as you could with more.* In fact, at El Centro Community Health Center, Local 535 took employees out on an 11-week strike and then agreed to a 2% cut in pay. [Emphasis in original.]

The union cannot use the law to force hospitals to agree to any of their demands. But it can and has used the threat of strike. This is why I am so concerned about the union getting in at Good Samaritan. *The union's threat of strike is their ultimate bargaining weapon.* [Emphasis in original.]

An undated "Good Samaritan Hospital fact sheet" was distributed to the nurses, with the heading, "There are no guarantees in collective bargaining — you could just as easily end up with less as you could more." The fact sheet then lists some examples of what the nurses put at risk through collective bargaining, and how such items have been resolved in other contracts negotiated by the Union. One example, which the General Counsel deems to be violative of the Act, states that the nurses' 12-hour shifts are put at risk, as follows:

(AMI Tarzana contract) 12-hour shifts can be eliminated with 60 days notice—the union can do nothing about it. (Kaiser contract) 12-hour shifts are effective only until April 1994.

An undated two-page document entitled “Thoughts About Unions” was distributed by a group referred to as “Nurses for Nurses; From Good Sam’s Nurses who do not want Union.” It was posted on the hospital’s bulletin boards. The document contains the following:

When asked why some employees want a union, they reply, “More money.” I haven’t heard about anything else but this reason for a union. I want to say to those people, “Wake up and smell the unemployment!” I know of so many companies who are laying off, freezing wages and bonuses. The “more money” people don’t seem to remember that when Good Sam a [sic] had the money, they could make up to 10% raise. And as revenues decreased, the raises unfortunately had to go down. We are now in a recession of nasty proportions with unwanted results.

In addition, the document deals with the possibility and ramifications of a strike: it expresses doubts that doctors would be able to take over patient care in the event of a strike, and questions whether true health care professionals could really walk out on people who need them. Further, the document contains the following:

And this doesn’t even cover the personal aspects about going out on strike. Some things to really think about:

- a. Could you afford to go on strike?
- b. Do you realize that if a strike is called and you work instead of striking, you will be heavily fined for everyday you work during that strike?
- c. Could you deal with the abandonment of your work?
- d. Could you deal with what may happen if you cross the picket lines (other than fines?)

In addition to the foregoing literature which, in part, the General Counsel deems to be violative of the Act, the Union maintains that other leaflets should be considered as evidence in support of its election objections.<sup>11</sup>

A letter to the registered nurses dated April 27, signed by Dr. Bowers, contains the following:

One of my chief concerns about the current union organizing effort is SEIU and Local 535’s reputation for strikes. We have discovered that this union has a secret

<sup>11</sup> The Acting Regional Director’s Supplemental Decision states that specified complaint allegations are “co-extensive” with certain union election objections, and that the issues raised by the objections could best be resolved by hearing together with the hearing on the unfair labor practices. Based on this language, the Respondent argues that the Union’s objections to the campaign literature of the Respondent are limited to those four pieces of literature specified in the complaint, and that the Union may not use any other campaign literature as a basis for its objections. While the Respondent’s inferential argument is plausible, I conclude, in the absence of any clear and unambiguous statement to the contrary, that the Acting Regional Director did not intend to so limit the Union’s use of other campaign materials in addition to those specified in the complaint.

48-page “*Strike Manual*” that explains in detail how to take employees out on strike. The union admits in this secret manual that:

“Collective bargaining and the negotiations process are real only when the union can back up its demands with a credible threat of strike.”

No one can predict that a strike will occur at Good Samaritan, but here is what this union has done:

SEIU unions, like Local 535, have taken thousands of employees out on 164 strikes in just the last six years.

*Local 535 has taken Kaiser RN’s out on three separate strikes and threatened a strike at Tarzana in 1991.* [Emphasis in original.]

Some SEIU unions’ strikes have lasted almost a full year.

*This union is serious about strikes—they even talk in their “Strike Manual” about how to assist you in applying for welfare benefits while out on strike.* No one knows what will happen, but I am sure the nurses at Kaiser were told by this same union not to worry about strikes—and they have gone out on strike three times. [Emphasis in original.]

I strongly encourage you to vote NO to this particular union and its reputation for strikes. Voting NO next Thursday or Friday is the only way to insure that the conflict of a strike never occurs here.

An undated Good Samaritan Hospital leaflet entitled “Facts,” states that the SEIU has represented employees at Kaiser for several years, and has failed to obtain certain specified contractual items. The fact sheet goes on to state:

Most importantly, since they have failed at the bargaining table, SEIU is preparing to take its members out on strike.

Confrontation, strikes, diverting patients to other hospitals, threatening everyone’s job security—*this is SEIU!* [Emphasis in original.]

Another document, entitled “Strike Information,” contains nine questions and answers about the how a strike would impact the nurses. It advises them that they would be ineligible to receive unemployment benefits; that they could be permanently replaced; that their return to work following a strike would not be automatic if the patient census is down; that the nurses who work during the strike could face public attacks by the Union; that the Union has taken employees out on strike before the first contract was negotiated, and the strike was reported as being violent, with threats of physical intimidation; that the nurses would have to continue paying union dues during a strike; and, finally, that they should vote “NO” if they do not want even the chance of a strike.

The evidence shows that most nurses were personally handed a sheet of paper by their clinical directors, framed with an elaborately designed border, entitled “The Hospital of the Good Samaritan Personal Strike Calculator.” Each such document is individualized with the nurse’s name and unit, and specifies the total amount of wages he or she would have lost, based on that nurse’s specific wage rate, had the nurse gone out on strike at each of four different hospitals

where strikes had occurred in the past. Further, the document specifies for each strike situation the "Length of time for you to regain lost wages if the difference in management's final offer and the contract settlement were the following: \$0.45/hr; \$0.30/hr; \$0.15/hr"; thus, the Personal Strike Calculator demonstrates that it could take years to recoup the loss in wages resulting from a lengthy strike.

10. The Union's objection to the Respondent's use of Ronald Masson as an election observer

The Union objects to the Respondent's use of Ronald Masson, a registered nurse who sometimes works as a "relief house supervisor," as an election observer. Masson acted as an observer for 3 hours during one of the polling sessions. Masson's name was placed on the eligibility list submitted by the employer, and his ballot was challenged by the Union.

Masson has been employed by the Respondent since February 1992. He is a resource nurse on the day shift in the emergency room. Resource nurses are not supervisors. His immediate supervisor is the clinical director of the emergency department. Masson testified that he also sometimes acts as a "relief house supervisor," and in this capacity he fills in on an irregular basis if something unforeseen happens and neither the regular house supervisors nor the regular relief house supervisors are able to work. He spends a very small percentage of his time in this capacity. As a relief house supervisor he is stationed in the nursing office and makes the rounds of the various hospital units to insure that things are operating smoothly. He has the authority to increase or reduce staffing, as the situation warrants, and may take immediate disciplinary action if necessary; otherwise, he makes recommendations regarding discipline or other matters to higher supervision. In emergency situations he contacts higher supervision, which individuals are always on call.

*C. Analysis and Conclusions*

The representation petition was filed on February 25. On that day, shortly after Clinical Director Donevant had been summoned to an emergency meeting regarding the Union, she returned to the CCU unit and counseled Susette Nacorda for permitting her friends from another unit to talk with her or wait for her to go on break with them, as they had done on previous occasions that week. I credit the testimony of Nacorda and find that Donevant told her to tell her friends from CSU (the cardiothoracic surgical unit) to stop coming to see her in CCU, and that if they continued to do so both Nacorda and her friends could be in a lot of trouble. Further, I find that Donevant went on to say, "And if they don't stop coming, we could be terminated and the Union can't do anything for us, to protect us."

I do not credit Donevant's testimony that she could not have counseled Nacorda on February 25. Nacorda appeared to have a vivid recollection of the incident, and recalled that it occurred on the day she presented the petition to Vosburgh. Donevant's testimony, premised on her alleged recollection of a sequence of events, is not convincing under the circumstances.

I credit the testimony of nurses Nacorda and Gles Gardoce-Padeo and find that it had been a common occurrence for nurses to engage in the practices which Donevant thereafter sought to prohibit. I do not credit Donevant's

uncorroborated testimony that such practices had always been contrary to established rules; nor do I credit her denial that she mentioned the possibility of termination should Nacorda and her friends continue to meet in CCU as they had done in the past.

I find that Donevant was well aware of Nacorda's prouion sympathies as a result of her outspokenness and the fact that she had worn a union button for several days prior to February 25. In this regard, I find no merit in the Respondent's position that union buttons were not introduced until February 25 or thereafter. As there appears to be no legitimate reason for Donevant's conduct, I find that the counseling and warning of termination to Nacorda was motivated by a desire to limit the extent of Nacorda's union activity and the activity of her prouion friends. By such conduct, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged.

It appears from the documents introduced into evidence that approximately 17 nurses were selected to occupy the position of unit-based educator for their respective units. It is clear from the documents and from the testimony of Lima that the unit-based educators began functioning in their new positions on April 1, the day they attended an all-day orientation and training session and were given their first assignment, namely, to create a needs assessment tool for their respective units.

It is clear that the new position was one which required some greater degree of experience and nursing expertise, and that the nurses who were selected for the position were to assist in the orientation and training of new nurses and the continuing education of nurses in their units. Further, while there was to be no immediate increase in pay, the unit-based educators' duties required that they perform functions other than the usual patient care functions approximately one-third of the time, and that their future evaluations would reflect the responsibility they had undertaken as unit-based educators. Accordingly, appointment to this newly created position clearly affected various work-related activities and constituted an immediate and significant change in the nurses' conditions of work, with new and challenging job opportunities and the possibility of attendant wage increases in the future. Thus, I find no merit to the Respondent's apparent argument that the position of unit-based educator was an insubstantial change from the nurses' customary role of caring for patients.

The abundant and detailed documentary evidence which demonstrates that the position of unit-based educator was enthusiastically accepted and endorsed by supervisors and managers with significant authority, and that the program was in fact implemented on April 1, belie Vosburgh's attempt to explain away the documents and events as being premature and unauthorized, and beyond the authority of Davidson; nor did the Respondent introduce any documentary or testimonial evidence supporting Vosburgh's assertion that the position of unit-based educator had to be placed on hold until September for budgetary reasons. Indeed, Vosburgh testified that, with regard to unit-based educators, there were "budgeted positions that were unfilled" and that "we had dollars for positions, and the way we wanted to allocate them was to have an educator for each of the specialties."

Further, it is significant that Vosburgh did not see fit to discipline Davidson in any manner for such an alleged unau-

thorized, costly and time-consuming process of planning for, selecting, and training a complement of 17 nurses to perform unit-based educator duties, and for taking them away from their regular patient care duties. Moreover, Davidson allegedly did all these things in direct disregard of Vosburgh's specific and repeated admonitions to refrain from such activities. Under the circumstances, Vosburgh's failure to take some significant disciplinary action against Davidson for gross insubordination provides convincing evidence that Vosburgh's entire account of the unit-based educator matter is not to be credited, and that it was for other than budgetary reasons that the then ongoing program of unit-based educators was discontinued.

It is significant that Vosburgh decided to put the program on hold within several hours after speaking with Lima in the cafeteria. Lima was wearing a union button at the time. Further, she had been one of the 25 nurses who presented Vosburgh with a petition for recognition on February 25, and had testified on behalf of the Union in the earlier representation hearing in March. Thus, it appears that perhaps the Respondent did not want pronoun nurses to be placed in positions which would provide them with greater opportunities to influence their coworkers. Indeed, Clinical Director McGann told Lima and Currie, after receiving the e-mail message from Vosburgh, that she thought the program was being placed on hold because of the union activity in the hospital. In any event, the program was admittedly discontinued because of the impending union election, as Vosburgh so advised the assembled unit-based educators.

The law is clear that it is unlawful to discontinue a pre-existing benefit for antiunion reasons; and an employer must proceed with its business decisions as if the union were not in the picture. The unit-based educator program was clearly in the process of being implemented prior to the February 25 date of the filing of the representation petition. Thus, up to that point, the announcement for the new positions had been circulated, the applicants had applied, and by early February the interviewing process had been conducted. Thereafter, following the filing of the petition, the Respondent continued the process by awarding the positions to 17 individuals, by holding an orientation and training session on April 1, and, finally, by taking the unit-based educators from their regular patient care assignments and assigning them entirely different unit-based educator duties during one shift per week.

Thus the Respondent was not privileged to discontinue the program and, in effect, to rescind the benefits that had previously been conferred on the unit-based educators. As the Board stated in *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 fn. 1 (1967):

As a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture. On the other hand, if an employer's course of action is prompted by the union's presence, then the employer violates the Act whether he confers benefits or withholds them because of the union. [Citations omitted.]

See *LRM Packaging*, 308 NLRB 829, 830 (1992); *Laidlaw Waste Systems*, 307 NLRB 52 (1992); *Gerkin Co.*, 279 NLRB 1012 (1986). By such conduct I find

that the Respondent has violated Section 8(a)(1) and (3) as alleged.<sup>12</sup>

The testimony of Lima regarding Clinical Director McGann's remarks at the April 27 NICU resource meeting is somewhat ambiguous. Thus, Lima testified that McGann may have stated both that the positions of assistant clinical director would be created "if the Union was not voted in," and that "the positions would be created once the union question was resolved"; and at the conclusion of her testimony, it appears that Lima impliedly acknowledged that McGann merely "indicated" rather than specifically said that the positions would be created if the Union were not voted in. There is no corroboration of Lima's testimony, and three other nurses who attended the meeting testified that the Union was not mentioned. Under the circumstances, even if the Union was mentioned, McGann's remarks at this meeting are of sufficient doubt to preclude my finding of the alleged violation. Therefore I shall dismiss this allegation of the complaint.

The complaint alleges that Dr. Bowers made several statements and/or threats violative of Section 8(a)(1) of the Act during his May 1 remarks to about 10 assembled nurses. Thus, it is specifically alleged that he threatened employees with the closure of the facility if the Union were voted in; that he told employees that the Respondent would not negotiate with the Union or work with the Union, thereby indicating the futility of voting for the Union; and that he told employees it would be necessary to strike in order to obtain bargaining demands.

It is significant that Bowers held 22 such meetings, many of which, it may be reasonably presumed, were attended by union supporters; yet there is no contention that Bowers made any statements violative of the Act in any meeting other than the May 1 meeting. Further, it appears unlikely that Bowers would make such blatantly unlawful statements as attributed to him by Breganza and Huyck in the presence of nurses who were demonstrably union supporters. Finally, a careful comparison of the testimony of Breganza and Huyck demonstrates that their testimony was not entirely consistent: for example, Huyck testified, at one point, that Bowers said the nurses would have to strike even to get the Respondent to the bargaining table, while Breganza did not attribute such a statement to Bowers. And Huyck's testimony was sometimes internally inconsistent: thus she maintains that Bowers said that he wanted to keep the hospital operating and did not want it to close, but also said that maybe the hospital should be closed. Assuming that Bowers said both of these things at various points, such ambiguity does not appear to amount to a threat to close the facility if the Union is voted in. While it appears that Breganza and Huyck were forthrightly attempting to relate their interpretation of Bowers' remarks, I credit the accounts provided by

<sup>12</sup>I also conclude that McGann's April 6 comment to Lima and Currie to the effect that it was her belief that the program was being discontinued because of the union activity constitutes an independent violation of Sec. 8(a)(1) of the Act. Similarly, I find that the statement Vosburgh made to the entire group of unit-based educators sometime later is also violative of the Act. I find the evidence insufficient to conclude that the program was discontinued because of Lima's testimony on behalf of the Union at the representation hearing in March; thus, I do not find an 8(a)(4) violation, as alleged.

McClarity and Gentle regarding the specific aforementioned complaint allegations as being, in essence, the more reliable, and find that Bowers did not make the statements alleged herein as being violative of the Act. Accordingly, I shall dismiss these allegations of the complaint.

The events on May 3 are curious in light of the fact that there had apparently been no prior interference with the right of the nurses to disseminate union literature within the hospital. Apparently, May 3 was the first time the Union had distributed materials to nurses outside the hospital premises, and, such unanticipated activity prompted the Respondent's spontaneous reaction. What the Respondent was looking for in the boxes of fortune cookies must remain a matter of speculation, as the Respondent proffered no explanation for its conduct. Regarding the interference with the May 3 union activity by the security guards, the Respondent called no security guards to deny that they stopped nurses on hospital premises as they were coming to work and searched their bags and fortune cookie boxes; told nurses that they would be written up if they brought union flyers into the hospital; and remained across the street from the hospital in close proximity to the ongoing union activity in order to observe such union activity. On the next day, May 4, the guards apparently discontinued such searching and surveillance activity, and there were no similar incidents.

I find no merit in the Respondent's contention that the guards were not agents of the Respondent and simply acted in an unauthorized manner on their own volition; the guards are employed by the Respondent, and there is no credible evidence that their conduct was unauthorized.<sup>13</sup> Indeed, Dr. Bowers, the hospital's president, was asked to observe such a search by a security guard, and not only did not instruct the guard to discontinue such searches, but did not even ask the guard why he was searching nurses' belongings. Further, I do not credit the denials of Bowers, and find that he, too, engaged in similar activity.<sup>14</sup> I find that by such conduct the Respondent has engaged in unlawful surveillance, threats,<sup>15</sup> and searches of employees as they were entering the premises on May 3, and that such conduct by the Respondent had an inhibiting effect on lawful union activity. Accordingly, I find that by such conduct the Respondent has violated Section 8(a)(1) of the Act as alleged. See *Sands Hotel & Casino*,

306 NLRB 172 (1992); *Reeves Southeastern Corp.*, 256 NLRB 574, 578 (1981); *Southern Moldings, Inc.*, 255 NLRB 839, 851, 852 (1981), enfd. 728 F.2d 805 (6th Cir. 1984); *Intermedics, Inc.*, 262 NLRB 1407, 1415 (1982), enfd. 715 F.2d 1022 (5th Cir. 1983); *Russ Togs, Inc.*, 253 NLRB 767, 775-776 fn. 6 (1980); *Woodland Molded Plastics Corp.*, 250 NLRB 169 (1980); *Arthur Briggs, Inc.*, 265 NLRB 299 fn. 2 (1982).

I shall dismiss the allegation of the complaint regarding the May 3 Vosburgh-Yui-Breganza incident. Breganza, who was off duty on the day in question, approached Vosburgh and Yui on hospital premises, and injected herself into a private conversation which did not concern her. She was repeatedly asked to leave and to conduct her union business across the street, and did not do so. Accordingly, I find that Vosburgh's several requests that she leave, and the security guard's actions in escorting her across the street, under the circumstances, do not constitute interference with legitimate union activity.

The April 22 discussion between Eilat and Clinical Director Tolentino appears to be no more than a frank disagreement regarding their respective positions relative to the feasibility of going from a 12-hour shift to an 8-hour shift. Tolentino was implying that if this was being done at Kaiser Hospital, where the nurses were represented by the Union, it would also be feasible for the Respondent. Eilat disputed this. It does not appear that the remarks of Tolentino were couched in terms of a threat. I shall therefore dismiss this allegation of the complaint.

The May 27 warning of termination by Assistant Vice President Barbara Brown to Efrén Devera occurred several weeks after the election, and is unconnected with the union campaign. It is alleged that Devera received such a warning because of his "union and/or protected concerted activity." The concerted activity involved here, according to the General Counsel, is Devera's casual remark to Marki that he had volunteered to be canceled on May 26. This apparently upset Marki, who had been canceled, and she thereupon voiced her displeasure to her supervisor. As a result, Devera was given a warning for, in Brown's words, "add[ing] to more trouble in an already troubled unit."

It is clear that the admittedly casual conversation between Devera and Marki was not intended to constitute concerted activity for the purpose of changing the hospital's long-established cancellation practice or to otherwise affect the employees' wages, hours, or working conditions. Marki, who is the one who did the complaining to her supervisor, was not disciplined or reprimanded. While, under the circumstances, the warning to Devera may have been unwarranted, the General Counsel has not demonstrated by the citation of any authority that such conduct by Devera and/or Marki is concerted activity within the meaning of the Act, or that the warning by Brown is violative of the Act.

The complaint alleges that four campaign documents, detailed above, contain statements violative of Section 8(a)(1) of the Act. Thus, it is alleged that the April 15 letter impliedly threatens employees with loss of benefits and/or employment; that the April 22 letter impliedly threatens employees with loss of benefits and/or employment; that the document entitled "Hospital of the Good Samaritan Fact Sheet" impliedly threatens employees with loss of benefits;

<sup>13</sup> See *Clark's Discount Department Stores*, 168 NLRB 273, 278 (1967), enfd. in pertinent part 407 F.2d 199 (6th Cir. 1969).

<sup>14</sup> The record contains much evidence regarding Dr. Bowers' conduct. The Respondent takes the position that such conduct never occurred or that if it did, it was committed by some unidentified individual other than Bowers. In this regard, the Respondent introduced photographs of the premises with foliage and shadows obscuring the hospital's main entrance, and the General Counsel introduced photographs taken from similar vantage points tending to demonstrate that individuals near the hospital's entrance could be readily identified from across the street, where the union supporters had congregated on May 3. I credit the various individuals who identified Bowers as being the individual involved in some of the searches; indeed, one of them was within 3 or 4 feet of Bowers at the time he was engaged in such activity.

<sup>15</sup> Regarding the encounter between a security guard and Billy Jean Stull, it appears that Vosburgh, who was standing nearby and questioned Stull about the matter, immediately told Stull that the guard should not have done what he did and that Vosburgh would take care of it. Accordingly, I find that Vosburgh effectively dissipated the coercive effect of the guard's conduct on Stull.

and that the document entitled “Thoughts About Unions” impliedly threatens employees with job loss. I do not agree.

The General Counsel, in support of these complaint allegations, cites the following cases: *Overnight Transportation Co.*, 296 NLRB 669 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991); *Phillips Industries*, 295 NLRB 717 (1989); *Harrison Steel Castings Co.*, 293 NLRB 1158 (1989); *Richlands Textile, Inc.*, 220 NLRB 615 (1975); *Dean Industries*, 162 NLRB 1078 (1967); and *Star Kist Samoa, Inc.*, 237 NLRB 238 (1978).

The campaign propaganda and factual circumstances in each of the foregoing cases is clearly distinguishable from the Respondent’s campaign propaganda here. In the cited cases the employer, either explicitly or, more subtly, by strong implication, conveyed the message, either verbally or in writing, that it would fail and refuse to bargain in good faith with the union, or would shut down its plant, or, as a result of other serious unfair labor practices, would not hesitate to do something else that would make a strike or loss of benefits inevitable. With such unlawful threats as a basis or predicate, repeated references to a strike and its consequences on the employees become unlawful. Without such a predicate, the employer’s emphasis of the mere possibility of a strike or loss of benefits, no matter how many times repeated, and regardless of the number of variations on these themes,<sup>16</sup> does not appear to be unlawful. I find that the statements of the kind contained in the above-described letters and leaflets disseminated by the Respondent during the election campaign, under the circumstances here, constitute permissible campaign propaganda protected under Section 8(c) of the Act, and do not constitute unlawful threats of loss of jobs or benefits. See *Clark Equipment Co.*, 278 NLRB 498 (1986); *Morristown Foam & Fibre Corp.*, 211 NLRB 52 (1974); *Histacount Corp.*, 278 NLRB 681 (1986); *Computer Peripherals, Inc.*, 215 NLRB 293 (1974).

Thus, in *Morristown Foam & Fibre Corp.*, *supra*, the employer distributed 12 letters, leaflets, and handouts during the critical preelection period. The Board stated as follows:

The Regional Director found that the Employer’s literature made continued reference to violence, disaster, threats to kill, loss of jobs, plant closure, and long, costly strikes, and that such a constantly recurring theme created an atmosphere of fear and a belief among the employees of the inevitability of strikes and loss of jobs and ultimately plant closure if they selected the Petitioner as their bargaining representative, thereby preventing them from exercising a free and untrammelled choice in the election.

Contrary to the Regional Director, we do not find that the literature distributed by the Employer exceeds the permissible limits of electioneering propaganda or that the employees were not capable of evaluating the literature as electioneering propaganda. Accordingly, we would not find the employees were prevented from exercising a free and untrammelled choice in the election.

In support of its election objections, the Union maintains that certain additional pieces of campaign literature, coupled

<sup>16</sup>It is conceivable, of course, that incessant references to strikes and their consequences could become tantamount to “brainwashing,” but that is not this case.

with the four pieces of literature advanced here by the General Counsel as being violative of the Act, demonstrates to the employees the inevitability of a strike, and therefore constitutes objectionable conduct. In support of this argument, the Union cites the following cases: *Fred Wilkinson Associates*, 297 NLRB 737 (1990); *Thomas Products Co.*, 167 NLRB 732 (1967); *Turner Shoe Co.*, 249 NLRB 144 (1980). These cases are also distinguishable from the instant facts.

While the additional campaign literature, detailed above, contains still more variations on the strike theme, it also appears to lack the necessary predicate of a clear threat or strong implication of the inevitability of a strike. Rather, the statements contained in such literature convey only the possibility of a strike, and go on to discuss the effect that the mere threat of a strike could have on the Respondent’s operations, and the consequences of a strike on the Respondent’s employees. I conclude that these repeated references to strikes, without more, constitute permissible campaign propaganda. Therefore, I shall recommend that this objection be overruled.

Regarding the Respondent’s use of Relief House Supervisor Ronald Masson as an election observer, it is recommended that this objection be overruled.<sup>17</sup> In *Canonsburg General Hospital Assn.*, 244 NLRB 899 (1979), a case directly in point, the Board found that a relief supervisor with the same duties and responsibilities as Masson, who filled in on an irregular basis when the regular and regular relief supervisors were unavailable, as is the case with Masson,<sup>18</sup> was not a supervisor within the meaning of the Act and was eligible to vote in the election even though the individual “possessed the same authority over the employees as that of a nursing supervisor.” There appear to be no factual distinctions here which would warrant a different conclusion.

#### 11. Conclusions regarding the election objections

I have found that during the critical preelection period commencing with the date of the filing of the representation petition, February 25, until the date of the election, May 6, the Respondent committed various unfair labor practices. Namely, it “counseled” and threatened termination of an employee for meeting with other employees on their breaks in an effort to inhibit their discussions about the Union; it discontinued the unit-based educator program, already in progress, and blamed such discontinuation on the advent of the Union; and it engaged in unwarranted searches of employees and surveillance of their union activities as they were entering work, and threatened them with reprimand if they brought union material into the hospital.

Given the nature of these unfair labor practices together with the number of employees who were directly affected or who may have been indirectly affected by them, in comparison with the relative closeness of the election results,<sup>19</sup> I recommend to the Board that the election be set aside and that

<sup>17</sup>In its brief, the Union has withdrawn another election objection pertaining to the Respondent’s alleged untimely or deficient posting of the Notices of Election.

<sup>18</sup>Masson filled in as relief supervisor on about 25 occasions within the 9 months preceding the May 1993 election.

<sup>19</sup>Of approximately 575 eligible voters, 554 ballots were cast, of which 277 were cast against the Union, 236 were cast for the Union, 41 ballots remained challenged, and 1 ballot was void.

a new election be conducted. Cf. *Clark Equipment Co.*, supra at 505.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated the Act as specified above.
4. The Respondent has not engaged in any other violations of the Act.
5. The unfair labor practices found here constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. The election objections filed by the Union should be sustained to the extent found here, and the previously conducted election should be set aside and a new election directed.

#### THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Affirmatively, it shall be required that the Respondent reinstitute the unit-based educator program which it discontinued after the advent of the Union. Moreover, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix."

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

<sup>20</sup> 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.

#### ORDER

The Respondent, the Hospital of the Good Samaritan, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
    - (a) Counseling and warning employees to discontinue the established custom of visiting each others' units during breaktime in an effort to limit their union activity.
    - (b) Discontinuing the established and functioning unit-based educator program because of the advent of the Union.
    - (c) Engaging in surveillance of employees' union activities, searching their belongings for union material, and warning them that they would receive reprimands for bringing such material into the hospital.
    - (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.
  2. Take the following affirmative action necessary to effectuate the policies of the Act.
    - (a) Reestablish the unit-based educator program and resume its functioning consistent with the prior implementation of the program.
    - (b) Post at its facility copies of the attached notice marked "Appendix."<sup>21</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, 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.
    - (c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.
- Further, it is recommended that the Board set aside the election previously conducted and that a second election be directed.

<sup>21</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."