

Beverly Enterprises, Inc., Beverly Health and Rehabilitation Services, Inc., Beverly Enterprises—Connecticut, Inc. d/b/a Greenwood Health Center and New England Health Care Employees Union, District 1199, AFL-CIO. Cases 34-CA-6513 and 34-RC-1219

September 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On May 2, 1996, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. Thereafter, the Respondent and the General Counsel filed answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the record and the decision in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt his recommended Order, as modified below.²

¹ The Respondent and the General Counsel have 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 relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In view of our agreement with the judge that the instant case is distinguishable from *Ideal Macaroni Co.*, 301 NLRB 507 (1991), in that the Respondent promised and conferred on employees' benefits that it previously concealed from them, we find it unnecessary to pass on the judge's discussion of *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Chairman Gould would find merit to the General Counsel's exception to the judge's failure to find that the Respondent coercively interrogated known union adherent Patty Pickus. In *Rossmore House*, 269 NLRB 1176 (1984), the Board found that an employer's questioning of open and active union adherents about their union sentiments, in the absence of threats or promises, does not necessarily violate the Act. In the instant case, the judge concluded that the Respondent's interrogation of Pickus, an active union supporter, did not reasonably tend to coerce her and that the allegation of unlawful interrogation must be dismissed. Chairman Gould disagrees with *Rossmore House*. He notes, as the Fifth Circuit has stated, the mere fact that an employee "was a widely-known union adherent does not validate otherwise coercive interrogation: 'Although an employee has openly declared his support for the union, the employer is not thereby free to probe directly or indirectly into his reason for supporting the union.'" *NLRB v. Brookwood Furniture*, 701 F.2d 452, 463 fn. 35 (5th Cir. 1983) (quoting *TRW-United Greenfield Division v. NLRB*, 637 F.2d 410, 418 (5th Cir. 1981)). Accordingly, Chairman Gould would reverse *Rossmore House*, and find that the interrogation of Pickus was unlawful.

² We shall modify the recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

ORDER

The National Labor Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Beverly Enterprises, Inc., Beverly Health and Rehabilitation Services, Inc., Beverly Enterprises—Connecticut, Inc. d/b/a Greenwood Health Center, Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(a) and (b).

"(a) Within 14 days after service by the Region, post at its facility in Hartford, Connecticut, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1994.

"(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Craig Lawrence Cohen, Esq., for the General Counsel.
Michael R. Flaherty and Joseph M. Martin, Esqs., of White Plains, New York, for the Respondents.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This complaint case, consolidated with the representation case, was tried in Hartford, Connecticut, on September 11-12 and 14-15, 1995. The charge was filed March 1, 1994¹ (amended April 5 and May 19, 1994) and the complaint was issued December 9, 1994, and amended at the trial.

Pamela Miller was Beverly Enterprises' administrator at its Greenwood Health Care Center in Hartford, a long-term health care facility. To lower labor costs, Miller adopted an unannounced "all you have to do is ask" policy, requiring employees to ask if they wanted to learn what employment benefits they were entitled to. This amounted to a concealment of benefits. Although Beverly's own survey revealed that "half of all" its employees nationwide wanted "to

¹ All dates are from November 1993 to February 1994 unless otherwise indicated.

know more about benefits," it had failed to require the administrators at its approximately 750 facilities to inform the employees of all their benefits.

The Company refused to distribute a requested handbook or "something in writing" identifying the benefits. In large part because of "the lack of knowledge of the benefits" and perceived favoritism—"some nurses knew about benefits and received benefits, while other nurses didn't receive benefits"—a majority of the licensed practical nurses (LPNs) signed authorization cards and sought recognition of the Union as their bargaining representative.

In response, Miller approved the distribution at the facility of a hurriedly prepared benefits summary. The summary excludes three of Beverly's costly corporatewide benefits: the Dependent Care Assistance Program (DCAP), the Employee Stock Purchase Plan, and the 401(k) Savingsplus Retirement Plan.

Shortly before the representation election Jay Begley, Beverly's campaign manager to defeat the Union in the election campaign, handed out a further benefits summary that includes the corporate DCAP, stock purchase, and 401(k) plans. In speeches to the LPNs and in a letter to their homes, he emphasized the possible loss of benefits by repeating the statement that union negotiations could result in better, the same, or worse working conditions.

The primary issues in the complaint case, as well as in the representation case, are whether the Company, Respondents Beverly Enterprises and its subsidiaries, (a) unlawfully promised and granted increased benefits during its antiunion campaign by promulgating benefits summaries, revealing previously concealed benefits that had been withheld from many of the employees, (b) promised a 4-percent across-the-board wage increase, and (c) engaged in other coercive conduct in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, the Respondent corporations, operates a health care facility in Hartford, Connecticut, where it annually derives over \$500,000 in gross revenues and receives goods valued over \$5000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7); that it is a health care institution within the meaning of Section 2(14); and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Concealment of Benefits

1. Miller's "all you have to do is ask" policy

Obviously to lower labor costs and increase profitability at the Greenwood facility, Administrator Pamela Miller adopted an unannounced "all you have to do is ask" policy, requiring the employees to ask if they wanted to learn what employment benefits they were entitled to (Tr. 138, 509). Following this policy, she instructed that the employee handbook, which listed various benefits at the facility, not be distributed to the employees.

When Miller first served as administrator at the Greenwood facility, from May to October 1988 (the year after the Company took over the operation in January 1987), the facility was still using the prior owner's personnel manual (Tr. 12, 270, 437-439). By the time she returned as administrator in August 1989, the facility had adopted a handbook, entitled Greenwood Health Center Personnel Manual (Tr. 439, 473).

The benefits described in the handbook (R. Exh. 8) include the following:

Bereavement Leave (p. 24), 3 days' pay for a death in the immediate family and 1 day's pay for in-laws.

Employee Discount (p. 11), a 10 percent discount for relatives admitted to a Beverly facility.

Jury Duty (p. 24), regular pay less jury pay.

Marriage Leave (p. 24), 1 day's pay.

Paternity Leave (p. 24), 1 day's pay.

Savings/Retirement Plan (p. 10).

Stock Purchase Plan (p. 10), with a matching contribution of 30 percent.

Tuition Reimbursement (p. 11), 75 percent of the employee's costs for tuition and books, with a maximum of \$750 a year.

Vacation (p. 23), providing 3 weeks for 5 years longevity.

The handbook, addressed to employees, provides two choices (p. 9):

1. *Benefits*: Includes vacation, holiday and personal time, and insurance. Regular part-time employees will receive prorated benefits.

2. *No benefits* [with 10% higher wage]: You will not receive holiday, vacation or personal time, nor be covered by our insurance plan. [Tr. 215; G.C. Exh. 4A.]

The last page of the handbook is an acknowledgment prepared for the employee's signature, stating in part (p. 30):

I have received a copy of the Beverly Enterprises Employee Handbook, and Supplemental Rules. I understand this handbook is not . . . a contract of employment. . . . I understand it is my responsibility to read and understand its contents.

²The Respondents' names in the caption were amended at the trial (Tr. 5).

Maria Faria, Beverly's director of nursing at the facility, admitted that "We were instructed not to give them out" and identified Administrator Miller as the person who gave her that instruction (Tr. 311-313).

Copies of the new handbook were initially furnished to department heads and made available to LPNs at nurses stations (Tr. 280-281, 337-339, 354-356, 588-590, 592-594). Miller admitted (Tr. 444), however, that during her tenure, "It was not distributed to the nurses stations" and that it was issued "Only to management personnel." Miller had her personal copy of the handbook. Payroll clerk Wendy Wheeler, who "administered all of the benefits in the facility," testified that she had a copy and that there was a copy in the business office (where Director of Development Patricia Wilcox had a copy). (Tr. 325, 361, 372, 449, 473, 533.)

At the time of the union organizing campaign—besides the corporate Stock Purchase Plan described in the Greenwood handbook (R. Exh. 8, p. 10)—there were other corporate benefits to which all nonunion employees in Beverly's approximately 750 health care facilities nationwide were entitled. They included (a) the Dependent Care Assistance Program (DCAP), which requires the facility to reimburse employees 20 percent of the cost of caring for dependent children and disabled family members during working hours and (b) the 401(k) Savingsplus Retirement Plan, adopted in 1992 replacing the Savings/Retirement Plan (p. 10) in the Greenwood handbook. (Tr. 210-211, 216-218, 226-227, 289, 530; R. Exh. 7.)

Employees at the facility were entitled to enroll in a disability plan, which is also not listed in the Greenwood handbook. It was the Guardian Disability Plan, a group insurance plan (with \$10,000 life insurance) that the prior owner of the facility had provided. Enrolled employees pay the entire premium. (Tr. 289-290, 334-336, 365-371, 519, 530; R. Exhs. 10, 30.)

There were also regional benefits. One was the employee discount in the Greenwood handbook (R. Exh. 8, p. 11) for relatives admitted to a Beverly facility (R. Exh. 5). Another was the regional tuition reimbursement plan, which has a maximum annual reimbursement to each participating employee of \$1200. The \$1200 maximum supersedes the \$750 maximum in the tuition reimbursement plan described (R. Exh. 8, p. 11) in the Greenwood handbook. (Tr. 222-223, 226-229, 471-472, 483-484.)

Administrator Miller admitted that "for quite a period of time" she was aware of the increase in the maximum tuition reimbursement from \$750 to \$1200, but that she had failed to update the Greenwood handbook. Moreover, she had concealed information of the increase from payroll clerk Wheeler, who "administered all of the benefits in the facility." Wheeler was not aware that the maximum had been changed. (Tr. 430, 484-485.) I infer that Miller was deliberately withholding this increased benefit from the employees.

Miller admitted that "employees were generally unaware of what benefits they were entitled to," that they "have always had questions about what benefits they were entitled" to, and that "even department heads were confused" and "often had questions about what benefits they were entitled to." She further admitted that at no time before the union recognition request on December 13, 1993, were the LPNs furnished a handbook outlining their benefits. (Tr. 14, 19-21, 25-26, 492-493.)

2. Continued concealment of benefits

One of Beverly's newsletters, Beverly Cares, dated November 6, 1991 (R. Exh. 1C), reveals that Beverly knew that its facility administrators were not sufficiently informing employees about their benefits. Under the title, "For Your Benefit," it reads in part:

Results of the June benefits survey show *half of all associates* [employees] want to know more about benefits and how much Beverly is contributing to the costs of these programs. [Emphasis added.]

Despite this knowledge, Beverly failed to require the administrators at its facilities to inform the employees of all their benefits.

After publishing the results of the survey, Beverly did refer to or describe certain corporate benefits from time to time in the newsletters, as shown by the 12 copies of the semimonthly or monthly Beverly Cares in evidence (R. Exh. 1), dated from November 1990 to October 1993. The newsletters, however, were not distributed to employees at the Greenwood facility. (149, 254-255.)

The Company employed about 250 employees at the Greenwood facility, but Beverly sent the facility only about 100 copies of the newsletters, which were displayed in the front lobby or reception area for any interested employees and visitors to take and read. As described by Director of Environmental Services Robert Flynn, the newsletters tell "what's going on [at Beverly facilities], interesting things, facilities that have gotten like E-awards, which is an award for excellence, people that have done noteworthy things within the Company and so forth" and "At times there are articles about benefits in there." (Tr. 78, 114, 150-151, 242-244, 253-256, 266-267, 271-273, 455-456, 502-504, 523-525.)

Some of the LPNs testified that they only occasionally or never read the newsletters. Company witness Katrina Carrier—who initially was a union supporter, but who turned against the Union after learning that the Company was offering the 401(k) plan—testified that she picked up a copy of the newsletter "Most of the time," but merely "skimmed through them," looking "for whatever pertains to Greenwood." Although there had been several references to the 401(k) plan and the DCAP benefit in the newsletters, Carrier testified that she never learned about either the 401(k) or DCAP plan before the union campaign. (Tr. 79-81, 90-91, 114-116, 148-151, 342-343, 348-352.)

Beverly did send out notices to be posted regarding enrollment in various corporate plans. When questioned about her seeing these notices on the bulletin board near the timeclock, LPN Carrier testified: "If they're posted by the time clock, I usually just come in, grab my card, punch in and go directly to the station," without stopping to read anything posted on the board. Beverly also send out flyers, brochures, and memos on corporate benefits but, if distributed, they were not distributed to all LPNs. (Tr. 81, 316, 325-327, 352-353, 382-384, 448-450, 453-454, 511, 514-516; R. Exhs. 13, 24, 26, 29.) There is no evidence that the Greenwood facility benefits or regional benefits were posted or distributed.

In 1992 Beverly prepared a Benefits Administration Policy and Procedures Manual (R. Exh. 7) and sent it to all its facility administrators (Tr. 210-211, 472, 506-508, 514; R. Exh.

1H p. 2). This corporate Benefits Manual includes a Benefits-at-a-Glance page (R. Exh. 7, p. 15), listing and describing the DCAP, Stock Purchase, and 401(k) benefits, as well as including detailed descriptions of these benefits (pp. 89-103, 105-114).

The corporate manual contains a notice to the administrators entitled, "Monthly Cost to Facilities for Associate Benefits." The notice (R. Exh. 7, p. 115) states that "Each month the facility receives [from Beverly] a *Monthly Profit and Loss Report* which details the facility's cost by account type and department for the benefits offered to its associates." It specifically lists as "facility's cost" the "company's contribution for associates participating in the Retirement Plan," the "20% company match" in the DCAP program, and the "30% company match" in the Stock Plan.

On receiving the corporate Benefits Manual, Administrator Miller deliberately concealed the benefits from many of the LPNs by continuing to follow her unannounced "all you have to do is ask" policy. She failed to distribute the Benefits-at-a-Glance page (describing the DCAP, Stock Purchase, and 401(k) benefits) at any time before Begley, the Beverly campaign manager, handed it out to the LPNs (as discussed below) in February, shortly before the February 17 election in the Company's campaign to defeat the Union. (Tr. 362-363, 498-499, 531; G.C. Exh. 4B.)

I find it obvious that Miller's motivation for deliberately concealing these costly corporate benefits from many of the employees was to limit the number of employees who would take advantage of the benefits to keep down labor costs and maximize profitability at the Greenwood facility on Beverly's monthly profit and loss report.

3. Application of "ask" policy

a. LPN Patricia Pickus

The Company hired Patricia Pickus in October 1989 as a per diem employee with "no benefits." Later when she became a regularly scheduled part-time employee, she chose "no benefits," enabling her to continue receiving a wage rate 10 percent above the base rate for an employee receiving benefits. About May 1992 she asked Director of Nursing Faria how to get the benefits (except health insurance) without taking a cut in pay. Faria told her she was a good nurse and Faria would "take care of it." Her pay was not cut. (Tr. 30-33; G.C. Exh. 4A.)

In May 1993, Pickus asked Faria what benefits she had "coming to me." Faria requested that she write a note asking for the information. Not being aware that she was entitled to any other benefits, Pickus listed only vacation days, personal days, and sick time on a handwritten note. On June 1, 1993, she received, on a Greenwood printed form, payroll clerk Wheeler's handwritten response showing the vacation, sick, and personal time she would be entitled to through July 31, 1994—the only information she specifically requested. (Tr. 33-35, 43-45, 427; G.C. Exhs. 2A and B.)

In July 1993, Pickus learned from a coworker that she was entitled to the 401(k) benefit, but Administrator Miller told her that she could not sign up in July and would have to wait until December. In early December (after the union organizing began), Garcia asked Miller in one of the HMO meetings "when can we sign up for 401(k)?" Miller then said that December was only the time when you can raise or lower

your contribution under the plan. Sometime after the February 17 election, during an enrollment period, Pickus enrolled in the 401(k) plan. (Tr. 36-38, 81, 89-90.)

Meanwhile in July 1993, after being told she could sign up in December, Pickus asked Faria if "there was a book, or something on paper" about the benefits she was entitled to. Ignoring the employee handbook (R. Exh. 8) and the Benefits-at-a-Glance page in the corporate Benefits Manual describing the DCAP, Stock Purchase, and 401(k) benefits (R. Exh. 7 p. 15), Faria said there was nothing. (Tr. 38-39.) Faria testified that she told Pickus "that I didn't know. That if there was, I didn't have one." (Tr. 308-310.) Pickus later told Unit Coordinator Sandra Baclaski she wanted such a book, as discussed later.

b. LPN Donna Nelson

Donna Nelson, hired in early 1989, was a per diem employee until about July 1990 when she began working a scheduled 24 hours a week as requested by Director of Nursing Faria's predecessor. She continued working without benefits. Around the first of July 1993 Faria told her that she had been a part-time employee about 3 years because she had regularly scheduled hours. She asked "when my benefits were," and Faria "said she would meet with me later to discuss benefits." (Tr. 94-97.)

Faria met with Nelson on July 16, 1993, called payroll clerk Wheeler, and wrote on a slip of paper Nelson's future benefits, effective July 1, 1993. She listed vacation, holidays, sick leave, and personal days and said that Nelson should have a \$1 cut in pay for the benefits. Nelson's pay, however, was not cut. (Tr. 97-99; G.C. Exh. 5.)

Faria did not inform Nelson of any of the other benefits to which she, being a part-time employee regularly scheduled to work 24 hours a week, was entitled—such as Dependent Care Assistance Program (DCAP) and the 401(k) Savings-Plus Retirement Plan. Nelson first learned about those benefits when Begley handed out the Benefits-at-a-Glance page from the corporate Benefits Manual shortly before the election. (Tr. 100, 105-106; G.C. Exh. 4B; R. Exhs. 7, pp. 15, 91, 107.)

c. LPN Elizabeth Garcia

Elizabeth Garcia was hired in December 1989 as a per diem employee with no set schedule. When she became a permanent, full-time employee with benefits on August 1, 1990, the Company cut her pay "at least \$1 an hour." The Company did not give her a list or summary of her benefits. As she learned from other employees about various benefits, she would go to payroll clerk Wheeler and ask about them. (Tr. 121-129, 147-148, 152-155, 160-163, 392-394; R. Exh. 21.)

When Garcia asked about child care benefits (DCAP) around the time she became a permanent employee, as she credibly testified, Wheeler told her "it was with KinderCare" (one of the companies that gave Beverly employees a 10-percent discount). Wheeler did not inform her that she had the choice of any individual, such as a "neighbor, relative, friend," for which the Company would also reimburse 20 percent of the cost. Garcia declined the benefit, telling Wheeler that KinderCare was "too far for me to drive" and that it was too expensive, even with the Compa-

ny's 20-percent reimbursement. (Tr. 123-124, 178-179; R. Exh. 13, p. 3.)

Wheeler (who is now the office manager) claimed, "I don't recall" telling Garcia that KinderCare was the only care provider (Tr. 381-382). She also claimed "we have had copies for at least the last five years [emphasis added]" of a 20-page brochure entitled, "Beverly's Dependent Care Assistance Program (DCAP)." The brochure, however, shows more recent revisions of the DCAP plan, including illustrations of tax savings in 1992, based on the 1991 tax rates. (Tr. 382-383, 408; R. Exh. 13.)

Meanwhile on Wednesday, April 8, 1992, Garcia applied for "Personal" leave on the Company's leave of absence form (R. Exh. 9) so she could go with her husband to Mexico for 2 weeks. Her father-in-law had died 2 months earlier. She told Faria that relatives in Mexico had called, saying that her mother-in-law "was not taking it well at all" and that her husband "would like to go and spend some time with the family." Being unable to afford the air fare, she and her husband spent 3 days driving each way. (Tr. 157-160, 295-296; R. Exh. 9.)

On returning from Mexico, Garcia found that she was being given holiday pay. Easter had fallen on April 12, during her personal leave of absence. There is no dispute that her paycheck showed holiday pay. Faria admitted that paychecks show regular hours and "I think it's holiday" for an excess, such as pay for a "personal day." (Tr. 158-159, 164-165, 297-299; R. Exhs. 8, p. 22, 9.)

As Garcia credibly testified (Tr. 157), she was not aware of bereavement leave.

The employee handbook, which Garcia had never seen, provides (R. Exh. 8, p. 24):

In the event of the death of a . . . parent-in-law, *one (1) bereavement day* will be paid. This day must be taken within a *reasonable time of death* or the *day of the funeral*. [Emphasis added.]

In an attempt to discredit Garcia (who by her demeanor on the stand impressed me most favorably as a sincere, truthful witness), the Company produced Garcia's 1992 employee data calendar, showing that on April 9, 10, and 13 (2 workdays before and 1 workday after Easter), there is written "C8" (for Condolence, 8 hours), and on the reverse side, the notation: "Condolence 4/9, 10, 13/92 father-in-law" (R. Exh. 16).

Not only was there nothing on Garcia's paycheck showing that the holiday pay was bereavement pay, there is no record in evidence showing that she was actually given 3 days of extra pay, instead of 1 day for the Easter holiday (Tr. 297-299).

I discredit Faria's claim that Garcia did not say her father-in-law had died 2 months previously and her claim that "it appeared that he had like died the day before." Her only explanation for the purported 3 days' bereavement pay, instead of 1 day for an in-law, was that it was "just an oversight." (Tr. 288-289.) Payroll clerk Wheeler, "who administered all of the benefits in the facility," similarly claimed, "It was an error" (Tr. 390).

I consider it unlikely that both the director of nursing and the payroll clerk would overlook the actual granting of 3 days' bereavement pay for an in-law.

I find, however, that even if it is assumed that the Company paid Garcia for 3 days of bereavement leave—although she applied for personal leave—and that Garcia's paycheck contained extra pay for 3 days, neither fact would indicate that Garcia was aware of the Company's bereavement policy. That policy did not provide for such a 3-day payment for the death of an in-law. I reject this and the Company's other challenges to Garcia's credibility.

d. LPN Katrina Carrier

Katrina Carrier, who was hired around 1980, was familiar with the benefits described in the Greenwood handbook because she had read the handbook at the nurses stations before Administrator Miller returned to the facility in August 1989 (Tr. 334, 337-338, 372, 444).

She was not, however, aware of Beverly's corporate Dependent Care Assistance Program (DCAP) benefit or aware of the 401(k) plan that Beverly adopted in July 1992 and included in the corporate Benefits Manual. As discussed above, she was initially a union supporter, but she turned against the Union after learning that the Company was offering the 401(k) plan.

e. LPN Richard Berman

The remaining LPN who testified was the company witness, Richard Berman, an antiunion employee who talked against the Union in the election campaign. He was a part-time employee from 1987 until 1992, when he became a full-time employee with benefits. (Tr. 171, 553-554, 563, 565.)

Berman claimed that he took bereavement pay when his father died in June 1992. He repeated this date of his bereavement pay on cross-examination and testified that he never had any other reason to take bereavement leave. When the counsel for the General Counsel pointed out that Berman's employee data calendar in his personnel file does not reflect that he took bereavement leave in 1992, the company counsel agreed to stipulate that Berman's "1992 calendar does not indicate that he took bereavement leave." The calendar, which would show his employment and benefits dates, is not in evidence. (Tr. 555, 567-569.)

When Berman was questioned about an absence report in his personnel file, stating that he called at 1:45 p.m. on April 20, reporting a "Death in Family" (G.C. Exh. 6), he claimed, "I really can't" explain the report, that there had not been a death in his family on April 20, and that "My dad passed away in June, but I never had . . . anyone else pass away" (Tr. 567-569). Because Berman's 1992 employee data calendar was not introduced in evidence, the record does not reveal whether Berman had become entitled to receive benefits (including bereavement leave) by the time of this reported "Death in Family" in April.

The Company has not suggested any explanation for the lack of any bereavement pay being shown on Berman's 1992 data calendar if in fact he had been given bereavement leave as he claimed.

B. Promising and Granting Increased Benefits

1. First benefits summary

a. Hurried preparation

The Company soon learned that the lack of information about its benefits was a major reason for the union organizing, which began in November around Thanksgiving Day. Employees were seeking a handbook or written summary of their benefits. The question of benefits was raised in early December in one of the Company's HMO meetings, and LPN Garcia, when questioned by Director of Staff Development Patricia Wilcox, impressed on Wilcox the seriousness of the information problem. (Tr. 40-42, 81, 111-112, 129, 134-135.)

In early December, Garcia and Wilcox were passing each other in the hallway—as Garcia credibly testified, contrary to Wilcox's denials (Tr. 134-135, 546, 548)—when Wilcox "asked me what brought this on?" referring to nurses wanting to organize:

And I said, benefits—the lack of knowledge of the benefits that we have; the favoritism—that some nurses knew about benefits and received benefits, while other nurses didn't receive benefits. . . . And she said, okay . . . she would see what she could do. [Emphasis added.]

A few days later, Garcia found a seven-page "Benefit Summary" on her desk (Tr. 135-137; G.C. Exh. 3). Wilcox had hurriedly prepared the summary, with Miller's approval. Sometime during the week of December 13 Wilcox left copies of the summary at the nurses stations and in the conference room. This was after a majority of the LPNs had signed authorization cards and after the Union requested recognition that Monday, December 13. (Tr. 40-41, 49-50, 100-101, 531-534.)

An examination of this first benefits summary reveals that all the pages except page 1 are xerox copies of pages in the Greenwood handbook. Wilcox made the copies from her own copy of the handbook, which did not reflect the change that Miller made in October 1989 on page 23 of Miller's personal copy—revising the vacation policy to provide for 3 weeks of vacation after 3 years instead of 5 years. Miller's copy, in evidence, shows both the change and the date that Miller made the revision. (Tr. 27-28, 439-440, 533-534; G.C. Exh. 3; R. Exh. 8, p. 23.)

Page 1 of this first benefits summary is a newly typed page, describing the Beverly health and dental plans and Greenwood's Guardian Disability Plan.

Page 2 is a xerox copy of page 11 of the Greenwood handbook (with the first two lines on page 11 of the handbook deleted). I note that page 10 of the handbook, describing the costly Beverly Stock Purchase Plan and the Savings/Retirement Plans (which was replaced in 1992 by Beverly's 401(k) plan), is omitted from the summary.

Pages 3 through 7 are xerox copies of pages 22 through 25 and page 29B of the handbook. I note that the first three lines at the top of page 3 of the summary are the concluding lines of the Progressive Discipline provisions on pages 21-22 of the handbook. Those

lines were not deleted—indicating haste in the preparation of the document. I also note that on page 4 of the benefits summary, under Vacation, the "5 years" before 3 weeks is changed to read "3 years," as Miller directed when reviewing it, to conform to the change she made on her copy of the handbook.

This first benefits summary (G.C. Exh. 3) includes the following benefits from the Greenwood handbook (R. Exh. 8): Bereavement Leave, Employee Discount, Jury Duty, Marriage Leave, Paternity Leave, Stock Purchase Plan, Tuition Reimbursement (with \$750 annual maximum), and Vacation. It also includes (p. 1) Greenwood's Guardian Disability Plan (R. Exh. 30), which is not contained in either the handbook or the Beverly Benefits Manual.

The first benefits summary does not include the following corporate benefits (on a Benefits-at-a-Glance page in the Beverly Benefits Manual, R. Exh. 7, p. 15): Dependent Care Assistance Program (DCAP), Stock Purchase Plan, and 401(k) Savingsplus Retirement Plan. Neither does it include the increase in the regional Tuition Reimbursement plan, to an annual maximum reimbursement of \$1200 (Tr. 471).

A few days after the Union's December 13 request for recognition, Miller approached Garcia and other employees at nurses station 7. Although the benefits summary she had approved omitted the DCAP benefit, Miller asked (as Garcia credibly testified, contrary to Miller's version of the conversation): "Do you know that we have day care reimbursement?" Garcia answered yes, "It's with KinderCare, and I don't use KinderCare." Miller said, "Oh, no, it's with any licensed day care facility now." Garcia said, "I wish I had known that four years ago." Miller nodded and walked away. (Tr. 131, 456-457.)

Miller did not reveal that the DCAP program in the Beverly Benefits Manual defined providers not only as "a licensed day care center," but also "an individual of the associate's choice [for example, a neighbor, relative, or friend]" (R. Exh. 7 pp. 15, 91).

b. Fabricated testimony

The first benefits summary was obviously distributed as a part of the Company's antiunion campaign. Yet, at the trial, Miller claimed that "The document was being prepared for quite a period of time" before she "knew that there was an organizing campaign afoot," and Wilcox claimed that yes, she was "sure that [the preparation of the summary] did not have anything to do with the union campaign" (Tr. 14-15, 527-528).

According to Wilcox, she learned in the healthcare insurance (HMO) meetings that there was "some misunderstanding of what benefits were available." She claimed that she then asked Miller "if I could prepare something in writing that could be given to the staff explaining what benefits were currently available" and that Miller gave her permission.

Wilcox recalled that she prepared the summary "the first week in December . . . the week of December 6," the same week the insurance meetings were held—not beginning it "quite a period of time" earlier as Miller claimed. She recalled that she distributed the summary "the week of December 13," after the recognition request. (Tr. 527-530.)

Wilcox claimed that she first learned about the union campaign "probably the second week in December" (Tr. 528).

On cross-examination she testified first that "I may have heard some rumors [the week of December 6] but that's about it" and then, "that's likely" she was aware of a union campaign "a few days" before December 13 (Tr. 549).

After Miller was confronted with her pretrial affidavit she admitted that Director of Nursing Faria told her about the union organizing "[s]ometime in the *very beginning of December* [emphasis added]" (Tr. 21-23). I consider it unreasonable to believe that Miller and Faria knew about the union organizing when Wilcox was preparing the benefits summary, without sharing the information with her. Furthermore at the time, as found, Wilcox was interrogating Garcia about "what brought this on," referring to the nurses wanting to organize.

Both Miller and Wilcox, by their demeanor on the stand, impressed me as being willing to fabricate any testimony that might help the Company's cause. I discredit, as fabrications, their claims that the first benefits summary was being prepared "quite a period of time" before the "very beginning of December" and that its preparation had nothing "to do with the union campaign."

2. Miller's "ask" policy revealed

LPN Pickus had not known before seeing the first benefits summary that she was entitled to such benefits (in the Greenwood handbook) as bereavement leave for an in-law, disability insurance, employee discount, marriage leave, and tuition reimbursement. Concerning the vacation policy, her understanding was that she would be entitled to a 3-week vacation after 5 years. (Tr. 50-54.)

(I note that Administrator Miller admitted that another employee "brought to my attention that she had not been paid bereavement leave for her, I believe, father-in-law," Tr. 487-488).

When the first benefits summary appeared at the nurses stations after the Union requested recognition, as Pickus credibly testified, LPN Bill LaCourse (who had been employed there about 10 years) asked Unit Coordinator Sandra Baclaski, "Since when have they given 3 weeks vacation for 3 years?" and told Baclaski that he never got 3 weeks after 3 years. Later, when Administrator Miller came down on the floor that day, LaCourse asked her the same question. (Tr. 53-54.)

LPN Donna Nelson was also unaware of various benefits described in the benefits summary. Although employed there over 6-1/2 years, she had been on benefits status less than 3 years and did not know that she would receive a 3-week vacation in 3 years after her benefits date. As she credibly testified, she had heard other employees say you can get 3 weeks' vacation after 5 years. (Tr. 94, 102-103, 105, 433.)

LPN Elizabeth Garcia, as found, had worked there 4 years since December 1989 and had been receiving benefits since August 1990, over 3 years before the summary appeared.

She had been told that you have to work 5 years for a 3-week vacation. When she saw on page 4 of the benefits summary that the figure "5" before "years" was crossed out and the figure "3" inserted, she asked Unit Coordinator Maria Parks "How many years do you have to work at Greenwood to get 3 weeks vacation?" Parks (who did not testify) said, "You have to work 5 years." Garcia showed her the change on page 4 of the summary and said, "They changed it. It's 3 years now." (Tr. 125, 135-137, 176.)

Garcia tried to page Director of Nursing Faria and then told Parks she was taking a break. Garcia found Faria at station 1 and told her, "Nela, it was my understanding that, after 5 years, you get 3 weeks vacation, and now it's changed to 3 years, and I've been here 4 years" and "I don't remember getting an extra week vacation." Faria "said she wasn't sure what the vacation times were, that she would get back to me." (Tr. 137-138.) On cross-examination Faria claimed, "I don't recall" a conversation in which Garcia said that she had been there 4 years and that the summary says 3 weeks' vacation after 3 years. (Tr. 320.)

A short time later Administrator Miller came to Garcia's desk at station 7. As Garcia credibly testified, Miller said, "Liz, I understand there's a discrepancy in your vacation time. You didn't get the extra week vacation last year." Garcia said no, that she understood you get 3 weeks after 5 years. Miller said, "Oh, no, that would be too long a wait. . . . [I]t makes sense to have 3 weeks after 3 years. . . . [Y]ou can have that week vacation this year." (Tr. 138.) I discredit Miller's denial that she ever had a conversation with Garcia about a discrepancy in her vacation entitlement (Tr. 469).

Miller then revealed her "ask" policy. When Garcia thanked her, Miller responded (Tr. 138): "See, *all you have to do is ask*. [Emphasis added.]"

When Garcia's 1993 employee data calendar was later checked, however, it was found that Garcia had already been credited with a 3-week vacation. It shows that in September 1993, 3 years after her benefits date, she earned 120 hours (3 weeks) of vacation time. She evidently was not aware of this because she had not taken any vacation time since that September and had not asked for her vacation balance. (Tr. 416-419; R. Exhs. 22, 23.)

There was considerable confusion among the management personnel, as well as the employees, about the vacation policy.

Unit Coordinator Parks, as found, told Garcia, "You have to work 5 years" to get a 3-week vacation. Director of Staff Development Wilcox, whose copy of the Greenwood handbook did not reflect Miller's October 1989 change in the policy, admitted that she "did not have a clear understand" about when "you actually got the credit" for the 3-week vacation (Tr. 533, 551). Director of Nursing Faria, who told Garcia she "wasn't sure what the vacation times were," claimed that there had never been a change in the vacation policy; it was "always the same"—3 weeks after 3 years (Tr. 319).

Both Miller and payroll clerk Wheeler claimed that there was only a brief period in 1989 when the vacation policy was 3 weeks after 5 years' service. Miller testified that during her absence from the facility from October 1988 to August 1989, the vacation policy had been changed from 3 weeks after 3 years to 5 years and that she changed it back, effective October 1989. (Tr. 395, 438-442.)

I note that page 23 of the Greenwood handbook, which was adopted during Miller's absence from the facility, does indicate that the vacation time (2 weeks after 1 year, 3 weeks after 5 years, 4 weeks after 8 years, and 5 weeks after 12 years) was "Effective January 1, 1989." That page also shows that Miller changed the vacation time, effective October 1989, from 3 weeks after 5 years to 3 years. It does not, however, indicate what change or changes were made in the

vacation times in January 1989, or whether the 3 weeks for 5 years of service had been in effective before 1989. (R. Exh. 8 p. 23.)

I find that Miller's and Wheeler's testimony that the vacation policy at the Greenwood facility had been 3 weeks after 5 years only for a brief period in 1989 is erroneous.

An examination of company records during the evening after the third day of trial did disclose that LPNs had been receiving a 3-week vacation after 3 years of service. A total of 9 of the 22 current LPNs who were eligible to vote in the February 17 election had accrued 3 weeks of vacation after 3 years (Tr. 401-402).

The records also disclose, however, that one of the LPNs was given a 3-week vacation after 5 years of service (Tr. 443). This could not have occurred if the 5-year policy had been in effect only during the period from January to October 1989. Any employee reaching 5 years of service during that year would have already been given a 3-week vacation after 3 years—demonstrating that contrary to the claims of Miller and Wheeler, there had been a 5-year policy in effect before 1989.

Following the discovery that the Company had been giving LPNs a 3-week vacation after 3 years (without the employees asking for this benefit), the General Counsel withdrew the allegations that the Company promised and granted improved vacation benefits during the election campaign (Tr. 403-404).

3. Second benefits summary

a. *Costly corporate benefits revealed*

When Beverly's associate relations representative, Jay Begley, became Beverly's campaign manager to defeat the Union in the election at the Greenwood facility, he made the Company's employee benefits a major part of its antiunion campaign (Tr. 193-194, 203-209).

In a series of employee meetings at the facility in February, shortly before the February 17 election, Begley handed out a second benefits summary (G.C. Exh. 4). It contains not only a two-page comparison of the LPN's benefits with benefits at other facilities, but also a xerox copy of the Benefits-at-a-Glance page from Beverly's Benefits Manual (R. Exh. 7, p. 15). The one-page document describes Beverly's costly Dependent Care Assistance Program (DCAP), Employee Stock Purchase Plan, and 401(k) Savingsplus Retirement Plan. (Tr. 207-208, 468.)

As found, Administrator Miller had deliberately concealed these costly corporate benefits from many of the employees by continuing to follow her unannounced "all you have to do is ask" policy. In that way she limited the number of employees who would take advantage of these benefits, obviously to keep down labor costs and maximize profitability at the Greenwood facility.

b. *Possible loss of benefits*

Both in Begley's presentations at the employee meetings and in a letter sent to the employees' homes, he emphasized the possible loss of these benefits by repeating the statement that union negotiations could result in better, the same, or worse working conditions (203-206, 248).

A flip chart he used in all the meetings (Tr. 204-206) graphically explained a so-called "Two/Thirds Rule" of

"One plus, conditions will get better" and "Two minuses, conditions stay the same and conditions get worse," then stating at the bottom, "Pay for representation."

The next to the last paragraph of a letter to the employees' homes states (R. Exh. 4):

Remember, as the result of negotiations a contract could either improve your working conditions, keep your working conditions the same, or result in a worsening of your working conditions.

c. *More fabricated testimony*

The Company's eighth defense witness was Director of Staff Development Wilcox who, as found, gave fabricated testimony that the first benefits summary she prepared "did not have anything to do with the union campaign."

As discussed, the evidence before she testified clearly showed that the Company first distributed the Benefits-at-a-Glance document (describing the costly corporate DCAP, stock purchase, and 401(k) plans) late in its antiunion election campaign. Begley had included the document in his second benefits summary, which he handed out in employee meetings that he held in February, shortly before the February 17 election.

Thus, the document was promulgated well within the critical preelection period, after the Company had signed a stipulated election agreement on January 11 (G.C. Exh. 1H).

When the Company called Wilcox to testify near the end of the 4-day trial, the Company produced a different copy of her first benefits summary (G.C. Exh. 3), a seven-page exhibit about which both the General Counsel and company witnesses had testified. Added to this copy (R. Exh. 31) was an eighth page, the Benefits-at-a-Glance document. Wilcox claimed that she was "Absolutely" certain that the Benefits-at-a-Glance document was included with the summary that she prepared and distributed. (Tr. 526-527, 531, 537-541.)

Her claim conflicts not only with the credited testimony of LPNs, who saw the seven-page first benefits summary (without the Benefits-at-a-Glance document) and first saw the Benefits-at-a-Glance document as a part of the second benefits summary (Tr. 49, 68-69, 102-103, 106, 131, 140-143, 345-346), but also with Begley's credited testimony regarding his sources for preparing the three-page second benefits summary (G.C. Exh. 4), which he handed out in February.

Begley testified that his sources for the two-page benefits comparison in his second benefits summary were the first benefits summary (that Wilcox prepared) and information from the facility management, whereas the one-page Benefits-at-a-Glance document "came out of" the Beverly Benefits Manual (R. Exh. 7, p. 15)—not from the first benefits summary (Tr. 209-211, 214-216).

If the Benefits-at-a-Glance document had been a part of the first benefits summary, which Wilcox distributed in the week of December 13 after the Union's recognition request, the Company could argue that it was first promulgated outside the critical preelection period. (The record does not disclose when the petition for an election was filed.)

I discredit, as another fabrication, Wilcox's claim that the Benefits-at-a-Glance document was added to her first benefits summary. I infer that she gave this false testimony (that the document had already been distributed) to ensure that the Benefits-at-a-Glance document (promulgated well within the

critical period) could not be found to be a basis for setting aside the February 17 election because it had been distributed previously.

4. Contentions of the parties

The complaint alleges that the Company unlawfully promised increased benefits and since December 1993 has "granted its employees increased benefits" and "a written brochure setting forth the employees benefits."

At the trial the General Counsel contended (a) that the Company consciously failed to advise employees of their benefits until the union campaign (Tr. 9), (b) that the second benefits summary (Begley's February summary containing the Benefits-at-a-Glance page from the Beverly Benefits Manual) was "only distributed to employees during the campaign" (Tr. 211), (c) that the Company's "failure to give the document to employees until the Union came on the scene is what's in issue" (p. 212), (d) that the Company's keeping it "close to the vest" until the union campaign "is at issue" (Tr. 213), and (e) "The issue is that employees at the facility were essentially kept in the dark until the campaign about the benefits that they were entitled to" (Tr. 511).

The Company, citing *Ideal Macaroni Co.*, 301 NLRB 507 (1991), contended at the trial (Tr. 10-11) that although it "may not have communicated available benefits to employees as effectively as it could have, prior to the campaign,"

[t]he mere fact that some employees were not aware of those benefits . . . prior to the campaign, does not mean that the employer by any means had to stand mute with regard to benefits available to employees.

To the contrary, the Board has repeatedly recognized that prohibiting an employer from publicizing existing benefits merely because employees had not previously been made aware of such benefits, would deprive the employer of a legitimate campaign strategy.

The Company contends in its brief (at 32-33) that *Ideal Macaroni* is *directly on point*. The General Counsel contends in his brief (at 15-16) that such cases as *Ideal Macaroni* are distinguishable.

5. Concluding findings

a. Purported "legitimate campaign strategy"

As found, the Company—to lower labor costs and maximize profitability at the Greenwood facility—followed the practice of deliberately concealing the Company's benefits from employees by requiring employees to *ask* if they wanted to learn what benefits they were entitled to.

Beverly Enterprises had publicized the results of its June 1991 benefits survey that "half of all" its employees nationwide "want to know more about benefits," but it had failed to require the administrators at its approximately 750 facilities to inform the employees of all their benefits.

The Company at the Greenwood facility refused to distribute a requested handbook or "something in writing" identifying the benefits. In large part because of this lack of knowledge of the benefits and perceived favoritism—"some nurses knew about benefits and received benefits, while other nurses didn't receive benefits"—a majority of the LPNs signed authorization cards and sought union representation.

To undercut the union organizing drive and defeat the Union in the election, the Company granted the requested information about employee benefits and made the previously concealed benefits a major part of its antiunion campaign.

The Company contends in its brief (at 32-33) that publicizing its existing benefits was a "legitimate campaign strategy" and that the following excerpt from the Board's decision in *Ideal Macaroni Co.*, *supra*, is *directly on point*:

The Board has recently reiterated that "prohibiting an employer from publicizing existing benefits *merely* because employees had not previously been made aware of such benefits would deprive the employer of a *legitimate campaign strategy* . . ." *Weather Shield of Connecticut*, 300 NLRB 93, 97 (1990); *Scotts IGA Foodliner*, 223 NLRB 394 (1976), *enfd. mem.* 549 F.2d 805 (7th Cir. 1977). Because the [employer] was referring to *existing benefits*, rather than granting or announcing new benefits, that reference does not in itself violate the Act. [Emphasis added.]

The present case, however, is not one in which the issue is whether the employer could be prohibited from publicizing existing benefits in its preelection campaign "merely because" employees had not previously been made aware of the benefits. This is a case in which, to lower labor costs, the employer had deliberately *concealed* benefits from employees and refused to distribute a requested handbook or "something in writing" identifying the benefits.

Neither could the benefits be considered "existing benefits" for many of the LPNs seeking union representation. The Company withheld various concealed benefits from them if they did not *ask* for the benefits.

Nor is this a case in which an employer granted unpublicized benefits that were not specifically requested by the employees. I note that when the General Counsel determined from the Company's records that it had granted employees a 3-week vacation after 3 instead of 5 years, even though not requested by the employees, he withdrew the allegation that the Company promised and improved vacation benefits during the election campaign.

Thus the Company deliberately concealed benefits from employees to save on labor costs and withheld benefits unless the individual employees specifically asked for them.

Under these circumstances I find that the Board's decision in *Ideal Macaroni* is distinguishable and that the Company's publicizing the benefits to defeat the Union was not a "legitimate campaign strategy."

I also find that the Company made the previously concealed benefits a major part of its antiunion campaign at the same time it was emphasizing the possible loss of benefits through union negotiations.

As found, the Company repeatedly reminded the employees, in meetings and in a letter to their homes, that union negotiations could result in better, the same, or worse working conditions. In all the meetings, the Company used a flip chart that graphically explained a so-called "Two/Thirds Rule" of "One plus, conditions will get better" and "Two minuses, conditions stay the same and conditions get worse."

I agree with the General Counsel's contention in his brief (at 12-13) that the "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also

the source from which future benefits must flow and which may *dry up* [emphasis added] if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

I find that the Company granted employees previously refused benefits summaries and promised and granted the following previously concealed benefits, coercing employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act:

In the week of December 13, 1993: Bereavement Leave, Employee Discount, Guardian Disability Plan, Jury Duty, Marriage Leave, Paternity Leave, Stock Purchase Plan, and Tuition Reimbursement.

Shortly before the February 17, 1994 election: Dependent Care Assistance Program, Employee Stock Purchase Plan, and 401(k) Savingsplus Retirement Plan.

b. *Specific holding of Supreme Court*

I further find that the specific holding of the Supreme Court in *NLRB v. Exchange Parts Co.*, supra, provides an additional ground for rejecting the Company's contention that publicizing its benefits was a "legitimate campaign strategy" in its campaign to defeat the Union in the representation election.

In *Exchange Parts*, in which the union lost an election held on March 18, 1960, the Court relied on the employer's March 4 letter sent to its employees, enclosing a statement detailing benefits it had granted. The Court held (375 U.S. at 407):

Included in the statement of benefits for 1960 were . . . a new system for computing *overtime* during holiday weeks which had the effect of increasing wages for those weeks, and a new *vacation* schedule which enabled employees to extend their vacation for sandwiching them between two weekends. *Although Exchange Parts asserts that the policy behind the latter two [overtime and vacation] benefits was established earlier, it is clear that the letter of March 4 was the first general announcement of the changes to the employees. . . .* [Emphasis added.]

The Board, affirming the findings of the trial examiner, found . . . the grant and announcement of overtime and vacation benefits were arranged by Exchange Parts with the intention of inducing the employees to vote against the union.

We think the Court of Appeals was mistaken in concluding that the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union, does not "interfere with" the protected right to organize. . . . Reversed.

Thus, the Court held that *although* the benefits *may have been* existing benefits, the "first general announcement" of the overtime and vacation benefits was the "conferral of employee benefits while a representation election is pending, for the purpose of inducing the employees to vote against the union," violating Section 8(a)(1) as found by the Board.

I note that it was in a footnote in *Scotts IGA Foodliner*, supra at 394 fn. 1, that the Board first ruled that the use of previously unannounced benefits while a representation elec-

tion is pending is a legitimate campaign strategy. The footnote states:

Prohibiting the [employer] from publicizing existing benefits—an issue raised by the [union] itself—merely because the employees had not previously been made aware of such benefits, would deprive the [employer] of legitimate campaign strategy necessary to counter the [union's] claim that it offers better benefits.

There is no indication in that case or the later cases, *Weather Shield of Connecticut*, supra at 97, *Ideal Macaroni Co.*, supra, and *Emery Worldside*, 309 NLRB 185 (1992), that the Board has considered the possible inconsistency between its "legitimate campaign strategy" ruling in those cases and the Supreme Court's holding in *Exchange Parts* that the "first general announcement" of benefits in an election campaign—although they may be existing benefits—constitutes "the conferral of employee benefits . . . for the purpose of inducing the employees to vote against the union" and therefore violates Section 8(a)(1).

If the Board's ruling and the Court's holding cannot be reconciled, the Board may want to reconsider its ruling.

C. *Promise of Across-the-Board Wage Increase*

Probably in 1990, as Administrator Miller recalled, there was an across-the-board wage increase at the Greenwood facility after Beverly's area manager "did an evaluation of our salaries and determined that our salary structure was substandard." About March 1993, Begley himself did another wage study that found some of the employees' rates were "below the general average in the area." About June 1993, as Director of Nurses Faria recalled, the Company gave five employees a wage adjustment. (Tr. 285, 317, 464-465.)

In one of Begley's meetings shortly before the election the question of an across-the-board wage increase was raised.

As LPN Patricia Pickus credibly testified (Tr. 67-68):

There was also conversation at this meeting about a 4 percent increase, ACROSS-THE-BOARD INCREASE.

Q. You're talking about a wage increase?

A. Right. There was a question . . . Mr. Begley, looked at Pam [Miller] and said *isn't that right*, and Pam said, "yes," and Nela [Faria] said, "[W]e're working on it." An employee, I don't remember who, *the room was full*, responded "Is that over and above our anniversary raise?" and the response back was, "[Y]es, it was." [Emphasis added.]

On cross-examination, Pickus was questioned about her pretrial affidavit. The affidavit reads in part (Tr. 87-88):

One of the meetings with Begley, I'm not sure which one, *Begley announced that there was talk of 4 percent across-the-board cost of living increase*. He looked at Pam Miller, asked, "[I]s that right?" She said, "[Y]es." Nela Faria said, "[W]e're working on it." Someone asked if it was the anniversary raise, if that was the anniversary raise. One of them answered, "[N]o, that it was over and above our normal anniversary raise." [Emphasis added.]

The company counsel then asked (Tr. 88):

Q. [By Mr. Flaherty]: Now, you don't, no one came right out and said there's be a four percent increase did they?

A. No.

LPN Donna Nelson credibly confirmed this testimony as follows (Tr. 104-105):

Q. [By Mr. Cohen]: Do you recall what *Mr. Begley* said during that meeting with regard to pay raises?

A. Yes.

Q. What?

A. That *they were working on an across-the-board four percent raise.*

Q. And in making that comment did he look or speak to anyone else?

A. Yes, he did, to Pamela Miller.

Q. Do you recall what if anything *Ms. Miller* said, if anything?

A. She agreed that *yes*, that was happening.

Q. Did anybody else other than *Ms. Miller* or *Mr. Begley* address that question of the four percent across-the-board pay increase?

A. I asked if that included the anniversary date, if that was four percent for that or that was separate.

Q. And what were you told?

A. I was told that that was separate. That was across the board, it didn't affect our anniversary increase.

Q. Do you recall who told you that it was separate and that it did not have, affect your anniversary increase?

A. I believe it was *Mr. Begley*. [Emphasis added.]

According to the company witnesses, nothing was said about the Company "working on" a 4-percent across-the-board increase in the meeting (Tr. 219-222, 292-295, 345, 469, 560).

Both Pickus and Nelson appeared on the stand to be truthful witnesses, doing their best to give an accurate account of what happened. I discredit the denials.

The statements made in the meeting to the full room of employees that the Company was "working on" a 4-percent across-the-board wage increase were not "general and vague," but were that the increase was "under active study or consideration." *Pennsy Supply*, 295 NLRB 324, 325 (1989). I find that the statements constituted an implied promise of a 4-percent across-the-board wage increase if the employees voted against union representation and violated Section 8(a)(1).

D. Other Alleged Coercive Conduct

LPNs Elizabeth Garcia and Patricia Pickus were two of the leading union supporters (Tr. 73, 129).

On December 10, before the union request for recognition on December 13, Director of Nursing Faria told Garcia in the med room at stations 6 and 7 (Tr. 130-131) that

she was feeling badly and taking it personally that the nurses felt they couldn't come to her with their problems, and that they went to . . . the Union. . . . [that] she always felt that she had a open-door policy [but] if the Union comes in, she would have to go by the book; she wouldn't be able to treat the nurses individ-

ually anymore. There would be no privacy; there would be a union representative at our meetings and everybody would know my personal business.

I agree with the Company that the Board has held that such statements as this do not contain any threats, simply point out that employees deal with the employer under a union contract through a union representative, impart a "mere fact of industrial life," and are not coercive. *Pembrook Management*, 296 NLRB 1226, 1227 (1989). I therefore find that the allegation of a threat of more onerous working conditions must be dismissed.

Sometime after December 13, but before Wilcox distributed the first benefits summary, Unit Coordinator Sandra Baclaski (who did not testify) asked Pickus in the med room at stations 2 and 3 (Tr. 41-42)

why I felt we needed to have a union at Greenwood. And I told her that I wanted to know what my benefits were, I wanted it in a book, I wanted it in writing. I felt that people wage wise and benefit wise were being treated differently around Greenwood. And that I wanted representation. [Emphasis added.]

Sandy said that she had worked in a union place before and that she didn't feel that [a union at Greenwood was the answer].

I find that this interrogation of this active union supporter did not reasonably tend to coerce her and that the allegation of unlawful interrogation must be dismissed.

I find, however, that Director of Staff Development Wilcox's solicitation of complaints from Garcia and her promise of relief was coercive. As found, Wilcox asked Garcia in the hallway in early December "[W]hat brought this on?" referring to nurses wanting to organize. In her response Garcia mentioned "the lack of knowledge of the benefits" and the perceived favoritism, "that some nurses knew about benefits and received benefits, while other nurses didn't receive benefits." After listening to Garcia's complaints, Wilcox promised that "she would see what she could do." A few days later Wilcox did what she had promised. Garcia found on her desk the first benefits summary that Wilcox had prepared and distributed.

As held in *Heartland of Lansing Nursing Home*, 307 NLRB 152, 156 (1992), citing *Uarco, Inc.*, 216 NLRB 1 (1974), "it is not the solicitation of grievances but the promise to correct them that is coercive."

Here, Wilcox not only solicited complaints and promised relief, stating "she would see what she could do" about Garcia's complaints," but a few days later lived up to her promise by distributing the requested benefits summary to discourage the employees from engaging in union activities. Wilcox was providing Garcia what she was seeking, without a union.

I therefore find that by soliciting the complaints and promising relief, the Company coerced employees in the exercise of Section 7 rights, violating Section 8(a)(1).

III. REPRESENTATION PROCEEDING

After the approval of a stipulated election agreement on January 11, 1994, an election was held on February 17, 1994. The vote was 11 for and 16 against union representa-

tion with 1 challenged ballot, an insufficient number to affect the outcome of the election. The Union filed timely objections on February 24, 1994. (G.C. Exh. 1H.)

The issues involved in the Union's Objection 5 and the additional conduct revealed during the investigation parallel the meritorious 8(a)(1) complaint allegations.

As found, a majority of the LPNs had signed authorization cards and sought union representation, in large part because of "the lack of knowledge of the benefits." The employer refused to distribute a handbook or written summary of the benefits.

During the critical preelection period, the Employer conferred benefits by distributing its February benefits summary, describing the Dependent Care Assistance Program, the Employee Stock Purchase Plan, and the 401(k) Savingsplus Retirement Plan. This was the first general announcement of these costly benefits, which had been concealed from employees to lower labor costs and increase profitability at the Greenwood facility.

I find that this conferral of benefits and also the implied promise of a 4-percent across-the-board wage increase to a full room of employees in one of the employee meetings during the critical preelection period clearly interfered with the employees' free choice of representation and that the election must be set aside and a new election held.

CONCLUSIONS OF LAW

1. By promulgating previously refused benefits summaries during its antiunion campaign, thereby promising and granting employees Bereavement Leave, a Dependent Care Assistance Program, Employee Discount, a Employee Stock Purchase Plan, a 401(k) Savingsplus Retirement Plan, a Guardian Disability Plan, Jury Duty, Marriage Leave, Paternity Leave, a Stock Purchase Plan, and Tuition Reimbursement, coercing the employees in the exercise of Section 7 rights, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By making an implied promise of a 4-percent across-the-board wage increase if the employees vote against union representation, the Company violated Section 8(a)(1).

3. By soliciting complaints and promising relief, the Company coerced employees in the exercise of Section 7 rights, violating Section 8(a)(1).

4. The Employer's conferral of benefits and its making an implied promise of a 4-percent across-the-board wage increase during the critical preelection period interfered with the employees' free choice of representation. The February 17, 1994 election must be set aside and a new election held.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

³If 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

ORDER

The Respondent, Beverly Enterprises, Inc., Beverly Health and Rehabilitation Services, Inc., Beverly Enterprises—Connecticut, Inc. d/b/a Greenwood Health Center, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising or granting benefits to undercut an organizing drive by New England Health Care Employees Union, District 1199, AFL-CIO, or any other union.

(b) Promising an across-the-board wage increase if the employees vote against union representation.

(c) Soliciting complaints and promising relief to undercut an union organizing drive.

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

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

(a) Post at its facility in Hartford, Connecticut, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 34, 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.

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

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election is set aside and Case 34-RC-1219 is severed from Case 34-CA-6513 and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

To act together for other mutual aid or protection
To choose not to engage in any of these protected
concerted activities.

WE WILL NOT promise or grant you benefits to undercut
an organizing drive by New England Health Care Employees
Union, District 1199, AFL-CIO, or any other union.

WE WILL NOT promise an across-the-board wage increase
if you vote against union representation.

WE WILL NOT solicit your complaints and promise relief
to undercut an union organizing drive.

WE WILL NOT in any like or related manner interfere with,
restrain, or coerce you in the exercise of the rights guaran-
teed you by Section 7 of the Act.

BEVERLY ENTERPRISES, INC., BEVERLY
HEALTH AND REHABILITATION SERVICES,
INC., BEVERLY ENTERPRISES—CONNECTICUT,
INC. D/B/A GREENWOOD HEALTH CENTER