

**Frances House, Inc. and American Federation of State, County & Municipal Employees (AFSCME) Council 31, AFL-CIO. Case 33-CA-11227**

November 14, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 17, 1996, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision and an answering brief.

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

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

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Frances House, Inc., Kankakee, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of 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.

*Judith T. Poltz, Esq.*, for the General Counsel.  
*Mark Nelson, Esq.* and *Stephanie L. Dodge, Esq. (Stickler & Nelson)*, of Chicago, Illinois, for the Respondent.  
*Robert Seltzer, Esq. (Cornfield & Feldman)*, of Chicago, Illinois, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

THOMAS R. WILKS, Administrative Law Judge. The underlying charge in this case was filed on June 12, 1995, by American Federation of State, County & Municipal Employees (AFSCME) Council 31, AFL-CIO (the Union) against Frances House, Inc. (Respondent). Thereafter, on August 1, 1995, the Regional Director for Region 33 of the National Labor Relations Board issued a complaint against the Respondent which alleged violations of Section 8(a)(1) of the Act in the form of coercive interrogations of its employees by Respondent Administrator John Absher in late May 1995. That allegation was amended at trial to include concurrent threats of unspecified reprisals. The complaint also alleged

that on June 2, 1995, Respondent discharged its employee, Eric Amazan, because of his membership in and assistance to the Union and because of his concerted activities with other employees for their mutual protection in violation of Section 8(a)(1) and (3) of the Act.

Respondent filed a timely answer which denied the commission of unfair labor practices. Respondent admitted the discharge of Amazan but contends that he was discharged for repeated errors in the distribution of medicine to patients.

The issues raised by these pleadings were litigated before me at trial in Kankakee, Illinois, on February 14 and 15, 1996, at which time the parties were afforded full opportunity to adduce relevant evidence in the form of testimony and documentation. The parties elected to file written briefs. Respondent and the General Counsel filed briefs which were received at the Division of Judges on March 20 and 25, 1996, respectively. Those briefs fully delineated the facts and issues and, in form, approximated proposed findings of facts and conclusions. Portions of those briefs have been incorporated here, sometimes modified, particularly as to undisputed factual narration. However, all factual findings here are based on my independent evaluation of the record. Based on the entire record, the briefs and my observation and evaluation of witnesses' demeanor, I make the following<sup>1</sup>

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE RESPONDENT**

At all material times, Respondent, an Illinois nonprofit corporation, with an office and several facilities in Kankakee, Illinois (Respondent's facilities), has been engaged in providing services, including residential care for the developmentally disabled, otherwise referred to as mentally impaired persons. During the calendar year, Respondent, in conducting its operations described above, derived gross revenues in excess of \$250,000. During the past calendar year, Respondent, in conducting its operations described above, purchased and received at its Illinois facilities goods valued in excess of \$50,000 directly from points outside the State of Illinois.

It is admitted, and I find, that Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. LABOR ORGANIZATION**

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

**III. THE UNFAIR LABOR PRACTICES**

**A. Background; Respondent's Facilities and Supervisors**

Respondent is an Illinois nonprofit corporation which operates residential facilities for the developmentally disabled (mentally impaired). In the Kankakee area, Respondent operates four 16-bed residences, two 6-bed residences, and four 4-bed residences. The 16-bed residences are Chamness

<sup>1</sup> On March 25, 1996, the General Counsel moved to supplement the record by the admission of G.C. Exhs. 10(a)-(e) pursuant to an all-party written stipulation. The motion is granted and G.C. Exhs. 10(a)-(e) has been received.

Square, Collins Square, Gravlin Square, and Hunt Terrace. The six-bed residences are Station Court and Roy Court. The four-bed residences are Dearborn Court, Kankakee Court, Eagle Court, and River Court.

In early April 1995, Maurice Grafton was appointed interim executive director, and he served in that capacity until midsummer 1995. Two administrators report to the executive director. John Absher served as administrator over the six-bed and four-bed residences from August 1994 until August 1, 1995. Polly Harris had been a secretary for many years and since 1991, she performed the functions of an administrative assistant. On March 31, 1995, she replaced Tobin Lane as administrator over the 16-bed residences.

The resident services directors (RSDs) supervise and direct the work of employees in the residences. They have authority to issue discipline to employees. At all material times, Lori Lalumendre was the RSD at Chamness Square; Kathleen Van Mill (now Memento) was RSD at Hunt Terrace; Stephanie Mead was RSD at Dearborn Court; and Cheryl Winnicki was RSD at Collins Square. Respondent employs "team leaders" at each facility who provide direct patient care to the residents. They report to the RSD. Some of the team leaders' duties, including that of Chamness Square's afternoon shift team leader, Eric Amazan, were to assist residents with daily living functions, to accompany and assist them in field trips into their community, and to distribute to them their medication at preappointed times of the day, i.e., 6 a.m. and 5 and 9 p.m. The last task is referred to as the medical pass (or med pass) and involved a documentation system in which a successful distribution to and receipt of medicine by the residents were recorded by the team leader placing his initials in an appropriate box for each resident for each medication on a form known as the MAR. Programs are developed by the RSDs for each resident correlative to that resident's ability in which the resident (or patient) identifies and acknowledges to the team leader the amount and type of medicine taken, e.g., so many pills of a certain color. Some residents are debilitated to such an extent that they have difficulty removing the pills sealed in plastic bubble or "blister packs." The team leader would be expected to assist by guiding the patient's hand function in a so-called "hand over" technique that must not, however, exceed assistance to become actual dispensation by the team leader. That is to say, the team leader must not actually dispense medicine but may only assist this self-medication program. The resident's ability to conform with the program is rated by various codes, some in a system of pluses and minuses and others by percentages accorded to the rate of compliance. The team leader must also concurrently record this evaluation on another separate form, i.e., program sheets. The team leader is also obliged to record the refusal of a patient-resident to accept medication by an appropriate entry, i.e., encirclement on the form of the entry box or other such indication. Undisputed testimony reveals that because of distraction, often caused by the residents themselves, it was not uncommon for team leaders to fail to record every distribution. On those occasions, the RSD inquired of the team leader whether in fact medication was distributed for that resident and, if recordation was the only omission, the team leader was requested to complete the form without discipline or corrective warning under Respondent's formal disciplinary system. At first, Harris testified that documentation failures were never left un-

corrected. However, when confronted with Respondent's MAR forms for May 1995, she conceded that there were in fact nonentries due to employee errors that had not been corrected.

Team leaders receive training during employment orientation as to the proper procedures in the medical pass and documentation tasks. Additionally, team leaders and other staff members receive ongoing "inservice" educational training in group meetings held about every 2 weeks by either the RSD, the administrator, the Respondent's Regional trainer, or an invited speaker. These in-service meetings cover a variety of procedures and policy change announcements and are not limited to the medical pass program. However, that topic was touched upon in 9 of the 12 in-service meetings held from January 6 to May 26, 1995, at Chamness Square. Of those meetings, nine were conducted on Friday, one on Sunday, April 19, and one on Thursday, February 2, which preceded a February 3 in-service meetings. The staff attendance generally ranged from about 4 to 9 persons although one meeting had an attendance of 20 persons. Eric Amazan attended 11 of those in-service sessions.

Administrator Harris testified that team leaders are excused from attending the in-service meeting if their duties conflict with the scheduled time of the meeting. There is no explicit evidence that attendance for every meeting was compulsory although subsequent to Amazan's discharge, one staff member was disciplined for nonattendance of a meeting characterized in her written discipline warnings as a "mandatory" in-service meeting. The variation in the number of attendees suggests that attendance was not mandatory, at least for all staff members.

It is Amazan's uncontradicted and therefore credited testimony that the regular biweekly in-service meetings were conducted at noontime on Friday to coincide with the distribution of paychecks to employees, including afternoon shift employees like himself who came into the facility to receive a paycheck and to attend the meetings. Amazan's shift alternated every 2 weeks, 2:30 to 10:30 p.m. or 3 to 11 p.m.

#### B. *The Union Organizing Campaign*

The Union commenced its organizing efforts among Respondent's employees in late 1994. Administrative notice of Case 33-RC-4030 reveals that the Union filed a petition for a Board-conducted election on November 9, 1995; that on January 19, 1996, an election was conducted among Respondent's employees; that a majority of those employees voted for the Union; that the Respondent filed but later withdrew objections to the election; that on February 27, 1996, subsequent to the trial here, the Union was certified as bargaining agent for a unit including maintenance and housekeeping personnel, cooks, and team leaders.

Harris, who periodically visited the residences under her supervision, first became aware of the union organizing activities prior to her assumption of the office of administrator. Thereafter, she also received employee reports that union meetings were held with employees. She conveyed this information to Absher and Grafton. The Union publishes a newsletter which is mailed to its members. In the January issue, a brief article referred to the Union's campaign to organize private agency employees and displayed a photograph of its organizer at a press conference surrounded by unidentified employees, one of whom was Amazan. Administrator

Absher's wife is a member of the Union at her employment at a nearby state-run mental health facility. There is no direct testimony that she received, read, identified Amazan, or reported the news item to Absher.

*C. The March 1995 Illinois Department of Public Health Survey*

In March 1995, the Illinois Department of Public Health (IDPH) conducted an annual certification and licensure survey of Frances House's Chamness Square facility and later issued a survey report on March 30, 1995, which found Chamness Square operations, under then Administrator Tobin Lane, deficient in its medication pass procedures. Specifically, the IDPH surveyor's noted in the report:

On 3/28/95, during P.M. medication administration, surveyor observed direct staff not implementing the self medication. . . . [D]irect care staff failed to implement the program by taking the pills out of the packet, putting the pills in [Resident 4's] hand and telling [Resident 4] to take the pills.

. . . .

Direct care staff failed to implement the program by not asking [Resident 5] to name or identify medications or to punch out medication from card. Direct care staff pushed out [Resident 5's] medication into hand and told [Resident 5] to take the medication.

. . . .

Direct care staff took hold of the medication card, punched the medication into [Resident 6's] hand and not prompting at any time for [Resident 6] to identify medications.

. . . .

[Resident 7's] medications were pushed out by staff and staff failed to ask

[Resident 7] to name [drug] and [Resident 7] was given medications by staff.

The survey report was silent as to any documentation errors. Harris testified that Amazan, with a tenure of 8 years, was by far Respondent's most senior employee. She testified that during the IDPH surveys, Amazan had been monitored and never had been observed to improperly distribute medicine, but that he was the team leader on duty and he had distributed medicine during the March 1995 survey. There is no evidence that Amazan had ever previously improperly distributed medicine on any occasion. Harris conceded that the March survey report did not have as its intent the disciplining of any employee and that Amazan was in no way disciplined or admonished for the manner of distribution of medicine. Furthermore, she grudgingly conceded that there is a fine judgmental distinction between proper hand's over assistance and excessive assistance and that two different observers might have reached two different conclusions as to the same conduct. As a consequence of the survey, Amazan and all other staff were subjected to further in-service training on "the implementation of medication programs." The survey actually recommended a plan of correction which was

timely complied with by Lane and accepted by the IDPH. Thus, Respondent avoided adverse IDPH action.

*D. Union and Other Concerted Activities*

At a mid-April 1995 union meeting, Amazan and other employees jointly expressed to the union representatives certain concerns about conditions in the residences which were then, at the same meeting, reduced to a written draft of a letter to be sent to the IDPH. Subsequently, a letter dated April 28, 1995, containing those concerns was addressed to the IDPH. The letter was signed "Frances House Direct Care Workers," and the authors' self-description was "direct care workers of Frances House in Kankakee." It commenced by alluding to a prospective IDPH inspection scheduled for the beginning of May 1995. It criticized Respondent's preparation as "fudging documentation of services which were not given or were given improperly." It then asserted that the authors were being "pressured to do the same." It listed various examples of such deficiencies directly related to the quality of resident care. However, it also referred to Respondent's conduct which affected their own conditions of employment. Thus, the letter complained not only that employees were not properly trained to perform work duties required of them but that they were obliged to perform duties that ought to have been performed by a professional nurse. The letter invited investigation of the complaints enumerated, requested confidentiality, and offered to meet with the IDPH representative pursuant to arrangements made by "Dan Giloth at the AFSCME Council 31 office in Joliet [Illinois]." Giloth was the union organizer assigned to Respondent's employees.

A letter dated May 16, 1995, was jointly addressed and later mailed to Administrators Absher and Harris. Amazan and six other employees signed the letter under the typed characterization, "Members of the Frances House Organizing Committee." The letter complained of "problems in the workplace which undermine the quality of service we provide to our residents." It went on to solicit an opportunity to present corrective ideas. It referred to several problem areas including the need for additional training of employees to perform tasks required of them. The letter further stated that the authors had prepared a "list of additional work problems" not specifically identified, but which it wished to discuss. The letter ended by suggesting meetings for either Tuesday, May 30, or Thursday, June 1, between 10 and 11:30 a.m.

One of the signers of the April 28 letter was Pat Williams, a midnight shift team leader employed at Station Court under Absher's jurisdiction. According to Harris' testimony, Williams telephoned her and talked about a letter that was "to be sent" regarding employee concerns with which she now decided that she was not in sympathy. Williams indicated to Harris that she did not wish to discuss it with Absher but offered to give a copy to Harris. The next day, Harris visited Station Court and received from Williams a copy of the April 28 letter. Harris insisted that she was utterly disinterested in the reference therein to the Union, the authors of the letter and Williams' own interest in the Union, and that she simply turned the letter over to Absher who joined her and Williams on the facility patio, at which time Absher read the letter aloud. Neither Williams nor Absher testified in this proceeding. Several aspects of Harris' testimony conflict with

her pretrial affidavit testimony and Respondent's statement of position, including the date when she obtained the April 28 letter from Williams. Harris testified that she did not become aware of the May 16 letter until after the April 28 letter disclosure. Having read Respondent's statement of position letter, she changed her testimony as to the receipt of the April 28 letter to on or a few days before May 23. She also testified that it was on the same date that Absher confronted Amazan with the April 28 letter in the office at Chamness in her silent presence, at which time Absher repeatedly asked Amazan what he knew about it despite his denials of knowledge.

Amazan testified that the confrontation occurred "around May" and "in May." In cross-examination, he admitted that it possibly occurred on May 23. However, he testified that Absher presented him with copies of both April 28 and May 16 letters which he "spread together" on the top of the desk at which he sat facing the standing Amazan. He testified that Absher asked him what he knew about the letters and he answered, "Yes I know about them," and, upon his asking to see them, Absher handed him first the IDPH letter and asked him "do you know what this letter could do to our company?" Amazan answered, "Yes, this could shut down the company." Absher then asked him if he signed the letter. Amazan answered that no individual employee signed it, but rather the union committee did. Absher then stated "so you don't support this letter?" Amazan responded, "I didn't say that." Amazan further answered that all he knew was that the letter had been sent to the IDPH, at which point Absher again asked, "[S]o you don't support this letter?" Again, Amazan repeated his first response and stated further "all we want is what is best for the resident," to which Absher stated his concurrence. Absher went on to state that during his prior work experience at a health care facility represented by the Union, problems were discussed between them, not like what had now occurred by writing to the IDPH by the "back stabbing" union. This was Amazan's first conversation with any Respondent agent regarding the Union. Amazan testified to no specific reference by Absher to the May 16 letter, a copy of which Absher also confronted him.

Harris did not deny that there was more to the conversation than the segment she recalled and implied that there was indeed more to it. Since Absher did not testify, the testimony of Amazan and two other witnesses as to private Absher confrontations is uncontradicted as to what was said by Absher to them. The one significant discrepancy between Harris and Amazan runs to the sequence of the confrontation and the May 16 letter receipt by Respondent. At first, she testified that Absher showed her a copy of it at some time after receipt of the April 28 letter. Then she admitted that Absher had confronted Amazan with copies of both letters and that she was aware that Absher also privately confronted two other employees, Lyla Bringelson and Wanda White, with the same two letters. She was not present, however, at those confrontations.

Lyla Bringelson was employed as a midnight shift team leader at the Dearborn Court facility under Absher's jurisdiction. She signed the May 16 letter and participated in the pre-April 28 letter discussion. She testified that on some date in either May or June 1995 Absher summoned her to the facility office and there, alone, behind closed doors, immediately asked her if it was not true that she had "been Union

before." When she answered affirmatively, Absher said that he had been "good friends" with the union president at the same prior place of employment referred to in the Amazan conversation. Similarly, he told her that when problems had occurred there "they" would talk informally and resolve them. He then stated that he had been told that the Union had sent a letter to the IDPH and said to her, "You need to realize that we can be closed down with that." He accused her of signing the letter. She responded that she had no recollection of signing such a letter. He told her that he understood that the employees wanted a union to obtain higher pay and more benefits and that they wanted registered nurses to distribute medication to the residents. Absher went on to state

. . . but if the State closed us down I'm going to tell the co-worker that they're going to lose their job that you one of the ones that signed the letter [sic].

When Bringelson again denied recollection of signing such a letter, Absher also said with respect to the Union, "you know, it's only a handful of you." To that, Bringelson retorted that "it's a whole lot of people involved."

Bringelson attended union meetings but engaged in no overt activity at the facility. She testified that Absher did not have any documents in his possession during their conversation. She was unable to recall whether the conversation occurred before or after she signed the May 16 letter on that date.

Wanda White was employed as a team leader on the afternoon shift at the Dearborn Court facility. She attended union meetings, participated in the discussion that led to the April 28 letter, and signed the May 16 letter but engaged in no overt activities at the facility. She testified that at some date during a 2- or 3-week period preceding Amazan's June 2 discharge she was summoned to the facility office where Absher confronted her alone behind closed doors. He told her he knew she was supporting the Union, but he added that he did not "think anything bad about the Union" because of his past experience as also referred to in the other two conversations. He asked her how many employees attended the union meetings and how many she had attended. She replied that she could not recall. He then asked her what the employees wanted and told her "have them talk to me and you won't even need your Union." At that point, Absher held up both April 28 and May 16 letters in close proximity to her face. He referred first to the April 28 letter and asked her if she had signed it. She pointed out that the letter bore no signatures. She testified:

He said, "well, do you realize what's going to happen because you sent this letter in." Then he started going off on how it was going to cause a big investigation, it was going to be my fault.

He said, "Do you realize that this letter to the public health were going to be investigated, it's going to cause a big stink around this place and we'll be shut down." He said, "Wanda, if these people lose their jobs I'm going to let them know it was your fault." I said, "John, my name's not there." Nobody's name is there.

Absher also asked her if she signed the May 16 letter and she acknowledged the obvious presence of it in the letter.

Then Absher urged her to go to the "Union" and "tell them to come talk to him and he'd go talk to management on what our wants and things worked out without the Union." She testified that she responded that they had tried to talk to him but he had refused. She explained that she was referring to the meetings on either May 30 or June 1, clearly prospective dates. However, because Absher did not testify, I must credit her.

On May 25, a group of five employees, including Amazan and White, signed a letter addressed to Absher, protesting the recent interrogation of employees about their union activities and the threats of retaliation for union activities. The group went to Collins Square where they presented the letter to Absher. White spoke for the group. Absher asked if the letter pertained to the Union. When they replied that it did, he said that he could not accept it personally. He told them to leave it in the mailbox in which the residence received its mail. They did so. Harris retrieved the letter from the mailbox and gave it to Absher.

### E. The Discharge of Eric Amazan

#### 1. Credibility issues

Many of the facts relevant to Amazan's discharge are not disputed. Harris testified as an adverse General Counsel witness. She testified that she made the decision to discharge Amazan and she testified as to the reasons for that decision. She was only corroborated in a very peripheral area, i.e., what consultation she had engaged in with Grafton, if any, with respect to the discharge decision and when did it occur. Their testimony is mutually and internally inconsistent. As to the remainder of Harris' testimony, she is uncorroborated. I find particularly significant the failure of Respondent to corroborate Harris with the testimony of RSD Lalumendre, Amazan's direct supervisor responsible for signing disciplinary forms, either with respect to allegations of past misconduct and alleged discipline or as to direct confrontations between Harris and Amazan, particularly the discharge interview where the RSD was present. I have already noted the failure of Absher to testify. Respondent's lack of corroboration of Harris' and Grafton's testimony severely impacts upon their credibility. I conclude that the failure of Respondent to call witnesses who must be assumed to be favorably disposed to it necessarily raises an inference that their testimony would adversely affect the Respondent. *International Automatic Machine*, 285 NLRB 1122 (1987), enf. 861 F.2d 270 (6th Cir. 1988).

Furthermore, Harris' testimony as to numerous critical matters was internally and externally inconsistent and outright contradictory. The disingenuous nature of her testimony was highlighted by such improbable representations as that both she personally and the Respondent were totally indifferent to whether Respondent's employees wanted union representation despite Respondent's active campaign to defeat the Union on the election. The reasons advanced for Amazan's discharge changed and shifted as she was cross-examined. Harris' demeanor lacked any spontaneity that is usually indicative of candor. She was variously calculating, hesitant, uncertain, and evasive. All these factors render her a most discreditable witness. I find her testimony completely unreliable, if not outright mendacious. Accordingly, where any factual discrepancy exists between her and any other

nonadverse General Counsel witnesses, I credit the latter. Some of Harris' more egregious misrepresentations will be noted hereafter.

Lyle Dagen was hired as a team leader at Chamness Square in August 1995. He had known Harris from their employment at a private security firm in 1982, where he had worked as a security guard and she had performed clerical duties. On August 25, 1995, Harris issued a written discipline to Dagen. During the conversation when issuing this discipline, she told Dagen that the employees were circulating a petition for the Union and if he signed it, he could be terminated for doing so. Harris told him "that Eric was trying to get a union in and he also was terminated on account of trying to get a union at the time." At that time, Dagen had never met Eric Amazan. This admission and threat is uncontradicted and therefore credited.<sup>2</sup>

#### 2. The discharge

On June 2, Amazan arrived at work at Chamness Square at 2:30 or 3 p.m., the beginning of the afternoon shift and noticed Grafton's white car in the parking lot. He did not see Absher's car in the lot but when he came into the facility, he found Absher sitting in the dining room with papers and files spread about him. Amazan noticed that his own name was on one of the papers.

RSD Lori Lalumendre told Amazan to come into the office. Present in the office were Lalumendre and Harris. Harris told Amazan to sit down. She told him he forgot to initial two of the residents' MAR files<sup>3</sup> He said, "I did?" Lalumendre told him his error had occurred the night before. Harris said that he had failed to follow instructions according to the Respondent's written disciplinary policy numbers 9 and 11 and told him that he was fired. Amazan smiled in disbelief and asked, "I was fired for this?" Harris replied that he was. Amazan asked why his coworker that night always refused to pass the meds when she worked with him, so he had to give the medications both at 5 and 6 p.m. Harris refused to discuss that question. Amazan left the room. As he walked away, he started to cry. Harris had prepared a discharge form, which, as Harris noted on the form, Amazan refused to sign. Amazan stayed at the facility for about 10 minutes, saying goodbye to the staff. Before leaving, he embraced Harris and Lalumendre.

Respondent's written disciplinary policy sets forth a progression of discipline and reads as follows:

##### Verbal Warning

A verbal warning is a form of discipline which is generally applied to correct minor misconduct. Notation of the verbal warning will be placed in the employee's file.

##### Written Warning

A written warning is a disciplinary action generally taken after a verbal warning or for more serious misconduct or unacceptable job performance. The written warning reinforces the fact that unacceptable behavior or attitudes must be corrected.

<sup>2</sup>The complaint was not amended to include Harris' statement to Dagen as an independent violation of Sec. 8(a)(1) of the Act.

<sup>3</sup>Harris asserted in her testimony that it was five residents, not two.

#### Suspension

A suspension is a disciplinary measure generally taken to correct serious misconduct or repeated occurrences of inappropriate behavior or unacceptable job performance.

#### Dismissal

A dismissal is a disciplinary measure generally used for significant misconduct, inappropriate behavior or unacceptable job performance.

The level and type of discipline assessed in any situation will be based upon the total circumstances and is discretionary. Progressive discipline is not guaranteed.

Next, there are 15 enumerated types of misconduct under the following prologue:

The following are examples of misconduct which will subject an employee to disciplinary action up to and including termination. This list is not meant to cover all types of misconduct; rather, its purpose is to illustrate behavior and conduct which is not acceptable. Because all types of misconduct cannot be listed, there may be misconduct for which an employee is disciplined or discharged that is not listed.

The list includes some very serious forms of misconduct, e.g., intoxication, drug abuse, possession of weapons, patient abuse, etc. The two policies cited by Harris to Amazan reads as follows:

9. Wilful neglect of one's duty, including sleeping while on duty;

11. Failure to obey reasonable instructions, or being insubordinate;

Harris testified that the disciplinary policy is not absolutely progressive. Harris testified that despite the apparent progression described therein from verbal warning up through dismissal, the policy implies that all circumstances are considered when issuing discipline, including discharge.

The discharge of Amazan was Harris' first discharge involvement for any employee. Respondent's records disclose that during the period January 1, 1994, through June 1, 1995, four employees were discharged at Respondent's Kankakee facilities. A probationary employee of 1 month's employment was discharged after seven tolerated incidents of tardiness and absenteeism. Another employee was discharged for absenteeism and tardiness of a willful and egregious nature. A fourth employee was discharged after a progression of warnings for "sloppy work," sleeping on the job, including an entire shift, improper facility telephone use, job inefficiency, and tardiness. A fourth employee was terminated for unspecified reasons. There is no evidence that any employee was discharged or was formally disciplined for medication pass errors during that period of time. Respondent's records and Harris' testimony also disclose that from May 10 through December 1995, Harris issued a progression of verbal warning notices, warnings, and ultimately a 5-day suspension, but not discharge, to an employee who had "deliberately and wilfully failed to obey reasonable instructions" by dereliction of cleaning duties; a failure to document a medical pass; a failure to inform her superior that a resident's medication was not available and thus not dispensed;

a failure to attend a "mandated" in-service; and, finally, a failure to follow reasonable instructions concerning a physician's order by administering medication 3 hours earlier than prescribed. Harris testified that such misconduct could have warranted a discharge in her discretion.

Harris testified that she decided to fire Amazan for "repetitive behavior." She enumerated two failures, i.e., failure to properly perform a medication pass and a failure to document both the MAR and the program sheet. Then she testified that the failure was limited to the MAR documentation for five residents on June 1, 1995, but she admitted that Amazan did not fail to distribute medication nor did he fail to document the program sheets on that day. Harris explained that she did not mean that five patients' records were totally undocumented. She explained that at the rate of 32 medications, i.e., 16 medications to patients on two shifts who received 3 to 4 different medications on the average of 3 medications for each patient, there were 96 medications passed and that Amazan failed to initial 5 of them. When confronted with the MAR records of June 1, 1995, which disclose Amazan's initials in all appropriate boxes, Harris insisted that she instructed Amazan to initial the Mar at the outset of the discharge interview in conformance with her strict universally enforced policy of tolerating no unexplained blank spaces. As noted earlier, this is inconsistent with the document itself which reveals other uncorrected failures, and with her own purported recordation of the discharge interview which is silent on that point. She explained that that document was incomplete. For reasons already stated, I credit Amazan that he did not initial the carbon copy of the June 1 MAR which Harris pointed to in the discharge interview when she claimed to him that he had failed to document boxes for two, not five, residents.

In further examination, Harris explained that she decided to discharge Amazan solely because of the alleged June 1 errors. Then she admitted that in 8 years of employment during which he routinely passed medication, Amazan had never been disciplined for even one error. She quickly qualified that statement with a recollection of having "once" written him up. Then she expanded that to "numerous times" that she had issued written disciplinary documents to him and that she relied on that past history as an additional reason for the discharge.

Harris identified only three prior disciplinary warnings for failure to initial MAR or program sheets which were purportedly issued by her to Amazan on May 19, 26, and 30, 1995, and added that she and the RSD also subjected him to "numerous" verbal counselings and at least 12 in-service training meetings to correct these errors. In her alleged June 2 contemporaneous written account of the discharge, she referred to 11 in-services since January 1995, "four previous write-ups" and only "2 verbal counsels" of which there is no record. In cross-examination, she admitted that in-service training was in fact ongoing education and not disciplinary action in Amazan's case and that she did not claim that in-service attendance was a cause of Amazan's discharge.

In further testimony, Harris insisted that Amazan's "total job performance" was a discharge consideration for which she cited the March 1995 IDPH inspection incident. Yet, she conceded that apart from that incident, Amazan "always" did a good job.

With respect to the alleged prior writeups in May 1995, for the foregoing reasons, I discredit Harris and credit Amazan that he had not received any of those disciplinary actions. Additionally, documentary evidence supports his testimony that he did not work on two of the dates when Harris claimed to have personally given the documents to him at the outset of or during his normal shift time. I conclude that those prior disciplinary documents were fraudulently contrived for this proceeding.

Finally, Harris testified that she, alone, decided to discharge Amazan on the evening of June 1, after consultation with Grafton on the telephone that evening. Grafton testified that she made the decisions, but that she did set forth the factual decision to him and did discuss "what decision would be most effective." He testified that he visited Chamness Square on June 2 at Harris' invitation before Amazan reported for work and he and Absher discussed with her how to conduct the discharge interview. He admitted that he had discussed the propriety of the action with Respondent's managerial consultant, Bibo, on the discharge date or before that date. After vacillating testimony, Grafton conceded that it could have been 1 day or even 1 week before June 2 and that there could have been between three to five such discussions prior to June 2 as to the Amazan discharge decision. Thus, according to Grafton, Harris' discharge decision was formulated much prior to the evening of June 1 and was not prompted by the alleged MAR documentation failure of that date.

Thus, I find that the reasons advanced by Respondent for Amazan's discharge were inconsistent, contradictory, uncorroborated by available witnesses, undocumented or falsely documented and accordingly pretextuous. Further, the discipline itself was unprecedented, disparate and out of proportion to the nature of misconduct even if it had occurred.

### 3. Analysis

#### a. *The 8(a)(1) allegations*

The General Counsel alleges that employees Amazan, Bringelson, and White were coercively interrogated by Absher in late May 1995 concerning their union and concerted activities, i.e., the IDPH letter, and threatened with reprisals for engaging in those activities.

With respect to the IDPH letter, Respondent concedes that concerted activities concerning wages, hours, or working conditions are protected and cites *Peter Vitale Co.*, 313 NLRB 971, 975 (1994). However, it argues that the IDPH letter writers did not concern themselves with those matters but rather with patient care and therefore that concerted activity was unprotected. Respondent relies on the Board's decision in *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980), which adopted the judge's decision. That case, however, is distinguishable because the employee complaints there were focused entirely upon patient care. Respondent's employees were concerned about their own conditions of employment as well as patient care, i.e., training, inappropriate assignment of work considered to be nurses' duties, and being required to engage in allegedly unethical, if not unlawful, documentation falsification in the course of their work duties. The case cited by Respondent, moreover, was ultimately decided upon the judge's finding that regardless of whether the employees' concerted conduct would otherwise

have been protected, it lost that protection when their complaints degenerated into excessive, repetitive, blindless, and aimless carping that disrupted employee morale.

The letter writers, moreover, allied themselves with and sought the representational assistance of the Union by explicit references to it in the letter. Absher's concurrent receipt of the May 16 union oriented letter seeking a union committee meeting to discuss "work problems" as well as patient care clearly entwined the IDPH complaint activity with protected union activities.

Even without union involvement, the facts demonstrate that the IDPH letter was the result of concerted activities concerning conditions of employment and known as such to Respondent. The Act protects employees who seek to improve working conditions by resorting to an administrative forum. *House Calls, Inc.*, 304 NLRB 311, 312 (1991). A threat of reprisal to an employee of adverse action if another employee or employees in concert filed work condition complaints with a regulatory agency is violative of Section 8(a)(1) of the Act. *Oakes Machine Corp.*, 288 NLRB 456 (1988). It is also violative of the Act to interrogate employees concerning concerted complaint letter writers. *American Poly-Therm Co.*, 298 NLRB 1057 fn. 2 and 1065 (1990).

Respondent argues that interrogation of employees as to their union sentiments are noncoercive when directed to open and active union supporters in the absence of threats or promises. It cites in support *Rossmore House Hotel*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). It further quotes that decision as posing the question, "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act," supra at 1177. With respect to Absher's reference to business closure, Respondent argues that it was a privileged factual prediction of possible adverse consequences by an agent who had no meaningful discretion or control over the events, i.e., that Respondent could lose its license as a consequence of the investigation. Respondent cites *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

While it is a fact that the interrogated employees announced their union allegiance in the May 16 letter and invited committee confrontation with Respondent concerning work problems and patient care, they did not invite selective, persistent individual grilling about their own or other employees' protected and union activities and sentiments in a closed door office by a high-ranking visiting manager. Nor by any other overt concerted or union conduct did those employees implicitly invite such confrontation. I conclude that by the mere manner and locus of the questioning, Absher's conduct reasonably tended to be coercive.

Further, to Amazan, Absher stressed the depth of his animus by referring to the Union as "back stabbing" and thus, by implication, he disparaged Amazan's association with it as an act of disloyalty. Compare *House Calls, Inc.*, supra at 313.

In dealing with Bringelson, Absher probed the extent of other employee support for the Union. Despite her protest that she did not sign the IDPH letter which, in fact, was unsigned by any individual employee, Absher threatened that he would tell other employees that they could lose their jobs because she signed that letter.

In confronting White, Absher demanded to know the number of other employees who attended union meetings and

how many meetings she herself attended and solicited her to encourage employees to deal directly with him, and he implicitly promised to satisfy their complaints. He also threatened her with exposure to her coworkers as an instigator of the IDPH letter which would cause an investigation, a "big stink" and necessarily result in facility closure.

Absher's implicit promise to satisfy employees' demands by individual bargaining further enhances the coercive nature of the interrogation of White.<sup>4</sup>

With respect to the threat of closure, Absher's blunt, unqualified statement of closure to White falls far short of the careful reasoned objective prediction permitted by the Court in the *Gissel* case. There is no objective evidence in the record that closure was an imminent or even remote consequence of an IDPH investigation. The evidence does reveal that the IDPH prescribes a corrective action plan for cited deficiencies to allow a facility to avoid formal adverse action. Absher in effect implied to White that Respondent would not take corrective action if ordered to do so but would rather shut down. That is an event subject to Respondent's control. Absher's entwinement of the Union with the IDPH letter implied to the employees that closure would be, at least in part, a result of union organizing activities.

Accordingly, I find that Respondent coercively interrogated its employees concerning their own and other employees' union and protected concerted activities and threatened them with reprisals of closure and other adverse actions because of their own and other employees' union and protected concerted activities for their mutual protection and thereby violated Section 8(a)(1) of the Act.

#### b. The 8(a)(1) and (3) allegation

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the employer's discharge decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused the discharge. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 fn. 7 (1983).

As cited by the General Counsel, the Board recently explained the allotted *Wright Line* burdens of proof in *W. F. Bolin Co.*, 311 NLRB 1118 (1993). In that case, the Board stated:

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. In order to rebut the prima facie case, the Respondent must demonstrate that it would have laid off (the discriminatees) in the absence of their protected activities. To establish its defense, the Respondent has the burden of presenting "an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken

place even in the absence of the protected conduct." [Citation omitted, 311 NLRB at 1119.]

The *Wright Line* burden of proof imposed on the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of factors, i.e., union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent's proffered nondiscriminatory motivational explanation is so consummately false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7th Cir. 1984); and *Williams Contracting*, 309 NLRB 433 (1992).

Respondent was proven to have actively campaigned against union representation and to have exhibited animus toward the Union and to the protected concerted activities, both of which it had known or suspected Amazan to have been a participant and one of the leaders. Its proffered reasons for the discharge were contradictory, shifting, false, disparate and pretextuous. I conclude that the General Counsel has sustained and the Respondent failed the *Wright Line* evidentiary burdens. I therefore find that Respondent violated Section 8(a)(1) and (3) of the Act by its June 2, 1995 discharge of Eric Amazan as alleged in the complaint.

#### CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, Respondent has violated Section 8(a)(1) and (3) of the Act and, further, I find such violations affect commerce within the meaning of Sections 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent unlawfully discharged its employee Eric Amazan on June 2, 1995, I recommend that it be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantial equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that Respondent remove from its files any reference to Amazan's unlawful discharge of June 2, 1995, and to the purported disciplinary actions dated May 17, 26, and 30, 1995, which were found here to have been falsely contrived and never issued, and to notify Eric Amazan in writing that this has been done and that the discharge and

<sup>4</sup>The General Counsel in the brief argues that such conduct is separately violative of the Act. However, there was no specific motion to amend the complaint to allege it as such.

those false disciplinary actions will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Frances House, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their own and other employees' suspected union activity and concerted activity for mutual protection and threatening them with its Kankakee, Illinois facilities closure or other adverse actions because they or their fellow employees engaged in such activities.

(b) Discharging Eric Amazan and any other employees because of their union activity or other concerted activities for mutual protection of employees.

(c) In any other 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) Within 14 days from the date of this Order, offer Eric Amazan full reinstatement to his former job or, if that job no longer exists, to a substantial equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Eric Amazan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of June 2, 1995, and to the falsely contrived unissued disciplinary actions dated May 17, 26, and 30, 1995, and within 3 days thereafter, notify the employee that this has been done and that the discharge and those disciplinary actions will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its Kankakee, Illinois facilities copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 33, 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. 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 June 12, 1995.

(e) 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.

#### 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.

WE WILL NOT coercively interrogate employees about their own and other employees' suspected union activity and concerted activity for mutual protection and threaten them with our Kankakee, Illinois facilities' closure or other adverse actions because they or their fellow employees engaged in such activities.

WE WILL NOT discharge Eric Amazan or any other employees because of their union activity or other concerted activities for mutual protection of employees.

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

WE WILL offer Eric Amazan full reinstatement to his former job or, if that job no longer exists, to a substantial equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eric Amazan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any references to the unlawful discharge of June 2, 1995, and to the falsely contrived unissued disciplinary actions dated May 17, 26, and 30, 1995, and WE WILL within 3 days thereafter, notify the employee that this has been done and that the discharge and those disciplinary actions will not be used against him in any way.

FRANCES HOUSE, INC.

<sup>5</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.

<sup>6</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."