

Beverly Farm Foundation, Inc. and American Federation of State, County and Municipal Employees, Council 31, AFL-CIO. Cases 14-CA-23500, 14-CA-23537, 14-CA-23700(1-2), 14-CA-23748, and 14-CA-23860

May 29, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On September 16, 1996, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent and the Charging Party Union filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the judge,² and to adopt the recommended Order³ as modified.⁴

¹ The Respondent has explicitly and implicitly 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.

In the absence of exceptions, we affirm the judge's findings that the Respondent did not unlawfully threaten Union Steward Lott or refuse to discuss employee Smith's grievance in the Union's presence.

² In agreeing with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to mediate grievances, we note that the Respondent, at least implicitly, agreed during negotiations to follow the provisions in the handbook until the parties agreed otherwise. In these circumstances, the Respondent's subsequent unilateral repudiation of the mediation provision, which the parties did not agree to dispense with, violated the Act.

Member Higgins agrees with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by making unilateral changes in the absence of a valid impasse. Accordingly, he finds it unnecessary to decide what findings would be appropriate had a genuine impasse between the parties existed on July 27, 1995.

In agreeing with judge that the Respondent violated Sec. 8(a)(1) by removing union literature from car windshields, Member Higgins does not rely on the judge's reasoning that the Respondent's 1992 memo would have mentioned client injury by ingestion if that matter in fact was a concern to the Respondent.

³ We note that no one has excepted to the period chosen by the judge for the extension of the certification year, which began on June 27, 1994. In any event, where as here, the Respondent has committed violations during the certification year that were likely to have an adverse effect on the Union's status as bargaining representative and the Respondent has later withdrawn recognition of the Union on the basis of an assertion of bargaining impasse, the judge's recommended Order is not unreasonable.

⁴ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Beverly Farm Foundation, Inc., Godfrey, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following as paragraphs 2(b) and (c).

"(b) Within 14 days after service by the Region, post at its facility in Godfrey, Illinois, copies of the attached notice marked 'Appendix.'²¹ Copies of the notice, on forms provided by the Regional Director for Region 14, 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 February 27, 1995.

"(c) 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."

Kathleen C. Richmond, Esq.,¹ for the General Counsel.
Row Friedman, Esq. (Susman, Schermer, Rimmel & Shifrin),
of St. Louis, Missouri, for the Respondent.
Gilbert Feldman, Esq. (Cornfield and Feldman), of Chicago,
Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. The American Federation of State, County and Municipal Employees, Council 31, AFL-CIO² filed charges on various dates in 1995³ and 1996, as detailed below.⁴ The original order consolidating cases, consolidated complaint and notice of hearing issued on June 30, followed by a second consolidated complaint dated September 1, and a third consolidated second amended complaint on February 7, 1996, alleging that

¹ Hereinafter referred to as the General Counsel.

² Hereinafter referred to as AFSCME or the Union.

³ Unless otherwise indicated, all events occurred in 1995.

⁴ The original charge in Case 14-CA-23500 is dated February 27; the charge in Case 14-CA-23537 is dated March 17, as amended on June 29; the charges in Case 14-CA-23700 (1 and 2) were filed on July 24; the charge in Case 14-CA-23748 is dated August 31; and in Case 14-CA-23860, November 13, as amended on February 5, 1996.

Respondent, Beverly Farm Foundation Inc.,⁵ violated Section 8(a)(1) and (5) of the National Labor Relations Act.⁶ The Respondent filed timely answers to each complaint.⁷

The case was tried in St. Louis, Missouri, on April 9 and 10, 1996, with all parties having the opportunity to examine and cross-examine witnesses, introduce documentary evidence, and argue orally. On the entire record,⁸ including my observation of the witnesses' demeanor, and the parties' posttrial briefs, and pursuant to Section 10(c) of the Act, I reach the following

I. FINDINGS OF FACT

A. Jurisdiction

At all material times, the Respondent, a nonprofit Illinois corporation, with an office and place of business in Godfrey, Illinois (Respondent's facility or Beverly Farm), provides residential care and developmental training for profoundly retarded adults.

During the calendar year ending December 31, Respondent, in conducting its business operations described above, derived gross revenues in excess of \$250,000. Respondent also purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Illinois. Accordingly, Respondent admits, and I find that Beverly Farm is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

B. Unfair Labor Practice Allegations

1. Introduction

Respondent operates a residential treatment center for approximately 410 mentally and physically disabled adults who are lodged in various accommodations, consisting of 6 group homes, 10 cottages, and an apartment house. Other buildings on the campus are used for administrative, maintenance, and dietary functions. A training facility is approximately 2 miles distant from the main campus.

After winning an election by a vote of 274 to 47, AFSCME was certified as the collective-bargaining representative of a unit composed of some 370 of the 600 Beverly Farm employees on June 27, 1994. Negotiations commenced on August 8, 1994. Almost a year later, after 19 bargaining sessions, the Respondent declared that an impasse existed and presented its final offer to the Union on July 14. Except for one dissent, the unit members voted to reject the offer. On November 8, Respondent revoked the final offer and withdrew recognition. Thereafter, a recertification petition was filed by a group of employees sufficient in number to warrant an election.

⁵ Herein referred to as the Respondent or Beverly Farm.

⁶ Hereinafter, the Act.

⁷ Respondent's answers were filed July 6, September 12, and February 14, 1996.

⁸ Hereinafter, documents offered into evidence by the General Counsel are referred to as G.C. Exh., followed by the appropriate exhibit number; documents introduced by the Respondent are cited as R. Exh., those of the Charging Party as C.P. Exh., and Joint Exhibits as Jt. Exh. The transcript is designated as Tr. followed by the relevant page number.

The complaint alleges that on July 14, 1995, Respondent violated the Act in presenting, and later implementing its final offer before reaching a valid impasse. Further, Respondent is accused of failing and refusing to bargain and subsequently withdrawing recognition of the Union without objective reasons for doing so. In addition, the Respondent is charged with unlawfully withdrawing consent to the Union's posting various pieces of literature, removing a union flyer from the windshields of cars parked at the facility, refusing to discuss or process three employee grievances, denying an employee's request for union representation at a disciplinary meeting, threatening an employee with reprisals because he engaged in union activities and announcing the formation of an employee-management committee. The Respondent asserts that it committed no unfair labor practices.

2. The negotiations

The parties met for their first collective-bargaining session on August 8, 1994, at the Respondent's facility. AFSCME Regional Director Kent Beauchamp, who served as union spokesperson, Local 31 Staff Representative Peggy Zimmerman, and a committee of employees represented the unit members throughout the negotiations. Respondent's bargaining team was composed of its counsel and principal spokesperson, Ross Friedman, joined by Human Resources Director Steve Patsaros, Executive Director Monte Welker, and other management personnel.

At their initial meeting, the parties agreed on the following ground rules: (1) noneconomic terms would be discussed first, and then the economic provisions would be negotiated; and (2) a complete agreement would be reached before any terms were implemented. The Union then presented a comprehensive proposal to management and briefly outlined its salient provisions. Respondent's negotiators observed that some of the provisions, such as those concerning entitlement to sick leave, holidays, and vacations, had economic implications and, therefore, should be reserved until they reached that aspect of the bargaining.

Over the course of the next half year, the Union and the Employer generally met once a month. In an effort to meet the objections of their counterparts, each side compromised some of their original positions, while holding firm to others. By February 16, they had agreed to 12 articles and some sections of additional articles. At the same time, a significant number of issues remained unresolved, including dues check-off, union security, a drug and alcohol policy, leaves of absence, the length of the probationary period, whether employees charged with abuse or neglect could grieve, filling vacancies, the length of recall rights, and overtime procedures, among others.

At the next meeting on March 16, the Union modified several of its proposals in an effort to reach agreement. However, the parties continued to differ on numerous issues.

3. Bargaining over economic issues

Notwithstanding their agreement to reserve bargaining over economic issues until noneconomic issues were resolved, Respondent began asking the Union to submit its economic proposals in March. Because a number of noneconomic issues were outstanding, and believing that the employees needed time to thresh out their ideas for this, their

first contract, the Union resisted the Respondent's requests. Not until May 25 did the Union submit its first economic offer which had a price tag of more than \$1 million above Respondent's then-present costs.

Finding the proposal unacceptable, the Employer counteroffered at the next meeting on June 21, but the Union deemed it deficient. On July 6, AFSCME lowered its economic demands but Respondent rejected this offer too, finding the \$900,000 increase still excessive. The parties remained at odds over a number of matters. For example, the Union wanted a 30-day probationary period, while Respondent insisted that it remain at 6 months. Another union proposal called for life insurance coverage of \$25,000, whereas the Employer would not agree to a policy of more than \$15,000. They also were differed on other matters including wages, sick leave, vacations, holidays, and the length of the contract.

At the next meeting on July 14, management came not to bargain, but to present a "last, best and final offer"—a contract with a 1-year term, a modest wage increase, life insurance coverage of \$15,000, and a revised health benefits plan which allocated \$100 toward an employee's physical examination. On July 27, the unit employees soundly rejected the offer by a vote of 191 to 1. Thereafter, the parties exchanged a series of letters, setting the stage for the adversary positions they would take at this proceeding.

By letter of July 31, Respondent informed the Union that it would implement the wage, health, and life insurance provisions of the final offer in early August.⁹ In an August 4 reply, Beauchamp asked to renew negotiations as the Union had a counterproposal to the final offer. By return mail of August 7, the Employer advised the Union that any new proposals would be evaluated if they were submitted in writing. Beauchamp answered reminding Respondent that it had a statutory duty to meet and bargain on request, and stated emphatically that the Union would not negotiate by mail. In a terse reply, Respondent wrote that after bargaining to impasse, it had no further obligation to engage in what it termed a "frivolous exercise." (G.C. Exh. 12.)

On September 29, Beauchamp sent another letter to the Respondent requesting to bargain, noting that the Union had new proposals to present on a number of specifically designated issues. Respondent curtly rejected the request, pointing out that by proposing further discussion on subjects covered in its final offer, the Union merely confirmed the existence of an impasse. The Union sought bargaining a third time by letter of October 27. Respondent notified the Union on November 9 that it was withdrawing recognition. Beauchamp quickly replied on the same date, demanding that Beverly Farm produce objective evidence to support its claim that the Union no longer enjoyed majority support. Respondent countered that since the certification year was long over, it had no duty to meet, bargain, or otherwise deal with AFSCME.

In late January 1996, employee David Kallal circulated a petition among his coworkers seeking the Union's ouster. After collecting 140 signatures, he filed the petition with the Board which determined that there was a sufficient showing of interest to warrant a recertification election.

⁹ Respondent disclaimed interest in implementing any other provisions of the final offer.

4. The parties' posting agreement

At the outset of negotiations in August, Respondent granted the Union the right to post informational literature on Beverly Farm bulletin boards. Initially, the Union posted various materials without any interference from management. Several months later, Human Resources Director Patsaros complained to the union negotiators that their notices were being plastered at inappropriate places around the facility, rather than on bulletin boards reserved for that purpose. The AFSCME representatives said they would try to dissuade members from such practices. The parties also agreed that until a final agreement was executed, the Union could not post literature which was "political, partisan or defamatory."

Patsaros raised the posting issue again in early 1995, stressing the parties' agreement that union messages could not be posted which were political, partisan, or defamatory. He also repeated that his approval was required prior to posting. That evening, the Union posted a leaflet containing a "bargaining update," but it did not remain intact for long. The next day, Patsaros advised Union Representative Zimmerman that he had removed the leaflet because the Union had failed to obtain his approval before posting a document he considered "inflammatory."¹⁰ Zimmerman explained that she thought approval was required only if the Union wished to post materials at places other than the timeclocks. Patsaros disabused her of this notion, maintaining that the Employer's policy required prior approval of all union materials. He also cautioned that "political, inflammatory or incorrect material would be disallowed." (G.C. Exh. 27.)

Following a bargaining session on February 16, the parties again turned their attention to the posting issue. Patsaros repeated that the content of all notices required prior approval and could be posted only at timeclocks. Beauchamp agreed to these restrictions, but insisted that Respondent had no right to censor the content of AFSCME's literature. When Patsaros asserted that approval could be withheld if the material was "incorrect," Beauchamp dissented, reminding Patsaros that the operative language was "political, partisan or defamatory."

After the meeting concluded, Beauchamp and several union staff members prepared an intentionally innocuous summary of the bargaining session. On February 21, he sent Patsaros a copy of this "Bargaining Update" with a second leaflet recommending ways to handle an outbreak of an infectious disease at the facility. Patsaros vetoed both notices, as "political and inflammatory." At trial, he admitted that he incorrectly substituted the word "inflammatory" when he meant "defamatory." He also explained that he rejected the union leaflet containing suggestions to combat the contagion because he thought they conflicted with measures Beverly Farm already was taking pursuant to recommendations issued by a state agency.

At a March 16 bargaining meeting, Respondent accepted a union proposal memorializing the parties' interim agreement on notice postings. While prior approval was not mentioned as a requirement, the provision confirmed the parties' understanding that

¹⁰ Patsaros testified that he frequently and inadvertently interchanged the words inflammatory and defamatory.

Items posted on the bulletin boards will not be political, partisan or defamatory. . . . The Employer reserves the right to immediately remove any item from the boards which do not conform to the above requirements or materials posted on company equipment or other places on the Employer's property.

In subsequent months, Patsaros reviewed and rejected other AFSCME bulletins, judging them "political and incorrect." Although some of the rejected items were union summaries of bargaining sessions, the Respondent did not hesitate to post accounts which reflected its own views on the latest round of negotiations. At the same time, Patsaros noted that the Union continued to post many leaflets without submitting them to Respondent's scrutiny.

5. Respondent removes union flyers from parked cars

On July 19, AFSCME staff members Zimmerman and Berks, and Beverly Farm employee Debra Beumer placed notices of an important union ratification meeting on the windshields of cars parked on an employee lot situated on Beverly Farm property. Later that day, on Patsaros' instruction, two staff assistants removed the leaflets.

Patsaros justified his decision on several grounds. First, he pointed out that the union representatives violated Respondent's long-standing policy prohibiting "posting or distribution, especially in outside areas . . . without authorization from the Personnel Director or Executive Director." (R. Exh. 15.) He relied on a 1992 memo which reaffirmed a policy first announced in 1988 advising employees that "unauthorized selling, soliciting, posting, or distributing of any written or other materials during working time or in working areas . . . is a violation of a Beverly Farm rule." (Jt. Exh. 2.) Patsaros explained that the rule was designed to protect Beverly Farm clients who might swallow such paper, but also to prevent litter.

6. The Krivohlavek hearing

Pursuant to regulations of the Illinois Department of Public Health, Respondent was required to comply with an "Abuse and Neglect Policy," which set forth procedures to be followed in the event an employee was accused of mistreating a client. In compliance with the regulations, Respondent established an internal review committee whose members were authorized to investigate alleged violations of the policy, and then file a written report with the State and the resident's guardian setting forth a detailed account of the incident and any discipline imposed, which could range from a reprimand to termination.

On June 5, an employee reported to Director of Social Services Steve Bartelli that another employee, Terry Krivohlavek, slapped and verbally abused one of the Beverly Farm clients. When Bartelli and another supervisor, Unit Director Mark Walker, questioned Krivohlavek about the accusation, she admitted having called the client a bitch a few times, and tapping her on the face, but denied doing anything worse. Krivohlavek was suspended immediately, but Bartelli encouraged her to attend a meeting of the internal review committee the following day to try to save her position.

That evening, Krivohlavek telephoned coworker Debra Beumer to discuss the forthcoming interview with the internal review committee. Beumer suggested that she try to post-

pone the hearing until she found union representation. When Krivohlavek expressed some anxiety about asking for a postponement, Beumer offered to request it for her. Beumer telephoned Bartelli who assured her that a union representative could accompany Krivohlavek when she appeared before the review committee. Beumer then contacted Union Organizer Berks, who agreed to attend the hearing with Krivohlavek after Beumer assured him that Bartelli did not object to a union representative attending the meeting.

Berks testified that the following day, June 6, after locating Bartelli and Walker, he informed them that he would represent Krivohlavek and asked to meet with her.¹¹ When she arrived a few minutes later, they spoke privately about the incident.

Internal Review Committee Member Walker denied that Berks introduced himself or stated the purpose of his visit. Rather, he maintained that Berks simply asked where he could find Krivohlavek and then left, presumably to talk to her. Walker further testified that Bartelli appeared to be confused by Berks' arrival, remarking to Walker that he had expected a woman would appear with Krivohlavek at the committee meeting, an apparent reference to the call from Beumer the evening before. Walker explained that Bartelli telephoned Patsaros to ask how he should proceed.

Patsaros stated that during this call, he asked Bartelli whether the employee in question had asked for representation. When told she had not, Patsaros advised Bartelli that Berks was not entitled to attend the hearing and should be sent to the personnel office.

Bartelli simply told Berks to report to the personnel office. At this, Berks instructed Krivohlavek that if the hearing started before he returned from personnel, she should stall for 5 or 10 minutes by insisting on union representation. He further advised her that if he still had not returned, she should proceed without him.

Berks stated that on arriving at the personnel office, he spoke by phone with Patsaros who told him that Krivohlavek was not entitled to union representation since she still was a probationary employee and that the grievance procedure did not apply to matters handled under the abuse and neglect policy which provided for appellate review before a state agency. Patsaros then instructed Berks to leave the facility.

Patsaros agreed with much of Berks' account, with this exception: he claimed that after Berks explained that he intended to represent Krivohlavek at the internal review committee hearing, he told Berks that no one had requested his services.

After speaking to Berks, Patsaros telephoned Bartelli and advised him to proceed with the disciplinary meeting without the union agent who was leaving the facility. Bartelli then called Krivohlavek into the conference room. She averred that at the outset, she took 5 or 10 minutes to demand union representation, as Berks had advised. However, Bartelli told her that as a probationary employee, she was not entitled to representation.

Contradicting Berks, Unit Director Walker, who served on the internal review committee with Bartelli, testified that he had no idea who Berks was or why he was in the building,

¹¹In addition to Bartelli, the committee included three other management level supervisors—Mark Walker, Craig Cook, and Martha Warfer.

although he acknowledged seeing him speak to Krivohlavek. Walker further stated that as soon as Krivohlavek entered the conference room she asked for Berks. When Bartelli informed her that Berks was gone, she proceeded to describe her encounter with the client, never requesting union representation. Following her remarks, the internal review committee caucused. Based on its recommendation, Krivohlavek was discharged the same day.

7. The Respondent declares impasse and implements final offer

The parties opened negotiations for a collective-bargaining agreement on August 8, 1994, with AFSCME's collective-bargaining agent, Kent Beauchamp, taking the lead as principal spokesman for the employees, and Respondent's counsel, Ross Friedman, serving in the same capacity for the Employer. On Respondent's suggestion, the parties agreed at the outset to address noneconomic matters before turning to economic issues. Accordingly, the Union presented its first noneconomic offer to Respondent at the parties' second meeting on August 19. Over the next 9 months, they focused on noneconomic terms, reaching agreement on some items and failing to see eye-to-eye on others.

On April 20, 1995, Respondent's counsel sent the Union a letter with supporting documents which summarized the status of the parties' negotiations on noneconomic issues. Specifically, Friedman grouped the proposals into three categories: (1) matters on which agreement was reached; (2) proposals which Respondent had modified in minor ways after reviewing the Union's second noneconomic offer of March 16; and (3) the balance of the Union's proposals which Respondent rejected. This latter category included provisions dealing with management rights, the length of the probationary period, the grievance procedure, health and safety, seniority, overtime, and drug testing, among others. Counsel concluded this letter with a request that the Union provide the Respondent with its entire economic package.

On May 25, the Union complied with this request, presenting a 2-year economic proposal seeking increases of more than \$1 million over Respondent's current costs. During the meeting, the parties also discussed some unresolved noneconomic issues. The Respondent submitted an economic counteroffer on June 21, to which the Union responded on July 6 with a revised proposal reducing the cost of its economic package to \$975,000.

When the parties met next on July 14, Respondent put its "last, best and final offer" on the table. It included the following elements: a 1-year contract as opposed to the Union's request for a 2-year agreement; a 3-percent wage increase, an increase in life insurance coverage to \$15,000, \$10,000 less than the Union's demand, and some changes in the employees' health insurance plan. This offer fell far short of the Union's demands. Consequently, on July 27, the unit members overwhelmingly rejected it by a vote of 191 to 1.

In a letter of July 31, Respondent notified the Union that "[b]ased upon the apparent impasse," the Company would implement the wage, health, and life insurance provisions of its final offer in early August. Without referring to this letter, Beauchamp notified the Respondent on August 4 that the employees had rejected the final offer. He added that the Union would like to make a counterproposal to the Employ-

er's offers and suggested that they arrange a bargaining session as soon as possible. (G.C. Exh. 9.)

Respondent's August 7 reply instructed Beauchamp to submit any union counterproposals in writing. Beauchamp answered on August 15, writing that a bargaining request created a legal obligation to *meet* and bargain, and that the Union was not interested in bargaining by mail. (Emphasis added.)

By letter of September 29, Beauchamp again requested that the Respondent meet and bargain, but this time, stated that the Union was prepared to submit new proposals on a number of specific topics. Again rejecting the Union's attempt to renew negotiations, Respondent declared in an October 2 response that Beverly Farm had bargained in good faith, and implemented its last best final offer only after the parties were at impasse.

8. The Respondent withdraws union recognition

On November 8, Respondent notified the Union that it was revoking its final offer and withdrawing recognition, since

[T]he one year certification period has long expired and . . . the employer, based on sufficient and objective consideration, has concluded that AFSCME Council 31 does not represent a majority of the unit employees.

In a facsimile message sent the next day, Beauchamp demanded that Respondent produce the evidence on which it relied to withdraw recognition. Later that day, Respondent answered cryptically that the certification year had expired and its legal obligations to the Union were satisfied.

At trial, Patsaros explained that Respondent withdrew recognition because it had become evident that a majority of the unit employees no longer favored the Union. In support of this conclusion, Patsaros relied principally on the failure of unit members to participate in union-sponsored events. He pointed out, for example, that when the Union engaged in informational picketing on June 14, 1995, no more than 12 of the 180 to 225 unit employees then on duty took part. Similarly, he noted that by November 8, only three or four employees wore green union T-shirts and hats on Thursdays, which were designated "Union Recognition Days." On Saturday, September 30, during a parents' weekend, union representatives, including some eight current employees, intervened in an executive board meeting to present a petition bearing 740 names. On reviewing the petition, Patsaros found the names of only 10 current and 11 former employees. On Sunday of the same weekend, Patsaros observed that some 19 to 20 employees were among the 190 persons who joined a union rally. At the same time, 35 of 60 developmental training employees crossed the Union's picket line to work. In addition, Patsaros claimed that prior to November 8, he had received an untold number of employee complaints which reflected their alienation from the Union.

David Kallal, a driver and member of the bargaining unit, corroborated Patsaros' testimony regarding employee disaffection with the Union. He asserted that based on his conversations with employees, by July, an estimated 75 to 100 employees no longer desired union representation. He attributed the employees' disappointment to the Union's failure to exercise its political clout, as promised, to obtain greater State funding for the facility. Another employee, Craig

Baker, also testified that employees were disenchanted with the Union because of its failed promise to promote legislation that would result in greater financial support for institutions like Beverly Farm.

In late January, and early February 1996, Kallal gathered 140 signatures on a recertification petition. He alleged that many other employees were reluctant to sign the petition for fear of union retaliation. He filed the petition with the Board on February 9, but the election was blocked by the pendency of unfair labor practice charges.

9. Daniel's alleged threat to Shop Steward Lott

The same day that Respondent notified the Union that it was withdrawing recognition the director of the facility issued a memo announcing its action to the entire staff, with the following explanation:

Beverly Farm presented a fair proposal which the union rejected and then failed and refused to make any substantive or other proposals to the last best final offer. We are at impasse. (Jt. Exh. 6B.)

Shop Steward Mark Lott testified that before the start of his regular shift on November 8, while seated in the lobby of a residential unit with a group of employees, including Tamara Rhoades, his supervisor, Mark Daniels, showed him the memo regarding the withdrawal of recognition and commented, "It looks like you're no longer Mark Lott, shop steward, you're just Mark Lott, team leader; you're a nobody, you don't have any juice, you've got a big arrow on your back." (Tr. 230.) While Lott acknowledged that he and Daniels had enjoyed both a professional and social relationship, he did not view Daniel's November 8 comment as well-intentioned or delivered in a jocular fashion, as Daniels claimed. Further, he denied that Daniels made similar remarks to him before this date.

Daniels recalled having said something to Lott about an arrow on his back. However, he maintained that he and Lott often bantered good-naturedly with one another, as they did on November 8. He further claimed that he had advised Lott on a number of occasions to be less critical of his fellow workers; that by treating them harshly, he was putting an arrow on his back; that is, making himself a target for retaliatory treatment.

Tamara Rhoades was on the scene when Daniels showed Lott the director's memo. She recalled that Daniels laughed when he told Lott he had an arrow on his back. Further, she added that Daniels often joked with employees and that Lott would respond in kind.

To show that Lott could not have taken his remarks on November 8 seriously, Daniels testified, without dispute, that Lott often initiated conversations with him about the Union, showing him AFSCME proposals before they were presented at the bargaining table and telling him in advance about grievances that were to be filed against certain supervisors. Daniels also stated, without controversy, that several months after the November 8 incident, Lott apologized to him for filing the charge, but indicated he would not recant, as he would "do whatever I can to help the union." (Tr. 345.)

10. Respondent's alleged refusal to mediate grievances

On October 9, 1994, Patsaros denied grievances filed by three employees—February 16, and March 2, the Union requested that Respondent submit grievances involving three employees—to mediation, the final step in a grievance procedure set forth in the employee handbook. Patsaros had denied the grievances on October 9, 1994; in accordance with step 3 of the grievance procedure, but then, refused to submit them to mediation as provided in article 15, step 4 of the employee handbook.

In the event a grievance is not satisfactorily adjusted under the preceding steps, the Employee or Grievance committee may submit the same to mediation for resolution. This Committee will consist of an Employee's representative, the Personnel Director, and an impartial outside party agreed upon by the other two Mediation Committee members. [Jt. Exh. 1.]

Patsaros responded to the mediation request the next day stating that since the Union had evidenced its dissatisfaction with the grievance procedure during the parties' collective-bargaining sessions, Respondent "saw no reason . . . for third party involvement." (Jt. Exh. 4F.)

Lott was involved in another incident on November 8. He was supposed to meet with employees Rose Smith and Toi Hinton on that date to schedule a first-step grievance meeting with Shift Coordinator Rose Boren, regarding their accusation that she engaged in a "pattern of favoritism and racial discrimination. (R. Exh. 6.) However, one of the employees with whom Lott was to meet telephoned to report that Boren had refused to speak to them. Lott testified that he quickly contacted Group Home Administrator Phil Sandbach to enlist his help in arranging a meeting with Boren. Sandbach assured Lott that he would get back to him, but when he returned the call some 20 minutes later, told Lott he was unavailable because he had to meet with Human Resources Director Patsaros.

Supervisors Boren and Bob Connell offered a different perspective on this incident. With only slight differences in their testimony, they maintained that they invited Smith to meet with them to discuss her concerns. They alleged that it was she who refused their invitation, telling them that Lott would handle her grievance.

Patsaros added that when the Smith-Hinton complaint came to his attention on November 13 he decided to address it under Respondent's harassment-free workplace policy, which, with the Union's consent, was administered separately from the grievance procedure described in the employee handbook. He noted that pursuant to that policy the complaint was investigated by a committee which included Lott as the employees' representative.

11. Respondent proposes an employee-management committee

On November 13, Respondent issued a memo to all employees announcing the formation of an employee-management committee "to share information, ideas and mutual problem solving." (Jt. Exh. 5.) However, the Respondent did not implement its proposal after the Union filed a charge protesting the formation of such a committee.

II. DISCUSSION AND CONCLUDING FINDINGS

A. Respondent Declared Impasse Prematurely and Wrongfully Refused to Bargain

As detailed above, from their first bargaining session on August 8, 1994, to their last on July 14, when Respondent presented its final offer, the parties met on 19 occasions. Typically, if negotiations do not produce an agreement after that length of time, one might conclude that the parties were at an impasse for "[t]he duty to bargain does not require a party to engage in fruitless marathon discussions." *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). However, in the circumstances present here, such a conclusion would be unwarranted. It is important to bear in mind that 16 of the parties' 19 bargaining sessions were devoted to noneconomic issues. Although a number of topics, both economic and noneconomic, were unresolved as of July 14, neither side had indicated that further movement was impossible.

By agreement, the parties did not turn to economic issues until May 25 when the Union presented its first wage proposal. The Respondent did not present its own economic proposal until June 21. On July 6, the Union submitted a second, modified economic proposal. Without further adieu, the following week, July 14, Respondent delivered its last, best, and final offer. When Beauchamps advised management that the unit employees overwhelmingly rejected the offer, Respondent concluded that the parties were at impasse although the parties had held only three meetings on economic issues.

A lawful impasse may occur where the parties have discussed the issues separating them fully and, notwithstanding their best efforts to reach agreement, are unwilling to move from their positions. *Taft Broadcasting Co.*, 163 NLRB 475 (1967), *affd. sub nom. Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). In the case at bar, the parties differed on various issues, but the Union never indicated that further bargaining would be futile or that it was wedded inalterably to any particular position.¹² Moreover, the Union assured management that a strike was unlikely.¹³

In light of the Union's flexible bargaining posture, and the relatively few meetings which were held at which economic issues were addressed, Respondent's declaration of impasse was premature. The parties were not stalemated when Respondent announced that it would implement parts of its final offer. By unilaterally changing terms and conditions of employment in the absence of a valid impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

An impasse is easily overcome by any number of changed circumstances. Thus, even assuming that a genuine impasse existed on July 27 when the employees rejected Respondent's final offer, the Union's August 4 letter advising Respondent that it had new proposals to submit and requesting resumed negotiations, constituted such a change, obliging Respondent to return to the bargaining table. *Gulf States Mfg.*, 704 F.2d 1390, 1399 (5th Cir. 1983).

Respondent greeted the bargaining invitation with a demand that AFSCME submit its proposals in writing. The Union refused to comply, correctly construing Respondent's attempt to impose this condition as an illegitimate requirement to bargain by mail. As Beauchamp properly pointed out, the Act requires that parties "meet at reasonable times."¹⁴ Construing this statutory language strictly, the Board holds that an employer who insists on negotiating by mail or demanding that a union submit its proposals in writing, has unlawfully refused to bargain. *NLRB v. U.S. Cold Storage Corp.*, 203 F.2d 924 (5th Cir. 1953). This precedent compels the conclusion that the Union's request to meet and resume bargaining on August 4 imposed a reciprocal obligation on Respondent. By refusing to resume direct negotiations with the Union, Respondent failed to bargain in good faith, thereby violating Section 8(a)(1) and (5) of the Act.

On September 29, the Union again requested Respondent to resume bargaining, and this time stated that it would submit new proposals on specific topics. In reply, Respondent brushed the Union off with disdain. Respondent erred; by refusing the Union's request to resume bargaining, Beverly Farm again violated Section 8(a)(1) and (5).

B. The Respondent Unlawfully Withdrew Recognition

Under *Brooks v. NLRB*, 348 U.S. 96 (1954), following certification, a union is endowed with an irrebuttable presumption of continuing majority status for 1 year. After the certification period has elapsed, an employer may withdraw recognition if it affirmatively proves that at the time of the refusal, the Union did not enjoy majority support, or that it held a good-faith, reasonably grounded doubt, supported by objective considerations, of the union's continued majority. *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775 (1990).

In the instant case, Respondent advised the Union that it was withdrawing recognition on November 8, some 3 months after the certification year ended, citing no grounds. Respondent claimed it held a good-faith doubt of majority support. As discussed below, I conclude that Respondent's doubts were not well-founded, nor did they rest on reasonably grounded considerations.

I reach this conclusion bearing in mind that Respondent violated its duty to bargain in good faith by unilaterally implementing changed terms and conditions of employment before the parties were at impasse. Making matters worse, for months, Respondent ignored its obligation to continue bargaining. It is reasonable to infer that its studied indifference to the Union had to erode the employees' confidence that AFSCME could represent them effectively. Where, as here, an employer's unlawful conduct may undermine a union's majority status, it cannot claim that good-faith doubts about that status prompted it to withdraw recognition. *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460 (6th Cir. 1992). For the same reasons, the Respondent may not rely on the recertification petition signed by a significant number of employees as proof that its "good faith doubt" was valid, when its misconduct tended to "affect the Union's status, cause employee disaffection (and) improperly affect(ed) the bar-

¹² See *Civic Motor Inns*, 300 NLRB 774 (1990) (willingness to consider bargaining issues further negates impasse).

¹³ *Page Litho*, 311 NLRB 881 (1993) (where union has not consulted employees about a strike, nor engaged in one, evidence insufficient to prove impasse).

¹⁴ Sec. 8(d) of the Act.

gaining relationship itself." *Guerdon Industries*, 218 NLRB 658, 661 (1975).¹⁵

Moreover, none of the circumstances which Respondent cited to justify its belief that the employees were alienated from the Union was sufficient to support a good-faith, reasonably based doubt of their continued union adherence. Respondent relied heavily on its observation that few employees participated in various union activities. However, some of the events which the Respondent cited as proof of the employees' disenchantment occurred during the Union's protected certification year. Even if all such events had occurred after the certification year ended, the workers' failure to participate in greater numbers in union-sponsored activities is not a reliable symptom of disaffection. See *Colonna's Shipyard*, 293 NLRB 136, 140 (1989); *Robinson Bus Service*, 292 NLRB 70, 78 (1988). Considering Respondent's decision to impose terms of employment, which a great percentage of the unit members had rejected, together with its refusal to meet and bargain with the Union, the employees' absence from AFSCME-sponsored events could reflect nothing more than reluctance to publicly brand themselves union proponents. This does not necessarily mean they were opposed to union representation. Having failed to present persuasive proof that majority support for the Union had collapsed by November 8, I conclude that Respondent improperly withdrew recognition of the Union.

C. Respondent Unlawfully Denied Krivohlavsek's Weingarten Rights

The complaint alleges, and Respondent denies, that Respondent violated Section 8(a)(1) by denying Tracie Krivohlavsek the right to union representation during a disciplinary hearing. In contesting this allegation, Respondent poses the following alternative defenses: (1) Krivohlavsek failed to request representation; but (2) even if she did make such a request, she was not entitled to representation as the hearing was noninvestigatory and the discipline to be imposed was predetermined. I find neither of these defenses convincing.

In affirming the Board's position in *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court ruled that an employee's insistence on union representation at an employer's investigatory interview, which the employee reasonably believes might result in disciplinary action against her, is protected concerted activity.

I am convinced that Krivohlavsek requested union representation at the internal review committee hearing. Consider the steps she took to insure the presence of a union representative. First, she solicited the help of a friend and coworker, Debra Beumer, and authorized her to find a union agent who would appear with her at the hearing. Next, she met Union Agent Berks just before the hearing was to start and reviewed her situation with him. His parting advice to her was that if he did not return before the hearing started she should take 5 or 10 minutes at the outset to demand union representation. With these preliminary events fresh in mind, it is inconceivable that she remained mum about wanting Berks to represent her before the internal review committee.

¹⁵ Respondent also errs in relying on the decertification petition to challenge the Union's majority since it withdrew recognition several months before the petition was circulated.

Beumer and Berks confirmed Krivohlavsek's account with respect to their participation in this episode. Both testified in ways that seemed spontaneous, forthright, and logical. In contrast to Berks' and Krivohlavsek's credible versions of this incident, Respondent's witnesses offered testimony that was at times contradictory and inconsistent. For example, Walker stated that when Berks entered the conference room, he asked to speak with Krivohlavsek, but failed to introduce himself or state the purpose of his visit. Consequently, Walker did not know who Berks was nor why he was there. Yet, Walker also stated that Bartelli appeared to be puzzled when Berks left the room to speak with Krivohlavsek, because he thought a woman would be representing her. Obviously, the presence and gender of the union representative came into question at that precise moment because Bartelli and Walker realized that Berks, rather than a woman, was there to assist Krivohlavsek. In other words, contrary to Walker's claim that he did not know who Berks was or why he was there, he and Bartelli must have assumed that Berks was on the scene to represent Krivohlavsek.

Patsaros claimed that he asked Bartelli in three different ways during their phone conversation whether Krivohlavsek had asked for representation at the hearing and was told she had not. While Walker claimed he heard this conversation, he did not mention that Bartelli assured Patsaros one, two, or three times that Krivohlavsek had failed to request union representation. Walker's silence and Patsaros' testimony on this matter cannot be reconciled.

Moreover, Beumer testified without dispute that during her telephone call to Bartelli he agreed a union representative could attend the hearing with Krivohlavsek. Thus, Bartelli knew in advance that a union agent would be present at the hearing, even if he initially assumed that representative would be a woman. If Patsaros repeatedly questioned him on this matter, it is inconceivable that Bartelli would fail to tell the human resources director that he had agreed to the presence of a union representative, that this representative was on the scene and conferring with Krivohlavsek as they spoke. In drawing inferences and reaching conclusions about this aspect of the case, I find it significant that Respondent failed to call Bartelli or the other supervisors on the internal review committee as witnesses.

Respondent's contentions that the hearing was not investigatory and that the discipline to be imposed was a fait accompli, also fail to pass muster. It is true that a preliminary investigation was conducted prior to the meeting of the internal review committee. However, in describing the committee's functions, Walker explained that at the hearing, the members may question the employee whose conduct is in question. An employee also may appear before the committee to present his or her version of the incident in question. Thus, although Bartelli and Walker questioned Krivohlavsek prior to the hearing, their investigation was not final and did not preclude further inquiry.

Further, if Krivohlavsek's termination was a foregone conclusion, as Respondent contends, then why did Bartelli urge her to appear before the internal review committee. The answer to this rhetorical question is apparent. Since the neglect and abuse policy provides that the discipline may range from a mild reprimand to a terminal sentence, it is apparent that punishment in these matters is tailored to suit the offense. Unless the committee functioned as a kangaroo court, its

members would not mete out a penalty until after hearing from the accused and conferring about their assessment of the offense. Based on all the above, I conclude that when Krivohlavek requested union representation, Respondent was obliged either to accede to her request or cancel the meeting. Instead, Respondent prevented Berks from representing her and proceeded to conduct a hearing. By denying Krivohlavek her *Weingarten* rights, Respondent violated Section 8(a)(1).

D. Respondent Unlawfully Withheld Approval of Union Posting

After numerous discussions, the parties agreed to the following conditions which would govern union postings at Beverly Farm on an interim basis: (1) AFSCME would submit all material to the Respondent for approval prior to posting; and (2) the Respondent could withhold approval if a document was political, partisan, or defamatory. Although Respondent rejected a number of union leaflets, the consolidated complaint refers to only two involving a February 22 "Bargaining Update" and a companion notice recommending steps to cope with an infectious disease which had manifested itself at the facility. Patsaros vetoed both documents on the grounds they were political and "inflammatory."

After consenting to union postings on its property, an employer cannot arbitrarily restrict that privilege for antiunion reasons. By the same token, where an employer and union agree to certain conditions which will govern postings, the employer may not construe those conditions in a way which sends an antiunion message. *Monongahela Power Co.*, 314 NLRB 65, 69 (1994).

Patsaros had some discretion in determining whether the Union's literature fell within the proscribed categories of "political, partisan or defamatory." However, these words are neither vague nor ambiguous. If Patsaros had carte blanche to define these terms in an overly broad manner, he would have unfettered power to censor every union document by merely claiming it was, in his view, political or partisan. This is precisely what happened when he disapproved the Union's "Bargaining Update." If this leaflet can be described as political or partisan, then nothing the Union hoped to post ever would pass Respondent's strict scrutiny. Inflammatory is not a synonym for "defamatory." By no stretch of the imagination could a reasonable person regard either of the documents the Union forwarded to Patsaros on February 21 as defamatory. The "Bargaining Update" would be considered political or partisan only by someone who would view any expression by the Union which differed from those held by the Respondent in those terms. The fact that the Union may have posted many other pieces of its literature does not atone for Respondent's refusal to permit the posting of only two bulletins on February 21.

E. Respondent Unlawfully Removed Union Leaflets

Respondent readily admits issuing a memo in 1992 reminding employees of an earlier policy which prohibited the posting of materials either inside or outside the facility without management authorization. Respondent also acknowledged enforcing this policy by removing union leaflets from the windshields of cars parked on an employee lot, which were placed there by an off-duty employee and two union agents without management's consent. Patsaros explained

that the rule was designed to protect the severely retarded residents at Beverly Farm from harming themselves by ingesting the leaflets. He added that the rule also was designed to prevent littering and safeguard the employees' vehicles.

Although Zimmerman and Berks did not comply with Respondent's rule requiring them to register their arrival at the facility, the complaint does not concern itself with their conduct. Rather, paragraph 5B of the consolidated complaint alleges that Respondent "removed union literature distributed by Respondent's employees from the windshields of employees' vehicles." (Emphasis added.) (G.C. Exh. 1y.) The only employee present on that occasion was Beumer, who was off duty and distributing union notices in a nonworking area.

Maintaining and enforcing a policy that prohibits off-duty employees from distributing union literature on nonworking areas of an employer's property, without legitimate business justification, violates Section 8(a)(1) of the Act. *St. Luke's Hospital*, 300 NLRB 836, 837 (1990); *Orange Memorial Hospital Corp.*, 285 NLRB 1099 (1987). The General Counsel contends that *St. Luke's Hospital* governs the disposition of this matter. I agree, but for reasons that go beyond those discussed in the Government's brief.

In *St. Luke's Hospital*, the employer claimed that its rule denying off-duty employees entry to outside nonwork areas was required to ensure patient security. But the Board found no evidence in the record that patients frequented those areas or that an alleged crime problem could not be controlled by denying off-duty employees access to the hospital premises. Thus, it found the employer's business rationale deficient. Id. at 1100.

In the present case, the record shows that Beverly Farm residents did have access to the employee parking lot. However, the record fails to support Respondent's claim that it removed union leaflets from cars parked in that lot to prevent clients from harming themselves by ingesting paper left within their reach. The 1992 memo that Respondent produced as proof that a legitimate business concern prompted its removal of the union notices, refers to a 1988 policy statement prohibiting "Soliciting or Selling or Posting of Written Materials During Work Time in Work Areas." (Jt. Exh. 2.) This earlier statement is utterly silent with respect to providing any rationale for the policy. Further, the second paragraph of the 1992 memo that bans the distribution of literature in and outside the facility without Respondent's approval, offers no reason for the restriction. A cautionary note appears in the first paragraph of this memo urging employees to lock their cars so that residents cannot enter them and injure themselves. Surely, this memo would have mentioned the possibility of client injury by ingestion if that was the true motive for removing materials from cars, placed there by an off-duty employee in a nonworking area.

Moreover, notwithstanding Respondent's rule, ample evidence establishes that employees routinely posted and distributed assorted papers throughout the facility without management approval. Surely, papers posted inside the facility posed as great, if not a greater, hazard to the residents as those placed on the windshields of employees' cars. By strictly applying its rule when a nonworking employee placed union literature on car windshields in a nonworking area—an employee parking lot—while generally ignoring the rule under other circumstances, Respondent violated Section 8(a)(1).

F. Respondent Improperly Refused to Mediate Grievances

As discussed in the fact statement above, Patsaros rejected the Union's request to submit grievances to mediation as the final step in a grievance procedure described in the employee handbook. The General Counsel submits that under *NLRB v. Katz*, 369 U.S. 736 (1962), Respondent's conduct in this regard amounted to an unlawful, unilateral change in a working condition in violation of Section 8(a)(1) and (5) of the Act.

Respondent contends that it was not obliged to accede to the Union's demand since the employee handbook in question expired at the end of 1994. Respondent also argues that the parties had agreed to forgo the grievance process as structured in the handbook. These arguments lack merit.

The following statement appears at page 1 of the employee handbook: "The policy guidelines outlined within will be in effect from 01/02/94 until notice of further change." (Jt. Exh. 1.) Respondent produced no evidence that either oral or written notice of changes was prepared, much less promulgated. Consequently, Patsaros' claim that the employee handbook expired at the end of 1994 not only finds no support in the record, it is contradicted by the terms of the handbook itself.

Further, Patsaros himself relied on provisions in the handbook subsequent to the date of its purported expiration. For example, he pointed to the terms of the 1994 handbook in an October 19, 1995 letter chastising Union Agent Zimmerman for failing to follow the first two steps of the grievance procedure. Respondent cannot have it both ways; Patsaros cannot claim, on the one hand, that the employee handbook was history as of December 31, 1994, and then, 10 months later invoke its provisions.¹⁶

Respondent also defends as refusal to submit grievances to mediation as prescribed in step 4 of article XV, by insisting that Patsaros and Zimmerman agreed to jettison the entire grievance procedure at a July 7, 1994 meeting. Patsaros' recollection of this meeting is badly flawed. The transcript of the instant proceedings establishes that on that date Zimmerman accepted Patsaros' proposal that the parties bypass only the first two steps of the grievance procedure, and forward the grievances directly to him for action as provided in article XV, step 3. At no time did the Union agree to scuttle the entire grievance procedure. It follows that on February 22, when Patsaros denied three grievances sent to him for resolution the week before, those matters became ripe for mediation. By refusing to proceed to mediation, Respondent altered a condition of employment, and thereby violated Section 8(a)(1) and (5).

G. Daniel Did Not Threaten Shop Steward Lott

Paragraph 7A of the complaint alleges that Supervisor Mark Daniels threatened Lott on November 8 when he suggested, in substance, that following the Respondent's withdrawal of union recognition Lott would become a target for

unspecified reprisals. This allegation requires little comment for it is clear that Daniels spoke in jest.

Tamara Rhoades, an employee and member of the bargaining unit, who was called as a government witness, was present when Daniels taunted Lott, and might be expected to testify in support of the shop steward. Instead, her observations buoyed Respondent's case. Thus, she confirmed that Daniels was laughing when he referred to an arrow on Lott's back. She added that Daniels often joked with many employees and that he and Lott frequently quipped with one another.

The most conclusive evidence that Daniels did not threaten Lott, and that Lott did not perceive himself to be threatened, rests on the supervisor's uncontroverted testimony that Lott subsequently apologized to him for filing the charge against him. Lott's failure to deny or rationalize Daniel's assertion is tantamount to a confession that he fabricated the charge. Accordingly, I shall recommend that paragraph 7A be dismissed.

H. Supervisors Did Not Refuse to Discuss Grievances in the Union's Presence

As described in the fact statement above, employee Rose Smith accused her supervisor, Rose Boren, of discriminating against her on the basis of race. Although the consolidated complaint alleges that Boren refused to speak with Smith about her grievance, the evidence establishes that quite the reverse is true. When Boren, in the presence of fellow supervisor Connell, offered to discuss Smith's grievance, it was Smith who declined to do so, explaining that Shop Steward Lott would handle the problem for her. Smith was not called as a witness; instead Lott testified about what Smith purportedly told him. In contrast to Lott's secondhand account, Boren and Connell offered consistent, credible statements about Smith's negative response to their offer to meet. Moreover, the parties do not dispute the fact that the negotiators for the Respondent and the Union reached an agreement that the employees could bypass the first two steps in the grievance procedure, and bring their complaints directly to Patsaros for a third-step resolution. Therefore, if Boren had refused to meet, she would have been complying with the parties' interim understanding, and would not be guilty of violating the Act.

I. Respondent Unlawfully Proposed an Employee-Management Committee

Shortly after withdrawing recognition from the Union, Respondent announced the formation of an employee-management committee with functions that look much like those a union might perform. The committee never became a reality but the announcement itself sent an uncoded message to the work force that with the Union out of the way the Respondent would cooperate with as employees to resolve problems with "agreeable position[s] or solution[s]." Given the timing of this announcement, coming on the heels of its withdrawal of union recognition, and considering the functions the committee was supposed to perform, Respondent plainly was planning to accord "tacit recognition to a representative not freely chosen by a majority of employees and founded, in part, to frustrate employees' efforts to choose a representative." *Magan Medical Clinic*, 314 NLRB 1083 fn. 2 (1994).

¹⁶ Respondent also relied on the grievance procedure long after the handbook purportedly expired when it alleged that the Cato grievance initially filed in October was time barred. By agreeing to disregard steps 1 and 2, both parties made it difficult to determine precisely when the timeframes began to run.

The Respondent's proposal to create such a committee amounts to blatant attempt to interfere with the employees' exercise of Section 7 rights in violation of Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent, Beverly Farm Foundation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The American Federation of State, County and Municipal Employees, Council 31, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Since June 27, 1994, the Union has been the certified, exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit within the meaning of Section 9(b) of the Act:

All service and maintenance employees including all housekeeping employees, dietary employees, laundry employees; cooks, seamstresses, activity aides, day training aides, zoo aides, trainers, apartment counselors B, group leaders B, team leaders, general cleaners, maintenance operators, groundskeepers, sidewalkers and drivers, EXCLUDING all office clerical and professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act including RNs LPNs, QMRPs (Qualified Retardation Professionals), CPCs (Client Program Coordinators), dental technicians, lead trainers, group leaders A, apartment counselors A, social workers and coordinators.

4. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Denying the Union's request to post several notices to unit employees on February 21, without justification, after having agreed previously to permit such postings.

(b) Removing leaflets distributed by an off-duty employee on the windshields of employees' automobiles in a nonworking area.

(c) Denying employee Tracie Krivohlavek the right to be represented by a union agent during an interview which she reasonably believed would result in disciplinary action being taken against her; and conducting that interview notwithstanding its denial of her request for representation.

(d) Refusing to submit three grievances to mediation as prescribed in the then-extant employee handbook.

(e) Announcing the formation of an employee-management committee with duties similar to those performed by a collective-bargaining representative.

5. Respondent violated Section 8(a)(1) and (5) of the Act by engaging in the following conduct:

(a) Advising the Union of its intent to implement its last, best, and final offer and then implementing some of its terms without having bargained in good faith to a valid impasse.

(b) Refusing to meet and collectively bargain with the Union after July 14, 1995 although requested by the Union to do so.

(c) Withdrawing recognition of AFSCME without having a good-faith doubt based on objective considerations that the Union no longer represented a majority of its employees in an appropriate unit.

6. By engaging in the unlawful conduct outlined in paragraphs 4 and 5, above, the Respondent engaged in unfair

labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act in any other way.

THE REMEDY

Having found that the Respondent violated Sections 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom, and take affirmative action designed to effectuate the policies of the Act.

Specifically, I recommend that an Order issue directing the Respondent to retract its final offer, if it is still outstanding,¹⁷ and restore recognition to the Union as the duly certified exclusive bargaining representative of its employees in the above-described appropriate unit, providing express notice to AFSCME and all employees in the appropriate unit that it has done so. Respondent also shall be ordered, on request, to resume negotiations with the Union for no less than 10 months, commencing on the date the parties return to the bargaining table and resume good-faith negotiations, until an agreement or a good-faith impasse is reached.

In addition, I shall recommend that Respondent post a copy of the notice appended to this decision in all places throughout the facility where notices to the employees customarily are posted. The notice shall contain, inter alia, a broad cease-and-desist order as prescribed in *Hickmott Foods*, 242 NLRB 1357 (1979). Although the Respondent has not exhibited a proclivity to violate the Act, the egregious nature and widespread impact of its 8(a)(5) violations which "demonstrate a general disregard for the employees' fundamental statutory rights," justify issuance of a *Hickmott* order. Id.

Lastly, I shall recommend the dismissal of any alleged unfair labor practices not specifically found to constitute violations of the Act in this decision.

AFSCME's Request for Extraordinary Relief

1. A *Gissel* order is not required

In its posttrial brief, the Union submits that Respondent's conduct was so flagrant and pervasive as to justify issuance of a *Gissel* bargaining order. *NLRB v. Gissel Packing*, 395 U.S. 575 (1969). Based on the findings of 8(a)(5) violations, I agree that the Respondent should rescind its unlawful withdrawal of recognition and resume bargaining with the Union, but not necessarily under *Gissel's* imprimatur. Rather, I rely on precedent which provides that a union's certification period may be extended beyond the customary 1-year period where, as here, the employer engaged in bad-faith bargaining and/or committed unfair labor practices that interfered with the union's representation. *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905 (9th Cir. 1990).

Pursuant to Section 10(c) of the Act, the Board has "exceedingly broad" discretion to fashion appropriate remedial orders aimed at expunging the effects of unfair labor practices. Id. at 910, citing *General Teamsters Local 162 v. NLRB*, 782 F.2d 839, 844 (9th Cir. 1986). Thus, when a party refuses to bargain during the certification year, the Board may extend the period to prevent that party from gain-

¹⁷ Any benefits which Respondent may have awarded to employees which were included in its final offer need not be withdrawn pending execution of a collective-bargaining agreement.

ing an unfair advantage. *Colfor, Inc.*, 282 NLRB 1173 (1987). If no flagrant violations were committed, the Board may extend the certification period by that part of the year remaining when unfair labor practices interrupt good-faith bargaining. *Schnelli Enterprises*, 262 NLRB 796 (1982). In appropriate circumstances, the Board may even renew the entire certification year without bad-faith refusal to bargain. *NLRB v. National Medical Hospital of Compton*, supra at 910 (citing *Glomac Plastics*, 234 NLRB 1309 fn. 4 (1978), enfd. 592 F.2d 94 (2d Cir. 1979)).

I hesitate to conclude that a 1-year extension of the Union's certification period is appropriate in the instant case, for the evidence does not show that Respondent violated the Act in ways that could be condemned as outrageous, flagrant, or pervasive from the start of the certification year which began to run on June 27, 1994. To be sure, Respondent's agents engaged in unlawful conduct which independently violated Section 8(a)(1) over a number of months during the certification period. For example, Respondent denied the union permission to post several notices on February 21, refused to submit three grievances to mediation on February 22, denied an employee her *Weingarten* rights on June 6, and removed union notices from employees' cars on July 19. However, neither the General Counsel nor the Union presented evidence which shed light on how many employees knew of these incidents other than the few persons immediately involved in them. Consequently, there is insufficient proof that the independent 8(a)(1) infractions were pervasive. Neither were they individually or in the aggregate, so flagrant or outrageous as to taint all of the bargaining which took place prior to July 14.

The same claims cannot be made for Respondent's 8(a)(5) violations. However, as misconduct did not become evident until mid-July when it prematurely foisted a final offer on the Union, unilaterally declared an impasse while ignoring the Union's entreaty to continue bargaining, and then implemented some of the terms of its final offer in early August. Respondent delivered the coup de grace in November when, without objective considerations, it withdrew recognition of the Union. Unlike the independent 8(a)(1) incidents, every employee had to know about and be affected by these machinations which were nothing less than pervasive and egregious. Respondent's ability to bring bargaining to a halt, impose terms of employment after the employees had vetoed them, and withdraw union recognition, surely caused many of unit members to lose faith in AFSCME's ability to represent them effectively. It also stands to reason that by undermining employee support for the Union, Respondent contributed to and encouraged the recertification movement.

Respondent's 8(a)(5) violations began in mid-July when little more than a month remained before the Union's certification year expired. However, to extend the certification period for just a month would hardly provide a reasonable opportunity for the parties to engage in meaningful collective bargaining. Respondent's ability to keep the Union at bay for almost a year had to negatively affect the employees' union sympathies. Consequently, even before bargaining resumes, the Union will require a period of time to reestablish ties with the unit members. In these circumstances, a 10-month extension of AFSCME's certification year clearly is warranted, to run from the date the parties meet and resume collective bargaining until a good-faith impasse or an agreement

is reached. As the Board observed in *Colfor*, supra at 1174: "The extension [of the certification period] need not . . . be the product of a simple arithmetic calculation." To renew the certification period for 10 months here, reflects "the realities of collective-bargaining negotiations as well as the realities of the effect of any bad faith bargaining in the prior year." *Id.* citing *Glomac Plastics*, supra at 1309 fn. 4.

2. Extraordinary notice provisions are unnecessary

The Union also contends that the Respondent should be ordered to read the notice aloud to the unit employees during working hours and mail a copy to them at their homes, citing *J. P. Stevens & Co.*,¹⁸ and *NLRB v. Elson Bottling Co.*,¹⁹ as authority for such a remedy. An examination of the employers' unfair labor practices in those cases reveals that they were far more numerous and notorious than the acts which Respondent commuted here. Consequently, I am not persuaded that the record in this case justifies the extraordinary relief the Charging Party requests.

Moreover, I am not convinced that mailing and reading the notice to the work force is justified or would have a more salutary effect than posting copies at numerous locations throughout the facility where messages to employees normally appear. There are a large number of unit employees who work on three different shifts around the clock and are assigned to separate buildings. It would be difficult to assemble all of them at one time, or even at one time during each of the three shifts. It also would be disruptive, even dangerous, to summon them from their work with an extremely disadvantaged clientele. In the final analysis, a 60-day posting period will provide the employees ample opportunity to absorb the message set forth in notices posted throughout the facility.

3. Reimbursement for litigation and/or organizational expenses is unwarranted

The Charging Party requests an award for litigation expenses, as well as a reasonable sum for its past or future organizational expenses. The rub is that awards of this kind depend on finding that the Respondent's positions in this litigation are patently frivolous. I do not find such a conclusion tenable. Although I have decided that Respondent violated the Act by prematurely submitting a final offer in the absence of a bona fide impasse, and wrongfully withdrew recognition from the Union, the question of whether Respondent's negotiators genuinely believed the parties were at impasse is open to debate. Respondent also erred in concluding that the Union lost majority support when it withdrew recognition, but its posture on this matter is debatable, not patently frivolous. See *Tiidee Products*, 194 NLRB 1234 (1972)

Lastly, the Union seeks an order which would make the unit employees whole for benefits lost as a result of the Respondent's refusal to bargain. AFSCME recognizes that *Ex-Cell-O Corp.*, 185 NLRB 1007 (1970), is dispositive. In *Ex-Cell-O*, a Board majority denied relief similar to that which the Union seeks here, principally on the ground that the assessment of damages would be speculative. The Union cor-

¹⁸ 157 NLRB 869 (1966), enfd. as modified, 380 F.2d 292 (2d Cir. 1967); 167 NLRB 266 (1967).

¹⁹ 155 NLRB 714 (1965), enfd. 379 F.2d 223 (6th Cir. 1967).

rectly points out that the *Ex-Cell-O* ruling rewards an employer's unlawful refusal to bargain and encourages the employer to pursue frivolous litigation. However, AFSCME also recognizes that the administrative law judge is bound by the *Ex-Cell-O* precedent which precludes granting the relief requested. The duty to devise remedies that effectuate the policies of the Act lies with the Board.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, Beverly Farm Foundation, Inc., Godfrey, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and, on request, bargain with AFSCME Council 31 as the duly certified exclusive bargaining representative of its employees in an appropriate unit described in paragraph 2(a) below.

(b) Presenting and implementing a final offer during negotiations with the Union without having bargained in good faith to a valid impasse.

(c) Withdrawing recognition of AFSCME without having a good-faith doubt based on objective considerations that the Union no longer represented a majority of its employees in the appropriate unit described above.

(d) Denying the Union's request to post notices to unit employees without justification.

(e) Removing leaflets distributed by off-duty employees in nonworking areas of its facility without good cause.

(f) Denying employees the right to union representation at investigatory hearings which could result in disciplinary action being taken against them.

(g) Refusing to comply with provisions governing the processing of grievances as specified in the current employee handbook; unless those procedures are superseded by grievance and arbitration provisions in an executed collective-bargaining agreement.

(h) Announcing the establishment of an employee-management committee with functions that duplicate those performed by the Union or which are otherwise covered by the terms of any collective-bargaining agreement the parties may execute.

(i) In any other 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) Recognize and, on request, bargain with the Union, AFSCME Council 31, as the exclusive representative of its employees in the appropriate unit described below concerning terms and conditions of employment, for no less than 10 months commencing from the date the parties resume good-faith collective bargaining, until agreement or a good-faith impasse is reached and, if an understanding is reached, embody the understanding in a signed agreement:

All service and maintenance employees including all housekeeping employees, dietary laundry employees, cooks, seamstresses, activity aides, day training aides, zoo aides, trainers, apartment counselors B, group leaders B, team leaders, general cleaners, maintenance operators, groundskeepers, sidewalkers and drivers, EXCLUDING all office clerical and professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act including RNs, LPNs, QMRPs (Qualified Retardation Professionals), CPCs (Client Program Coordinators), dental technicians, lead trainers, group leaders A, apartment counselors A, social workers and coordinators.

(b) Post at its facility in Godfrey, Illinois, copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 14, 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 throughout as facility where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with the American Federation of State, County and Municipal Employees, Council 31, AFL-CIO as the exclusive bargaining representative of our employees in an appropriate unit.

WE WILL NOT present or implement a final offer during negotiations with the Union without having bargained in good faith to a valid impasse.

WE WILL NOT withdraw recognition of AFSCME Council 31, without having a good-faith doubt based on objective considerations that the Union no longer represented a majority of our employees in the appropriate unit described below.

²⁰ 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.

WE WILL NOT deny the Union's request to post notices to unit employees without justification, pursuant to any agreement which may be reached with AFSCME representatives.

WE WILL NOT remove leaflets distributed by off-duty employees in nonworking areas without good cause.

WE WILL NOT deny employees the right to union representation at investigatory hearings which could result in disciplinary action being taken against them.

WE WILL NOT refuse to comply with provisions governing the processing of grievances as specified in the current employee handbook, unless or until those procedures are superseded by grievance and arbitration provisions in an executed collective-bargaining agreement.

WE WILL NOT announce the formation of, nor establish, an employee-management committee with functions that duplicate or overlap those performed by the Union, or are otherwise covered by the terms of any collective-bargaining agreement which we may sign.

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

WE WILL recognize and, on request, bargain with the Union on terms and conditions of employment for our employees in the appropriate unit described below, for no less than 10 months, beginning with the first date on which we meet and negotiate in good faith with the Union, until agreement or a lawful impasse is attained.

All service and maintenance employees including all housekeeping employees, dietary laundry employees, cooks, seamstresses, activity aides, day training aides, zoo aides, trainers, apartment counselors B, group leaders B, team leaders, general cleaners, maintenance operators, groundskeepers, sidewalkers and drivers, EXCLUDING all office clerical and professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act including RNs, LPNs, QMRPs (Qualified Retardation Professionals), CPCs (Client Program Coordinators), dental technicians, lead trainers, group leaders A, apartment counselors A, social workers and coordinators.

BEVERLY FARM FOUNDATION, INC.