

Leisure Centers, Incorporated d/b/a Grand River Village and Local 243, International Brotherhood of Teamsters, AFL-CIO. Cases 7-CA-38229 and 7-RC-20797

September 30, 1998

DECISION, ORDER, AND DIRECTION

BY MEMBERS FOX, HURTGEN, AND BRAME

On October 24, 1997, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and record¹ in light of the exceptions and brief and has decided to affirm the judge's rulings,² findings,³ and conclusions⁴ and to adopt the recommended Order as modified.⁵

¹ Four determinative challenged ballots were cast at the March 5, 1996 election. The parties have stipulated that two of the challenged employees were ineligible to vote. Challenges to the ballots of employees Bruchnak and West remain to be resolved.

² The Respondent moved to strike the testimony of former Supervisor Roth on the ground that the General Counsel had not consulted with the Respondent's counsel before contacting her. The judge denied the motion and the Respondent renews it here. We affirm the judge's ruling. It is well established that former supervisors are not agents of the employer and that statements they make after the employment relationship has ended are not binding on the employer as admissions. See Rule 801(d)(2)(D), Fed.R.Evid.; Sec. 10056.6, NLRB General Counsel's Casehandling Manual. Roth was no longer employed by the Respondent when the General Counsel contacted her during the investigation. Accordingly, the General Counsel had no duty to notify the Respondent's counsel. *Southern Maryland Hospital Center*, 288 NLRB 481 fn. 1 (1988). See also *Electronic Data Systems Corp.*, 305 NLRB 219, 239 (1991).

³ 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ In overruling the challenge to employee West's vote, we do not rely on letters from the Respondent's former counsel, dated March 25 and April 3, 1996, notifying the Regional Director that certain employees on the eligibility list were no longer employed, or on the judge's characterization of some of the Respondent's internal documents as "questionable." On the latter point, even taking the documents at face value, we find that they do not establish West's ineligibility to vote.

In assessing whether an individual is a guard within the meaning of Sec. 9(b)(3) of the Act, Member Brame would apply the test set forth by the Eighth Circuit in *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 326 (8th Cir. 1987), which turns on the existence of an "obligation to protect the employer's property combined with the responsibility to enforce rules against fellow employees." Justin West is a custodian who, as a small part of his job, checks to see whether doors are locked. There is no evidence that he has any "responsibility to enforce rules against fellow employees." On this basis, Member Brame agrees with his colleagues that West is not a guard for statutory purposes, and joins in overruling the challenge to his ballot.

⁵ The judge inadvertently omitted from his Order and notice a provision for removing reference to the unlawful discharge from the Respondent's records. We accordingly shall modify the Order and substitute a new notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Leisure Centers, Incorporated d/b/a Grand River Village, Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Todd Bruchnak in writing that this has been done and that the discharge will not be used against him in any way."

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

DIRECTION

It is directed in Case 7-RC-20797 that the Regional Director for Region 7 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Todd Bruchnak and Justin West. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discriminate against or discharge Todd Bruchnak or any other individual because they engaged in union activity.

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

WE WILL, within 14 days from the date of this Order, offer Todd Bruchnak his former position, or, if that position is not available, a substantially equivalent position, without prejudice to seniority or any other rights or privileges to which he may be entitled.

WE WILL make Todd Bruchnak whole for any and all loss incurred as a result of our unlawful discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharge, and WE WILL, within 3 days thereafter, notify Todd Bruchnak in writing that this has been done and that the discharge will not be used against him in any way.

LEISURE CENTERS, INCORPORATED D/B/A
GRAND RIVER VILLAGE

Mark Rubin, Esq. and Patricia Fedowa, Esq., for the General Counsel.

Robert Seigel, Esq., for the Respondent.

Lee Ann Anderson, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This consolidated case was tried in Detroit, Michigan, on November 19 and 20, 1996. The complaint in Case 7-CA-38229, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about union activities and Section 8(a)(3) and (1) of the Act by discharging employee Todd Bruchnak because of his union activities. The Respondent submitted answers denying the essential allegations in the complaint. The representation case, Case 7-RC-20797 involves a Board-conducted election which the Charging Party Union lost 13-12, with 4 determinative challenged ballots. The parties stipulated that two of the challenges involve employees who, it is now agreed, were not eligible to vote in the election. The other two challenges remain to be resolved. The Respondent alleges that Bruchnak was not eligible to vote because he was properly discharged, and, in any event, did not have a community of interest with the other employees in the election. It also alleges that another employee, Justin West, was ineligible because he was excluded from the unit by the terms of the election agreement of the parties. The Charging Party Union urges that the ballots of both employees should be counted. After the conclusion of the trial, the parties filed briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Farmington Hills, Michigan, is engaged in the operation and management of an assisted living facility. In a representative 1-year period, the Respondent derived gross revenue in excess of \$500,000; it also purchased supplies valued in excess of \$10,000 from suppliers outside the State of Michigan and caused them to be shipped directly to its facility in Farmington Hills. Accordingly, I find as the Respondent concedes, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent's Farmington Hills facility is a retirement community featuring independent living with services such as meals, housekeeping, and maintenance for approximately 170 residents. The catered living department, with 36 residents, 30 provides additional services such as assistance from a resident's apartment to the dining room and medication reminders. The facility is one of 33 owned by Respondent nationwide. The Farmington Hills facility is not a licensed nursing home, although it is staffed 24 hours per day.

A. Bruchnak's Discharge

Todd Bruchnak worked as a dietary aide in the catered living department at the Farmington Hills facility, under the immediate supervision of Mary Roth. His job included working in the kitchen, answering emergency calls, passing out, but not administering, medication, watching monitors, and making beds. In answering emergency calls, he was required to respond to signals from residents who pulled emergency cords in their apartments. He was instructed to enter apartments, see if residents were coherent, and determine whether to call 911. He was not to provide medical assistance. According to Roth, Bruchnak was a good employee with a quality rating of "one hundred percent."

Bruchnak was a high school student, who was working under a co-op arrangement whereby he was evaluated for and received course credit for his work. He began working for the Respondent in September 1994, but he also worked beyond the school term, including the summer of 1995. He regularly worked about 35 hours per week and was, of course, paid for his work. He worked side by side with other regular full- and part-time employees and the substance of his work and working conditions was the same as that of other employees.

In January 1996, Bruchnak became the leader of an effort to bring about union representation. He talked to his fellow employees at the facility before and after work and during breaks. He also contacted a union representative, from whom he obtained union authorization cards, which he then distributed to employees. He signed a card on February 4, 1996, and, during the next few days, circulated cards, asked his fellow employees to sign them, and collected the signed cards. This was done openly at the facility on nonwork time. The Respondent's executive director, Marguerite Casey, testified that she knew of Bruchnak's union activities in early February.

On February 9, 1996, Bruchnak was terminated. Supervisor Roth, who was no longer employed by the Respondent at the time of the trial, testified that she was called into Casey's office on the morning of February 9 and told that Bruchnak had to be fired. Roth said she had "no reason" to do so. Casey then told Roth that the "higher ups in the company said that we need to fire him because he was involved with the union deal that was going on." Casey mentioned no other business-related reason for the discharge. Casey, who also was no longer employed by the Respondent at the time of the trial, controverted the essentials of Roth's testimony, although she conceded that she and Roth met to discuss the discharge, that she was directed by higher management to fire Bruchnak, and that Roth said she

had no reason to discharge him. I credit Roth's account for reasons I will discuss in greater detail later in this decision.¹

Shortly after the meeting between Casey and Roth, Casey did indeed carry out the discharge, after which she had Bruchnak sign a statement barring him from the Respondent's premises after his termination. Casey told Bruchnak that he was being discharged because of an incident report he completed the night before, which showed that, after answering an emergency call where he found a resident on the floor in her apartment complaining about chest pains and dizziness, he took her pulse and called 911. Casey expressed the view that Bruchnak was taking too much responsibility during the emergency call because he had taken the resident's pulse.

The above is based on a composite account of the discharge interview. To the extent that there are differences in the testimony of Casey and Bruchnak, I credit Bruchnak over Casey for reasons I shall discuss later in this decision.

Casey, as the executive director of the Farmington Hills facility, had full authority to fire employees without the intervention of her superiors, and did so on other occasions. However, on the morning of February 9, before she spoke with Ross or Bruchnak, she called Regional Director Richard Howells, who was stationed in Dayton, Ohio. He in turn consulted President John Luciani, who was apparently located in Boca Raton, Florida. After talking with Luciani, Howells called Casey back and directed her to terminate Bruchnak.

On March 1, 1996, the Union filed an election petition, and, pursuant to a Stipulated Election Agreement, an election was conducted among the Respondent's employees. Prior to the election, scheduled for April 5, 1996, Casey delivered several speeches to assembled employees asking them to vote against the Union. In two of them, she pointedly referred to Bruchnak. The written draft of her first speech, delivered in mid-March, states as follows:

Some of you have asked "what's going to happen to Todd Bruchnak?" We fired Todd, so he's gone and we have NO-INTENTION of hiring him back. The union filed a charge with the NLRB complaining about the firing, but that charge won't be decided upon for a long time . . . perhaps years. This union election will be long over before that case is tried. The union has lawyers and we have lawyers too. Our lawyers will fight that case and we'll let you know when a decision is reached. But for now, HE'S GONE!

B. The Respondent's Explanation for the Discharge

The Respondent's explanation for Bruchnak's discharge rests on the testimony of Casey and Howells. Their explanation is not plausible. Casey testified that Bruchnak was fired for "inappropriate performance of his job, for doing things above and beyond what we were allowed to do with our residents." She also testified that Howells and Luciani made the final deci-

sion and that Luciani did so at Howells' recommendation. Howells testified that Casey called him, after reading the February 8 incident report which revealed that Bruchnak had taken a resident's pulse. According to Howells, Casey, who had discussed similar incidents with him in the past, said that he was involved in another one, "performing procedures that were more than standby." (Tr. at 137.)

Although both Casey and Howells suggested that the February 8 incident was one of several that motivated them, it is clear that they focused on the February 8 incident as the precipitating factor in the discharge. The alleged offense itself was minor, almost trivial. According to Casey, she was concerned that Bruchnak, in answering the emergency call, checking on the resident and calling 911, had taken the resident's pulse. No one criticized Bruchnak at the time for what he did, and there is no evidence that anyone suffered or was prejudiced by his taking the resident's pulse. Bruchnak's supervisor, Roth, acknowledged that employees are generally supposed to avoid medical intervention or even touching stricken residents; they are supposed to simply call 911. Roth, however, said that it was only natural for aides, to touch a stricken patient, for example, to "grab a person's hand" or to take a pulse. She herself had done so. Bruchnak was instructed in accordance with Roth's views. Thus, it seems implausible to me that the February 8 incident, based on Bruchnak's own written report, would be the precipitating event for a summary discharge of a high school co-op student—indeed one that needed the final decision of the president of a company that runs 33 nursing homes throughout the country. Indeed, the discharge came without any prior written warnings that Bruchnak had violated the so-called no-touching rule when answering emergency calls.

The lack of previous written warnings for the offense of touching residents during an emergency call is particularly telling because there is no apparent written rule on the subject against which to determine whether warnings are justified or uniformly issued or applied. Moreover, the Respondent did have a policy of issuing written warnings to document discipline. Indeed, in August 1995, Bruchnak himself had received two such warnings, although neither involved touching residents when answering emergency calls. The August 1995 warnings themselves are not clear—indeed, they are vague and basically unsupported. There was no testimony on the underlying incidents that prompted them. For example, the August 8, 1995 warning mentions "taking on too much responsibility," itself an ambiguous standard, along with "spending too much time" with residents and their families and touching a hallway camera. There is no further explanation of the alleged offense, but Bruchnak's written response to the warning questions the factual allegations in it and states that someone else made a call for which he apparently was criticized. The August 21, 1995 warning deals only with Bruchnak's alleged angry reaction to some unspecified decisions, going into resident apartments to visit, and picking up paychecks for others. Here too there was no evidence of the underlying incidents. Thus, not only do the August 1995 warnings fail to deal with the no-touching rule, but nothing in the warnings or the evidentiary record provides a basis for determining what, if anything, Bruchnak had done wrong.

Although both Casey and Howells referred to a "taking on too much responsibility" offense on the part of Bruchnak, that term—ambiguous as it is—was not used to refer to Bruchnak's alleged violation of the no-touching rule during emergencies

¹ In its brief, the Respondent renewed a motion, which I denied at trial, that Roth's testimony be stricken because the General Counsel contacted Roth without consulting the Respondent's counsel. Although the Board's Casehandling Manual requires counsel for the General Counsel to first contact counsel for respondents before talking with their supervisors, Roth was clearly not employed by the Respondent when she was contacted by the General Counsel. There was thus no violation of the manual provisions and there is no reason to strike Roth's testimony. I therefore reaffirm my ruling denying the motion to strike.

until December 1995 or January 1996. At that point, Casey testified that she did tell Roth to tell Bruchnak to “back off” and stop “taking too much responsibility” during emergency calls, although there is some conflict between Roth and Casey as to exactly when or how often this took place. Roth acknowledged that she spoke to Bruchnak about “performing hands on procedures,” but “no more than I spoke to any of my other employees.” (Tr. at 30.)

Casey did, however, read three incident reports submitted by Bruchnak in late January 1996, which she viewed as showing violations of the no-touching rule during emergencies. The reports themselves are sketchy. In one, dated January 21, 1996, Bruchnak stated that he called “poison control” after someone told him that the resident had overdosed on medication, “they had Louise take her blood sugar” and Bruchnak called EMS, apparently an emergency service. There is no clear evidence of Bruchnak touching a resident. In a second, that dated January 25, the report said another employee lifted the stricken resident, thus violating the no-touching rule, and Bruchnak “checked his feeling in arms and legs, none.” He also indicated that he called 911. The third, undated, incident report also states that another employee lifted the stricken resident from the floor. The report states that Bruchnak called EMS and someone (the report is not clear on this) took her blood pressure. No further evidence of these incidents appears in the record, and, of course, Casey was privy only to Bruchnak’s written incident reports, which, she testified, she reads routinely. Significantly, no one—not Roth nor any other supervisor—criticized Bruchnak for his conduct on these occasions. Nor do the written incident reports demonstrate obvious improprieties. Even if they did, it is clear that other employees were involved in touching residents or intervening; but there is no evidence of any criticism of such other employees or even of any concern over, or investigations of, the alleged improprieties.

More importantly, however, after reading each of the three incident reports discussed above, Casey saw no need to talk directly to Bruchnak, issue him written warnings, or make it clear that he was subject to discharge for doing what he was doing. Indeed, as shown above, both by the testimony of Roth and Bruchnak, as well as the Respondent’s failure to warn or criticize other employees such as those involved in the January 1996 incident reports, the no-touching rule during emergencies was not uniformly enforced.

As for Howells, he testified that he was aware of Bruchnak’s alleged problem with “performing medical procedures” during emergency calls as early as August 1995. (Tr. at 134–135.) He allegedly learned of this problem during his periodic visits to the facility and talking with Casey. The difficulty with this testimony is that, as indicated above, the August 1995 written warnings do not document violations of the Respondent’s no-touching rule during emergency calls. When testifying about her previous conversations with Howells about Bruchnak, Casey herself was not specific about what was said or what Bruchnak’s problem was. She referred to these conversations in an almost off-hand manner stating, “I had previously spoken with [Howells] on numerous occasions . . . About Todd’s performance and these things going on.” (Tr. at 182–183.)

Finally, I note that Casey and Howells testified about a concern that medical-type intervention by employees might expose the Respondent to some kind of liability. That is a superficially appealing position. But, like most of their testimony, it was conclusory, unspecific, and unsupported by probative documentary or other evidence. More importantly, it did not tie

mentary or other evidence. More importantly, it did not tie into Bruchnak’s alleged offense. It failed convincingly to demonstrate why it was necessary to fire Bruchnak for taking a resident’s pulse during an emergency call, a fact that he himself reported.

In these circumstances, I find that the explanation offered by Casey and Howells for the summary discharge of Bruchnak is unpersuasive and implausible.

C. Credibility

As indicated above, the testimony of Casey and Howells as to their explanation for Bruchnak’s discharge does not withstand scrutiny and reflects adversely on their credibility. Both Casey and Howells seemed to me to be stretching the so-called no-touching rule beyond its reasonable limits and were intent on stretching it further to apply to Bruchnak without adequate evidentiary support. Their testimony was vague and conclusory in describing Bruchnak’s alleged derelictions. Moreover, I thought their demeanor was not that of straightforward, candid witnesses.

Other aspects of their testimony also show them to be unreliable witnesses. I find it implausible, as they both testified, that Casey did not tell Howells that a union organizing campaign had been initiated at the facility; Casey, of course, knew, and she also knew that Bruchnak was involved. Since they both testified that they talked on numerous occasions about Bruchnak’s job performance and Casey had numerous contacts with Howells on other matters in the normal course of their relationship, I find it hard to believe that they did not discuss such a momentous happening in the life of the Farmington Hills facility. Indeed, in view of the strident antiunion speeches delivered by Casey to employees during the subsequent election campaign, it is clear that Casey—and indeed, the Respondent—felt strongly about keeping the Union out of its facility. In these circumstances, one would naturally expect Casey to tell Howells at least that a union campaign was underway.

I also find inconceivable that the Respondent would have required the intervention of its corporate president to direct the discharge of a high school student and co-op employee for taking the pulse of a stricken resident during an emergency call. On the other hand, I find it quite plausible that Casey would have shared with Roth, whom she viewed as part of management, the real reason for the discharge, Bruchnak’s union activities.

Roth and Bruchnak impressed me as candid witnesses who exhibited truthful demeanors. Both conceded they literally violated the so-called no-touching rule, which, of course, was nowhere written or clearly defined. I believe them when they say others likewise violated the rule without the Respondent’s intervention because the Respondent did nothing to the two aides who touched residents as described in the January 1996 incident reports written by Bruchnak and used by the Respondent in a pretextual effort to support the discharge. Roth had been terminated by the Respondent when she testified, as had Casey. But Roth seemed to me to bear no grudge against the Respondent. She cooperated with the General Counsel, answered a government subpoena from Florida, where she was living, and traveled to the site of the hearing in Detroit. She testified truthfully. Bruchnak himself candidly admitted to an angry outburst at his summary discharge and candidly wrote incident reports later used by the Respondent against him, de-

tailoring his dedication in dealing with elderly residents, who were, of course, the Respondent's consumers.

One other credibility determination must be resolved. Tracy Reese, an employee of the Respondent until she quit in March 1996, testified on behalf of the General Counsel to two significant matters in this case. First, she testified that, sometime in March 1996, she was called into Casey's office, and, in the presence of another employee and Roth, was asked whether she and the other employee knew about the Union coming in. She was also told that union dues would cut into her paycheck. It is undisputed that Casey called the employees into her office to read them a prepared antiunion speech she delivered to assembled employees at an earlier time when those employees were absent. The above testimony is relied on by the General Counsel to support the separate 8(a)(1) allegation.

Reese also testified that, earlier on the day when the interrogation took place, she overheard a conversation between Casey and a woman named Sue, who was identified as the Respondent's activities director, in which Casey asked Sue if Sue knew why the Respondent had been fired. According to Reese, Sue said, "because of the union he got in," and Casey replied, "Yes, exactly."

Casey denied making the statements attributed to her by Reese and none of the other participants in the incidents related above testified about them, including Roth who testified about other matters in this proceeding.

As discussed earlier, I did not find Casey to be a reliable witness, particularly on the Bruchnak discharge. But Reese also did not impress me as a reliable witness. Her testimony was not corroborated and she exhibited what to me seemed a palpable hostility toward the Respondent that reflected on her credibility. I find it also significant that, in her opening testimony, she did not mention that Casey was reading from a prepared text for at least part of the time, a fact she later conceded when called on rebuttal. Accordingly, I cannot credit Reese's testimony on either of the matters discussed above.

D. Analysis and Conclusions

The evidence overwhelmingly demonstrates that the Respondent fired Bruchnak for his union activities. The discharge came within days of his having spearheaded an effort to bring the Union into the facility, a fact known by the Respondent. Executive Director Casey admitted to Roth, Bruchnak's supervisor, that he was being discharged for his union activities, even though Roth stated that she had no reason to discharge him. Indeed, Roth had high regard for Bruchnak. Moreover, as discussed above, the Respondent's explanation for the discharge did not withstand scrutiny and was pretextual. The summary dismissal came at the direction of the Respondent's corporate president, without prior written warnings on the specific type of offense charged or suggestions of impending discharge. Finally, the Respondent's specifically focused animus was shown by its written banishment of Bruchnak from its premises immediately after his discharge. This was not done, for example, when Casey was terminated. Such specifically focused animus was also demonstrated when the Respondent used Bruchnak's discharge in its antiunion election speeches. It did not tell employees that Bruchnak was fired for cause, the legal position it now advances; instead, it was content to leave the impression among employees that his discharge was indeed union related. In these circumstances, I find that the Respondent fired Bruchnak because of his union activities in violation

of Section 8(a)(3) and (1) of the Act. See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 482 U.S. 393 (1983).²

Based on my having discredited the testimony of Tracy Reese, I shall dismiss the 8(a)(1) allegation that the Respondent unlawfully interrogated employees.

III. THE REPRESENTATION CASE

A. Bruchnak is Eligible to Vote

As I have found, Bruchnak was unlawfully discharged prior to the election. Had he not been unlawfully discharged, he would have been employed on the date of the election. He thus did not lose his voter eligibility because of his unlawful discharge.

The Respondent urges another ground for not counting his vote. It alleges that as a co-op employee and high school student he did not have a community of interest with the rest of the employees in the election unit. I disagree.³

As I have mentioned above, Bruchnak worked 35 hours a week, performed essentially the same duties as other part-time and full-time employees, and worked side by side with them under the same rules and working conditions. Moreover, he continued to work for the Respondent beyond the school year and during the summer, with no interruption. Although Bruchnak received school credits for his employment, his employment was regular and substantial and he shared a community of interest with other employees in the election unit. Bruchnak is thus included in the unit and entitled to have his vote counted. See *W & W Tool & Die Mfg. Co.*, 225 NLRB 1000, 1001 fn. 11 (1976); and *Parkwood IGA Foodliner*, 210 NLRB 349 (1974).

The Respondent cites to the co-op agreement between it and Bruchnak's school to allege that the Respondent surrendered some aspects of control over Bruchnak. Thus, it states that the Respondent is to notify the school's co-op coordinator of improper performance of duties for the coordinator to take "corrective steps" with the student, and that, if Bruchnak dropped out of school, the Respondent would be expected to dismiss him. The latter, of course, never happened, but, in any event, the Respondent employed Bruchnak beyond the school year. The former is a specious argument. There is no evidence that the Respondent ever notified Bruchnak's school of his alleged improper performance, and its failure to do so lends credence to my finding that he was discriminatorily discharged. Indeed, the Respondent itself apparently failed to abide by its pledge in the agreement to "first notify" the coordinator before terminating Bruchnak. Nothing in the one-page form co-op agreement warrants a finding that Bruchnak did not have a community of interest with other employees or that the Respondent was significantly restricted in its handling of his employment.

² It is well settled that if, as here, a respondent's reason for its action is pretextual, that fact supports the General Counsel's showing of discrimination and defeats any attempt by a respondent to show it would have acted the same way absent discrimination. See *Greyhound Lines Inc.*, 319 NLRB 554, 575 (1995), and cases there cited.

³ The Charging Party alleges that the Respondent waived its reliance on this argument by not raising it in the pleadings. I will assume *arguendo* that the Respondent did not waive this argument.

B. Justin West is Eligible to Vote

The Respondent alleges that employee Justin West's vote should not be counted on alternative grounds, first, because he was terminated before the date of the election, and, second, because he was a security guard within the meaning of Section 9(b)(3) of the Act.⁴

I find that West was an employee as of the date of the election, April 5, 1996, and that he was not a guard within the meaning of the Act and applicable authorities.

West was hired for a part-time weekend housekeeper-security position in January 1996. He worked on Saturday and Sunday nights from 11 p.m. to 7 a.m. He reported to the maintenance office to begin his shift. West's job duties included garbage collection, vacuuming, power washing the kitchen floor, snow removal, assisting employees with emergencies, and maintenance. He also did some hallway patrolling, a very small part of his job.

Beyond his limited patrolling duties, which essentially amounted to checking whether doors were locked, West performed no security-type duties. He never enforced security rules or monitored the ingress or egress of people, inspected items carried into or out of the facility, or filled out incident reports. He did not carry a weapon, although he did push a cleaning cart for most of his workday.

In contrast, the Respondent employed a night monitor who was on duty at all times West was on duty. She exclusively performed security-type duties. She sat at a central desk that included the facility's electronic surveillance equipment, which she monitored. West was never trained on this equipment; nor did he operate such equipment. Indeed, the Respondent apparently did not even view the night monitor as a guard because her name appeared on the voter eligibility list supplied to the Board and she voted in the April 5, 1996 election.

West was primarily a housekeeping or maintenance employee, with incidental patrolling duties, which did not involve security-type responsibilities. He did not enforce rules to protect the Respondent's property as required of a guard within the meaning of Section 9(b)(3) of the Act. He was not therefore a guard within the meaning of the Act or ineligible to vote because he was a guard. See *Bear River Lumber Co.*, 150 NLRB 1295, 1297 (1965); and *TAC/Temps*, 314 NLRB 1142, 1143-1144 (1994).

As to the second issue involving West's eligibility to vote, it is clear that an employee is eligible to vote in a Board election if the employee is employed on the established eligibility date, which West clearly was, and on the date of the election. See *Plymouth Towing Co.*, 178 NLRB 651 (1969). It is also well settled that, in order for a termination to be effective, the employer's intent to terminate must be communicated to the employee by some affirmative, objectively established, action. See *Speakman Electric Co.*, 307 NLRB 1441 (1992); *Miami Rivet Co.*, 147 NLRB 470, 483-484 (1964). See also *Westchester Plastics v. NLRB*, 401 F.2d 903, 908 (6th Cir. 1968), and *Calvert Acquisition Co. v. NLRB*, 83 F.3d 598, 607 (3d Cir. 1996), a case cited by the Respondent (Br. at 44), where the court

⁴ Sec. 9(b)(3) of the Act makes a unit inappropriate if it includes guards with other employees. It also defines a guard as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises."

stated that an employer may not "merely point to its own subjective intention" to establish a termination.

The Respondent alleges that it intended to terminate West before April 5. The evidence, however, shows that the Respondent never communicated that alleged intended decision to West prior to or on the April 5 election date. West last worked the weekend before April 5 and appeared twice at the Respondent's facility in an attempt to vote. The second time he voted a challenged ballot because his name was not on the eligibility list provided to the Board by the Respondent. At no time, even on election day, did the Respondent approach him in person to tell him he was or would be terminated. Nor did it send a letter, fax, or telegram notifying him of such decision prior to April 5. He found out indirectly on April 7, 1996, 2 days after the election, when he was denied access to the facility when trying to report for work.

Ron Mutter, the Respondent's maintenance and security supervisor, testified that he hired West's replacement on March 22, while West was still working, but did not put him on the payroll until April 4 because he was awaiting approval from Casey. He also testified that he wanted to terminate West for excessive absenteeism and had prepared some internal documents to effectuate the termination. That testimony is unconvincing, given that Mutter did not notify West that he was or was going to be terminated or replaced or that he even had an absenteeism problem. Mutter did reach West's mother by telephone on April 6, the day after the election. But, even then, he did not tell her that her son was discharged. He admitted that he simply told her to tell Justin not to come to work that night.⁵

None of the circumstances set forth above constitute objective evidence of the requisite notification to West himself prior to the election. Mutter did testify about his efforts to contact West, but this testimony was unsupported by the telephone records that were admitted in evidence. Moreover, Mutter's other testimony was unreliable. In one instance, as I have noted above, his testimony was internally inconsistent. Other testimony was implausible and indicative of a frantic, suspicious effort to remove West from the payroll and put someone else on in his stead, immediately prior to the election. That testimony was not rescued by questionable internal documents supposedly supporting Mutter's position because West was never told either about his impending discharge or of the excessive absenteeism that allegedly led to it. Indeed, my assessment of Mutter's testimony and his uninspiring demeanor convinces me that he was a wholly unreliable witness. He seemed to be tailoring his testimony to fit the Respondent's litigation theory.

Indeed, Mutter's testimony and the Respondent's present position on this issue conflicts sharply with, and, indeed, is undercut by, the actions of the Respondent's then attorney and agent, Mark G. Flaherty, immediately prior to the April 5, 1996 election. Flaherty sent two letters to the Regional Director explicitly notifying him of named employees who left the Respondent's employ in the days before the election and asking that

⁵ I do not credit Mutter's testimony that he told Justin's mother to have Justin call him on this occasion. When he first testified about the conversation, he testified that he told her only that Justin should not come to work that night. That is what Delphine West, Justin's mother, testified to; and Justin acted on that message, thus corroborating his mother. A few minutes after testifying that he told Delphine West only to tell her son not to come in that night, Mutter contradicted himself and testified that he also told her to tell her son to call him. This is a prime example of Mutter's unreliability as a witness.

these individuals be stricken from the eligibility rolls. The letters, dated March 25 and April 3, 1996, were also sent via telefax. West's name was not listed in those letters. Nor was his alleged termination mentioned in Flaherty's April 10 letter to the Board agent in charge of the election, wherein Flaherty submitted, on behalf of the Respondent, that West's challenge should be sustained because he was a security guard. That was the only basis for the Respondent's position that West was ineligible to vote.⁶

In sum, I find that the evidence demonstrated that West was employed on April 5, 1996. He was thus an eligible voter and his vote should be counted.

CONCLUSIONS OF LAW

1. By discriminatorily discharging employee Todd Bruchnak because of his union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. The above violation is an unfair labor practice affecting commerce within the meaning of the Act.

3. The Respondent has not otherwise violated the Act as alleged in the complaint.

4. Todd Bruchnak and Justin West are eligible to vote in the election of April 5, 1996, and their votes should be counted.

REMEDY

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

I shall recommend that the Respondent immediately offer employment to Todd Bruchnak in his former position or, if that position is not available, a substantially equivalent position. Further, the Respondent shall be directed to make him whole for any and all losses of earnings and other rights, benefits, and privileges of employment he may have suffered by reason of the Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Leisure Centers, Incorporated d/b/a Grand River Village, Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against or discharging Todd Bruchnak or any other individual because they engaged in union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in 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 Todd Bruchnak his former position, or, if that position is not available, a substantially equivalent position, without prejudice to seniority or any other rights or privileges to which he may be entitled.

(b) Make Todd Bruchnak whole for any and all losses incurred as a result of the Respondent's unlawful discrimination against him, with interest, as provided in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment Records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director, post at its Farmington Hills, Michigan facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter 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 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 and former employees employed by the Respondent at any time since February 29, 1996.

(e) Within 21 days after service by the Regional Director, 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.

IT IS ALSO ORDERED that Case 7-RC-20797 be remanded to the Regional Director for Region 7, with directions to count the ballots of Todd Bruchnak and Justin West and to certify the results of the election of April 5, 1996.

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

⁶ The Respondent contends that West knew he was terminated because, according to the testimony of the night monitor, Frances Reese, he told her, 1 or 2 weeks before the election, that he knew he was going to be replaced because he saw a newspaper ad for his job. Assuming that this conversation took place, it does not show that the Respondent actually terminated West or that it notified him of such action. Indeed, he was still employed at this time and the Respondent could well have approached him and told him he was terminated. It never did so prior to the election. Reese's testimony does not aid the Respondent's cause.

⁷ In the event 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.

⁸ If this Order is enforced by a judgment of the 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."