

Mercy Healthcare Sacramento d/b/a Mercy General Hospital, Mercy Medical Plaza, Mercy American River Hospital, Mercy San Juan Hospital, Methodist Hospital and Mercy Hospital Folsom and Health Care Workers Union, Local 250, Service Employees International Union, AFL-CIO, Petitioner. Cases 20-RC-17563 and 20-RC-17564

May 24, 2001

DECISION AND DIRECTION OF SECOND ELECTIONS

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to elections held on January 27, 2000, and the hearing officer's report recommending disposition of them. The elections were conducted pursuant to a Decision and Direction of Elections. The revised tally of ballots in Case 20-RC-17563 shows 598 for and 701 against the Petitioner, with 89 challenged ballots; and in Case 20-RC-17564, the tally shows 193 for and 305 against the Petitioner, with 25 challenged ballots. The challenges were insufficient to affect the results of either election.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations¹ only to the extent consistent with this Decision and Direction of Second Elections, and finds that both elections must be set aside and new elections held.

I. INTRODUCTION

Two units were stipulated to by the Employer and the Petitioner, and determined to be appropriate by the Acting Regional Director. These units, as described by the

¹ The Petitioner and the Employer have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the hearing officer's findings.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule: the Petitioner's Objections 1, 2, 3, 4, and 5; the portions of the Petitioner's Objection 7 alleging that employees were impermissibly restricted from wearing union pins, that a nonemployee organizer was improperly excluded from a hospital cafeteria, that an agent of the Employer created the impression of surveillance when he told an employee that "there are people around the hospital watching you," and that the Employer closed a side-door hospital entrance to coerce, restrain, and interfere with protected activities; and the Petitioner's Objection 8 alleging that the Employer threatened employees who engaged in protected activities. We also adopt, pro forma, in the absence of exceptions, the hearing officer's finding that the evidence was insufficient to establish the supervisory status of any of the individuals alleged to have engaged in objectionable conduct.

hearing officer, include employees employed by the Employer at five California hospitals: Mercy General Hospital, located in Sacramento;² Mercy American River Hospital and Mercy San Juan Hospital, located in Carmichael; Mercy Hospital Folsom, located in Folsom; and Methodist Hospital, located in South Sacramento. The unit determined appropriate in Case 20-RC-17563 is referred to as the service unit. The unit determined appropriate in Case 20-RC-17564 is referred to as the technical unit.

The hearing officer found certain conduct engaged in by agents of the Employer to be objectionable and other conduct to be unobjectionable. The hearing officer found, however, that the objectionable conduct was insufficient to warrant setting aside the elections.

Both the Employer and the Petitioner filed exceptions to the hearing officer's report. In its exceptions, the Petitioner alleges that the Employer engaged in additional objectionable conduct not found by the hearing officer, and that the totality of objectionable conduct was sufficient to warrant setting aside the elections. In its exceptions, the Employer contends, inter alia, that the hearing officer erred in finding that the individuals who engaged in the conduct found objectionable are agents of the Employer, and that no objectionable conduct occurred in any event.

The resolution of the Petitioner's and the Employer's exceptions requires, as a threshold matter, that the Board determine whether the individuals alleged to have engaged in objectionable conduct are agents of the Employer so that their conduct is attributable to the Employer.³ *Yale Industries*, 324 NLRB 848, 851 (1997). If an agency relationship is established, we must then resolve whether the conduct of these agents was objectionable. Finally, if the conduct of the Employer's agents is deemed objectionable, the Board must determine whether this misconduct warrants invalidating either or both elections because the conduct was more than de minimis with respect to affecting the results of the elections. *Caron International*, 246 NLRB 1120 (1979).

II. ANALYSIS

A. Agency

The hearing officer concluded, inter alia, that Tom Peterson, Jean Scafton, Candie Kenner, Scott Travis, Tim

² Employees at Mercy Medical Plaza, which is associated with and located on the same property as Mercy General Hospital, also are included in the unit.

³ The hearing officer determined that the evidence was insufficient to establish that these individuals possessed supervisory authority under Sec. 2(11) of the Act. Because neither the Employer nor the Petitioner challenges this determination, our inquiry here is limited to the issue of agency.

Frates, Lori Kehoe, Allison Jones, Elizabeth Garcia, Lorraine Shalanar, K. D. Lowe, Sara Clemons, and Jabari Jahi⁴ are agents of the Employer.⁵ The Employer has excepted to the hearing officer's agency findings, arguing that the hearing officer's reliance on job titles as establishing agency status is misplaced. We agree with the Employer, for the reasons that follow, that the evidence is insufficient to establish that Clemons and Jahi were agents of the Employer. Otherwise, we agree with the hearing officer's conclusions that each of the other above-named individuals is an agent of the Employer, but we do so for the following reasons.

It is a long-established policy and practice of the Board to apply the common-law principles of agency. *Allegany Aggregates*, 311 NLRB 1165 (1993). Under the doctrine of apparent authority, an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question. *Id.*; see generally, *Dentech Corp.*, 294 NLRB 924, 925 (1989). Thus, in determining whether the actions by individuals towards employees are attributable to the Employer, the test is whether "under all the circumstances, 'the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Waterbed World*, 286 NLRB 425, 426-427 (1987), supplemented by 289 NLRB 808 (1988), supplemented by 301 NLRB 589 (1991), *enfd. sub nom. NLRB v. Omnix International Corp.*, 974 F.2d 1329 (1st Cir. 1992) (quoting *Einhorn Enterprises*, 279 NLRB 576 (1986), *enfd.* 843 F.2d 1507 (2d Cir. 1988), *cert. denied* 488 U.S. 828 (1988)); see also *Victor's Cafe* 52, 321 NLRB 504, 513 (1996).

1. Tom Peterson

Peterson is described by both Petitioner and Employer witnesses as "president," "CEO,"⁶ and "COO" of the hospital.⁷ Less than 1 week before the elections, Peterson addressed a group of four employees at Mercy Gen-

⁴ Jabari Jahi is referred to as such by the Employer in its exceptions; he is referred to as Jahib Jabari by the hearing officer. The record does not conclusively resolve this discrepancy. For the purpose of consistency, our decision will refer to this individual as Jabari Jahi, the name provided by the Employer.

⁵ The hearing officer also concluded that Sherry Franchesca was an agent of the Employer. Because no party has excepted to the hearing officer's determination that the incident involving Sherry Franchesca did not occur during the critical period, we do not address the hearing officer's conclusion that Franchesca was an agent of the Employer.

⁶ Testimony of Maria Ramirez, Tr. 246.

⁷ Testimony of Tim Frates, Tr. 474 (stating that "Tom is the COO of the hospital, and this is his hospital"). See also testimony of Robert Dags at Tr. 347.

eral, talked about voting in the upcoming elections, and told employees that they would lose their accrued, paid time off if employees selected the Petitioner to represent them. On a separate occasion, Peterson also explained Mercy General Hospital's solicitation policy to a fifth employee, Robert Dags, after Dags had attempted to leave prounion literature in a hospital breakroom.⁸ Peterson did so at the behest of Jean Scrafton.⁹ Peterson told Dags not to be angry with Scrafton for removing union literature from the breakroom because she was "following the advice of management."¹⁰ Under these circumstances, where it was well known that Peterson was head of the hospital and where he spoke on the Employer's behalf with employees about the hospital's personnel policies, we conclude that employees would reasonably believe that Peterson was acting on the Employer's behalf and, thus, was vested with apparent authority. Accordingly, we conclude that Peterson is an agent of the Employer.

2. Jean Scrafton

Scrafton is a clinical coordinator at Mercy General. Scrafton told an employee that if the Union came in, Scrafton would not be able to grant the employee 2 consecutive weeks of time off during a year. The record establishes that Scrafton communicates employment matters to employees on behalf of the Employer. For example, Scrafton has disciplined¹¹ employees within her department.¹² Scrafton also assigns work to employees,¹³ and grants them time off.¹⁴ Accordingly, we conclude that employees would reasonably believe that Scrafton was acting for management when making the statement in issue here.

3. Candie Kenner

Kenner is employed at Mercy General as a clinical coordinator. Kenner told employee Lisa Sweeting that if the Union were selected, bargaining would start from "ground zero." Sweeting described Kenner as her "immediate supervisor."¹⁵ Kenner communicates employment matters to employees on behalf of the Employer. For example, Sweeting testified that Kenner fills out her

⁸ Testimony of Dags, Tr. 347-349.

⁹ According to Dags, Peterson told him that "Jean called me here to explain our policy because it seems like you don't understand the policy here." Tr. 348. Dags described Scrafton as the "PM supervisor, clinical supervisor." Tr. 344.

¹⁰ Tr. 349.

¹¹ As set forth above, there were no exceptions to the hearing officer's finding that there was insufficient evidence to establish supervisory status.

¹² Testimony of Lisa Sweeting, Tr. 313.

¹³ Tr. 312-313.

¹⁴ Tr. 310; see also testimony of Dags, Tr. 344.

¹⁵ Tr. 310.

annual performance evaluation and that the evaluation affects her ability to get a raise.¹⁶ In addition, Kenner assigns work to employees. The record also establishes that Kenner, like Scrafton, disciplined employees.¹⁷ Accordingly, we conclude that Kenner was speaking for management when she raised the spectre of the loss of existing benefits.

4. Scott Travis

Travis is employed at Mercy General Hospital. Travis made three statements that are alleged to constitute threats of adverse consequences if employees selected the Petitioner as their collective-bargaining representative. Travis, who identified himself as a supervisor,¹⁸ communicates employment matters on behalf of the Employer. Thus, the record shows that Travis evaluates employees and that the evaluation affects the employee's ability to get a raise.¹⁹ In addition, Travis disciplines employees.²⁰ Accordingly, we conclude that employees would reasonably believe that Travis was speaking for management when he made the statements alleged to be objectionable.

5. Tim Frates

Frates works at both Methodist and Mercy General Hospitals. He is the manager for the Central Sterile Processing Department. Frates removed union literature from breakrooms at Methodist²¹ and Mercy General Hospitals²² and told employees to "do their business outside the [Central Service] department."²³ Frates identified himself as a supervisor.²⁴ In addition, the record shows that Frates evaluates employees,²⁵ advising them of the Employer's assessment of their job performance. Accordingly, because Frates communicates employment matters to employees on behalf of the Employer, we conclude that employees would reasonably believe that Frates' conduct reflected the position of the Employer.

6. Lori Kehoe

Kehoe is the Nutrition Services supervisor at Mercy Hospital Folsom. Kehoe prohibited employee Nikki Sparks from talking about the Union in Mercy Hospital Folsom's cafeteria. The record shows that Kehoe evaluates employees and, thus, communicates the Employer's

assessment of their job performance to them.²⁶ Under these circumstances, where Kehoe communicates employment matters to employees on behalf of the Employer, employee Sparks would reasonably believe that Kehoe was acting for management when she barred Sparks from talking about the Union.

7. Allison Jones

Jones is the supervisor of the Medical Telemetry unit at Mercy General Hospital.²⁷ Jones told an employee that if the Union were selected she could no longer allow the employee to take certain days off. Jones also prohibited conversations about the Union at employee workstations during working hours while permitting conversations about other subjects. Jones disciplines employees and, thus, communicates to employees the Employer's assessment of employees' job performance.²⁸ Under these circumstances, we conclude that employees would reasonably believe that Jones was speaking for management.

8. Elizabeth Garcia

Garcia was identified at the hearing as a supervisor in the Orthopedic Surgery unit at Mercy General Hospital. Garcia told employee Zoia Quinn to remove a pronoun message from a button. Unrebutted testimony establishes that Garcia has the authority to discipline employees and approve leave requests.²⁹ The record shows that Garcia enforced the Employer's no-solicitation policy.³⁰ Under these circumstances, where the record reveals that Garcia communicates employment matters to employees on behalf of the Employer, employees would reasonably believe that Garcia was speaking and acting for the Employer.

9. Lorraine Shalanar

Shalanar is employed at Methodist Hospital. The record establishes that, during the critical period, Shalanar left an urgent phone message with an employee and, subsequently, questioned that employee regarding whether the Petitioner's organizers had accompanied the employee into the hospital.³¹ Shalanar is identified by employee Robert Nielsen in unrebutted testimony as the "nursing supervisor" who "runs the house" and is the "ultimate authority on weekends" at Methodist Hospital.³² Shalanar did not testify. Based on Nielsen's unrebutted testimony, we conclude that employees would

¹⁶ Tr. 311.

¹⁷ Tr. 312-313.

¹⁸ Testimony of Scott Travis, Tr. 490.

¹⁹ Testimony of Darlene Burleson, Tr. 364, 369.

²⁰ Testimony of Zoia Quinn, Tr. 98-99.

²¹ Testimony of Mark Nielsen, Tr. 404-405.

²² Testimony of Burleson, Tr. 378-379.

²³ Testimony of Frates, Tr. 473.

²⁴ Tr. 468.

²⁵ Testimony of Burleson, Tr. 364, 369.

²⁶ Testimony of Nikki Sparks, Tr. 120.

²⁷ Testimony of Allison Jones, Tr. 447.

²⁸ Testimony of Laura Zamora-Gaffney, Tr. 421-422.

²⁹ Testimony of Quinn, Tr. 91-92.

³⁰ Tr. 91.

³¹ Testimony of Nielsen, Tr. 407-408.

³² Tr. 407.

reasonably believe that Shalanar was acting for the Employer.

10. K.D. Lowe

Lowe is identified in the record as a hospital administrator at Methodist Hospital.³³ Lowe led a meeting during January 2000 in which he is alleged to have threatened employees with adverse consequences if the Petitioner were selected by employees as their collective-bargaining representative. At this meeting, attended by supervisors, managers, and employees, employees were given the opportunity to ask questions about union representation and discuss the Employer's personnel policies.³⁴ Lowe responded to employment-related matters raised by employees.³⁵ Under these circumstances, we conclude that employees would reasonably view Lowe as speaking on behalf of the Employer.

11. Sara Clemons

Employee Margie Ulibarri identified Clemons as a supervisor at the Surgery Center,³⁶ which is associated with Mercy American River Hospital. Clemons enforced the Employer's policy against discussing the Union during work hours.³⁷ There is no evidence, however, establishing that, prior to the incident alleged to be objectionable, employees would reasonably view Clemons as acting or speaking on behalf of management or reflecting company policy. Unlike the hearing officer, therefore, we conclude that the record is insufficient to warrant a finding that Clemons was an agent of the Employer.

12. Jabari Jahi

Martin Jone—an organizer for the Petitioner—identified Jahi as “the head of human resources” at Methodist Hospital,³⁸ stating that Jahi introduced himself to Jones by that title.³⁹ Jahi did not testify. Except for Jones' bare assertions, there is no evidence establishing employees would reasonably believe that Jahi acted or spoke on behalf of management or was reflecting company policy. Unlike the hearing officer, therefore, we conclude that the record is insufficient to warrant a finding that Jahi was an agent of the Employer.

Accordingly, we conclude—as did the hearing officer—that the conduct of Peterson, Scrafton, Kenner, Travis, Frates, Kehoe, Jones, Garcia, Shalanar, and Lowe

is attributable to the Employer. Thus, having concluded that these individuals were acting as agents of the Employer, we turn to the issue of whether their conduct was objectionable.

B. Alleged Objectionable Conduct

1. Threats made to hospital employees

The hearing officer determined that threats made by six agents of the Employer—Travis, Scrafton, Jones, Peterson, Kenner, and Lowe—constituted objectionable conduct. We agree.

With regard to Travis, Scrafton, Jones, and Peterson, the hearing officer credited employee testimony that each one of them told employees that they would no longer receive certain benefits that they were currently receiving, if they selected the Petitioner as their bargaining representative. Travis told employee Burlison, *inter alia*, “that if the union came in that we wouldn't be able to take time off, we would have to give at least a year in advance for vacation.”⁴⁰ Scrafton told employee Sweeting that if the Union came in she would not be able to grant 2 weeks consecutive time off to Sweeting and that other employees would lose their ability to visit their families because of this restriction.⁴¹ Jones told employee Zamora-Gaffney that if the Petitioner won the election, Jones would no longer be able to schedule certain days off for employees. And employee Ramirez testified that Peterson told employees that they would lose their accrued, paid time off if they selected the Petitioner to represent them.⁴² It is well established that such threats are objectionable. *Story Oldsmobile, Inc.*, 244 NLRB 835, 838 (1979). (“[T]he threat of loss of vacation benefits or other scheduled time off clearly tends to interfere with [employees'] Section 7 right to seek union representation.”)

The Employer argues that, in making these statements, Travis, Scrafton, Jones, and Peterson were simply referring to a collective-bargaining agreement that the Petitioner had with another employer. The Employer's contention is not supported by credible evidence. In the case of Travis and Jones, the Employer's argument is based on their testimony, which was not credited. And in the case of Scrafton, it is not supported by the testimony of Sweeting, which was credited. With regard to Peterson, employee Ramirez specifically denied that Peterson referred to a collective-bargaining agreement,⁴³ and Peterson did not testify. We therefore reject the Employer's argument, and find that each of these Employer agents

³³ Testimony of Myra Bennett, Tr. at 229.

³⁴ Tr. at 229.

³⁵ Tr. at 229–230. (Bennett testified that Lowe asked, “What [are] your issues?” and pointedly asked about “a separate time bank” for employees' sick leave, family health benefits, and pay raises.)

³⁶ Testimony of Margie Ulibarri, Tr. at 432.

³⁷ Tr. at 433.

³⁸ Testimony of Martin Jones, Tr. at 143.

³⁹ *Id.*

⁴⁰ Testimony of Burlison, Tr. at 366.

⁴¹ Testimony of Sweeting, Tr. at 314–315.

⁴² Testimony of Ramirez, Tr. at 248.

⁴³ Tr. at 252.

engaged in objectionable conduct by threatening employees with loss of benefits if they selected the Petitioner as their bargaining representative.

The hearing officer found that agent Kenner told employee Sweeting that if the Petitioner won the election, bargaining would start at “ground zero” and that employees “wouldn’t have anything.”⁴⁴ The Board has held that an employer’s statement that negotiations would start from “ground zero” if employees selected union representation constitutes an unlawful threat. *Webco Industries*, 327 NLRB 172, 172 fn. 4 (1998), enf. 217 F.3d 1306 (10th Cir. 2000) (quoting *Plastronics, Inc.*, 233 NLRB 155, 156 (1977)). In *Plastronics*, the Board stated that “[s]uch statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure on what the Union can induce the employer to restore.” *Id.* Such comments, however, are not objectionable “when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining.” *Id.* The Employer presented no evidence placing Kenner’s statement in such a context. Kenner did not testify. Thus, we conclude that Kenner’s statement constituted a threat and is objectionable. *Id.*

The statement attributed to agent Lowe by employee Bennett was that, under the future union contract, employees would be forced to give 60 days’ advance notice for any time off requests. At the time of Lowe’s statement, employees were not required to give 60 days’ advance notice when requesting time off. Bennett replied that the rules governing time off would be dependent on the contract that was negotiated by the parties.

The Employer argues that Bennett’s comment mitigated any threat flowing from Lowe’s statement. We disagree. Under similar circumstances, in *St. Vincent’s Hospital*, 244 NLRB 84, 92 (1979), the Board found impermissible statements from supervisors that if employees voted for union representation, they would no longer be able to follow the current practice of granting requests for time off. In that case, the supervisors subsequently “failed to qualify their language” that the loss of benefits would occur if employees voted for union representation. *Id.* Here, Lowe never disavowed or qualified his statement that employees would lose an established benefit if employees voted for union representation. Accordingly, we conclude that the circumstances surround-

ing Lowe’s exchange with employees in no way militates against the conclusion that his comments constituted an objectionable threat of loss of benefits.

2. Surveillance

The hearing officer determined that the Employer engaged in objectionable surveillance when security guards hired by the Employer followed employees at Mercy General Hospital, Methodist Hospital, and Mercy San Juan Hospital. The hearing officer also concluded that the Employer engaged in objectionable surveillance through the use of a security camera at the main entrance into Mercy General Hospital. The Employer challenges these determinations by the hearing officer. We agree, except as set forth below, with the hearing officer’s conclusion that the Employer engaged in objectionable conduct in both instances, but we do so for the following reasons.⁴⁵

The hearing officer’s conclusion that open union adherents Quinn, Burleson, and Teresa Schwager at Mercy General Hospital, Susan Cripe at Methodist Hospital, and Karissa Ann Lujan of Mercy San Juan Hospital were followed by security guards is fully supported by the record. The hearing officer credited the testimony of these employees that they were regularly and deliberately followed by security guards, and that fellow employees noticed that they were being followed.⁴⁶ There is nothing in the record—other than contradictory, discredited testimony from Employer witnesses—supporting the Employer’s exception. As stated supra, the clear preponderance of the evidence establishes that the hearing officer properly resolved conflicts in witness credibility. Accordingly, we conclude that the Employer’s surveillance of employees Quinn, Burleson, Schwager, Cripe, and Lujan was objectionable.⁴⁷

⁴⁵ The Petitioner excepts to the hearing officer’s conclusion that the Employer’s hiring of additional security guards during the critical period did not constitute objectionable surveillance of employees’ union activities. We conclude, for the reasons stated by the hearing officer, that the Employer’s hiring of additional security guards did not constitute objectionable surveillance.

In addition, as stated supra, we do not agree with the hearing officer’s conclusion that Jahi was an agent of the Employer. Thus, we do not adopt the hearing officer’s finding that Jahi engaged in objectionable surveillance through his activities at Methodist Hospital.

⁴⁶ Testimony of Susan Cripe, Tr. 137–138. (“My nursing co-workers had noticed the man following me[.]” “They were just discussing how it was apparently obvious that he was following me.”) See also testimony of Quinn, Tr. 83.

⁴⁷ However, contrary to the hearing officer, we find, in agreement with the Employer, that the alleged following of employee Bright during his meeting in the Mercy General Hospital cafeteria did not constitute objectionable surveillance because the record does not show that the incident occurred during the critical period.

⁴⁴ Testimony of Sweeting, Tr. 317–318.

The hearing officer also concluded that it was objectionable for the Employer to point its security camera directly at employees engaged in union leafleting outside of Mercy General Hospital. The Employer challenges this conclusion, arguing that its observation of employee campaign activities on its property is not objectionable and comports with conduct that the Board deemed permissible in *Roadway Package System*, 302 NLRB 961 (1991). According to the Employer, “[o]bservation in this particular instance would have been warranted both because of the pre-existing practice of focusing the camera on that location at shift changes, and because the site can be restrictive and contains substantial pedestrian and vehicular traffic.”

In *Roadway Package System*, the Board concluded that a manager who *visibly observed* employees as they distributed prounion literature on the employer’s property did not violate Section 8(a)(1) because, “where . . . employees are conducting their activities openly on or near the company premises, open observation of such activities by an employer is not unlawful.” *Id.* at 961. However, the Board also has recognized that, “absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate.” *F. W. Woolworth Co.*, 310 NLRB 1197 (1993) (citing *Waco, Inc.*, 273 NLRB 746, 747 (1984)). The Board warned in *F. W. Woolworth* that “[w]hen an employer’s surveillance activity constitutes more than ‘mere observation,’ the Board has found a violation of the Act.” *Id.* at 1197 (citations omitted). “Photographing and videotaping clearly constitute more than ‘mere observation’ because such pictorial record-keeping tends to create fear among employees of future reprisals.” *Id.*

Thus, the facts in *Roadway Package System* are distinguishable because that case did not involve the use of a security camera but, instead, concerned a manager who merely observed employees as they leafleted. Here, the hearing officer found that the Employer pointed its security camera at employees as they distributed pro-union leaflets outside Mercy General Hospital, and “that the direction in which the camera was pointing on such occasions did not result from the established way in which the camera was operating.” The hearing officer also found, and we agree, that the Employer failed to introduce evidence sufficient to demonstrate a business justification for engaging in surveillance of employees’ union activity.

The Employer also argues that the camera’s operation was reviewed prior to the critical period by Region 20 of the Board. Even assuming that such a review occurred, however, at issue is how the security camera actually was

operated by the Employer during the critical period, i.e., whether the camera’s operation would have the reasonable tendency to intimidate employees in the exercise of their protected rights. Here, we find that the security camera’s actual use during the critical period had the reasonable tendency to intimidate. Accordingly, we affirm the hearing officer’s finding of objectionable surveillance.

3. Interrogation

The hearing officer also concluded that an agent for the Employer, Shalanar, interrogated employee Nielsen at Methodist Hospital, concerning his union activities. Specifically, the hearing officer found that Shalanar asked Nielsen to identify the two nonemployees who accompanied him in the hospital during his lunchbreak, whether any organizers were present, and whether any organizing occurred. Shalanar did not testify. The Employer challenges the hearing officer’s conclusions, arguing that Shalanar’s questioning of Nielsen was not an interrogation about an employee’s union sympathies but concerned an activity that was not protected (the presence of two strangers touring the hospital).

Whether the questioning of an employee concerning union activity constitutes objectionable interrogation is determined by all of the existing circumstances, including the background, nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). See also *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), *cert. denied* 449 U.S. 889 (1980). In *Laredo*, the U.S. Court of Appeals for the Fifth Circuit observed:

[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer’s knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer.

Id. at 1342 fn. 7. In *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000), the Board determined that a supervisor’s questioning of employees that “made it clear to them that the Respondent wanted to find out about any union organizing activity, and implied to the employees that they were to let [the respondent] know what they found out” violated Section 8(a)(1). See also *Crown Cork & Seal Co.*, 308 NLRB 445, 449 (1992) (employer’s questioning as to who served on a union organizing committee “went well beyond the question of [the employee’s] own union activi-

ties and was an attempt to seek out information concerning how widespread union support was”), enf. denied on other grounds 36 F.3d 1130, 1142 (D.C. Cir. 1994).

Here, Nielsen’s uncontradicted testimony is that Shalanan asked whether he had engaged in union organizing at the hospital. Thus, contrary to the Employer’s assertion, Shalanan’s question directly inquired into Nielsen’s protected union activities. Under these circumstances, we agree with the hearing officer that Shalanan’s questioning of Nielsen was objectionable. *Rossmore House*, supra.

4. Employer restrictions on union activity

a. Conduct found objectionable by the hearing officer

The hearing officer concluded that on several occasions the Employer impermissibly restricted union activities at the Employer’s facilities.⁴⁸ In each instance, the Employer excepts to the hearing officer’s conclusions.

As to employee Hensley, who is employed in the service unit at Mercy General, the hearing officer found that the Employer, through agent Jones, discriminatorily prohibited conversations about the Union at employee workstations while permitting conversations covering other subject matters. Thus, the hearing officer concluded that the Employer had engaged in objectionable conduct. The Employer argues that Jones was attempting to maintain order in a patient care area, which the Employer asserts is permissible under *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

Although the Employer argues that *Beth Israel Hospital* allows the Employer greater control to prohibit solicitation in patient care areas, nothing in that decision empowers an employer to discriminate against conversations pertaining to the Union. See *Opryland Hotel*, 323 NLRB 723, 728–729 (1997) (stating that “[w]here an employer maintains a no-solicitation rule which is valid it must be applied uniformly, not sporadically, not springing up only when union activities begin, and not singling out union activities only for enforcement”). Here, even accepting the Employer’s assertion that the incident took place in a patient care area, Hensley’s testimony that employees discussed other subject matters without limitation in the same area of the hospital is not contradicted. Accordingly, we agree with the hearing officer that the Employer’s discriminatory prohibition against union talk was objectionable.

As to employee Quinn, who is employed at Mercy General, the hearing officer concluded that Employer agent Garcia told her to remove a ribbon containing a

prounion message from a button. The Employer does not dispute Quinn’s account, but argues that Garcia’s actions were permissible because the removal of the message was necessary to maintain the integrity of the hospital’s uniform.

The Board has held that the wearing of pins by employees engaged in protected activities may not be prohibited absent special circumstances. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); see also *St. Luke’s Hospital*, 314 NLRB 434, 435 (1994) (finding that the record did not support the company’s assertion that patients would become upset by a button’s prounion message).

As found by the hearing officer, the message on the button read, “working together works SEIU Local 250.” Similar to *St. Luke’s*, there is no evidence in the record that the button’s message in any way undermined the integrity of the hospital’s uniform. The fact that the Employer permitted the button itself, which is described by the hearing officer as a “little fuzzy, purple ball with eyes, antennae and feet on it,” to remain visible on the uniform belies the Employer’s assertion that it in any way was concerned with the button’s effect on the hospital’s uniform. That the Employer required Quinn to remove only the ribbon containing the prounion message supports the hearing officer’s conclusion that the Employer interfered with an employee’s exercise of a protected activity. *St. Luke’s*, supra. Accordingly, we agree with the hearing officer that the Employer’s conduct was objectionable.⁴⁹

b. Conduct not found objectionable by the hearing officer

The Petitioner excepts to the hearing officer’s conclusion that an incident involving employee Sparks at Mercy Hospital Folsom was not objectionable because it did not occur during the critical period. Specifically, Sparks stated in testimony credited by the hearing officer that Employer agent Kehoe verbally reprimanded her for talking about the Union while working. The Petitioner argues that, although Sparks’ testimony does not establish the incident’s timing, Kehoe’s testimony does establish that the incident took place well within the critical period.

⁴⁹ For the reasons stated by the hearing officer, we also agree with his finding of objectionable conduct based on security guard Barry’s interference with employees’ right to express their support for the Union to the Speaker of the California Assembly when he visited Mercy General Hospital. Member Truesdale finds it unnecessary to pass on this finding given that any findings of objectionable restriction of union activities on the Employer’s premises by Barry would be cumulative.

⁴⁸ As stated supra, we disagree with the hearing officer’s conclusion that Clemons was an agent of the Employer. Accordingly, we find that Clemons’ activities did not constitute objectionable conduct.

The Petitioner's assertion is correct.⁵⁰ Accordingly, we conclude that the hearing officer erred in determining that the conversation between Sparks and Kehoe did not occur during the critical period. Further, as found by the hearing officer, Sparks testified that while working employees discussed a variety of nonwork subjects without restriction. This testimony was not contradicted. No similar restrictions were placed on other subject matters. The Employer therefore engaged in objectionable conduct by discriminating against employee discussions regarding the Union. See *Opryland Hotel*, supra.

The Petitioner also excepts to the hearing officer's failure to find objectionable the Employer's restriction during the critical period on the distribution of union literature in the Employer's facilities. Specifically, the hearing officer found the restrictions unobjectionable because they began before the critical period began. The hearing officer stated:

According to the Union's evidence, Union literature and notices were treated differently from other non-work related notices and literature. Two of the Employer's supervisors who acknowledged removing Union literature and notices from break rooms, [agent] Frates and [agent] Scrafton, testified that they started such removals in about March and April 1999 There is no testimony showing that the Employer's policy was first enforced during the critical period from November 15, 1999 to the date of the election. Therefore, the maintenance of the Employer's policy after the start of the critical period does not constitute objectionable conduct, even if the establishment of the policy was initially motivated by a desire to prevent the distribution and posting of Union materials within the Employer's facilities.

Hearing officer's report at 31. The Petitioner argues that it was objectionable for the Employer to remove union literature from breakrooms during the critical period. We agree with the Petitioner.

It is well settled that an employer may not confiscate prounion literature from employee breakrooms. *Venture Industries*, 330 NLRB 1133, 1134 (2000). Here, as found by the hearing officer, Employer agents Frates and Scrafton removed and threw away prounion literature from breakrooms at the Employer's facilities during the critical period. Consistent with the Board's holding in *Venture Industries*, we find that the Employer's conduct was objectionable because it interfered with employees'

⁵⁰ Testimony of Lori Kehoe, Tr. 507. (Q: "When did—when was this conversation that you had with Ms. Sparks?" A: "It was January 15th.") The critical period is November 15, 1999, to January 27, 2000.

right to distribute union literature in nonwork areas on nonworking time. Further, contrary to the hearing officer, we also find that it is irrelevant that the Employer's policy of removing union literature from the breakrooms may have begun before the start of the critical period. See *Custom Trim Products*, 255 NLRB 787, 788 (1981) (overbroad no-distribution rule held to be objectionable, even though it was first posted outside the critical period).

C. Impact of the Objectionable Conduct On the Elections

Having found that the Employer engaged in objectionable conduct, we turn to the issue of whether this misconduct warrants setting aside the elections. "In resolving the question of whether certain Employer misconduct is de minimis with respect to affecting the results of an election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors." *Caron International*, 246 NLRB 1120 (1979). The hearing officer found that the Employer's objectionable conduct "had a minimal impact on the election process" and, thus did not require setting aside the elections. We disagree.

The first factor to be considered in determining whether the Employer's conduct warrants setting aside the elections is the number of incidents involved. Here, a significant number of instances of objectionable conduct occurred, including six incidents involving surveillance, six incidents involving Employer threats, and one incident of interrogation. In addition, the Employer's objectionable conduct included five instances where it impermissibly restricted union activity in its facilities. We find that the number of instances of objectionable conduct engaged in by the Employer was more than minimal.⁵¹

Another factor to be considered in determining whether the Employer's conduct warrants setting aside the elections is the severity of the conduct. We disagree with the hearing officer's conclusion that the Employer's conduct was "not sufficiently serious" to warrant setting aside the elections. The Board has held that the employees' opportunity to be informed as to the issues in the exercise of their statutory right to vote is of primary importance. *Excelsior Underwear*, 156 NLRB 1236, 1238 (1966). Employees must have "an effective opportunity to hear the arguments concerning representation." *Id.* Thus, conduct that impermissibly interferes with the dis-

⁵¹ Although Member Truesdale finds it unnecessary to pass on one of the five incidents in which the Employer is found to have impermissibly restricted union activity in its facilities, he agrees that the number of instances of objectionable conduct engaged in by the Employer was more than minimal. He also notes that this incident is only one of a large number of instances of objectionable conduct found to have occurred at Mercy General Hospital.

semination of campaign information to employees has a tendency to interfere with employees' free choice in the election. See generally *AK Steel Corp.*, 317 NLRB 260 (1995); see also *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998) (the Board finding objectionable the employer's tardy furnishing of an *Excelsior* list and, in ordering a new election, stating that the objectionable conduct interfered with employees' opportunities "to be informed of the arguments concerning representation, so that that they can freely exercise their Section 7 rights"). Here, much of the objectionable conduct engaged in by the Employer had the effect of restricting the employees' access to information concerning the issues raised by the organizational campaign. For example, the objectionable surveillance reasonably had the effect of discouraging employees from leafleting for the Union. Removing campaign materials from hospital breakrooms, discriminatorily prohibiting employees from talking about the Union at workstations, and prohibiting an employee from wearing a button containing a pronoun message, all had a tendency to inhibit the free flow of information and employees' willingness to participate in union campaign activities. The objectionable threats and interrogation also had a tendency to seriously inhibit the employees' willingness to engage in union activity, and to impede the free flow of information. Accordingly, we find the Employer's objectionable conduct to be sufficiently serious to warrant setting aside the election.

We also disagree with the hearing officer's conclusion that the Petitioner failed to establish significant dissemination of the Employer's objectionable conduct. A large number of instances of objectionable conduct occurred at Mercy General Hospital, the largest hospital; but objectionable conduct also occurred at Methodist Hospital, Mercy San Juan Hospital and Mercy Hospital Folsom. The record demonstrates that a large number of employees, from both units, were told of or witnessed such conduct.⁵² In addition, a large, but unknown, number of

⁵² As to the objectionable threats, Bursleson testified that other employees heard Travis' threats, and Sweeting testified that several employees heard Kenner's threats. Ramirez testified that three other employees heard Peterson's threat. Bennett testified that 10 to 15 employees heard Lowe's threat.

As to the objectionable surveillance, Cripe testified that coworkers noticed guards following her. Quinn testified that she spoke to coworkers about being followed. Lujan testified that a guard followed 5 feet behind her "wherever I went" outside her department during the 2 weeks before the election. Schwager testified that one employee was with her when a guard followed her, and that coworkers commented to her about the security camera's movement.

As to the objectionable restrictions on union activity, Hensley testified that at least one employee witnessed Jones' conduct. Sparks testified that she told coworkers about Kehoe's conduct. Schwager testified that "a group" of coworkers was present during the Speaker incident.

employees in both units entering and exiting the hospital during shift changes and at other times would have observed the Employer's objectionable videotape surveillance at Mercy General Hospital. A large, but also unknown, number of employees in both units at Mercy General Hospital, Methodist Hospital, and Mercy San Juan Hospital likely would have noticed the objectionable conduct of security guards following pronoun employees. Another group of employees witnessed the objectionable conduct of a security guard in front of Mercy General Hospital during the Petitioner's campaign event. Another unknown number of employees in both units were directly affected by the various restrictions on campaigning and literature distribution imposed by the Employer. Thus, contrary to the finding of the hearing officer, the record demonstrates that, despite the large size of the units, the Employer's objectionable conduct was widely disseminated among employees in both units.

Finally, we disagree with the hearing officer's conclusion that the ballot tallies weigh in favor of a determination that the elections should not be set aside. In Case 20-RC-17563, a switch of only 52 votes from 1299 cast—not counting the 89 unresolved challenged ballots—would have resulted in an election victory for the Petitioner. In Case 20-RC-17564, a switch of only 57 votes from 317 cast—not counting 25 unresolved challenged ballots—would have resulted in an election victory for the Petitioner. We conclude, therefore that, in light of the potentially large number of employees directly affected by the objectionable conduct, the voting margins in both Case 20-RC-17563 and Case 20-RC-17564 hardly preclude a determination that the Employer's conduct affected the election results.⁵³

Quinn testified that she told coworkers about Garcia's conduct. Dags testified that coworkers witnessed the 15- to 20-minute conversation he had with Peterson regarding the hospital's solicitation policy.

⁵³ Although the hearing officer correctly pointed out that the Board gives great weight to the closeness of an election, this factor is but one of several factors the Board considers in determining whether an election result should be set aside. In *Scientific Atlanta, Inc.*, 278 NLRB 467, 468 (1986), for example, the Board set aside an election even though 717 votes separated the number of votes for the petitioner and those opposed. The Board stated that the employer's misconduct "was far more than de minimis" and directed a second election even though "the extent of the effect of the misconduct here cannot be determined with any mathematical certainty."

Accordingly, for all these reasons, we conclude, contrary to the hearing officer, that the Employer's objectionable conduct cannot be dismissed as de minimis in either the service unit or the technical unit. Therefore, we shall set both elections aside.⁵⁴

⁵⁴ As the Union has excepted to the hearing officer's failure to order

[Direction of Second Elections omitted from publication.]

that the notice of the new election include, pursuant to *Lufkin Rule Co.*, 147 NLRB 341 (1964), a statement of the reason for the first elections being set aside, we order that such language be included in the notice of the new election. See NLRB Casehandling Manual (Part Two), Representation Proceedings, Sec. 11452.1.