Baptist Medical Center/Health Midwest and Medical Center of Independence/Health Midwest and Menorah Medical Center/Health Midwest and Overland Park Regional Medical Center/Health Midwest and Lee's Summit Hospital and Visiting Nurse Association/Visiting and Nurse Services of Health Midwest and Health Midwest *and* Nurses United for Improved Patient Care

Research Medical Center of Health Midwest *and* Nurses United for Improved Patient Care and Nursing Practice Committee (Party-in-Interest). Cases 17–CA–20415–3, 17–CA–20415–5, 17–CA–20655, 17–CA–20415–6, 17–CA–20524–4, 17–CA–20415–7, 17–CA–20524–3, 17–CA–20506, 17–CA–20524–5, 17–CA–20616, 17–CA–20623, 17–CA–20415–8, 17–CA–20524–2, and 17–CA–20640

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On July 25, 2001, Administrative Law Judge George Aleman issued the attached decision. On August 16, 2001, he issued an erratum (omitted from publication; corrections were made). The Respondents filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs to the Respondents' exceptions.

The National Labor Relations Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, except as discussed below, and to adopt the recommended Orders as modified.[3]

A.

The judge has found that the Respondents committed numerous unfair labor practices. The parties' exceptions to these findings are limited. The Respondents' exceptions only challenge findings that: (1) Respondents Health Midwest and Visiting Nurse Association/Visiting Nurse Services of Health Midwest (VNA/VNS) violated Section 8(a)(1) of the Act by distributing memoranda that impeded employees' access to the Board and obstructed Board processes;[4] (2) Respondent Research violated Section 8(a)(1) by ejecting nonemployee organizers from outside entrances to its facility,[5] and by creating the impression that employee Jandra Hancock's union activities were under surveillance and threatening her with discipline;[6] and (3) Respondent Overland Park Regional Medical Center/Health Midwest (Respondent Overland Park) violated Section 8(a)(3) of the Act by issuing written discipline to employees Anita Carr and Sharyn Johnson for engaging in union solicitation at nurse stations during their off-duty time.[7] The General Counsel cross-excepts only to the judge's failure to find three 8(a)(1) violations *in addition to* violations that the judge did find with respect to an incident involving Carr and Johnson in Respondent Overland Park's cafeteria.[8]

For the reasons set forth below, we reverse the judge as to the issue in (1) above, in its entirety, and as to the issues in (2) above, in part. We affirm the judge's findings as to the issue in (3) above on limited grounds. We decline to make the additional unfair labor practice findings requested by the General Counsel.

1. The judge found that two memoranda distributed to employees by Respondents Health Midwest and VNA/VNS violated Section 8(a)(1) because they interfered with employees' access to the Board and attempted to obstruct the Board's processes. We disagree.

On April 7, 2000,[9] the Respondents distributed a memorandum to employees. The memorandum began with a declaration that the "United States Department of Justice has in recent years increased the resources devoted to the investigation of health care" in the area, that the Respondents' counsel had informed them of an apparent increase in the issuance of investigative subpoenas, and that the "companies of Health Midwest could be included in such investigations." The memorandum then explained that its purpose was to give employees "some information about your rights and responsibilities if you are asked to speak with investigators as part of a government investigation."

Among the rights identified was the right to talk to or to decline to talk to a government investigator and the

[1] By Order dated December 11, 2001, Case 17–RC–11816 was severed from this consolidated proceeding and remanded to the Regional Director for Region 17 for further appropriate action.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Orders shall be modified to accord with the findings discussed infra, and new notices shall be substituted to include language changes in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[4] See sec. II,A,3 of the judge's decision.

[5] See sec. II,B,1,d of the judge's decision.

[6] See sec. II,B,1,b,(2) of the judge's decision.

[7] See sec. II,F,2 of the judge's decision.

[8] See sec. II,F,3 of the judge's decision.

[9] All dates are in 2000.

right to "seek the advice of a lawyer before doing so." The memorandum further advised that "you may be best served by working with a lawyer who has experience in matters of this type. Depending on the nature and scope of the investigation, Health Midwest will pay for the costs of an attorney who will represent your interests." The memorandum also stated that an employee had the right to consult with a lawyer before testifying under a subpoena. The one-page message concluded with a request to inform officials of the Respondents "if you receive a grand jury subpoena or are contacted by investigators regarding a matter involving any Health Midwest company in any way."

When the Respondents distributed the April 7 memorandum, both a Board complaint against the Respondents and union objections to an election conducted a week earlier at Respondent VNA/VNS were pending. The Union filed an unfair labor practice charge alleging that the April 7 memorandum violated employees' Section 7 rights to file charges or to give testimony to the Board. Seeking to refute this charge, the Respondents distributed a second memorandum to employees on April 20. This memorandum specifically referred to the Union's charge, denied that the April 7 memorandum had the alleged unlawful effect, and "clarif[ied] the record" regarding NLRB investigations, as follows:

> 1. You are free to talk to an NLRB investigator if you wish to do so.
> 2. You are under no obligation to notify me if an NLRB investigator contacts you.
> 3. You will not be disciplined for failing to notify me if an NLRB investigator contacts you.
> 4. If you choose to talk to an NLRB investigator, tell the truth.

The April 20 memorandum then reaffirmed the information contained in the April 7 memorandum for employees "when approached by an investigator in a matter other than a Labor Department, NLRB or similar matter." As to such investigations, the Respondents repeated the right to speak or not to speak to government investigators and again requested notification by employees "if you are contacted by an investigator . . . so that we can deal promptly with issues like . . . indemnification and defense of employees."

Reviewing the legality of the April 7 memorandum, the judge noted the pendency of the Board proceedings and the absence of specific proof that there was any ongoing Justice Department investigation of Health Midwest facilities. In this context, he reasoned that the memorandum's general references to "government investigations" revealed the Respondents' intent to alert employees to the ongoing Board investigation and, by encouraging resort to a lawyer and notice to the Respondents, to interfere both with employees' right of access to the Board and with the Board's processes.

The judge concluded that the April 7 memorandum violated Section 8(a)(1). Furthermore, because the April 20 memorandum not only failed to repudiate the unlawful elements of the predecessor document but "in fact, reaffirmed" them, the judge concluded that the April 20 memorandum also violated Section 8(a)(1).

As explained by the Board in *Certain-Teed Products Corp.*,[10] when an unfair labor practice charge has been filed against a party

> [t]he Board's ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully and to obtain relevant information and supporting statements from individuals. It is for this reason that the Board has carefully sought to protect the integrity of its processes by preventing any obstruction of Board agents in their investigation of charges.

Applying this principle, the Board has consistently found 8(a)(1) violations where employers have explicitly discouraged or warned their employees not to provide information to investigating Board agents, or advised that Board subpoenas could be disregarded.[11] However, in all these cases, the Board was identified specifically as the agency with which employees should not cooperate. Here, by contrast, the only governmental entity identified by name in the April 7 memo was the Justice Department. No mention is made of the Board or its proceedings in connection with the Respondents' offer of legal counsel and its request for notification in the event that employees were contacted by government investigators.

The question, therefore, is whether the memorandum reasonably tended to interfere with employees' access to the Board. We conclude that, in all the circumstances, it did not. The April 7 memorandum made explicit reference to investigations by the Justice Department and was clearly directed at investigations that had nothing to do with the Board, unfair labor practices, or objections. There is nothing inherently implausible in the purported concerns reflected in the memorandum, which a reasonable employee would probably take at face value.[12]

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[10] 147 NLRB 1517, 1520 (1964).

[11] See, e.g., *Clark Equipment Co.*, 278 NLRB 498, 518 (1986); *Air Express International Corp.*, 245 NLRB 478, 497 (1979); *ABC Specialty Foods, Inc.*, 234 NLRB 475, 477 (1978).

[12] We note that a July 1998 grand jury indictment led to the conviction of a Baptist Medical Center/Health Midwest executive for viola-

It is true that the memorandum contained language that, if taken out of context, might lead an employee to conclude that it required him to notify management if he was contacted by any type of government investigator, including perhaps a Board agent. Thus, the memorandum states, "Please inform me . . . if you receive a grand jury subpoena or are contacted by investigators regarding a matter involving any Health Midwest company in any way." Unlike the judge, however, we conclude that this slightly overbroad language was probably inadvertent, and not related to the ongoing investigation of unfair labor practices and objections. Support for this conclusion can be found in the fact that the Respondents quickly corrected the memorandum on April 20, as soon as it was advised that the language could possibly be read to cover contacts with Board agents. Taking the April 7 memorandum in its entirety, we conclude that a reasonable employee would not likely read it out of context, and construe it to cover a Board investigation. And in any event, the Respondents clearly clarified the memorandum on April 20, by stating explicitly that employees were free to talk to Board investigators without contacting management and without fear of any repercussions. Unlike the judge, we find that the April 20 memorandum did narrow the possible coverage of the original memo, and thus removed any inadvertent implication that an employee would have to notify management before talking to a Board agent.

Accordingly, we conclude that the evidence fails to support the judge's finding that the April 7 and 20 memoranda unlawfully impeded employee access to the Board or obstructed the Board's investigating process. We shall therefore dismiss this aspect of the complaint.

2. The judge found that Respondent Research violated Section 8(a)(1) by ejecting two nonemployee union organizers from the outside entrances of its facility and by threatening to have them arrested. The Respondents except, arguing that this violation was neither alleged in the complaint nor fully litigated at the hearing. We find merit in the exception.

The relevant paragraph in the complaint[13] alleged that Respondent Research unlawfully "[t]hreatened employees with arrest in response to their engaging in protected union activities" when soliciting union support on March 10, outside entrances to Respondent Research's facility. In his decision, the judge found no credible evidence that Respondent Research's officials attempted to evict or to arrest its employees on this occasion. However, the judge found that these officials did violate Section 8(a)(1) by ejecting and threatening to arrest two *nonemployee* union representatives who were also soliciting at the facility's entrances. The judge based his finding on Respondent Research's failure to prove that it had a private property interest which would privilege its exclusion of nonemployees.

In finding this violation, the judge stated that the allegation was included in the complaint. In fact, however, the General Counsel concedes in his answering brief to Respondent Research's exceptions that the complaint alleged only the unlawful threat to arrest employees. The General Counsel first alleged unlawful conduct with respect to nonemployees in his posthearing brief, based on the testimony of Respondent Research's witnesses.

It is well settled that the Board may find a violation even in the absence of a specific complaint allegation if the issue: (1) is closely connected to the subject matter of the complaint, and (2) was fully litigated at the hearing. *Pergament United Sales*, 296 NLRB 333, 334 (1989).[14] Here, we assume, without deciding, that the first part of this test has been met. However, we find that the issue was not fully litigated.

As indicated above, the judge found the 8(a)(1) violation because Respondent Research failed to establish that it possessed a property interest in the entrance areas from which the nonemployee union organizers were excluded. In this respect, the judge applied precedent holding that an employer may generally bar nonemployee organizers from trespassing in order to engage in Section 7 activity, but the employer bears an initial burden of proving a sufficient property interest entitling it to exclude these individuals. E.g., *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997). However, at all relevant times in this proceeding, the complaint alleged and the General Counsel argued at hearing only that Respondent Research removed employees, not nonemployees, from its hospital entrances and threatened them with arrest. In cases involving the eviction or arrest of *employees* who are engaged in protected union solicitation, an employer's proof of a property interest in the situs of the alleged misconduct is not by itself an adequate defense. See generally *Stoddard-Quirk Mfg. Co.*, 138 NLRB 15 (1962), and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Consistent with this precedent, Respondent Research here successfully defended against the only allegation known to it by proving that its officials did not direct any employees to quit the premises under threat of arrest. In the absence of any indication by the General Counsel that the lawfulness of the ejection of the nonemployee

tion of the Medicare Anti-Kickback Act. See *U.S. v. McClatchey*, 217 F.3d 823, 827–828 (10th Cir. 2000).

[13] Par. 5(e)(xvii) of the third consolidated complaint.

[14] Member Cowen expresses no view as to this legal principle.

organizers was also being placed in issue, the Respondent had no notice that there was any reason to present a property-interest defense. Accordingly, because the issue was not fully litigated, we shall reverse the judge and delete any reference to this event from the Order and notice.[15]

The Respondents also except to the judge's finding that Respondent Research violated Section 8(a)(1) by creating the impression of surveillance of employee Hancock's union activities when her supervisor, Terry Plesser, remarked that she had "heard through the grapevine" that Hancock had been engaged in union solicitation at a medication island during a shift change. We find it unnecessary to pass on this finding. Elsewhere in his decision, the judge found that on a different occasion Respondent Research unlawfully created the impression that employees' union activities were under surveillance. There are no exceptions to this finding. The finding of an additional 8(a)(1) violation based on Plesser's remark would be cumulative and would not affect the remedy for Respondent Research's misconduct.

We agree with the judge, however, that Plesser's further remark to Hancock that she would be written up if an investigation revealed that she had solicited employees at a medication island constituted an 8(a)(1) threat. In adopting this violation, we note that the Respondents do not except to the judge's finding that the medication island was not shown to be a patient care area where solicitation could be lawfully prohibited. See generally *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979).[16]

Our dissenting colleague would dismiss this 8(a)(1) threat on the basis of an "unresolved conflict" between the testimony of Hancock and Plesser. We perceive no such conflict, and agree with the judge that Hancock presented uncontradicted testimony regarding the threat made to her by Plesser. Although Plesser was asked to give her "best recollection" of her encounter with Hancock, her testimony did not contain a specific denial of the threat ascribed to her by Hancock on January 21 to "write her up" for engaging in union solicitation (Tr. 1715). Nor is it even clear from Plesser's testimony that it pertained to the January 21 conversation during which Hancock testified the threat was made, or whether she was recalling another conversation that the two had later in February. Finally, we note that in its exceptions, the Respondents do not contend that Hancock's testimony was contradicted by Plesser. To the contrary, they appear to accept that Plesser warned Hancock of potential discipline, and argue only that under the circumstances no violation should be found. See Respondent Research's exceptions at 6–7.

3. The judge articulated two separate grounds for finding that Respondent Overland Park violated Section 8(a)(3) by disciplining employees Carr and Johnson for soliciting union support and distributing union literature during their off-duty hours at various nurses stations: (1) the discipline was issued pursuant to a no-solicitation/no-distribution policy that was unlawful under the access rules applicable to off-duty employees set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976); and (2) the nurses stations were not shown to be immediate patient care areas as defined by the Supreme Court in *NLRB v. Baptist Hospital, Inc.*, supra, where the prohibition of union solicitation is presumptively lawful. The Respondents except only to the second ground cited by the judge and expressly do not except to the first ground. In the absence of exceptions, we affirm the judge's finding on the basis of the first ground summarized above. We therefore find no need to pass on the second ground and the Respondents' exceptions thereto.[17]

[15] Without addressing all of the cases cited in this section of the decision, Member Cowen agrees with his colleagues that this issue was not fully litigated and that the violation should be reversed.

[16] Member Cowen would not find this 8(a)(1) violation. Contrary to the judge's findings, and his colleagues' arguments, Member Cowen finds that Hancock's testimony regarding her January 21, 2000 discussion with Plesser was contradicted. Plesser offered conflicting testimony of, in Respondent Research's words, "this same meeting," which the judge failed to consider or discuss.

Member Cowen finds unpersuasive his colleagues' attempts to disclaim the conflict by stating that Plesser's "best recollection" of her discussion with Hancock did not even contain a specific denial of the threat ascribed by Hancock. On the contrary, Plesser's "best recollection," as set forth below, expressly rejects Hancock's version:

> I asked her not to—to refrain from doing that again, that no discipline would occur because I had two separate sides to a story, but if something happened again where another staff member came forward, I would have to take their side and then we would have to talk to her."

In the face of this unresolved conflict, Member Cowen finds that the General Counsel has not met his burden of proof as to this allegation. Accordingly, Member Cowen would dismiss it.

[17] Member Cowen would dismiss the 8(a)(3) allegations regarding the discipline of Carr and Johnson. Contrary to his colleagues, Member Cowen finds that the record establishes that the Overland Park nurses stations at issue were patient care areas, and that Respondent Overland Park excepted to the judge's findings to the contrary. Accordingly, because Carr and Johnson were disciplined for soliciting in those areas, Member Cowen finds that the discipline imposed was lawful, regardless of the overbreadth of the no-solicitation rule relied on. *Saia Motor Freight*, 333 NLRB 607 (2001) (concurring opinion), vacated in 334 NLRB 607 (2001). See also *Mt. Clemens General Hospital*, 335 NLRB 48 fn. 2 (2001) (Chairman Hurtgen's position)."

Member Bartlett agrees in principle with former Chairman Hurtgen's opinions in the cases cited by his colleague. Specifically, he agrees that a disciplinary action that is imposed pursuant to an overbroad no-solicitation rule is not unlawful if the application of the rule in the circumstances presented was lawful (e.g., if the employer made clear that the discipline was being imposed because the employee was soliciting during working time or in patient care areas). However, here Respondent Overland Park did not except to the judge's finding that the

The judge also found that Respondent Overland Park violated Section 8(a)(1) on November 18, when Chief Executive Officer Kevin Hicks prohibited Carr and Johnson from soliciting and distributing union literature in the cafeteria during their off-duty time, threatened to surround their display table with "a bunch of supervisors," and evicted them from the facility. The Respondents do not except to these findings. However, the General Counsel cross-excepts to the judge's failure to find that during the same encounter Hicks also violated Section 8(a)(1) by prohibiting Carr and Johnson from displaying a union sign on the back of a chair, by threatening them with unspecified reprisals if they failed to remove signs, and by repeatedly asking them whether they were going to follow his order to leave the facility. With respect to the alleged threat, we find it unnecessary to pass on the General Counsel's cross-exception because an additional unfair labor practice finding would be cumulative to the undisputedly unlawful threat to surround Carr's and Johnson's table with supervisors and, hence, would not affect the remedy for Respondent Overland Park's misconduct. As for the remaining cross-exceptions, we find that the conduct urged as unlawful is encompassed within the violations already found by the judge.

B.

The Respondents also raise a limited remedial issue. Although they do not except to the judge's finding that they violated Section 8(a)(1) by promulgating, maintaining, and enforcing overly broad no-solicitation/no-distribution policies at their various health care facilities, they do except to the cease-and-desist provisions of the judge's recommended Orders and notices that direct them to refrain from prohibiting employees' nonworktime *distribution* of union literature in *nonpatient care areas*. In response, the General Counsel agrees that it would be appropriate for the Board to modify this remedial language.

We also agree. As in any other industry, health care industry employers may lawfully prohibit distribution of union literature in *working areas*, even if they are nonpatient care areas. See *Brockton Hospital*, 333 NLRB 1367, 1368 (2001); *Hale Nani Rehabilitation & Nursing Center*, 326 NLRB 335 (1998). Accordingly, we shall modify the relevant cease-and-desist paragraphs to preclude the Respondents from applying their no-distribution rules only in nonworking, nonpatient care areas during employees' nonworktime.

discipline violated the Act because it was imposed pursuant to an overbroad no-solicitation rule. Thus, in the absence of exceptions, Member Bartlett adopts the judge's finding.

ORDER

The National Labor Relations Board adopts the recommended Orders of the administrative law judge as modified below and orders that

A. Respondent Health Midwest, Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas, and circulating or disseminating to employees memos containing ambiguous and vague interpretations of its unlawful rules."

2. Substitute the following for paragraph 2(a).

"(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to employees on November 22, 1999."

3. Substitute the attached notice marked "Appendix A" for that of the administrative law judge.

B. Respondent Research Medical Center of Health Midwest, Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas.

"(b) Preventing employees from soliciting and distributing literature during their nonworktime in the cafeteria; creating the impression it was keeping its employees' union activities under surveillance; interrogating employees regarding their union activities; disparately prohibiting use of employee mailboxes for the distribution of union literature or storage and not allowing an employee to store union literature at a work station while allowing other nonunion material to be stored; prohibiting employees from discussing the Union among themselves and threatening them with discipline if they did so; and threatening employees with adverse job consequences, including loss of jobs, less supervisory flexibility, if they selected the Union to represent them."

2. Substitute the attached notice marked "Appendix B" for that of the administrative law judge.

C. Respondent Baptist Medical Center/Health Midwest, Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas."

2. Substitute the attached notice marked "Appendix C" for that of the administrative law judge.

D. Respondent Medical Center of Independence/Health Midwest, Independence, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas."

2. Substitute the attached notice marked "Appendix D" for that of the administrative law judge.

E. Respondent Menorah Medical Center/Health Midwest, Overland Park, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas."

2. Substitute the attached notice marked "Appendix E" for that of the administrative law judge.

F. Respondent Overland Park Regional Medical Center/Health Midwest, Overland Park, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas."

2. Substitute the attached notice marked "Appendix F" for that of the administrative law judge.

G. Respondent Lee's Summit Hospital, Lee's Summit, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas."

2. Substitute the attached notice marked "Appendix G" for that of the administrative law judge.

H. Respondent Visiting Nurse Association/Visiting Nurse Services of Health Midwest, Kansas City and Lexington, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing employees in their exercise of Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support during their nonworktime and distributing union literature during their nonworktime and in nonwork, nonpatient care areas."

2. Substitute the following for paragraph 2(a).

"(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to employees on November 22, 1999."

3. Delete paragraph 3.

4. Substitute the attached notice marked "Appendix H" for that of the administrative law judge.

APPENDIX A

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by promulgating, maintaining, or enforcing any rule or policy that prohibits employees from soliciting on behalf of a labor organization during their nonworktime or distributing union literature during their nonworktime in nonworking nonpatient care areas of our facilities, and WE WILL NOT require employees to obtain our approval before engaging in such protected activities.

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 rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo we distributed to you on November 22, 1999.

HEALTH MIDWEST

APPENDIX B

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by promulgating, maintaining, or enforcing any rule or policy that prohibits employees from soliciting on behalf of a labor organization during their nonworktime or distributing union literature during their nonworktime in nonworking nonpatient care areas of our facilities, and WE WILL NOT require employees to obtain our approval before engaging in such protected activities.

WE WILL NOT prevent you from soliciting and distributing union literature during your nonworktime in the cafeteria; create the impression we are keeping your union activities under surveillance; question you about your union activities; prevent you from using employee mailboxes to distribute union literature or from keeping union literature at your work station while allowing other nonunion material to be so distributed or kept; prohibit you from discussing the Union among yourselves or threaten you with discipline if you choose to do so; threaten you with adverse job consequences, including a loss of jobs and less supervisory flexibility if the union is chosen to represent you.

WE WILL NOT dominate, assist, or otherwise support the Nursing Practice Committee.

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 rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to you on November 22, 1999.

WE WILL disestablish and cease giving assistance to or supporting the Nursing Practice Committee.

RESEARCH MEDICAL CENTER OF HEALTH MIDWEST

APPENDIX C

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by promulgating, maintaining, or enforcing any rule or policy that prohibits employees from soliciting on behalf of a labor organization during their nonworktime or distributing union literature during their nonworktime in nonworking nonpatient care areas of our facilities, and WE WILL NOT require employees to obtain our approval before engaging in such protected activities.

WE WILL NOT prohibit you from discussing the union with other employees.

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

WE WILL rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to you on November 22, 1999.

BAPTIST MEDICAL CENTER/HEALTH MIDWEST

APPENDIX D

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits you from soliciting on behalf of a labor organization during your nonworktime or distributing union literature in nonwork nonpatient care areas of our facility during your nonworktime, and WE WILL NOT require employees to obtain our approval before engaging in such protected activities.

WE WILL NOT unlawfully deny off-duty employees access to our facility, WE WILL NOT unlawfully deny employees of other Health Midwest facilities the right to solicit and distribute literature in employee breakrooms or other nonpatient care areas of our facility during their nonwork time, and WE WILL NOT threaten employees with arrest or loss of their nursing licenses for engaging in such 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 rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to you on November 22, 1999.

MEDICAL CENTER OF INDEPENDENCE/HEALTH MIDWEST

APPENDIX E

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits you from soliciting on behalf of a labor organization during your nonworktime or distributing union literature in nonwork nonpatient care areas of our facility during your nonworktime, and WE WILL NOT require employees to obtain our approval before engaging in such protected activities.

WE WILL NOT remove union literature from employee mailboxes and WE WILL NOT prohibit you from soliciting or distributing union literature in our cafeteria or require that you first obtain permission to do so, and WE WILL NOT create an impression of surveillance by photographing employees engaged in union activities.

WE WILL NOT issue disciplinary writeups or warnings to employees Teresa Barnett and Angela Tuska-Wagner, or any other employee, in retaliation for their union activities.

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 rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to you on November 22, 1999.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful writeups issued to Teresa Barnett and Angela Tuska-Wagner on October 12, 1999, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and the writeups will not be used against them in any way.

MENORAH MEDICAL CENTER/HEALTH MIDWEST

APPENDIX F

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits you from soliciting on behalf of a labor organization during your nonworktime or distributing union literature in nonwork nonpatient care areas of our facility during your nonworktime, and WE WILL NOT require you to obtain approval before engaging in such protected activity.

WE WILL NOT interfere with your right to solicit and distribute union literature during your nonworktime in our cafeteria, and WE WILL NOT attempt to coerce you into refraining from such activity by threatening to have you surrounded by supervisors as you engage in such activity.

WE WILL NOT issue disciplinary writeups to employees Anita Carr and Sharyn Johnson, or any other employee, for engaging in union activities.

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 rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to you on November 22, 1999.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful writeups issued to Anita Carr and Sharyn Johnson on October 26, 1999, and WE WILL , within 3 days thereafter, notify them in writing that this has been done and the writeups will not be used against them in any way.

OVERLAND PARK REGIONAL MEDICAL CENTER/HEALTH MIDWEST

APPENDIX G

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits you from soliciting on behalf of a labor organization during your nonworktime or distributing union literature in nonwork nonpatient care areas of our facility during your nonworktime, and WE WILL NOT require you to obtain approval before engaging in such protected activity.

WE WILL NOT unlawfully interrogate you about your union sympathies or activities, and WE WILL NOT threaten you with more adverse working conditions, closure of our facility, or a loss of jobs if you choose to be represented by a union.

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 rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to you on November 22, 1999.

LEE'S SUMMIT HOSPITAL

APPENDIX H

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits you from soliciting on behalf of a labor organization during your nonworktime or distributing union literature in nonwork nonpatient care areas of our facility during your nonworktime, and WE WILL NOT require you to obtain approval before engaging in such protected activity.

WE WILL NOT threaten you with job loss, harsher treatment, closure of operations, and a strike if you select the Union to represent you; threaten that a strike would adversely impact your wages and cause you financial hardship, threaten that our supervisors would no longer be flexible if you brought in the Union; tell you it was futile to support the Union; interrogate you about your union sympathies or activities; threaten to be more adversarial with you if the Union were brought in; suggest that we might not bargain in good faith by telling you we would be more confrontational with the Union if you select it to represent you; prohibit you or nonemployee union organizers from soliciting or distributing literature in the outside areas of our facilities over which we have no control.

WE WILL NOT issue disciplinary writeups to employees Deanna Jones, Mary Porter, Patricia Gallagher, and Nora Herse, or any other employee for engaging in union activities.

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 rescind our overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo distributed to you on November 22, 1999.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful writeups issued to Deanna Jones on January 26, 2000, to Mary Porter on March 29, 2001, and to Patricia Gallagher and Nora Hersh on May 1, 2000, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and the writeups will not be used against them in any way.

VISITING NURSE ASSOCIATION/VISITING NURSE SERVICES OF HEALTH MIDWEST

David A. Nixon, Esq., for the General Counsel.

David L. Wing and *Carol Clark, Esqs. (Spencer, Fane, Britt, & Browne),* for the Respondents.

Walter "Bud" Roher, Esq. (Roher & Wood), for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. A hearing in this matter was held on various dates between May 23 and July 20, 2000, following unfair labor practice charges filed by Nurses United for Improved Patient Care (the Union),[1] and issuance of a third consolidated complaint on May 9, 2000, by the Regional Director for Region 17 of the National Labor Relations Board (the Board).

The consolidated complaint alleges that Respondent Health Midwest (HM), and several health care facilities owned and operated by HM, including Respondents Baptist Medical Center/Health Midwest (Baptist), Medical Center of Independence/Health Midwest (MCI), Menorah Medical Center/Health Midwest (Menorah), Overland Park Regional Medical Center/Health Midwest (Overland Park), Research Medical Center of Health Midwest (Research), Lee's Summit Hospital (Lee's), Visiting Nurse Association/Visiting Nurse Services of Health Midwest (VNA/VNS), in various manner, violated Section 8(a)(1) of the National Labor Relations Act (the Act). It further alleges that Respondent Research's creation and support of a Nurse Practicing Committee violated Section 8(a)(2), and that Respondents VNA/VNS, Menorah, and Overland Park also engaged in unlawful conduct which violated Section 8(a)(3) and (1) of the Act. On May 16, 2000, the Regional Director issued an order consolidating the allegations in the third consolidated complaint with objections to an election filed by the Charging Party Union on April 6, 2000, in Case 17–RC–11816.[2] On May 23, 2000, the Respondents collectively, by counsel, timely filed a joint answer to the third consolidated complaint denying the commission of any unfair labor practices.

All parties were afforded a full and fair opportunity at the hearing to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. On the entire record, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General

[1] The Union filed its various charges and amended charges between November 8, 1999, and May 8, 2000 (see GC Exh.1[fff]).

[2] In Case 17–RC–11816, the Union filed a representation petition with the Board on January 19, 2000, seeking to represent "all full-time and regular part-time registered nurses employed by VNA and/or VNS of Health Midwest which provide clinical services or support services for clinical services, including registered nurses employed from 2801 Wyandotte Street, Kansas City, Missouri, and Lexington, Missouri, but *excluding* all other professional employees of VNA/VNS of Health Midwest, office clerical employees, guards, and supervisors as defined in the Act, and all other employees." An election among employees in the above-described unit was held on March 30, 2000, resulting in 58 votes being cast for, and 61 against, representation, with two nondeterminative ballots having been cast.

Counsel, the Charging Party, and the Respondents,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent HM is a corporation with an office in Kansas City, Missouri, where it is engaged in the business of owning and managing health care institutions. Respondents Baptist, MCI, Research, Overland Park, and Lee's, all corporate entities, are acute care facilities owned and operated by HM.[4] VNA/VNS, also owned and managed by Respondent HM, maintains offices in Kansas City and Lexington, Missouri, and is engaged in the business of providing nonacute health care services primarily at patients' homes. During the 12-month period ending December 31, 1999, each named Respondent had gross revenues in excess of $250,000 and, during the same period, purchased and received at its facility products, goods, and materials directly from points outside the geographical state in which they operate and do business. The complaint alleges, the Respondents admit, and I find, that each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondents herein are alleged to have violated Section 8(a)(1) by, inter alia, promulgating, maintaining, and enforcing overly broad no-solicitation/no-distribution policies, interfering with the Board's investigatory processes, threatening employees with job loss, closure of facilities, less favorable working conditions, wage loss, financial hardship, and strikes if they brought in the Union; telling employees support for the Union would be a futile gesture; interrogating employees about their activities, creating the impression of surveillance of their activities, ejecting employees and nonemployee union supporters from their facility and threatening them with arrest if they did not do so, and refusing to allow union literature to be placed in employee mailboxes or to be distributed in their cafeterias. Respondent, Research Medical, is also alleged to have violated Section 8(a)(2) by establishing and lending assistance a labor organization. Finally, Respondents Menorah, Overland Park, and VNA/VNS are alleged to have violated Section 8(a)(3) and (1) by issuing disciplinary warnings to employees because of their union activities. Discussion of the specific allegations involving each Respondent, and my findings with respect thereto, follows.

A. Health Midwest (HM)

1. HM'S corporate-wide no-solicitation/no-distribution policy

The record reflects that HM maintains a corporatewide no-solicitation/no-distribution corporate policy which the parties agree was distributed or made available to employees of the various named Respondents between May 8, 1999, and the start of the hearing (GC Exhs. 67, 67[h]).[5] The policy reads as follows:

> PURPOSE:
>
> To prevent disruptions in operations, interference with patient care and inconvenience to patients and visitors.
>
> POLICY:
>
> Solicitation and distribution within Health Midwest…facilities must be approved by the corporation and conducted according to specified procedures.
>
> A. Non-Employee Solicitation
>
> Persons not employed by Health Midwest…may not solicit or distribute literature on Health Midwest . . . property for any purpose at any time, unless prior authorization from Health Midwest Vice President for Human Resources has been obtained in writing.
>
> B. Employee Solicitation
>
> 1. Working time
>
> Except for solicitation for official Health Midwest . . . sponsored employee programs, no employee shall solicit any other employees during working time, nor shall any employee distribute any literature during working time.
>
> 2. Non-working Time
>
> No employee shall solicit any other employee of Health Midwest . . . or distribute any literature during non-working time

[3] Unless otherwise indicated, all dates herein refer to the period between May 1, 1999, and April 30, 2000. Reference herein to oral testimony is identified by the transcript page number (Tr. __). General Counsel, Respondents, and Charging Party exhibits received into evidence are respectively identified as "GC Exh.," "R. Exh.," and "CP Exh." followed by the exhibit number. Reference to arguments contained in the parties' briefs are identified as "GC Br." for the General Counsel's brief, "R Br." for the Respondents' brief, and "CP Br." as the Charging Party's brief, followed by the page number(s).

The General Counsel's motion to strike portions of the Respondent's brief is denied. In the absence of any opposition thereto, the General Counsel's further motion to supplement the record by making four documents relating to Case 17–RC–11816 (e.g., copies of the petition, Notice of Representation Hearing, Affidavit of Service of the Notice of Representation Hearing, and return receipts showing service of notice on parties) part of the record as GC Exhs. 88 through 91 is granted. Finally, the General Counsel's unopposed motion, appended to its brief, to correct certain typographical errors in the transcript is granted and made part of the record herein as GC Exh.-92.

[4] Respondents Baptist and Research are located in Kansas City, Missouri; Menorah and Overland Park are situated in Overland Park, Kansas; MCI in Independence, Missouri; and Lee's Summit in Lee's Summit, Missouri.

[5] HM's corporate policy apparently has been in effect since "9/15/92" (see GC Exh. 67[h]). While not specifically alleged in the complaint as unlawful, HM's no-solicitation/no-distribution, as discussed infra, is virtually identical to policies adopted and maintained by the other named respondents which are alleged to be unlawful and whose the validity was fully litigated at the hearing. The validity of HM's no-solicitation/no-distribution policy is therefore closely related to the complaint allegations and is, I find, properly before for me consideration. *Ithaca Industries*, 275 NLRB 1121, 1126 (1985); *Carpenters Local 2605 (DeRose Industries)*, 256 NLRB 584 fn. 1 (1981).

time in those areas to which patients and/or visitors have access.

a. This prohibition on solicitation and distribution during non-working time includes patient treatment areas, hallways, waiting rooms, elevators, patient/public lounges and office areas.

b. Those areas in which employees may engage in solicitation and distribution during non-working time are the employee lounges, employee restrooms, employee locker room, parking lots and cafeteria.

3. Employees may engage in solicitation of or distribution to other employees only when both employees are on non-working time, such as break periods or meal periods, and only in areas to which patients and visitors do not have access.

4. Employees may not bring goods or services onto the premises for sale to other employees.

C. Solicitation of Patients/Visitors

Solicitation of patients or visitors and/or distribution of any matter to patients or visitors for any purpose by any employee is prohibited at all times.

D. Enforcement of Policy

1. This policy will be strictly enforced.

As stated, copies of HM's policy were distributed or made available to all HM employees employed at its various hospitals, including those employed by the various Respondents herein. Comparison of HM's policy with those maintained by said Respondents reveals that, with minor variations, the policies are virtually the same. Thus, the policies maintained by Respondents VNA/VNS, MCI, Research, and Lee are similar to HM's policy, except that in paragraph B.2.a. of VNA/VNS', MCI's, and Research's policy, and in section 400-200-30, subsection 2.2.a. of Lee's policy, the latter Respondents added "patients rooms" and "operating rooms," and replaced "office areas" with "nurses' stations" as areas where solicitation and distribution was prohibited.[6]

Regarding the validity of HM's corporatewide policy, the parties readily acknowledge on brief that the Board's rule regarding solicitation in health care facilities differs from that which the Board generally applies to other employers. The Board, for example, has long adhered to the view that employer rules prohibiting employee solicitation during worktime are presumptively valid, whereas rules prohibiting or otherwise restricting solicitation during nonwork time are considered presumptively invalid. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1954). However, in *St. John's Hospital*, 222 NLRB 1150 (1976), the Board, with Supreme Court approval, see *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979), modified its policy on solicitation and held that hospitals may limit or restrict employee solicitation during nonworking time in "immediate patient-care areas," such as patients' rooms, operating rooms, and places where patients receive treatment, such as X-ray and therapy areas,[7] and that a hospital rule prohibiting solicitation in such "immediate patient care areas" would be viewed as presumptively valid. However, prohibitions of lawful nonwork time solicitation and distribution in areas other than immediate care areas, even with respect to areas that may be accessible to patients, are presumptively unlawful, absent a showing by the health care facility that such a ban is necessary to avoid a disruption of patient care. *Brockton Hospital*, 333 NLRB 1367, 1368 (2001); *Cooper Health System*, 327 NLRB 1159, 1163 (1999). With these principles in mind, I address the specific allegations raised by the General Counsel regarding HM's solicitation policy.

The General Counsel first contends, on brief, that HM's policy is unlawful because it requires employees to obtain approval from the hospital before engaging in any solicitation or distribution activity. I agree with the General Counsel, for the Board has found the imposition of such "prior approval" requirements before employees could exercise their Section 7 right to engage in lawful solicitation and distribution activities to be facially unlawful. *Teletech Holdings, Inc.*, 333 NLRB 402 (2001); *Lake Holiday Manor*, 325 NLRB 469, 478 (1998); *Blossom Nursing Center*, 299 NLRB 333, 338 (1990); *Brunswick Corp.*, 282 NLRB 794 (1987).

The General Counsel next contends that the policy's prohibition in paragraph B.2 on employee solicitation and distribution during their nonwork time is overly broad and hence presumptively unlawful. I agree, for the proscriptive language in paragraph B.2 is not limited to immediate patient care areas but rather extends to any and all areas to which "patients or visitors have access," including, as evident from paragraph B.2.a., areas that are generally not viewed as patient care areas such as "hallways, elevators, patient/public lounges, and office areas." See, e.g., *Brockton Hospital*, supra.[8] The rule is moreover vague and ambiguous, for while paragraph B.2.a. specifically lists areas to which the solicitation and distribution ban applies, there is nothing in the rule itself, or elsewhere in the record, to

[6] Compare VNA/VNS' policy at GC Exh. 5, MCI's policy at GC Exh. 67(f), Research's policy at GC Exh. 67(d), and Lee's policy at GC Exh. 67(g), with Health Midwest's policy at GC Exh. 67(h) and Menorah's policy at GC Exh. 21. Several of the Respondents, in particular, Menorah, Research, and Lee also maintain abbreviated versions of their no-solicitation/no-distribution policies. Respondent Baptist's no-solicitation/no-distribution policy differs somewhat from the policies maintained by the other Respondents. (See GC Exh. 67[c].) While no evidence was produced to show that Baptist, like the other Respondents, adheres to, or has adopted, the provisions of HM's policy, I am convinced that it does, for the distribution of HM's corporate policy to all of its affiliate hospitals, including Respondent Baptist, would have served no purpose if the policy had no application to them.

[7] The Board subsequently held in *Intercommunity Hospital*, 255 NLRB 468 (1981), that "halls and corridors adjacent to patient rooms, operating rooms, x-ray rooms, and other immediate patient care areas are extensions of immediate patient care areas in which solicitation presumptively may be prohibited."

[8] Compare *Presbyterian/St. Luke's Medical Center*, 258 NLRB 93, 99 (1981), where the Board found valid a prohibition on solicitation in hallways and elevators because they were utilized primarily for the movement of patients and emergency equipment. Here, HM has not shown that its hallways, elevators, patient/public lounges, or office areas are used in like manner.

suggest that the list was to be all-inclusive, that is, intended to exclude any area not mentioned therein. In fact, the word "includes" in paragraph B.2.a., suggests that the areas identified therein were being cited by way of example and reflected some, but not all, of the hospital areas to which "patients or visitors" would have access. Thus, the language of paragraph B.2 prohibiting solicitation and distribution in all areas where "patients or visitors have access" could reasonably be read to include other nonpatient care areas not listed in paragraph B.2.a., such as the facility's lobby, entrances, and public restrooms, as these areas presumably would be accessible to patients and visitors.

Where, as here, the language of a no-solicitation rule is ambiguous and can reasonably be interpreted by employees in such a way as to cause them to refrain from exercising their statutory rights, the rule is deemed to be invalid even if interpreted lawfully by the employer in practice. *Presbyterian/St. Luke's Medical Center*, 258 NLRB 93, 99 (1981). "Any ambiguity in a particular prohibition that sweeps so broadly as to put in doubt an employee's right to engage in union solicitations protected by the Act without fear of punishment by his or her employer is construed against the employer which formulated that prohibition." *Grouse Mountain Lodge*, 333 NLRB 1322, 1337 16 (2001); *Altorfer Machinery Co.*, 332 NLRB 130 (2000). Respondent HM neither asserts, nor has produced evidence to show, that its ban on employee solicitation and distribution of union literature in nonpatient care areas of its facility during their nonwork time was necessary to avoid a disruption of patient care or disturbance of patients. Accordingly, HM's rule prohibiting such solicitation and distribution by employees during their nonwork time is found to be unlawful and in violation of Section 8(a)(1) of the Act. Paragraph 3 of HM's policy is, by extension, likewise unlawful for it amounts to nothing more than a restatement of the prohibition contained in paragraph B.2.

In sum, I find, as alleged by the General Counsel, that HM's corporate no-solicitation/no-distribution policy is overly broad and that, by maintaining and distributing its policy to all employees at its various facilities, HM violated Section 8(a)(1) of the Act. *Hoyt Water Heating Co.*, 282 NLRB 1348, 1357 (1987).

2. The Q&A memo

On or about November 22, each Respondent circulated to their respective employees the following question and answer (Q&A) memo which, as stated in the Q&A memo's opening paragraph, was intended to "explain this facility's policy and practice concerning solicitation and distribution activities." (See Jt. Exh. 2.):

> ***May non-employees distribute information or solicit on hospital premises?***
>
> No. The hospital prohibits non-employees from distributing information or soliciting on our premises. This prohibition is applied in a non-discriminatory way. The hospital requires that non-employees only use its premises in a manner consistent with the premises' general use. For example, the hospital limits non-employees use of the cafeteria to eating.
>
> ***May employees distribute information or solicit within the hospital facility?***
>
> During non-working time in non-work areas, employees are allowed to communicate with other employees about non-work-related topics (including union topics). The hospital does not require that employees get pre-approval to do so. The hospital prohibits distribution and solicitation activities during working time (for both the soliciting employee and the employee being solicited) and in all patient care areas. Working time does not include meal times, breaks or time before or after shifts.
>
> Patient care areas include patient rooms, treatment areas, sitting rooms and corridors on floors where patients stay or are treated, entrances where patients are picked up and dropped-off, and areas where patients check-in. On the other hand, employee lounges, the cafeteria, vending areas, and the gift shop are generally not considered to be patient care areas.
>
> ***May off-duty employees distribute information or solicit within the hospital facility?***
>
> Off-duty employees may engage in solicitation and distribution activities in the non-patient care areas of the hospital.
>
> ***May employees currently assigned to other Health Midwest facilities distribute information or solicit within this facility?***
>
> Employees from other locations may engage in solicitation and distribution activities in the non-patient care areas of the hospital that are generally open to the public such as the cafeteria. Under ordinary circumstances, such employees should not be entering the work areas at facilities to which they are not currently assigned.
>
> ***May the hospital (acting through supervisors or managers) distribute or post information?***
>
> Yes. Even though the hospital has a general rule prohibiting employees from distributing or posting information in certain areas and at certain times, hospital supervisors and managers may distribute information during work time and in work areas.
>
> ***What do I do if I have more questions on solicitation and distribution?***
>
> Contact the Human Resources Director at the hospital.

The Respondents contend that the Q&A memo effectively clarified and corrected their no-solicitation/no-distribution rules so as to make them "consistent with the law."[9] I disagree, for

[9] While generally denying that their no-solicitation/no-distribution policies are overly broad or presumptively invalid, the Respondents on brief, in connection with their discussion of Respondent Baptist's rule, implicitly concede that their policies may indeed be facially invalid. Like the rules maintained by the other Respondents, Baptist's no-solicitation/no-distribution policy bans solicitation and distribution "in areas to which patients have access." In addressing the validity of that policy, the Respondents on brief (p. 35), concede that such a ban potentially violates Sec. 8(a)(1) "in that it could be construed to prohibit solicitation in non-patient care working areas where medical care is not likely to be disrupted and it could be construed to prohibit distribution in areas that are not either patient care or working areas." They con-

"clarifications of ambiguous rules or narrowing interpretations of overly broad rules must be effectively communicated to an employer's work force before the Board will conclude that the impact of facially illegal rules has been eliminated." *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994). Such communications, however, must clearly and unambiguously convey to employees that the employer is disavowing or repudiating the invalid rule. *TeleTech Holdings, Inc.*, 333 NLRB 402 (2001). The Q&A memo contains no such repudiation or disavowal of the unlawful provisions contained in the above-described HM policy and in the identical policies maintained by the various Respondents herein. Rather, the memo simply states in its opening paragraph that its purpose was to "explain" the no-solicitation/no-distribution rules in the Respondents' policies. Thus, the memo gives no indication to employees that the responses set forth therein to the hypothetical questions posed were intended to replace or supersede any rule(s) found in the Respondents' no-solicitation/no-distribution policies, or that in the event of any inconsistencies between the responses in the memo and any rule found in its no-solicitation/no-distribution policy, they were to ignore the latter and adhere to the former.

There are, to be sure, inconsistencies between certain responses provided in the Q&A memo and the no-solicitation/no-distribution rules found in HM's no-solicitation/no-distribution policy, and by extension in the policies maintained by the other Respondents. Thus, while HM's policy requires employees to first obtain management's approval before engaging in solicitation and distribution activities, and that said activities must be conducted in accordance with certain specified procedures, the Q&A memo, in response to the second hypothetical question, states that "the hospital does not require that employees get pre-approval" to engage in such activities.

Further, the Q&A memo, in response to question two, also states that "[d]uring non-working time in nonwork areas, employees are allowed to communicate with other employees" about nonwork related topics, including union matters, but that "the hospital prohibits distribution and solicitation activities during working time . . . and in all patient care areas." The Q&A memo then defines the patient care areas as including "patient rooms, treatment areas, sitting rooms, and corridors on floors where patients stay or are treated, entrances where patients are picked up and dropped off, and areas where patients check in."[10] The prohibited areas identified in the Q&A memo, however, differ from those listed in HM's above policy. Thus, HM's policy does not expressly identify hospital "entrances where patients are picked up and dropped off," and "areas where patients check in," as areas where solicitation and distribution are prohibited. Conversely, HM's inclusion in its policy of "hallways, waiting rooms, elevators, patient/public lounges and office areas" as areas where solicitation and distribution are prohibited are not listed in the Q&A memo as prohibited areas. Finally, while HM's policy contains no restriction on employees engaging in solicitation and distribution at HM facilities where they are not employed, the Q&A memo, as noted, states that "employees from other locations" are allowed to solicit and distribute literature in the "non-patient care areas of the hospital that are generally open to the public, such as the cafeteria," adding that "under ordinary circumstances, such employees should not be entering the work areas at facilities to which they are not currently assigned."

The inconsistencies between responses in the Q&A memo and provisions in the Respondents' policies, and the lack of any repudiation or disavowal of the unlawful provisions in their no-solicitation/no-distribution policies, in my view, served only to confuse, rather than clarify, how employees could exercise their Section 7 right to solicit and distribute union literature at their workplace. Without an express disavowal of the unlawful provisions, employees could reasonably have believed that said provisions remained in full force and effect, and that the Q&A memo may simply have been intended to supplement those provisions. At a minimum, employees would have been confused as to which of the conflicting rules, those set forth in the Q&A memo responses or the contrary provisions in Respondents' policies, they were expected to follow. See *Garfield Electric Co.*, 326 NLRB 1103, 1107 (1998). Thus, the Q&A memo, in my view, created more, not less, ambiguity and could reasonably have caused employees to refrain from engaging in any lawful solicitation or distribution activity for fear that adherence to the Q&A memo's conflicting "explanation" of their employer's existing "no-solicitation/no-distribution" provisions might cause them to violate said provisions. In these circumstances, I find that the Q&A memo was indeed coercive and violated Section 8(a)(1) of the Act.[11]

3. Hiersteiner's memos

On or about April 7, 2000, Respondent HM, through Senior Vice President and General Counsel Joseph Hiersteiner, distributed the following memo entitled, "Your Rights and Obligations Related to Government Investigations," to "Employees of Health Midwest Companies" (see GC Exh. 52):

> The United States Department of Justice has in recent years increased the resources devoted to the investigation of health care in Kansas City. Consistent with this increase in resources, our counsel informs us that there appear to be increasing numbers of investigative subpoenas

tend, however, that by distributing the Q&A memo, "Baptist [and implicitly HM's other facilities] expressly notified each of its employees in writing that solicitation and distribution were prohibited only during working time and in all patient care areas," and that by distributing the Q&A memo to their employees they, as well as Respondent Baptist, "appropriately clarified" their "overbroad or ambiguous" policies.

[10] The Q&A memo, as noted, makes reference to "work" and "nonwork" areas without defining them. These terms, however, are found nowhere in any of no-solicitation/no-distribution policies maintained by the Respondents. Rather, those policies speak in terms of patient care and non-patient care areas. I am convinced that Q&A memo was equating work area with patient care area, and nonwork area with non-patient care area. (See GC Exh. 67.)

[11] The suggestion in the Q&A memo, that employees should contact the HR director of their respective employer hospital if they had more questions on solicitation and distribution, does not remedy the problem for the Respondents, for such inquiries would in all likelihood require employees to divulge their union involvement or sympathies to their employer, which employees are undeniably privileged not to disclose. *Lutheran Hospital of Milwaukee*, 224 NLRB 176, 183 (1976).

being delivered to various health care institutions in the metropolitan area.

Given this increase in activity, the companies of Heath Midwest could be included in such investigations. This memorandum is designed to give you some information about your rights and responsibilities if you are asked to speak with investigators as part of a government investigation.

You have the right to talk to a government investigator if you desire to do so. You also have the right to decline the opportunity to talk to a government investigator, or to seek the advice of a lawyer before doing so.

Investigations of this type are generally not routine, although they are becoming more common. Therefore, you may be best served by working with a lawyer who has experience in matters of this type. Depending on the nature and scope of the investigation, Health Midwest will pay for the costs of an attorney who will represent your interests.

If you elect to speak with the investigator, or are required by subpoena to do so, *it is absolutely imperative that everything you say be accurate and truthful*. Information which is based upon speculation or rumor could have unintended and harmful consequences. Lying to government investigators can itself be a crime which in some cases is more serious than the matter being investigated.

As part of any ongoing investigation, you may also be served with a subpoena to appear and offer testimony. You have the right to consult with a lawyer before testifying.

Please inform me . . . or Brent Lagergren, Director of Corporate Compliance . . ., if you receive a grand jury subpoena or are contacted by investigators regarding a matter involving any Health Midwest company in any way.

You remain free to speak with any investigator if you wish to do so. If you choose to speak to the investigator, tell the truth and be accurate in your statements.

Please contact me if you have any questions or concerns.

VNA/VNS also distributed Hiersteiner's memo on the same day to its nursing employees. On April 10, the Union filed a charge alleging that Hiersteiner's memo unlawfully interfered with the employees' Section 7 rights. On April 20, Hiersteiner circulated another memo to employees (GC Exh. 53) denying that the April 7, memo "interfered, restrained, coerced, or discriminated against anyone," and clarifying "the record regarding NLRB investigations." The April 29, memo sets forth the following employee rights:

1. You are free to talk to an NLRB investigator if you wish to do so.
2. You are under no obligation to notify me if an NLRB investigator contacts you.
3. You will not be disciplined for failing to notify me if an NLRB investigator contacts you.
4. If you choose to talk to an NLRB investigator, tell the truth.

The only testimony provided at the hearing regarding this memo came from VNA/VNS employee, Celeste Michelson, a registered nurse. Michelson testified to being given a copy of the memo by her immediate supervisor, Pat Tenner, on April 11. On asking Tenner what the memo was all about, the latter explained it was "about ongoing investigations here in Kansas City, that there was a possibility that Health Midwest could become a part of that," and that "the FBI" was conducting the investigations. Michelson commented to Tenner that she viewed the investigation as "cool," and asked if she might be of some help. Tenner replied that if Michelson believed such investigations were "cool," she should "call some of those people out in Independence that just went under investigation with the Columbia system." Michelson then asked Tenner if she could call any of the people whose names were listed at the bottom of the Hiersteiner memo, but Tenner discouraged her from doing so by stating to Michelson, "Oh, no, don't do that." That, according to Michelson, ended the conversation. Neither Tenner nor Hiersteiner testified in this proceeding.

The General Counsel contends that the distribution of this memo by HM was unlawful, arguing, in support thereof, that HM's motivation for circulating the memo was to hinder the Board's investigation of the charges filed against it by discouraging employees from cooperating with Board agents.[12] HM denies the accusation, noting that Hiersteiner's memo makes no mention whatsoever to the Board or its proceedings, and that the memo on its face, as well as Michelson's testimony, makes clear that the matter raised by the memo had to do with a Department of Justice investigation, not the Board, and that the memo simply sought to address in an "evenhanded and accurate" fashion the "very serious issue of investigations."

Several factors, including the timing of its issuance, lead me to reject HM's explanation that the Hiersteiner memo was merely intended to apprise employees of an ongoing Justice Department investigation. Initially, despite its reference to a Justice Department investigation, there is nothing in the memo itself to suggest, or any evidence of record to show, that HM or any of its affiliated hospitals, including the Respondents herein, were under investigation by Justice Department at the time Hiersteiner circulated his memo. Further, while the memo states that "there appear to be increasing numbers of investigative subpoenas being delivered to various health care institutions in the metropolitan area," there is again no indication in the memo that HM or any of its health care facilities had been served with any Justice Department subpoenas. If anything, Hiersteiner's assertion therein, that "the companies of Health Midwest *could be* included in such investigations," makes patently clear that no such ongoing investigation by the Justice Department of HM or any of its facilities was taking place on

[12] Respondent VNA/VNS is also alleged to have violated Sec. 8(a)(1) by distributing the Hiersteiner memo to its nurses. While the complaint also alleged that several other named Respondents engaged in similar unlawful conduct, the General Counsel on brief has moved, without opposition, to withdraw complaint par. 5(b)(viii) because "there is no evidence that any Respondent" other than HM and VNA/VNS "was responsible for the distribution of Hiersteiner's April 7 (or April 20) letter(s)." (GC Br. 61, fn. 46.) The motion to withdraw complaint par. 5(b)(viii) is granted.

April 8, when HM distributed the memo to employees. However, while HM and its respondent affiliates may not have been under a Justice Department investigation on April 8, they were at the time undergoing a Board-conducted investigation in connection with unfair labor practice charges filed by the Union.[13] Further, the Board had, just 1 week earlier, served the Respondents with a copy of its second consolidated complaint. Finally, on April 6, 1 day before VNA/VNS and HM distributed the Hiersteiner memo, the Union filed objections to the March 30 election accusing VNA/VNS of interfering with the conduct of the election.

I find it to be no mere coincidence that HM and VNA/VNS chose to circulate the Hiersteiner memo to their employees when they did. Indeed, the absence of evidence showing that HM was indeed under investigation by the Justice Department, the fact that the memo generally refers to "government investigations" and not merely to a Justice Department investigation, and the timing of its issuance, e.g., days after issuance of a second consolidated complaint and the filing of new unfair labor practice charges, and a day after the Union's filing of objections to the VNA/VNS election, convinces me that the memo was indeed intended to alert employees to the ongoing Board investigation. By offering to provide employees who might be contacted by the Board during the course of said investigation with free legal counsel, and by directing employees to notify them when served with a subpoena or when contacted by "investigators regarding a matter involving any Health Midwest company *in any way*," the Respondents, I find, unlawfully interfered with the employees' right of free and unimpeded access to the Board and unlawfully attempted to obstruct the Board's processes. *Air Express International Corp.,* 245 NLRB 478, 497 (1979). Accordingly, I find that Respondent HM, as well as Respondent VNA/VNS, violated Section 8(a)(1) of the Act when they distributed Hiersteiner's April 7 memo to their employees.

I further find that Hiersteiner's subsequent April 20 memo did not purge Respondent HM and VNA/VNS of liability arising from their issuance of Hiersteiner's first memo. It is settled that under certain circumstances an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. To be effective, however, the repudiation must be done in a timely manner, be unambiguous and specific in nature to the coercive conduct, be adequately published to the employees involved, and must provide employees with assurances that no interference with their Section 7 rights will occur in the future. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978); also *Service Employees Local 399 (City of Hope National Medical Center)*, 333 NLRB 1399, 1401 (2001). Hiersteiner's April 20 memo falls short of satisfying the *Passavant* requirements for a successful repudiation. Thus, in his April 20 memo, Hiersteiner, far from repudiating or disavowing the unlawful and coercive statements made in his first memo, insisted that his April 7, memo had in no way 'interfered, restrained, coerced, or discriminated against anyone." *Mohawk Liqueur Co.*, 300 NLRB 1075, 1086 (1990). Moreover, nowhere in his April 20 memo does Hiersteiner provide employees with assurances that Health Midwest would not interfere with their Section 7 rights in the future. In fact, while advising employees that they were not required to notify management when contacted by a Board agent, Hiersteiner in his April 20 memo again "requests" that employees notify HM if contacted by "investigators," and implicitly promises to cover any legal expenses they might incur because of said investigation by stating that notifying HM of such investigation was necessary so that HM could address issues such as the indemnification and defense of employees." Thus, Hiersteiner's April 20 memo not only failed to repudiate his prior unlawful April 7 memo, it, in fact, reaffirmed the very conduct that rendered the April 7 memo unlawful in the first place by requesting employees to report their contacts with Board agents, and promising to compensate them for legal expenses incurred as a result of such contacts. Accordingly, I find that issuance of the April 20 memo, like the April 7 memo, was coercive and violated Section 8(a)(1) of the Act.

B. Respondent Research

1. The 8(a)(1) conduct

a. The no-solicitation/no-distribution policy

As previously noted, Research's no-solicitation/no-distribution policy is virtually identical to HM's corporate policy. Like HM's corporate policy, Research's no-solicitation/no-distribution rule for employees, contained in paragraph B.2 of its policy, bans employee solicitation and distribution during their nonwork time "in those areas to which patients and/or visitors have access" and, in paragraph B.2.a, identifies some of those areas as including "patients rooms, operating rooms, and patient treatment areas," and such nonpatient care areas as "hallways, waiting rooms, elevators, patient/public lounges, and nurses' stations." (GC Exh. 67[d].)[14] For the reasons previously discussed regarding the invalidity of HM's rule, I find that the no-solicitation/no-distribution language of paragraphs B.2 and B.2.a. of Research's policy is also unduly broad and presumptively invalid as the ban on such activity extends to nonpatient care areas and is not confined to immediate patient care areas, as required by the Board and the courts.[15] Research has presented no evidence to show that it had experienced a disruption in patient care, or that patients were being disturbed through employee solicitation and distribution of union literature in the nonpatient care areas of its Hospital, including those listed in paragraph B.2.a (e.g., hallways, waiting rooms, elevators, patient/public lounges, and nurses' stations), so as to justify banning employee solicitation and distri-

[13] The record reveals that new and/or amended charges were filed by the Union and served by the Board on the following dates: Respondent Lee—March 23; VNA/VNS—March 28 and April 3 (new charge); Respondent Menorah—March 28; Respondent Overland Park—March 29.

[14] Research also maintains a "shortened version" of its policy. (See p. 3 of GC Exh. 67[d].)

[15] Research's claim, that the language of par. B.2.a. effectively clarifies the general language of par. B.2, and eliminates "any potential that the policy might be misconstrued" (R. Br. 17), is, for the reasons discussed above in connection with HM's no-solicitation/no-distribution policy, without merit.

bution in such areas.[16] Accordingly, I find that Respondent Research's ban on solicitation and distribution of literature by employees during their nonworktime to be unlawful and in violation of Section 8(a)(1) of the Act.

b. Alleged unlawful conduct by Supervisors Peggy Hieronymous, Terry Plesser, Louis Davis, and Paul Gass

(1) Peggy Hieronymous

Research employee, Winnifred Davies, testified to having several conversations with Hieronymous during which she was repeatedly questioned about the Union, and to attending a staff meeting conducted by Hieronymous during which the subject matter of the Union was discussed. Hieronymous did not testify. Consequently, Davies' following testimony is unrefuted and accepted as true.

Hieronymous' staff meeting was held in early October. Davies recalls that after discussing work-related matters, Hieronymous told employees "she had heard that there was some union activity going on and she hoped that, if any of us were approached, that we would come and talk with her about it." (Tr. 1289.) Hieronymous' above comment is alleged to be unlawful. I agree, for Hieronymous' request, that employees advise her if they were solicited by others, could reasonably be read to include notifying Hieronymous even when the solicitation activity was of a lawful nature, such as the lawful attempts by union supporters to solicit employee signatures on union authorization cards. Employees involved in lawful solicitation activity might, therefore, be reluctant to engage in such protected activity for fear of being reported to management. Accordingly, I find Hieronymous' remark was coercive and amounted to a violation of Section 8(a)(1) of the Act. *Smith & Johnson Construction Co.*, 324 NLRB 970, 982 (1997). *Manno Electric, Inc.*, 321 NLRB 278, 291 (1996); *Arcata Graphics*, 304 NLRB 541 (1991); *Dunes Hotel*, 284 NLRB 871, 878 (1987).

In mid-October, Hieronymous approached Davies and during this one-on-one conversation stated that she understood there had been a union meeting the night before, and asked Davies if she had attended. When Davies responded that she had, Hieronymous asked her to come to her office to talk. Once there, Hieronymous asked how many employees had attended the union meeting. Davies replied that approximately 75 people had been there. Hieronymous then proceeded to ask if she was able to recognize anyone and, on receiving an affirmative response, asked Davies where the employees worked. Davies answered that the employees were from the "2 West" and "ICU" departments. Hieronymous continued her questioning by asking Davies if the Union had asked them to sign cards at the meeting, and whether Davies would sign a union card. Davies replied that she probably would not sign one. In early November, Hieronymous again questioned Davies about her attendance at a union meeting. Thus, Davies recalls Hieronymous asking if she had "somewhere special to go last night." When Davies answered, "[Y]es," Hieronymous asked how many people had been there. Davies answered, "a lot." The conversation ended at that point. Finally, on December 13, Davies went to the Hospital cafeteria and, after getting her food, sat at a table with fellow employees Nancy Fisher and Linda King who were distributing union literature. Davies recalled seeing Hieronymous seated at a table some 20 feet away. After lunch, she returned to her work station. The next day, as Davies headed towards the waiting room to pick up some family members of a patient, Hieronymous approached and asked her why she had been sitting with "those union people," the day before at the cafeteria. Davies replied that she was merely having lunch with her friends, to which Hieronymous responded, "You are a bad influence," and walked away. (Tr. 1286.)

Regarding the above conduct, I find that Research unlawfully created an impression of surveillance when Hieronymous told Davies in mid-October and early November she knew of the union meetings that had taken place just prior to their conversations. The test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his or her union activities had been placed under surveillance. *Fred'k Wallace & Son*, 331 NLRB 914 (2000); *Tres Estrellas de Oro*, 329 NLRB 50 (1999). Here, Hieronymous gave no indication of how she knew that these meetings had taken place. As to her mid-October reference to the previous night's meeting, there was nothing ambiguous about Hieronymous' statement regarding her knowledge of the meeting. Although Hieronymous' early November statement was a bit more subtle, Davies' response makes clear that she understood full well that Hieronymous was making reference to a union meeting when the latter rhetorically asked Davies if she had "somewhere special to go last night." Thus, I am convinced that on both occasions, Hieronymous' comments would clearly have conveyed to Davies the impression that Hieronymous was monitoring her, and other employees' union activities, rendering them unlawful under Section 8(a)(1) of the Act. *Evans Bros. Barber & Beauty Salons*, 256 NLRB 121 (1981). *Firmat Mfg. Corp.*, 255 NLRB 1213, 1219 (1981).

[16] I find no merit in Research's assertion that its ban on solicitation at nurses' stations is presumptively valid for, as previously indicated, that presumption applies to such immediate patient care areas as patients' rooms, operating rooms, and places where patients receive treatment, such as X-ray and therapy areas. In *Rocky Mountain Hospital*, 289 NLRB 1347, 1360 (1988), the judge, with Board approval, noted that the "Board has never extended its listing of what it considered an immediate patient care area to nursing stations." While the Board has found a ban on nurses' stations to be valid, *Intercommunity Hospital*, 255 NLRB 468 (1981), it has done so based on evidence produced by the hospital establishing that the ban was justified to prevent a disruption to patient care or disturbance of patients. Here, Respondent Research has produced no such evidence regarding its nurses' stations. Instead, Research relies on evidence adduced at the hearing regarding the practices followed at nurses' stations at another of HM's facility, Overland Park. No claim has been made here, nor evidence produced to show, that Research's nurses' stations operate in the same fashion as the nurses' stations at Overland Park, or that any of HM's other affiliate hospitals share the same nursing stations' operating practices and procedures. Accordingly, I decline to infer from evidence produced at the hearing regarding Overland Park's nurses' stations that Research was somehow justified in banning solicitation at its nurses' stations, for such an inference would be based on nothing more than speculation and conjecture.

Further, Hieronymous' questioning of Davies during that mid-October encounter as to her and other employees' attendance at the union meeting, as to which employees were in attendance and whether authorization cards were signed, and as to whether she would sign a card if asked to do so, constituted an unlawful interrogation, as did Hieronymous' subsequent mid-November questioning of Davies' presence at another union meeting, and her December 13 questioning of why Davies was sitting with union supporters, Fisher and King. In determining whether the questioning of an employee constitutes an unlawful interrogation, the Board applies the totality-of the-circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984).[17] See *Westwood Health Care Center*, 330 NLRB 935 (2000); also *Mercy General Hospital*, 334 NLRB 100, 104 (2001). Here, Hieronymous, on learning during the mid-October meeting that Davies had attended a union meeting the night before, summoned Davies to her office, a coercive setting in my view, and began to grill her on what took place at the meeting, on the involvement of other employees, and regarding Davies' own sympathies. There is no evidence to suggest that prior to this meeting, Davies was known to be a union supporter or sympathizer. In fact, Hieronymous' query to Davies on whether she would sign a union card if given one suggests that Hieronymous did not know where Davies stood regarding the Union, and Davies' own response, that she probably would not sign one, could reasonably have reflected Davies' unwillingness to reveal how she actually felt for fear of reprisal. This questioning, as noted, occurred not long after the early October employee meeting during which Hieronymous unlawfully asked employees to report on the solicitation activities of others. In these circumstances, I find that the Hieronymous' mid-October questioning of Davies amounted to an unlawful interrogation and, as noted, violated Section 8(a)(1).

The early November and December 13 incidents were, as stated, also coercive. Respondent Research has presented no evidence to suggest that Hieronymous had some legitimate reason for questioning Davies about her attendance at union meetings, the attendance of others, or why on December 13, Davies chose to sit and have lunch with Fisher and King. Regarding the December 13 questioning, Hieronymous' reference to Davies as a "bad influence" after asking why she was sitting with Fisher and King, could reasonably have been viewed by Davies as a sign that Hieronymous suspected her of being a union supporter, and cause her to refrain from limiting her contacts or having any further association or communications with Fisher and King, or other union supporters, as it was her Section 7 right to do. In light of all of the above facts, and as these conversations, as demonstrated below, occurred against a background of hostility and other unlawful conduct, I find that Hieronymous' early November and December 13 questioning of Davies were, as indicated, unlawful interrogations in violation of Section 8(a)(1). *Westwood Health Care Center*, supra.

[17] Under *Rossmore House*, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation as relevant, as well as whether or not the employee being questioned is an open and active union supporter.

Finally, Davies testified to another conversation with Hieronymous on or about June 2000, that began with the latter approaching Davies with a flyer in hand. The flyer notified employees of an upcoming community rally. Davies recalls seeing the flyer at a union meeting she attended the night before. Hieronymous asked Davies if the paper belonged to her and whether Davies had placed it on her desk. Davies denied placing the document on Hieronymous' desk at which point the latter simply walked away.

I do not find that Hieronymous unlawfully interrogated Davies by asking if Davies had placed the flyer on her desk. There is nothing to suggest that Hieronymous was seeking information from Davies about the previous night's union meeting or about Davies' own sympathies or activities. Rather, Hieronymous appears to have been interested solely in ascertaining where the flyer had come from, and ended the inquiry when Davies denied responsibility for the flyer appearing on her desk. Accordingly, this particular allegation is dismissed.

(2) Plesser and Davis

RN James Duncan testified, without contradiction, to the following incidents involving Plesser and Davis. On November 4, admitted Supervisor Terry Plesser asked him to remove certain union meeting announcements from the staff nurses' mailboxes. Duncan told Plesser that it was his understanding that if the boxes were being utilized for personal use, then they could also be used to distribute union material. Plesser purportedly replied that she would look into it but that, in the meantime, the union announcements had to be removed. When Duncan responded, "Well, but we put other things in there," Plesser answered, "Well, I just never enforced the policy, but the official policy is that it is for business uses only." She further told Duncan that she had been lenient with Duncan by letting him put notices on the back of bathroom doors. Duncan then agreed to, and did, remove the union announcements from the mailboxes. Duncan testified that items such as Christmas cards, thank you cards, shower announcements, party announcements, and personal notices from one employee to another, were some of the personal items that were routinely placed in the staff mailboxes. Although called as a witness, Plesser was not questioned about this incident. Duncan's testimony regarding this incident therefore stands unrefuted and is credited.

After removing the union announcements from the mailboxes, Duncan folded them and placed them in a small cubby hole next to his workstation at the intensive care unit (ICU). Duncan explained that he and other employees who worked at the workstation routinely used the cubby hole to place trash, or to store personal items such as magazines, papers, newspapers, etc. He testified that later that day, Assistant Head Nurse Louise Davis, an admitted supervisor, came by, noticed the union announcements in the cubby hole, and after pulling them out, asked, "What are these?" Duncan said they were his and asked her to return them. Davis, instead, opened one of the folded announcements and, on reading it, remarked, "This is Union stuff; you can't have this here." Duncan again told Davis that the papers were his and that she should return them, at which point Davis did so and left. Davis did not testify. Accordingly, I credit Duncan's above account.

The General Counsel contends, and I agree, that Research, through Plesser, violated Section 8(a)(1) by directing Duncan to remove the union announcements from the staff mailboxes. Duncan's undisputed and credited testimony makes clear that the mailboxes were routinely used by employees to deliver personal and nonwork-related messages and notices to other employees. There is no indication that the Respondent had in the past objected to, or sought to prevent, such use of its mailboxes by employees. This is confirmed by Duncan's credited testimony that Plesser admitted she had never enforced the alleged ban on the use the mailboxes to distribute personal items. In fact, there is no record evidence to indicate that Respondent had a rule restricting use of the mailboxes to work-related matter. Accordingly, I find that by refusing to allow its mailboxes to be used for distribution of union-related material while permitting them for other personal uses, Research acted in a disparate and unlawful manner and violated Section 8(a)(1) of the Act, as alleged. *Fairfax Hospital*, 310 NLRB 299, 305–306 (1993). Research, I find, further violated Section 8(a)(1) when, through Davis, it instructed Duncan to remove the "Union stuff" from the workstation. As credibly testified to by Duncan, he and other employees at the workstation routinely kept personal items in the cubby hole. Research has neither contended nor produced evidence to show that employees were prohibited from keeping personal items such as magazines, newspapers, etc., at their workstation. Research thus acted in a disparate and unlawful manner, and in violation of Section 8(a)(1) when it prohibited Duncan from maintaining his union literature at his workstation.

Plesser was also involved in an incident involving employee RN Jandra Hancock. Hancock testified, without contradiction, that on January 21, Plesser told her she had heard "through the grapevine" that Hancock had been talking with other nurses about the Union at the "medication island" during shift change. Hancock replied that she could not remember who she had spoken with or what had been discussed, but that she believed she was free to speak about the Union wherever she was free to discuss personal matters. Plesser stated that because she had simply heard about the union talk through the grapevine, she was going to investigate to find out what actually occurred, but that if she found out Hancock had "been talking about Union activities, that she would be forced to write [her] up." Some 10 days later, Plesser pulled Hancock aside and said that she had done some investigating and that the accounts she had received were so different, she was going to drop the matter. Hancock replied that she too had done some investigating and had learned that employees "could talk about the Union in places where we could talk about our personal lives," but that distribution and solicitation had to be done in "designated break areas." Plesser replied that "that sounded right." (Tr. 938–939.) I credit Hancock's above uncontradicted testimony regarding her meetings with Plesser.

The General Counsel contends, and I agree, that Plesser's "heard it through the grapevine" remark about Hancock's alleged union talk at the medication island during a shift change would reasonably have created in Hancock's mind the impression that her union activities were being kept under surveillance, and was therefore unlawful and a violation of Section 8(a)(1). *Mayfield Produce Co.*, 290 NLRB 1083, 1084 (1988); *American Tool & Engineering Co.*, 257 NLRB 608, 614 (1981); *Bryant Chucking Grinder Co.*, 160 NLRB 1526, 1547 (1966). I also find Plesser's threat to write Hancock up if she learned that Hancock had indeed "been talking about Union activities," to be unlawful. Thus, Research has not established that the medication island is an immediate patient care area, nor produced evidence to show that a ban on solicitation at the medication island was justified. Consequently, Hancock was clearly within her right to discuss union matters with employees at this location without fear of retribution. Plesser's threat to write up Hancock if she discovered the latter had in fact been talking to employees about the Union at the medication island, which she was lawfully permitted to do, was therefore coercive and a further violation of Section 8(a)(1).

(3) Paul Gass

Paul Gass is currently employed by Research as a staff nurse. He has held that position since February 2000. Prior thereto, Gass had been a night-shift nursing supervisor since 1991. Gass testified that as a supervisor, he often attended monthly supervisory meetings. Gass recalls that sometime September or October, he attended a management meeting at which a consulting firm known as Management Sciences Engineering, which he described as a "union buster," was present to discuss strategies Research should take in response to the Union's campaign. Gass testified to one supervisors meeting held in late November or early December chaired by his supervisor, Director of Nursing Cheryl Ratliff. The meeting was held at a small second-floor office used by supervisors. He recalls that Supervisors Mary Ann Gilbock, Jerry Thomas, and Bea Grey were present. During the course of the meeting, Ratliff, Gass recalls, asked the supervisors if they knew anyone that was vocally opposed to the Union. When several supervisors responded in the affirmative, Ratliff suggested they talk to those employees and let them know that "we've got other people that were opposed to the Union, and to get them to form a group that would help keep the Union from coming into Research." According to Gass, as of the date of the hearing, a group of employees opposed to the Union had formed a group known as "Non-Union Nurses for Change," or NUNC, for short. He could not be sure, however, when the group was formed.

Gass testified that following Ratliff's supervisors meeting, he spoke on numerous occasions with employees, sometimes individually, other times in groups, in an effort to persuade them to oppose the Union. Gass, who admits being opposed to the Union, explained that he tailored his message to fit the employee(s) he was addressing, and would include in such discussions how the Union would adversely affect their terms and conditions of employment. He recalled having one such conversation with employee Steve Hunt, whom he supervised and who, Gass believed, opposed the Union. Gass testified that he approached Hunt and told him it would be "a good idea if he got together with other nurses that were opposed to the Union to try to fight the unionization effort," and that Hunt agreed it would be a good idea.

In November, Gass met with a group of employees that included Staff Nurses Sharon Hurley, Cathy McCahey, and Kim

Gerhardt, all three of whom he believes were union supporters, during which he described to them the "negative aspects that might go along with the nurses forming a Union." He recalls telling them that there would probably be "a lot more animosity or adversarial relationship between management and staff nurses than what we enjoyed at that time," and that a lot of the flexibility managers then enjoyed in, for example, allowing employees to take time off, would be lost because there would be a contract in place and everything would be "in black and white," and they would no longer be able to bend the rules. He also told the employees that the parties' failure to reach agreement "might lead to a strike and that employees might lose their jobs because the hospital "didn't necessarily have to employ them if they couldn't come to a contract agreement." Gass also mentioned that if the Union came in, there would be a big change in nursing management, and some nurse managers "would probably be fired" because if the staff nurses were unhappy, it meant the nurse managers were not doing their jobs.

Gass further testified to having two separate conversations with employee Karen Hutten in late November or early December. The first conversation, he confessed, was triggered by his knowledge that the nurses had held a prounion meeting. During this first conversation, he asked Hutten if she had attended the meeting, and then asked what had occurred at the meeting. Hutten admitted being at the meeting and went on to discuss with Gass what had transpired. During the second meeting with Hutten, Gass, as he had done with the earlier group of nurses, told Hutten about the negative aspects of having a union at Research. In all, Gass candidly admitted having had some 20 to 30 conversations with employees during which he sought to encourage those opposed to the Union to band together, and to persuade the prounion employees that the Union would not benefit them. Gass' testimony was not refuted by any other witness and is found to be credible. (Tr. 899–921.)

I find, in agreement with the General Counsel, that Research, through the various remarks and comments Gass admits repeatedly making to employees, violated Section 8(a)(1) of the Act. Thus, Gass' attempt to persuade Hunt to band together with others to resist the Union's organizational efforts amounted to unlawful interference with the employees' Section 7 rights. While an employer certainly has a right to be opposed to unions, it does not have the right to interfere with employees, or to restrain and coerce them in choosing whether or not they want union representation. *Becton-Dickinson Co.*, 189 NLRB 787, 792 (1971); *Sylco Corp.*, 184 NLRB 741, 754 (1970).

Gass' remarks to employees about the adverse effects bringing in a union would have on management-employee relations was also clearly unlawful. While an employer has, under Section 8(c) of the Act, a right to communicate its general views on unionization to its employees, the protection afforded by Section 8(c) extends only to such communications that do not contain a threat of reprisal or force or promise of benefit. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Under *Gissel Packing*, an employer is free to make a prediction as to the precise effect it believes unionism will have on the company, provided the prediction is based on objective facts as to convey the employer's belief of the probable consequences beyond his control that unionization would have on the company. Id. at 618. Research here neither contends, nor has produced evidence to show, that any of the remarks made by Gass regarding changes or events that might occur if the Union were brought in had any factual basis to them. Gass' remarks, therefore, were not lawful predictions but rather unlawful threats of reprisals. Accordingly, I find that Research, through Gass, violated Section 8(a)(1) by threatening employees with loss of jobs and by telling them that supervisors would have less flexibility in handling their concerns if the Union were to come in. *Clinton Electronic Corp.*, 332 NLRB 479 (2000); *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989), *Progress Industries*, 285 NLRB 694, 714 (1987); *Michael's Markets*, 274 NLRB 826, 835 (1985); *St. Vincent's Hospital*, 244 NLRB 84, 92 (1979).

I further find that Gass' remark about the likelihood of a strike if the parties could not reach agreement to have been unlawful and a violation of Section 8(a)(1). The remark was not made in isolation but rather served as a preface to his further unlawful remark that should no agreement be reached, employees might lose their jobs because Research was under no obligation to retain them without a contract. Finally, I find that Research also violated Section 8(a)(1) when Gass questioned Hutton about the union meeting. In so doing, Gass clearly created the impression that Research was engaging in the surveillance of its employees' union activities. His asking Hutton whether she had attended the meeting and inquiry into the specifics of the meeting was also coercive as it amounted to an unlawful interrogation. There is no indication that Hutton was an open and active union supporter. Nor is there any indication that Gass' questioning of Hutton regarding her activities served any legitimate purpose. Indeed, Gass' own testimony makes clear that his purpose in meeting with employees was to ascertain their loyalties, to encourage those who were opposed to the Union, and to discourage its supporters. It is reasonable to assume that his interrogation of Hutton was done in furtherance of that goal. Accordingly, I find that Gass' interrogation of Hutton further violated Section 8(a)(1). *Laidlaw Waste Systems*, 305 NLRB 30, 33 (1991); *Nachman Corp.*, 144 NLRB 335, 344 (1963).

(4) The cafeteria solicitation incidents

Lana Jo Koon-Anderson is employed as an RN by Magnetic Imaging Incorporated at two sites, one of which is the Research facility. She testified to two separate incidents that occurred at Research's cafeteria as she tried to solicit support for the Union. The first occurred on December 1. That day, she and Research employee Gary Cullen went to Research's cafeteria to set up a union information table and distribute literature. Soon after setting up the table, Research's president and CEO, Steve Newton, and Patient Services Vice President Gary Eubank informed them they could not have union literature on the table but were free to hold it in their hands and distribute it throughout the cafeteria. Newton also told Koon-Anderson and Cullen that they had to remove a sign containing the Union's mission statement that had been taped to the front of the table, which they did.

Jandra Hancock testified that on December 13, she, along with employees Linda King, Nancy Fisher, Janice Douty, and Ann Young, went to Research's cafeteria where they set out some union literature on a table and taped a sign containing the Union's "mission statement" to the front of the table. At the time, she observed that there were approximately 10 supervisors in the cafeteria, including Newton, Eubank, and Supervisor Terry McDermott, sitting two tables behind them. She recalled that approximately 45 minutes after setting up their display, Eubank and Newton approached them. Newton told the group they had to take the union literature off the table and take down the sign. Hancock and the others were somewhat puzzled by Newton's directive as they believed they had a right to display their literature in the cafeteria. Either Newton or Eubank, however, told them that Research had a policy prohibiting people from posting signs because people might believe that this was a hospital-sponsored event and that their activity was clearly not being sponsored by the Hospital. They further told Hancock and the others that management was not trying to infringe on their right to pass out information, but that the information could not be placed on the table nor could they post a sign. According to Hancock, the information was then removed from the table and placed in a box. As to the sign, one of the employees placed it on herself rather than posting it on the table. Hancock and the others then proceeded to distribute the literature personally to employees as they entered the cafeteria. Some 10 minutes later, Eubank again approached the group and stated that they were not permitted to hold up the sign. King, the employee who was holding up the sign, asked why she was not allowed to do so, and Eubank replied that because the activity was not a hospital-sponsored event, the sign could not be displayed at all. King then hugged Eubank, stated she understood, rolled up the sign, and put it away.

Linda King testified to another cafeteria incident that occurred on February 3. She testified that she arrived at the cafeteria around 11:15 a.m., and saw several employees—Patrick Duncan, Sharon Appel, Karen Hutten, Margo Foley, and Lisa Christianer—at a table containing union literature. Next to the table, the employees had posted a union mission statement sign propped up on a chair. Also in the cafeteria were two nonemployee union organizers who, according to King, were having lunch. Approximately 15 minutes later, Supervisor Donna Sofairlo approached and asked the employees to remove the literature from the table and take the sign down because it was against the Hospital's policy on solicitation. King responded to Sofairlo that she thought this "was an okay thing to do," noting that a complaint had been filed with the Board and that one of the allegations suggested that such solicitation was "permissible." Sofairlo acknowledged King's response, but answered that she wanted the literature removed because it violated Research's no-solicitation policy. King then told Sofairlo that the employees wanted a few minutes to discuss the matter, and the latter agreed and left. The employees then caucused and decided they wanted to leave the literature and the sign on the table. King and Appel volunteered to notify Sofairlo of their decision.

When King and Appel informed Sofairlo that employees had agreed to continue what they were doing because they believed they had a right to do so under federal law, Sofairlo replied that this was Research's policy, and that the Hospital would not allow "Avon to set up a booth." King countered that she understood, but that employees were not "selling a commercial product," and that their pamphlets were for educational purposes. Sofairlo informed them she would have look into the matter further. A short while later, after King and Appel joined the others at the union table, Sofairlo returned with Eubank and Newton. Newton told the employees that under the Hospital's no-solicitation policy, they would have to remove the literature from the table and take down the sign. King replied that the Board had issued a complaint suggesting that employees were allowed to engage in such activity, and asked if Newton had received a copy. Newton acknowledged receiving a copy but reiterated that their activity violated the Hospital's no-solicitation policy, and reiterated that the material would have to be removed. The employees, however, insisted that they wanted the material to remain on the table, at which point Newton stated he would consult with legal counsel on the matter. Newton and Eubank then left but returned a short while later and stated that following consultation with counsel, they still wanted the union literature removed and the sign taken down, but were free to hold on to the literature and pass it out in that fashion, and could discuss the Union with employees. King replied that she did not understand Newton's position, to which the latter stated that the employees had 15 minutes to remove their stuff from the table and faced disciplinary action if they failed to do so. When asked by King what kind of disciplinary action would be taken, Newton declined to say.

After Newton and Eubank left, the employees discussed the matter among themselves and agreed to comply with Newton's demand that the union literature be removed and the sign be taken down. Newton and King returned minutes later and thanked the employees for their cooperation. At one point, King recalls that employees asked what kind of disciplinary action would have been imposed had they not complied, but Newton said it was not necessary to discuss it because the incident had been resolved. King further recalls that when the question was again asked about the discipline that might have been imposed, someone she was unable to identify responded, "insubordination." (Tr. 956–962.) King and the other employees then remained in the cafeteria and continued to distribute the union literature by hand to others. Eubank admits that King's above testimony regarding the above incident was accurate.

The second incident involving Koon-Anderson occurred around 11 a.m. on February 21, when she and employees Jeff Colgan and Ann Young arrived at the cafeteria to distribute literature. Soon after placing union literature on the table and propping up the union mission statement sign, Director of Nursing Carolyn Logston approached and advised them they had 10 minutes to remove their literature and take down the sign. Koon-Anderson and the others complied with Logston's request.

The last incident of record regarding union solicitation in Research's cafeteria occurred on March 10. That day, employees King, Douty, and Hutten had set up union literature on a cafeteria table and posted a union "missions statement" sign

when Director of Special Projects Cheryl Ratliff, an admitted supervisor, approached and directed them to remove the sign as it was inconsistent with the Hospital's no-solicitation policy. (Tr. 1266–1269.) Ratliff had little recollection of this incident, but did admit telling Douty and Hutten to remove the sign because it was not consistent "with our solicitation policies." Douty testified, without contradiction, that between March 8–10, she observed a table inside the entrance to the cafeteria with literature on it describing the Hospital's "core value" statement, e.g., the Hospital's mission with respect to patients." She also recalls that on March 10, several tables were set up in the cafeteria with literature on it. One such table, she further recalls, was being used by Research Supervisor Sharon East and others she did not recognize, to distribute copies of the Hospital's "core value" statement to employees, and another was being used by the Union to distribute its own literature.

While not specifically questioned as to the above cafeteria incidents to which he was party, Eubank did admit that the testimony provided by the above employees as to what he and/or Newton told employees was accurate. Ratliff, as noted, provided limited testimony regarding the March 10 incident, and neither Newton, Sofairlo, or Logston were called to testify.

The General Counsel contends that in each of the above incidents, Research violated Section 8(a)(1) by preventing employees from using a cafeteria table to display and distribute union literature and to post union signs. Research denies that its restriction on the setting up of display tables and chairs and posting of signs in the cafeteria was unlawful. It further points out that in early March, it discontinued its practice of not allowing materials to be placed on tables for distribution, but continued the practice with respect to the posting of signs, and that in these circumstances, no violation should be found. I agree with the General Counsel.

First, Newton's, Eubank's, Sofairlo's, and Ratliff's statement to the above employees, that use of a cafeteria table and/or chair for solicitation and distribution purposes was prohibited under Research's no-solicitation/no-distribution policy, was patently false, for Research's policy contains no limitation or restriction whatsoever on how employees could carry out their Section 7 protected activities. Rather, Research's policy, inter alia, states only that employees are free during their nonworktime to solicit and distribute literature in the cafeteria. Finding no support in its written policy for the restriction imposed by its managers and supervisors during the above incidents, Research on brief raises a "past practice" defense to its manager's actions. Thus, Research claims it has always "maintained some limited restrictions on use of its property in the cafeteria" that included a prohibition on employees "posting signs or using tables to set up display booths," and that said restrictions were designed to "to protect the ability of the facility to continue serving its primary function as a cafeteria, and to ensure that events that are not official hospital functions do not appear to have its endorsement." (R. Br. 20.) It has, however, produced no evidence in support of its claim.

Thus, neither Eubank or Ratliff, the only two management officials to testify as to these incidents, claimed to have been adhering to a past practice when they refused to allow employees to use a cafeteria table and chair in furtherance of their union-related solicitation and distribution activities. Indeed, the credited testimony of the employees who testified regarding these incidents makes clear that Eubank and Ratliff referenced Research's written no-solicitation/no-distribution policy, not any particular past practice, in directing them to remove the union material from the cafeteria tables and chairs. Nor did Research produce evidence to show that it had, in the past, prevented employees from using its cafeteria tables and/or chairs to display nonunion material or to engage in some other activity unrelated to the cafeteria's normal function. Finally, if the Research had intended its written no-solicitation/no-distribution rule to include a ban on the use of cafeteria tables/chairs for solicitation and distribution purposes, there is again no evidence to show that Research either orally or in writing made its intent known to employees. In sum, I find no record support for Research's claim to a written rule or a past practice prohibiting employees from using cafeteria tables or chairs to distribute literature or to post signs. Nor is there evidence to indicate that the employees' placement of union literature on a single cafeteria table or chair had somehow interfered with the cafeteria's ability to carry out its normal food service function or to adequately accommodate its patrons. Further, I find it highly unlikely that anyone could reasonably have mistaken the union literature sitting on a table and a union sign propped up on a chair as a Research-sponsored event. Research has therefore not demonstrated that it had a legitimate business reason for denying employees use of a cafeteria table and chair to solicit and distribute union literature. Accordingly, I find that Research's refusal in each of the above incidents to allow employees to display union literature on a cafeteria table and/or chair amounted to an unlawful interference with their Section 7 right to solicit and distribute union literature and violated Section 8(a)(1) of the Act.

Research's assertion, that no violation should be found because it changed its policy sometime in March to allow cafeteria tables to be used for display purposes, is without merit, for there is no evidence that this change in policy was communicated to employees that Research ever repudiated its prior unlawful conduct, or that it assured employees it would no longer interfere with their Section 7 rights. *Passavant Memorial Area Hospital*, supra.

c. The removal of union literature from bulletin boards

Research employee Karen Hutton testified, without contradiction, that on February 6, and again on February 12, she and coworker Leslie Remington, posted several pieces of union literature on two bulletin boards located in a hospital locker room, and in a "3 North" wing breakroom.[18] In the process of placing the literature in the breakroom, Hutton admits she removed from the board a notice about a symposium on humor dated 1995, and that the union literature she and Remington posted took up at least half the total available space on the bulletin boards. On February 9, Hutton noticed that the literature she posted on February 6, was no longer on the bulletin boards

[18] Several of the items posted by Hutton and Remington were received into evidence as GC Exhs. 39, 76–79. Hutton admits that she posted other union material on the breakroom bulletin board in addition to those received into evidence (Tr. 1316).

and, on February 14, was notified by Remington that the literature they posted on February 12, had also been removed. On February 18, Hutton spoke with her supervisor, Lori Burns, regarding the bulletin boards. Burns told Hutton she was upset because Hutton had taken down the notice on the 1995 symposium to post her union notices. Hutton stated she did not think it mattered much as the symposium brochure was dated 1995. Burns responded that whether or not such items were removed was a decision she, not Hutton, was allowed to make. She further told Hutton that she was allowed to post one or two pieces "of current information on the bulletin board," and that if Hutton posted more than that, she would take it down again. Hutton noted that she had removed dated material from the bulletin boards in the past and that no one from management ever complained or objected to her about the removals. She further testified that the bulletin boards were often used to post personal messages about church socials, parties, recycling, etc. Burns did not testify.

The General Counsel contends that the removal of the union literature violated Section 8(a)(1) of the Act. I disagree. Hutton's own testimony makes clear that Burns' objection to the posting was not that the material was union related, but rather that Hutton had monopolized the bulletin boards by occupying, by Hutton's own admission, at least half the total space available for posting. Hutton's further admission that Burns told her she could post no more than two notices per board makes clear that Burns did not prohibit her from using the bulletin boards and was simply and, in my view, lawfully seeking to prevent monopolization of the bulletin boards by Hutton to the possible exclusion of other permitted materials. There is nothing in Hutton's account of her conversation with Burns to indicate that the removal of the union material was motivated by anything other than the latter's legitimate concern that the bulletin board be fully accessible to all employees, not just to the union supporters. Accordingly, I find that Burn's removal of the union literature posted by Hutton and Remington on February 6 and 12, did not violate the Act and shall, therefore, recommend dismissal of this allegation.

d. Solicitation by nonemployee organizers at Research entrances

The complaint alleges that Research violated Section 8(a)(1) when, on March 10, it expelled and threatened to arrest union organizers gathered outside its front entrances as they attempted to solicit support for the Union from employees entering the facility. Testimony regarding this incident was provided by Patient Services Supervisor Jo Thomas, hospital security officer Joel Nee, and employee Arlene Foster. With minor exception, Thomas and Nee testified in similar fashion. The following is a composite of their testimony.

On the evening of March 10, several employees reported to Thomas that they had been approached by union representatives as they entered the facility to report for work. Thomas went to each of the Hospital's three entrances to see for himself. At each entrance, he observed some individuals who were Research employees, and others he could not identify. He returned to his office and called Newton to inform him of his observations. Newton, who was not at the Hospital at the time, arrived 10 to 15 minutes later. Thomas then met with Newton and with Nurse Manager Denice Nelson. Nelson suggested that she and Thomas go to each entrance, identify and speak with those who were not employees, and instruct them that unless they were employed by Research, visiting a patient, or seeking medical attention, they would have to "vacate the premises" or be considered trespassers. Thomas and Nelson did just that. Those identified as nonemployees, however, refused to leave saying they had a right to be there. Thomas and Nelson returned to Newton to inform him of what they had done and of the response they received. Newton then proceeded to contact Hospital security and spoke with Nee. Nee, accompanied by Newton, next went to Thomas. Nee recalls Newton asking what procedure he intended to follow, and Nee replied that he would first ask individuals to leave the premises and give them a trespassing warning, but that if they still refused to leave, he would have them arrested. Newton instructed him to proceed but to handle the matter in as subtle a way as possible.

Nee and Thomas proceeded to one of entrances where they encountered Union Representative Terry Falbo, a nonemployee. On learning she was not an employee, Nee asked her to leave and, when she refused to do so, informed her she was being placed under arrest. Nee and Thomas then escorted Falbo to the Hospital's emergency section from where the Kansas City, Missouri police were called and told of the arrest. While they waited for the police to arrive, Nee and Thomas went to another hospital entrance and encountered Rob Hill, another nonemployee union representative. Nee claims he followed the same procedure with Hill and that the latter also refused to leave. When told he faced arrest if he did not leave, Hill stated Nee had no authority to arrest him. During this exchange, two Kansas City police officers arrived. Hill then asked to speak separately to the police officers and Nee moved away from them but apparently was able to overhear some of the conversation. Hill, he recalls, protested to the police that he, Nee, had no authority to arrest him, but was told by the police that as he was on private property, Nee could have him arrested. After some more discussion, Hill agreed to leave but only if Falbo were also allowed to leave. Nee agreed to release Falbo at which point the incident ended.

Foster provided a different version from that provided by Nee and Thomas. Thus, she testified that she was part of the group that was soliciting signatures on March 10. She recalls that when Thomas came out, she asked Foster and the others if they were employees of Research, and the employees responded that they were. She admits that nonemployee union organizers were also in the group at some point during their soliciting activity. Thomas then left but subsequently returned with approximately 10 security guards and told the employees they would have to leave. According to Foster, while outside the entrance, the security guards formed a semicircle and surrounded the employees and remained in this position for some 20–30 minutes. She recalls that one security guard, whose name she did not know, stated they were going to call the police, and that at one point, an individual wearing a VNA/VNS name tag stated she had a camera and would take a picture of the guards surrounding the employees.

As between Foster's testimony regarding this incident, and that provided by Thomas and Nee, I find the versions provided by the latter two to be more credible and reliable.[19] Thus, I do not believe that Thomas asked employees of Research to leave the premises. Rather, I find, as testified by Thomas and Nee, that their directive was aimed at the nonemployee union organizers who were soliciting outside the hospital entrances.

The General Counsel contends, and I agree, that Research's ejection of union organizers Falbo and Hill from the areas outside its three entrances, and its threat to have them arrested if they failed to do so, were unlawful. The Board has held that where, as here, the exercise of Section 7 rights by nonemployee union representatives purportedly conflicts with an employer's private property rights, the employer bears the initial burden of establishing that, at the time it expelled the union representatives, it had a sufficient interest in the property entitling it to exclude individuals from the property. *Food for Less*, 318 NLRB 646, 649 (1995); also *Farm Fresh, Inc.*, 326 NLRB 997, 1001 (1998), enfd. in part sub nom. *Food & Commercial Workers Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000); *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999). If an employer is unable to meet the burden of demonstrating the requisite property interest, its exclusion of union agents from the area constitutes a violation of Section 8(a)(1). *Indio Grocery Outlet*, supra at 1141; *Food & Commercial Workers Local 400 v. NLRB*, supra at 1035. Respondent Research here has clearly not met that burden for, as the General Counsel correctly points out, Research has presented no evidence whatsoever regarding the extent of its interest, if any, in the property from which it had Falbo and Hill ejected on March 10.[20] Accordingly, I find that Research's ejection and threat to arrest Falbo and Hill on March 10, violated Section 8(a)(1) of the Act, as alleged.

2. The 8(a)(2) allegation

This particular allegation involves Research's creation in late 1999 of a Nursing Practice Committee (NPC), which the General Counsel alleges is an employer-assisted labor organization proscribed under Section 8(a)(2) of the Act, but which Research contends was created solely to deal with patient care and training issues and not as a labor organization. Testimony regarding NPC's formation and purpose was provided by Eubank, Ratliff, and employee RN Anne Young.

Eubank testified that he first raised the idea of establishing such a committee with his management staff in August or September. He recalls holding some six staff meetings during which the NPC was discussed, that the first of such meetings occurred in August or September, around the time the goals and budget for the following year were being developed, and that establishment of the NPC was "a priority in our division." (Tr. 1055.) He recalls that Director of Nursing Carolyn Logston, Director of Nursing Education Colleen Mall, Information Systems Manager Mike Allegri, Director of Surgical Services Mary Hibdon, and Ratliff were present at this first meeting. Eubank claims that at this meeting, which lasted approximately 1 hour, a decision was made to set up the PNC and that its development would be one of the goals for the coming year. According to Eubank, nothing of what was discussed or decided at this first meeting was reduced to writing. Eubank, however, claims that the goal was included in the following year's management plan for the Hospital which was finalized around November 1999. Eubank testified that between his first meeting in August or September when the creation of the NPC was raised, and November 1999 when the management plan was finalized, he held regular weekly meetings with his staff during which "a tremendous amount of business" was discussed. He claims, however, that while NPC was discussed at these weekly meetings, it was not the "focal point of our discussions." Notwithstanding his admission that a "tremendous amount of business" was conducted at these meetings, Eubank insisted that no minutes were ever taken at any of these meetings. Nor, according to Eubank, were any notes of what was discussed or agreed to at those meetings taken by the other members of management attending the meetings. (Tr. 1069.) According to Eubank, he and the other members of management who attend these meetings confine everything to memory. (Tr. 1073.)[21]

Sometime in January or February, Eubank discussed the formation of NPC with Kevin Haeberle of MSA, the consulting firm retained by Respondents to assist in opposing the Union's organizational efforts. He claims that Haeberle just happened to stop by his office that day and that he told Haeberle, "I am thinking about putting together this nursing practice committee," in which "we'll sit around and talk about the issues that are affecting the practice of nursing here at the hospital." He then asked Haeberle what he thought of the idea, and the latter replied, "I think it's a good idea." Haeberle went on to say that "hospitals throughout the country have similar committees," and asked how membership in the committee would be estab-

[19] The General Counsel, it should be noted, does not allege that employees who also engaged in the same solicitation activities at Research's entrances were asked to leave, as testified to by Foster.

[20] While denying in the answer that the eviction of the union organizers was not unlawful, Research on brief raises no defense to its actions. Further, the fact that only nonemployee organizers, and not its own employees, were evicted from the premises is of no consequence for nonemployee organizers enjoy a "derivative right" under Sec. 7 of the Act to engage in such organizational activities. *NLRB v. Indio Grocery Outlet*, supra at 1086; also *BE&K Construction Co. v. NLRB*, 246 F.3d 619, 626 (6th Cir. 2001).

[21] Eubank claims he also informed the Hospital's vice presidents of his plan to create the NPC at one of the weekly VP meetings held during the fourth quarter of 1999. He again testified that no minutes or notes of what transpired during these weekly VP meetings, including the one in which he explained his plan for the NPC, were ever taken. I reject as simply not credible Eubank's claim that no minutes or notes of what occurs at these various meetings are taken and maintained by Research. It simply defies logic and common business sense to believe that an institution as large as Research, which by Eubank's estimation employs almost 2200 employees, would hold separate weekly business meetings among its management staff and vice presidents, and not commit to writing either through minutes or notes, the substance of what was discussed at those meetings or the decisions reached. Eubank's suggestion that he and the other managers simply commit everything to memory borders on the absurd. Indeed, I find it strange that Research willingly maintains minutes of the NPC meetings, but does not do the same with meetings Eubank holds with the management staff or of its vice presidents' meetings.

lished. Eubank then discussed with Haeberle in some detail how he intended to choose the NPC members. Eubank admits having two or three further discussions with Haeberle regarding NPC, during which Haeberle inquired, and Eubank provided information, on the status of NPC. (Tr. 1123–1129.) When, on direct examination of Eubank, the General Counsel expressed skepticism over the latter's denial that he and Haeberle had discussed the NPC in connection with the MSA' antiunion consulting activities, Eubank did not expressly deny that such discussions occurred and insisted only that the NPC "was not established to deal with the Union issue." (Tr. 1128.)

NPC was eventually formed and held its first meeting on April 18, 2000. Eubank testified that he serves as its chairperson, and that certain staff nurses were selected to serve on NPC. Those selected received written notification stating what the alleged purpose of NPC was and of the April 18 meeting.[22] Eubank testified that he alone decided what the purpose of NPC was to be. Once formed, the staff members of NPC staff purportedly created two subcommittees, identified in the record as customer services and orientation/preceptors subcommittees.[23] (See GC Exh. 56.) Eubank testified that he placed some members of management on the committees to support them in their endeavors. He explained that whatever activities the committees decided to pursue, the chairperson of those committees would present their recommendations to Eubank who would either accept or reject the recommendations. Eubank's testimony as to who could or could not be a member of NPC was confusing. Thus, he initially stated that NPC was intended for staff nurses. When asked if members of management were permitted to become members, Eubank vacillated somewhat and avoided a direct answer by stating that management officials were free to attend the NPC meetings and interact with staff nurses. On further questioning by the General Counsel, Eubank conceded that members of management are indeed members of NPC, but do not have to attend the meetings. Asked if employees are required to attend NPC meetings, Eubank replied that their attendance is "highly encouraged," and that they get paid for attending just as if they were performing their regular work duties at the hospital.

Documentary evidence reflects that the customer services subcommittee met on April 26, during which issues identified as "barriers to patient care and customer services" were discussed. The subcommittee agreed to meet again on May 2, to "present benefit information and ideas to improve the available benefits to allow for retention of current employees and hiring of new employees." (See GC Exh. 57.)

A second NPC general meeting was held May 16, 2000. Eubank testified, and the minutes of that meeting reflect, that during this meeting, Staff Nurse Katherine Spangler-Perry, who apparently headed one of the two NPC subcommittees, discussed with the NPC ways for retaining nurses at the Hospital. She stated that her subcommittee "was looking into issues that related to changes in wages and salaries," and that her subcommittee had "called a few hospitals and were looking at health insurance, and how health insurance benefits were offered."[24] The subcommittee was also looking into the question of "call pay, and how other hospitals were paying for call pay." Spangler-Perry told those in attendance that her "committee was interested in surveying other hospitals to gain benefit information." She then asked Eubank who would be receiving the information her subcommittee gathered on the above matters. Eubank purportedly responded that the Board had recently notified him that the NPC had been illegally formed, that he had been subpoenaed to attend a hearing to discuss the NPC, and that "until all of that was resolved, we could no longer discuss wages, salaries, benefits or conditions of employment" with the NPC. (Tr. 1086.)

Ratliff testified she attended the April 18 and May 16 NPC meetings. She described the first meeting as a "brainstorming" session focusing on two principal issues: how to manage orientation of new employees, and patient satisfaction issues. She had some limited recollection about discussion at this first meeting focusing on ways to improve the new employee mentoring process. She also recalled, again in limited fashion, that some discussion took place at this first meeting about the nurses' float pools used in the med/surgical and the critical care units.[25] She could not, however, recall if the subject of the float pool was raised by management or staff employees, and admits that possible suggestions for changes in the operation of the float pool were raised by both management and staff personnel attending the meetings.

Ratliff also testified that she attended some eight management meetings beginning in August 1999 in connection with preparation of the Hospital's fiscal year 2000 management plan. She explained that these were directors' meetings which are held every Thursday, lasting from 1 to 2 hours, and that the management plan was one of several agenda items that formed the basis for discussion at these meetings. Ratliff admitted that NPC was also discussed at these meetings, but denied that the Union's organizing campaign was ever discussed at any of the meetings held in connection with the FY 2000 management plan. Like Eubank, Ratliff testified, incredibly in my view, that no written agendas are prepared for any of these meetings, and no minutes are ever taken of the directors and vice president meetings. (Tr. 1261.) From a demeanor standpoint, Ratliff was

[22] The purpose of the NPC, as stated in the letter sent to the staff nurses chosen to be members, is "to discuss pertinent issues affecting our ability to deliver optimal patient care." (GC Exh. 62; Tr. 1096.) Eubank admitted that NPC's stated purpose is similar to that contained in the Union's mission statement set forth in GC Exh. 39 in that both express a commitment to providing optimal patient care.

[23] Preceptors are staff nurses who provide learning experiences for new nurses. Research employee Anne Young explained that a preceptor "takes someone under [their] wing and shows them what you do and how you do it, and why you do it, and how your department" communicates with other departments, how patients are received and transferred from one location to another. (Tr. 1029.)

[24] Minutes of the subjects discussed by Spangler-Perry's subcommittee at a May 2, 2000 meeting preceding NPC's May 16 meeting were received into evidence as GC Exh. 63. Those minutes reflect that in addition to call pay, the subcommittee discussed such matters as health insurance for employees, education/tuition reimbursement, and vacation/sick time benefits.

[25] According to Ratliff, nurses assigned to the float pools in either unit were required to remain and work in the assigned unit for 6 months.

not a very convincing witness. She was at times evasive and appeared unwilling to provide straightforward answers to questions posed by the General Counsel. I place little credence in her overall testimony.

Employee RN Anne Young testified that in early March, she saw an NPC bulletin (GC Exh. 54) asking nurses interested in being on the NPC to submit their names to the head nurse or manager. The head nurse of her operating room (OR) unit, Tess Levin, had placed a notation on the bulletin asking those interested in the NPC to contact her. Young did just that and several weeks later, in early April, Levin handed her an envelope containing a letter stating she had been selected to serve as representative of the OR unit. Prior to attending the first NPC meeting in April, Young received a list of names of individuals who would be attending the meeting. (GC Exh. 56.) Young did in fact attend the first NPC meeting and recalls that some 40 management and regular staff employees were present. Eubank, she claims, opened the meeting by thanking them for attending, asking them introduce themselves, and stating that the purpose of the NPC was "to address the things in healthcare that we could change to make things better for our patients." Eubank next went around the room asking each person to identify some things they wished to discuss at the meeting, and wrote the suggestions on a chalkboard. One major item of discussion, according to Young, involved the preceptorship program. Thus, discussion was had about providing certain incentives for preceptors, such as a luncheon or some form of reimbursement for those employees who volunteered to serve as preceptors. She recalls that preceptors from other departments expressed their desire to get fewer patients, rather than more, so they would have more time to train and validate the orientation they were providing to the new student nurses.

Another issue raised at this first meeting dealt with nurses' complaint about not being consulted regarding the Hospital's recent purchase of patients' beds. Nurses presumably were concerned that as they were the ones who operated the patients' beds, they would have preferred to be consulted regarding the purchase. Discussion was also had on the difficulty nurses were having finding someone to clean patients' rooms during evenings and weekends, and with the lack of food service available for family members and staff in the late evenings and nighttime. One recommendation subsequently proffered to the NPC by the customer service subcommittee regarding the lack of food service was make box lunches available for families and staff. Eubank, according to Young, approved of this recommendation, along with other recommendations made by the subcommittee involving housekeeping issues, and stated that these are the kinds of things that can be addressed by the NPC.

Young testified that during the first meeting, nurses got into a discussion about wages, salaries, and benefits, but Eubank halted the discussion stating that he was not going to be able to take care of such matters with the NPC. She recalled one employee, Lisa Christianer, asked who they needed to talk to if that was something Eubank had no control over, but Eubank avoided the answer and simply stated that that was not what they were there to discuss. (Tr. 1028.) Young testified that at the second NPC meeting in May, Eubank again repeated that subjects pertaining to wages, salaries, benefits, and conditions of employment could not be discussed at the NPC meetings, and referenced either the Union or the Board in this regard. She recalled him stating that he was probably going to receive a subpoena that afternoon and that "he wasn't supposed to discuss [the above subjects] anymore." (Tr. 1035.) Young claims that Eubank himself had in fact never raised the issue of wages, salaries, or benefits, and that it was the employees who expressed an interest in discussing these matters. However, she does recall him saying that "wages, salaries, and benefits or conditions of employment . . . would be the normal thing that we would be doing [at the NPC], but that the Union has filed unfair labor practice charges against this committee," and that, consequently, he "cannot accept anything that deals with wages, salaries, benefits, or conditions of employment," and that the NPC "will not be looking into that until after the hearing, which is scheduled for May 23." (Tr. 1041.) Unlike Eubank and Ratliff, Young was a very convincing witness who, I find, testified in an honest and truthful manner regarding the NPC meetings and what Eubank may have said at those meetings.

Regarding the complaint allegation, I agree with the General Counsel that Research's establishment of the NPC amounted to a violation of Section 8(a)(2) of the Act. Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Section 2(5) of the Act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." In deciding whether an employer has violated Section 8(a)(2) and (1) by interfering with, dominating, or supporting an employee committee, the Board engages in a two-step inquiry. First, it examines whether the committee is a "labor organization" as defined by Section 2(5). If it is not, the allegation is dismissed. If, however, the committee satisfies the 2(5) criteria, the Board next determines if the employer has dominated or interfered with the formation or administration of the committee. See *Efco Corp.*, 327 NLRB 372, 375 (1998), citing to *Electromation, Inc.*, 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994).

Applying the above principles to the instant case, it is patently clear that NPC is indeed a labor organization within the meaning of Section 2(5). There is no question that employees participate in the NPC. Eubank, Ratcliff, and Young all testified to that effect, and documentary evidence reveals that Eubank was in fact recruiting participants in NPC from the ranks of employee nurses. Research does, however, deny that NPC was created for the purpose of "dealing with" employee terms and conditions of employment. Young's credited testimony, however, reveals otherwise. Thus, Eubank's remark to employees at one of the NPC meetings, that he had intended to discuss issues pertaining to employee wages, salaries, and benefits as one of the "normal things" NPC was set up to do, but was precluded from doing so due to pending unfair labor practices filed by the Union, convincingly establishes that one of NPC's purposes was indeed to address concerns nurses may

have regarding their terms and conditions of employment. That Eubank declined to discuss such issues when raised by employees during the NPC meetings, and instead steered employees away from any such discussions, does not defeat a finding of NPC as a 2(5) labor organization, for if, as the Board pointed out in *Electromation*, supra at 996, "a purpose [of the committee] is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met." Here, the remarks attributed to him by Young, whom I have credited, makes clear that Eubank's reluctance to engage in any such discussions with the staff nurses was prompted not by any belief on his part that such discussions fell outside the scope for which NPC was created, but rather because of the pending unfair labor practice charges alleging the formation of NPC to be unlawful. I am fully convinced that had those charges not been filed, Eubank would have addressed the staff nurses' concerns regarding their wages, salaries, and benefits. Indeed, Eubank's further remark, again as credibly testified to by Young, that the issues relating to terms and conditions of employment would not be addressed until after the hearing in this case, strongly suggests that Eubank was simply postponing any further discussion and resolution of such issues until after the hearing in this matter. Support for this proposition can be found in Research's FY 2000 management plan, received into evidence as General Counsel's Exhibit 71, which, at page 11, sets forth as one of Research's "major initiative" its intent to "work with MSA to defeat [the] union's organizing efforts for RN's," and identifies establishment of "a staff nurse council" as one of several courses of action it planned to take in furtherance of that initiative."[26] The weight of the evidence here thus makes clear that Research established NPC in response to the Union's organizing drive and that it hoped to channel and address employee concerns regarding their terms and conditions of employment through NPC as a way of undermining and possibly defeating the Union's efforts. In these circumstances, NPC falls squarely within 2(5)'s definition of a labor organization.

There is also no disputing Research's domination of NPC. A labor organization that is the creation of management, whose structure and functions are essentially determined by management, and whose continued existence depends on the fiat of management, is one whose formation or administration is dominated under Section 8(a)(2). *EFCO Corp.*, 327 NLRB 372, 376–377 (1998), citing to *Electromation*, supra at 995. Here, the record makes clear that NPC was formed by Eubank in consultation with other management officials in mid- to late-1999. It was also Eubank who recruited staff nurses for membership in NPC, who selected which staff nurses would serve on the NPC from among those who disclosed their interest in serving to their head nurse or manager, and who chaired the NPC meetings. Eubank also decided how the NPC was to be structured. Thus, Young testified that at the first meeting, those present had initially divided themselves into four subcommittees, but Eubank subsequently determined that the NPC should consist of only two subcommittees. Further, as Eubank readily admits, and as the documentary evidence shows, membership in the NDC is not limited to staff nurses but also includes members of management. Moreover, as testified to by Young, employees attending the NPC meetings are compensated for their time. (Tr. 1020.) The above facts make patently clear that Research, through Eubank, exercises full control over, and indeed dominates, the activities of, NPC. Finally, documentary evidence of record, and in particular Research's FY 2000 management plan received into evidence as General Counsel's Exhibit 71, provides irrefutable proof that Research created the NPC as a means of defeating the Union's organizing drive among its nurses.[27] Accordingly, I find, as alleged in the consolidated complaint, that Research's formation and domination of, and assistance to, NPC violated Section 8(a)(2) of the Act, as alleged.

C. Respondent Baptist

1. The 8(a)(1) conduct

a. The no-solicitation/no-distribution policy

Baptist's no-solicitation/no-distribution policy reads as follows:

> SOLICITATION & DISTRIBUTION
>
> Because our clients are in areas throughout the Medical Center, and because tranquility is essential to proper client care, the Medical Center has adopted the following policy with regard to solicitation:
>
> Except to solicit participation in official employee programs, no employee shall solicit any other employee for any purpose at any time in any area to which clients have access and client care may be affected. This prohibi-

[26] Eubank, who prepared GC Exh. 71, admits that NPC was the "staff nurse council" mentioned in that management plan. Also admitted into evidence as GC Exh. 70 was a document that Eubank also identified as Research's FY 2000 management plan but which is clearly different from GC Exh. 71. Both GC Exhs. 70 and 71 were provided to the General Counsel in response to the latter's subpoena. Despite identifying both as Research's FY 2000 management plan, Eubank did not adequately explain the existence of both documents. Counsel for the Respondents, David Wing, represented at the hearing that he believed from discussions with Research's CEO that GC Exh. 71 was merely a "preparatory document," not the actual FY 2000 plan, and that GC Exh. 70 was the actual plan. Wing's representation in this regard, however, not only contradicts Eubank's sworn, albeit, not very credible testimony, but is, more importantly, based on out-of-court hearsay statements. The CEO who purportedly made such a representation to Wing was never called to testify, leaving intact the confusion as to which of the two documents was in fact Research's actual FY 2000 management plan. It should be noted that while the caption on p. 1 of GC Exh. 70 identifies that document as the FY 2000 plan, the bottom of all subsequent pages identifies it as the "FY 99 Management Plan," casting doubt on its reliability.

[27] Thus, GC Exh. 71, p. 11, lists the following strategy for the FY 2000: "Work with MSA to defeat union organizing efforts for RN's." Among the steps listed to accomplish this goal is the establishment of "a staff nurse council" or the NPC. (Tr. 1194–1195.) Eubank's admission that it was he who prepared GC Exh. 71 clearly establishes that he knew from the very outset that NPC was established for the purpose of defeating the Union's efforts, and not, as initially claimed by Eubank, to address patient care concerns. I consider Eubank's entire testimony highly suspect and have given it little or no weight.

tion includes, among other areas: client rooms, ancillary client care areas, hallways, stairs, elevators, waiting rooms, client and visitor lounges and the lobby.

Employees may engage in solicitation of other employees only when both employees are on non-working time and only in areas to which clients do not have access and client care will not be affected, such as employee-only lounges and locker rooms. Except in the course of performing job duties, no employee shall distribute any matter of any kind in any area of the Medical Center except in non-working areas to which clients or visitors do not have access. At no time shall any employee distribute any matter to clients or visitors unless such distribution is required as a job duty.[28]

The General Counsel contends, and I agree, that the above no-solicitation/no-distribution rule is overly broad and presumptively invalid. Thus, the rule bans employee solicitation and distribution in any and all areas to which patients have "access," including the hospital's stairs and lobby, and, consequently, is not limited to "immediate patient care areas" which, as previously discussed, the Board and courts have held is the permissible parameter for a rule at a health care facility to be considered valid. *Presbyterian/St. Luke's Medical Center*, supra. Baptist appears to agree with this assessment of its rule, for it argues on brief that the policy, as written, "potentially violates Section 8(a)(1) in that it could be construed to prohibit solicitation in non-patient care working areas where medical care is not likely to be disrupted . . . and can be construed to prohibit distribution in areas that are not either patient or working areas." (R. Br. 35.). It contends, however, that the above rule was "appropriately clarified" and rendered lawful by the November 22 Q&A memo. For the reasons discussed in section II,A,2 above, its contention is without merit. Baptist further claims that no violation should be found here because it has not enforced its ban on solicitation or distribution in nonpatient care areas. I disagree. First, the Board has found that mere maintenance of an overly broad no-solicitation rule violates the Act because such a rule tends to chill employees' exercise of their protected rights. *Beverly Health & Rehabilitation Services*, 332 NLRB 347 (2000); *Mead Corp.*, 331 NLRB 509 (2000). Second, Baptist, as shown below, implicitly relied on this very rule to justify its conduct in prohibiting an employee from talking about the Union to other employees, rendering its "no enforcement" defense patently false.

b. Directing employees not to discuss the union with others

Respondent Baptist is alleged to have violated Section 8(a)(1) by directing an employee not to discuss the Union with other employees. The pertinent facts regarding this allegation stem from testimony provided by the affected employee, Rachel Cox, and by admitted supervisor, Darcy Smith, who does not deny so instructing Cox. According to Cox, who remains employed by Respondent Baptist, on or about October 19, Smith called her at home and told her that two nurses "were tired of hearing" about the Union and asked Cox "not to talk about the Union." Cox responded, "Okay." Cox claims that Smith never told her who the two nurses were, and made no mention of whether Cox's alleged union discussion with these two nurses occurred during worktime. (Tr. 1273–1275.)

Smith's version is that sometime in the morning of October 19, she had a conversation with nurses Jo Ann Pummill and Lis Heinsohn during which the latter complained to her that they were tired of, and no longer wanted, Cox talking to them about the Union, and asked her to talk to Cox about it. Smith then called Cox and asked her "if she would please not bother Lis and Jo Ann anymore with talking about the union," and that, after a few minutes of silence, Cox replied, "Okay." (Tr. 1851–1853.) In her version, Smith never mentioned telling Cox that the alleged union discussion she purportedly had with the two nurses occurred during either Cox's or the nurses' worktime.

As between Smith and Cox, I found the latter's version of the phone conversation to be the more credible of the two. From a demeanor standpoint, I was more favorably impressed by Cox as a witness and am convinced that she testified in an honest, straightforward, and truthful manner. Her willingness to testify against her employer's interest while still in its employ further adds to her reliability as a witness. *GATX Logistics, Inc.*, 323 NLRB 328, 332 (1997). Smith, on the other hand, was not so convincing. Accordingly, I credit Cox and find that Smith never identified the nurses to her during their phone conversation and that, after informing Cox that two nurses were tired of hearing her talk about the Union, Smith instructed Cox "not to talk about the Union."

The General Counsel contends that Smith's remark to Cox violated Section 8(a)(1) because of its tendency to deter Cox from exercising her Section 7 right to discuss the Union with other employees. Respondent Baptist counters that Cox's alleged Union conversation with Pummill and Heinsohn occurred during worktime, and that it had a right, presumably pursuant to its above-described no-solicitation rule, to "prohibit solicitation during working time." For this reason, it contends that Smith's remark to Cox "was not improperly coercive or restrictive of [her] Section 7 rights." It points out that even if the report she received from the two nurses was inaccurate, no Section 8(a)(1) can be found because on receiving the report Smith, "believing the report to be truthful, contacted Cox and instructed her to cease raising the issue during shift change." (R Br. 37–38.) Respondent Baptist's argument is flawed in at least two respects.

First, Respondent Baptist cannot properly rely on its no-solicitation rule to justify Smith's decision to prohibit Cox from discussing the Union for, as found above, that rule is overly broad and unlawful. As held by the Board, an overly broad rule governing solicitation is invalid for all purposes. *Crestfield Convalescent Home*, 287 NLRB 328 (1987). *Mesa Vista Hospital*, 280 NLRB 298, 300 (1986). Second, Smith's directive to Cox that she refrain from talking to employees about the Union was not limited either expressly or by implication to working time.[29] Thus, even if Respondent Baptist had a lawful provi-

[28] The rule refers to the hospital's patients as "clients."

[29] Respondent Baptist's claim on Br. (p. 37–38), that Smith "instructed [Cox] to cease raising the issue during shift change," finds no support in the record and is a patent mischaracterization of Smith's

sion prohibiting solicitation on an employee's working time only, Smith's failure to so instruct Cox about the limitation, or to advise her that she was free to engage in such activity during nonworktime, would reasonably have led Cox to believe that she was precluded from discussing the Union with other employees under any and all circumstances, including nonworktime, which she had lawful right to do. Accordingly, Smith's remark to Cox, as correctly pointed out by the General Counsel, would have had the effect of deterring Cox from freely exercising her Section 7 right to solicit other employees during her or their nonworktime. For these reasons, I find Smith's remark to have been unlawful and a violation of Section 8(a)(1) of the Act.

D. Respondent MCI[30]

1. The 8(a)(1) conduct

a. The no-solicitation/no-distribution policy

MCI's no-solicitation/no-distribution policy (GC Exh. 67[f]), as noted, is virtually identical to HM's policy, the only difference being that in its rule restricting employee solicitation and distribution during nonworktime, MCI added patients' rooms, operating rooms, and nurses' stations as areas where such conduct is not permitted. However, for the reasons set forth above in connection with HM's policy, MCI's no-solicitation/no-distribution policy is overly broad and presumptively invalid as its prohibition on employee solicitation and distribution of union literature during their nonworktime is not limited to the Hospital's immediate patient care areas but rather extends to all "those areas to which patients and/or visitors have access," which, by definition, would obviously include nonpatient care areas of the facility. Regarding nonemployee solicitation, MCI's rule prohibits "persons not employed by MCI" from soliciting or distributing literature on Health Center property for any purpose at any time, unless prior proper authorization from the executive vice president has been obtained in writing. (See GC Exh. 7[f].) On September 28, MCI enforced its no-solicitation/no-distribution policy against two employees of Respondent Menorah, Teresa Barnett and Angela Tuska-Wagner (Tuska-Wagner).

b. Barnett's and Tuska-Wagner's activity at MCI and Baptist

Teresa Barnett and Angela Tuska-Wagner,[31] both employees of Respondent Menorah, testified that on September 28, a nonworkday for them, they visited MCI in an effort to solicit support for the Union and to distribute union literature. They had, just prior thereto, been to Respondent Baptist and engaged in the same activity without incident.[32] On arriving at MCI, Barnett and Tuska-Wagner, each of whom was wearing their employee identity badge identifying them as Health Midwest employees and a union ribbon on their blouse lapel, went to the ICU and surgical services breakrooms where they spoke to employees about the Union, and distributed union literature and union ribbons. They then decided to do the same at the other MCI break areas and headed to their next destination on the fifth floor. On arriving at the fifth floor, they asked a woman behind a desk if she could show them where the breakroom was as they wanted to leave some information there. The woman replied that she was heading in that direction and asked Barnett and Tuska-Wagner to follow her. As the breakroom was locked, the woman unlocked it for them and let them in. Once inside, Barnett and Tuska-Wagner found the room empty and then began placing literature in the room, and posting brochures and union ribbons on the bulletin board. Barnett recalled that soon thereafter, a woman, who subsequently identified herself to Barnett at the latter's request as Mary Adams Meirerend (at the time a clinical supervisor with MCI), opened the door to the breakroom and told them they would have to leave. When Barnett asked her the reasons for directing them to leave, Meirerend, according to Barnett's and Tuska-Wagner's testimony, replied that they were "interrupting patient care." Barnett responded that they were not interrupting patient care because

testimony for, as set forth above, Smith's description of what she said to Cox contains no reference to "shift change."

[30] The General Counsel's unopposed motion to withdraw, "for want of evidence," complaint pars. 5(b)(vi), alleging that MCI Supervisor Mary Jones disparately prohibited employees from talking about the Union in a nonpatient care area, and 5(b)(vii), alleging Jones made an unlawful promise of benefit if employees rejected the Union, is granted.

[31] Although the Respondents on brief contend that Tuska-Wagner's name is actually "Pustka-Wagner," (R Br. 6 fn. 3), at the hearing the witness was asked to and did spell her name as "Tuska-Wagner" (Tr. 627). Consequently, the witness' spelling of her name at the hearing is accepted as correct.

[32] Barnett and Tuska-Wagner visited breakrooms during their activities at Baptist Hospital to drop off union literature, including one situated in Baptist's surgical unit. Access to this latter breakroom requires passage through a set of doors marked, "Surgery-Authorized Personnel Only." Barnett testified, credibly and without contradiction, that the door to the surgical unit at Menorah where she is employed contains the same "Authorized Personnel Only" sign. She further testified, again without contradiction, that she and other nurses are permitted free access through the Menorah surgical unit area even if not assigned to that unit, and that the only limitation placed on nurses is that entry to certain sub-areas of the surgical unit requires that nurses be properly attired in surgical garb. Baptist's no-solicitation/no-distribution policy expressly allowed for the solicitation and distribution of union literature by off-duty employees at "employee-only lounges [e.g., breakrooms] and locker rooms." (See. GC Exh. 67[c].) The policy similarly contains no provision precluding employees of other HM affiliated hospitals from entering the Baptist facility for such purposes. There is no evidence to indicate that during their activities at Baptist, Barnett and Tuska-Wagner were ever told to cease their union activities, or prevented from doing so. Nor was evidence produced by the Respondents to contradict Barnett's claim that she and other nurses had free access to the surgical unit at Menorah, or to show that the practice at Baptist regarding nurses' access to the surgical unit was any different from that followed at Menorah. The Respondents, however, contend that Tuska-Wagner and Barnett interrupted several on-duty employees at Baptist during the course of their activities. Their contention finds no support in the record. While Tuska-Wagner testified that some of the employees they encountered and questioned as to the location of the various breakrooms during their trek through Baptist's facility were in hospital attire, she never testified that these individuals were in fact "on duty" at the time. The fact that the individuals she and Barnett may have encountered were standing near a nurses' station or a breakroom does not, without more, establish that these individuals were in fact working at the time. (R. Br. 71.)

they were distributing literature in a breakroom. Meirerend repeated that they would have to leave, and then departed.

As Barnett and Tuska-Wagner got on the elevator to leave they were confronted by security guard Robert Vick. Vick asked them what the problem was and Barnett replied that there was no problem. Vick next requested that they step off the elevator and asked for their name badges. After taking their badges, Vick went to make a phone call. Barnett testified that she overheard Vick providing their social security numbers to the person at the other end, but could not make out the rest of the conversation. Vick returned a short while later and told Barnett that her social security number had "a hit" on it but did not reflect any outstanding "warrants." When Barnett asked Vick to explain what he meant by "a hit," Vick simply repeated his earlier remark that "a hit" had shown up but that there were no "warrants out." Barnett recalls that as Vick was giving them back their badges, Meirerend appeared and told Vick that she had received instructions from MCI's CEO, Kent Howard, that they were to be escorted out of the Hospital. Tuska-Wagner's recollection is that Meirerend stated she had received instructions from Howard that she and Barnett were to be escorted off the grounds because they were interrupting patient care.

At the lobby of the hospital, Barnett asked Vick if she could make a phone call. Vick agreed and Barnett then called the Union's attorney, Walter Rorer, to apprise him of the incident. As Barnett was on the phone, Howard appeared and knelt slightly in front of Tuska-Wagner to look at her identification badge and asked Tuska-Wagner if she was an MCI employee. Tuska-Wagner replied she was not, but that she worked at Menorah Medical Center. Howard then went over to Barnett, who was still on the phone, glanced at her identification badge, and returned to Tuska-Wagner. He then informed Tuska-Wagner that non-MCI employees are not allowed in the breakroom. Tuska-Wagner then pulled out a copy of Menorah's solicitation policy and showed it to Howard, told him that, according to Menorah's policy (GC Exh. 21), employees of the HM hospital system like herself were entitled to be in the breakroom, bathrooms, or cafeteria at MCI, and asked if the policy had been changed.[33] Howard replied that he was fully aware of the policy, but insisted that the Hospital did not allow non-MCI employees in its breakrooms. After instructing Vick that Barnett and Tuska-Wagner were permitted to engage in such activity only in the cafeteria, but nowhere else in the Hospital, Howard left. As soon as Barnett got off the phone with Attorney Rorer and returned to where Tuska-Wagner was, Vick told them it was time for them to leave. Barnett recalls him saying that "if we returned to the hospital even to see a patient, we could be arrested, and that he hated for us to lose our nursing license because of this." Barnett recalled Vick stating that they could be arrested for trespassing if they were found anywhere in the hospital, even if visiting a patient, and expressed concern that they could lose their nursing licenses over this." Barnett and Tuska-Wagner then left the Hospital.

Meirerend's version of the September 28 incident is that as she was walking down the hall where the breakroom was located, she noticed an individual she did not recognize standing halfway inside the doorway to the breakroom and went to see if a staff member was with them.[34] She claims she had never before seen either Barnett or Tuska-Wagner prior to that day, and does not recall whether they were wearing identification badges. When she got to the breakroom, one of them, she does not recall which, made a comment about leaving something in the breakroom. Meirerend claims she asked them to leave because she did not recognize them, and that one of the two, she could not recall which, replied that they did not have to leave the room. Meirerend informed them that she was going to call security and have them escorted out of the facility. She could not recall if anything else was said during that brief conversation. Meirerend claims that at that point, she walked away and called security, and also notified Howard because she always informed Howard whenever she had to call security. Meirerend was unable to recall whether she saw Howard later that same day or the following day, and was not present when Howard approached Barnett and Tuska-Wagner in the lobby. Meirerend claims she had no further involvement in this Barnett/Tuska-Wagner incident and was unaware that the two subsequently received a disciplinary writeup for this incident. Neither Howard nor the security guard, Vick, testified in this proceeding.

I credit Barnett's and Tuska-Wagner's version of this incident. While there were some minor variations in their testimony, overall Barnett and Tuska-Wagner corroborated each other on the more salient points. Thus, I find that Barnett and Tuska-Wagner were wearing Health Midwest identification badges when they were in the breakroom, and that Meirerend must have seen their badges and on confronting them knew they were employed by Health Midwest at Menorah Hospital. I also credit their versions of the conversations they had with Howard and Vick as their testimony in this regard is undisputed. Thus, I find that Tuska-Wagner alerted Howard to the provision in HM's corporate policy

The General Counsel contends that MCI's refusal to allow Barnett and Tuska-Wagner to solicit and distribute literature at its fifth floor breakroom violated Section 8(a)(1). MCI defends its conduct by asserting that it had a right to exclude Barnett and Tuska-Wagner from soliciting under its no-access rule, and that no showing has been made that "MCI has at any time permitted employees assigned to other facilities to roam the patient floors or enter work areas." (R. Br. 40.). I agree with the General Counsel.

Initially, it is unclear from the Respondents' brief if MCI's reference to its no-access rule pertains to the provision in paragraph A of its policy applicable to nonemployees, or to paragraph B,2 which applies to off-duty employees. Under either

[33] The language apparently referenced by Tuska-Wagner in her remarks to Howard is found in par. B,2,b of GC Exh. 21. MCI's own rule contains similar language, also found in par. B,2,b of GC Exh. 67(f). The only difference between the two provisions is that Menorah's rule B,2,b lists employee locker rooms as an area where employees may freely solicit and distribute during nonworking time, while MCI's rule B,2,b does not. Neither Menorah's nor MCI's policy contains any express prohibition on solicitation or distribution of literature at those facilities by employees employed at other HM facilities.

[34] Meirerend testified that the breakroom effectively served as the employee lounge as MCI did not have a separate employee lounge (Tr. 1440).

provision, however, MCI would not prevail. Regarding paragraph A, that provision, as noted, applies only to nonemployees.[35] While Barnett and Tuska-Wagner were not employed by MCI, they were employed by Health Midwest, MCI's corporate parent, at HM's Menorah facility. Thus, when Barnett and Tuska-Wagner, as employees of HM's Menorah hospital, sought to distribute literature at MCI, another of HM's hospitals, their status was that of off-duty employees, and not outsiders or nonemployees. See *Ryder Student Transportation Services*, 333 NLRB 9 (2001); *ITT Industries*, 331 NLRB 4 (2000); *Postal Service*, 318 NLRB 466 (1995). As such, MCI's prohibition on solicitation by nonemployees anywhere "on Health Center property for any purpose at any time" without "prior proper authorization" did not apply to them. Howard, I am convinced, was fully aware of their status as off-duty employees of another HM facility as he acknowledged to Barnett and Tuska-Wagner that they had a right to solicit and distribute literature in the hospital cafeteria, a right not available to nonemployees under paragraph A of MCI's policy. Thus, to the extent MCI seeks to justify its eviction of Barnett and Tuska-Wagner based on the rule applicable to nonemployees, its conduct was unlawful and in violation of Section 8(a)(1).[36]

Nor can MCI lawfully rely on its no-solicitation/no-distribution rule for off-duty employees to justify the exclusion of Barnett and Tuska-Wagner from the breakroom, for paragraph B,2,b of MCI's policy expressly authorizes the solicitation and distribution of union literature by off-duty employees in "employee lounges (e.g., breakrooms), employee restrooms, parking lots, and cafeteria." Thus, when, on September 28, Barnett and Tuska-Wagner entered the fifth-floor breakroom or employee lounge to distribute literature, they did no more than what was permitted under paragraph B,2,b of MCI's own policy.[37] In these circumstances, I find that MCI's eviction of Barnett and Tuska-Wagner from its fifth-floor breakroom unlawfully interfered with their Section 7 rights and violated Section 8(a)(1) of the Act. I also agree with the General Counsel that MCI, through its agent, Vick, further violated Section 8(a)(1) by threatening to have them arrested for trespassing and with a possible loss of their nursing license if they should return to the facility for any reason whatsoever.

E. Menorah Medical Center[38]

1. The 8(a)(3) allegations

a. The disciplinary writeups of Barnett and Tuska-Wagner

On October 12, 2 weeks after their solicitation and distribution activities at Baptist and MCI, Barnett and Tuska-Wagner were issued disciplinary writeups by their Employer, Menorah, for their activities at those facilities, which writeups the consolidated complaint alleges and Menorah denies violated Section 8(a)(3) and (1) of the Act. Barnett testified that on October 12, she was called to the offices of Director of Surgical Services Richard Allison and Manager of Peri-Anesthesia Lois Lair. Once there, Allison smiled at Barnett, laid the writeup on the table, and asked her to read it. (See GC Exh. 20.) The writeup contained a brief description of Barnett's activities at the MCI and Baptist facilities, identifying the former as incident 1, and the latter as incident 2.[39] After reading the writeup, Barnett asked for a copy and asked to make a phone call. After calling Union Attorney Rorer, presumably to inform him of the writeup, Barnett signed the writeup and received a copy. Tuska-Wagner testified that she too was called in after Barnett and given a writeup (see GC Exh. 38). She recalls Allison handing her the writeup as she walked into his office and asking if Tuska-Wagner wanted " to just get this over with." Having learned from Barnett about the writeup, Tuska-Wagner responded, "Yes." Barnett and Tuska-Wagner both testified, without contradiction, that at no time prior to receiving their writeups were they asked by Allison, Lair, or any other Menorah management official to explain, or provide their versions of, what occurred at either MCI or Baptist.

As discussed above, Barnett and Tuska-Wagner gave detailed, mutually corroborative, and credible testimony regarding their activities at MCI and Baptist. However, the writeups' description of what occurred at MCI differs somewhat from Barnett's and Tuska-Wagner's version of events. Thus, contrary to the statement in the writeup that they asked a charge nurse to let them into a locked breakroom, Barnett and Tuska-Wagner testified only that they simply asked a woman who was behind a desk at the nurses' station for directions to the break-

[35] While MCI has a no-access rule for nonemployees, its general no-solicitation policy contains no similar "no-access" provision for off-duty employees. Rather, MCI's restrictions on solicitation and distribution activities by off-duty employees is directed at certain areas inside the facility, and does not include a total ban on employee access to its facility during their days off.

[36] MCI likewise cannot justify the eviction on the basis of language found in the Q&A memo, discussed supra, which purports to address the right of employees of one HM facility to solicit or distribute literature at another HM facility, for Q&A memo was distributed to employees in November, *after* the incident involving Barnett and Tuska-Wagner occurred. In any event, that memo, as previously discussed, was too ambiguous to have adequately and fairly apprised employees of their right to solicit and distribute literature at the various other HM facilities.

[37] Even if MCI's policy expressly prohibited solicitation and distribution in the fifth-floor breakroom, that provision would be presumptively unlawful and unenforceable as the breakroom is clearly not an "immediate patient care area," and MCI has not demonstrated that a ban on such activity in the breakroom was needed to prevent a disruption in patient care or a disturbance of patients.

[38] The General Counsel's unopposed motion to withdraw for lack of evidence complaint par. 5(c)(ix), alleging that Supervisor Lair disparately prohibited employees from posting union literature on bulletin boards, is granted. (GC Exh. 79.)

[39] As to incident 1, the writeup states that Barnett was "observed" at MCI's 5 East nurses' station, that the "charge nurse" at that station was asked either by Barnett or an acquaintance "to be let into the locked breakroom so you could leave information." It asserts that Barnett "interrupted her work at the nurses' station to let you into the break room," that soon after returning to work the charge nurse asked her to leave the premises, and that Barnett had been identified by security as one of the nurses who had been in the breakroom.

As to incident 2, the writeup states that on or about September 28, Barnett "entered through a restricted access door into the surgical area in Baptist Hospital" that was "clearly marked 'Surgery Authorized Personnel Only,'" and that while there, Barnett "engaged in conversation with 4–5 staff members on their lunchbreak."

room, and that it was this unidentified person who volunteered to personally show them to the breakroom as she was already heading in that direction, and who willingly unlocked the breakroom door for them on finding it locked. Further, contrary to writeup, at no time in their testimony did either Barnett or Tuska-Wagner identify the individual as a "charge nurse." Nor does their credited testimony reflect that they asked this individual to open the locked breakroom door for them, as declared in the writeup. Finally, contrary to what the report states, Barnett's and Tuska-Wagner's testimony makes clear that it was Meirerend, and not the unidentified person who led to them to the breakroom, who subsequently entered the breakroom and directed them to leave the premises.

Menorah has offered no explanation on to how it learned of Barnett's and Tuska-Wagner's activities at the MCI and Baptist Memorial facilities. Nor has it explained why it felt justified in disciplining the two for engaging in protected activities during their off-duty hours at facilities other than its own. Indeed, the entire circumstances surrounding the issuance of these writeups are highly suspect. While there is no denying, and indeed Barnett and Tuska-Wagner readily admit, distributing union literature at the Baptist and MCI breakrooms on September 28, no other individual connected with the issuance of these writeups was called to testify. Thus, Allison, whose name appears on both writeups as the immediate supervisor and as the one responsible for issuing them, did not testify. Nor did Lair, who was present when the writeups were given to Barnett and Tuska-Wagner. There is, consequently, no explanation in the record as to how Menorah, and Allison in particular, learned of these two incidents. Meirerend, as noted, denied having had any involvement in this incident beyond directing the two employees to leave the MCI breakroom. Howard and the security guard Vick, as noted, did not testify. Nor did Menorah learn of their activities from either Barnett or Tuska-Wagner for, as noted, neither was questioned about these incidents prior to receiving the writeups. Finally, even when given the writeups on October 12, neither Barnett nor Tuska-Wagner were apparently informed as to how Allison, or Menorah itself, knew of their activities at other facilities.[40]

I find that the writeups issued to Barnett and Tuska-Wagner were patently unlawful, for they were issued solely because Barnett and Tuska-Wagner had, as previously found (see MCI discussion above), engaged in the protected activity of soliciting employees and distributing union literature at the Baptist and MCI Hospitals. *Saia Motor Freight Line, Inc*., 333 NLRB 784 (2001). As pointed out by the Board in *Saia Motor*, application of its *Wright Line*[41] test is not required where, as here, the conduct for which the employer claims to have disciplined the employee was protected activity. See also *Opryland Hotel*, 323 NLRB 723, 728 (1997). Application of a *Wright Line* analysis would, in any event, result in a finding of a violation.

Thus, to establish a *Wright Line* prima facie case, the General Counsel must show the affected employed engaged in union activity, that the employer knew or had reason to be aware of such activity and harbored antiunion animus, and that the employer took adverse action against the employee for engaging in such activity. In the absence of direct evidence of animus or a discriminatory motive, the Board may infer animus or an unlawful motivation from all of the surrounding circumstances. Evidence of suspicious timing, false reasons given in defense, and a failure to adequately investigate an employee's alleged misconduct all support such inferences. *Washington Nursing Home*, 321 NLRB 366, 375 (1996). Here, there is no question that Barnett and Tuska-Wagner were engaged in union activity when they distributed union literature at the MCI and Baptist facilities, nor any doubt that Respondent Menorah knew of their activities, for the warnings were issued to them precisely for engaging in that very conduct. Finally, Menorah's failure to question either Barnett or Tuska-Wagner about their activities at MCI or Baptist, or to afford them an opportunity to defend their actions before issuing them the written warnings, suggests that Menorah had little interest in determining whether any of their alleged misconduct had in fact occurred, and supports an inference that the warnings were issued for discriminatory reasons. In these circumstances, the General Counsel, I find, has made a strong prima facie showing sufficient to support an inference that the warnings issued to Barnett and Tuska-Wagner were motivated by their union activity.

Other than the writeups themselves, Menorah has produced no evidence to refute the General Counsel's prima facie case. As previously explained, it has offered no explanation on how it learned of Barnett's and Tuska-Wagner's activities at the Baptist and MCI facilities. Allison, the one person who most likely could have answered this troubling question, was not called to testify. Nor has any claim been made that she was unavailable to testify. Menorah's failure to call Allison, or for that matter anyone else involved in the decision-making process, as a witness to explain the circumstances surrounding the issuance of the warning, or why Barnett and Tuska-Wagner were not afforded an opportunity to present their side of the story before being disciplined, supports an adverse inference that, if called, Allison's testimony would not have been helpful to Menorah in its effort to justify the writeups. *Keller Mfg. Co.*, 237 NLRB 712, 727 (1978). As noted, the writeups themselves are factually inaccurate, leading me to suspect that Menorah had little interest in getting the facts straight because its real motive was to punish Barnett and Tuska-Wagner for their union activity, not for any alleged violation of company policy. In short, I find that Menorah has not sustained its burden of showing that Barnett and Tuska-Wagner would have been disci-

[40] While there is no allegation that the writeups created an unlawful impression of surveillance, the circumstances surrounding their issuance could reasonably have led Barnett and Tuska-Wagner to believe that Menorah, in fact, was keeping tabs on their union activities at other facilities. However, in the absence of a specific allegation, I make no finding in this regard.

[41] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In *Wright Line*, the Board established a causation test to be applied in all discrimination cases turning on employer motivation. Thus, under *Wright Line*, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

plined for violating its no-solicitation/no-distribution policy even if they had not, at the time, been engaged in union activity. Accordingly, under a *Wright Line* analysis, the writeups issued to Barnett and Tuska-Wagner on October 12, 1999, violated Section 8(a)(3) and (1) of the Act, as alleged.

b. The alleged unlawful withholding of work from Barnett

The consolidated complaint alleges that on October 13, 20, and 27, Menorah unlawfully withheld work from Barnett because of her union activities.[42] Barnett is employed as a part-time nurse at Menorah's post anesthesia care unit (PACU), and works approximately 20 hours per week. She has also worked in the Hospital's ICU, and averaged one to two shifts per month during the period January–October 1999. The record reflects that the ICU at Menorah maintains a self-scheduling system whereby nurses from that and other departments having ICU experience sign up to work different shifts by placing their names on a signup sheet reflecting the days they would like to work during a given month. (See, e.g., GC Exh. 9.) ICU Director Lesli Bauer testified that the signup process is for the most part managed and prepared by a self-appointed group of nurses known as the staffing committee. According to Bauer, the staffing committee begins the ICU staffing process by simultaneously putting out a 4-week time schedule containing columns with individual dates on top, and the names of individuals who had worked in the ICU in the past month or so (see, e.g., GC Exh. 23), and a blank worksheet containing only dates, but no names, in squares or boxes. (See GC Exh. 9.) Bauer explained that employees interested in working on a given day listed on the schedule could do so by designating the shift they prefer in the dated column, and by writing their names in the appropriate box in the blank worksheet. The staffing committee determines which names to include on the time schedule based on whether they worked in the prior month. However, employees whose names were not included in the time schedule are nevertheless free to have their names added to the list or to request the staffing committee do so. When the time schedule and worksheets are filled in, the staffing committee prepares a clean copy of the work schedule and a work grid showing on a weekly basis those employees who have signed up to work in the ICU for the following month. The staffing committee then reviews the schedules and worksheets and makes whatever adjustments need to be made. Bauer testified that the staffing committee's completed time schedule is then turned over to her the Friday before the Monday on which the shifts are scheduled to begin, and that the schedule is thereafter kept in her office. She claims that once she gets the final schedule from the staffing committee, no more changes are made to the schedule unless an employee comes to her and requests a specific change. Bauer testified that the only time she removes someone from the list is if, after the signup sheet is completed, the employee has either been terminated or voluntarily resigned their employment.

Barnett testified that she has in the past used the ICU's self-scheduling system to obtain additional work whenever she needed to make some extra money. She claims that prior to October 13, she averaged one to two shifts per month at the ICU. Barnett further testified that while she often had no problem getting the ICU work she signed up for, there were occasions when, because of a low "census" of patients, she might be called on the day she was scheduled to work and told either to remain on call at home, or that the shift work she had signed up for was canceled.[43] Such occasions, according to Barnett, were rare, occurring probably less than five times during the 3-year period between October 1996 and October 1999. Barnett also explained that a nurse who wants to work a particular shift for which four other nurses have already signed up will typically work it out with one of the four nurses by swapping shifts, or simply taking another shift.

The record reflects that Barnett entered her name on the ICU signup sheet to work on October 13, 20, and 27. Thus, General Counsel's Exhibit 9 shows that Barnett was the second person to sign up for a shift on October 13, and the first person to sign up for shifts on October 20 and 27. On or about September 16, Bauer notified Barnett in writing that her request for ICU work on the three dates requested was not being granted. The note sent by Bauer to Barnett simply states, "[Thanks], but we are OK." (GC Exh. 11.) Bauer explained that she removed Barnett's name because she already had three regular full-time ICU staff nurses assigned to work, and therefore had no need for Barnett who was not part of her regular ICU staff. Barnett testified that she had never before been informed so far in advance of her desired shift, and in writing, that her shift request was not being approved.

The General Counsel contends that Barnett was unlawfully denied the October 13, 20, and 27, ICU shift assignments because of her union activities, and that such conduct therefore violated Section 8(a)(3) and (1). I disagree. To establish a prima facie case under *Wright Line*, the General Counsel, as noted, must produce evidence to show that at the time of the alleged unlawful conduct, in this case September 16, Barnett was at the time engaged in union activity, that Menorah knew or had reason to know of her union activity, and that its denial of work to Barnett was motivated by antiunion animus. The General Counsel, in my view, has failed to meet that burden here.

Barnett's role as a union activist is fairly well established in the record. The record reflects that Barnett became involved in union activities in early September when she prepared and distributed a flyer to employees at union meetings held at her house and at an apartment clubhouse on or around September 8. The flyer identified Barnett as one of several nurses employees could contact for further information or if they had any questions. Further, as previously discussed, Barnett, on September 28, solicited and distributed literature at Respondents Baptist and MCI, for which conduct she was given an unlawful warning by Menorah on October 12. The above facts make patently clear that as of September 28, Menorah was fully aware of Barnett's involvement with the Union. There is, however, no evidence showing that Menorah had knowledge of Barnett's

[42] The General Counsel's unopposed motion to withdraw, for want of evidence, complaint par. 7(b), alleging that employee Barnett was also unlawfully denied work on February 28 and March 29, 2000, is granted. (GC Exh. 82 fn. 60.)

[43] "Census" refers to the number of patients usually maintained at the ICU on a given day, which typically numbered around seven.

activities prior to September 28, and in particular as of September 16, when Bauer informed her that her services for the shifts requested would not be needed.

The General Counsel suggests on brief that Menorah would have known in early September of Barnett's involvement with the Union from the flyers posted by Barnett at Menorah and other HM facilities announcing upcoming union meetings, including the one on September 8, and identifying Barnett as a union contact person. I disagree, for while Barnett, as noted, testified to having distributed flyers about an upcoming September 21, union meeting to employees of various HM institutions at a meeting held at her house and at a September 8 meeting held at an apartment building, nowhere in her testimony does Barnett make the claim that she also posted the flyer announcing the September 21 meeting, or for that matter any other union flyer, at Menorah or any other HM facility prior to September 21. Tuska-Wagner's testimony is equally devoid of any such claim.

Nor is there any evidence to support the General Counsel's assertion that Bauer or any other Menorah management official had seen, or been provided with, copies of the flyer distributed by Barnett in early September identifying her as a union advocate. In short, I find the General Counsel has not established that Menorah had knowledge of Barnett's union activities on September 16, when it disapproved Barnett's request to work the October 13, 20, and 27 shifts at the ICU. Having failed to prove an essential element of his prima facie case, I find that the General Counsel has not sustained his initial *Wright Line* burden of proof, and shall therefore recommend that this particular allegation be dismissed.

c. The alleged removal of Barnett's name from the ICU work list

Barnett testified that sometime in February, she looked at the ICU signup worksheet for March and saw that her name was not on it. She then called Bauer on or about February 28, and told her she had been interested "in signing up for some shifts the last 2 or 3 months" but that her name was no longer on the signup roster. Bauer purportedly told her, in what Barnett described as a harsh tone, that if she wanted to sign up for shifts, Barnett would have to see her. Bauer recalls Barnett calling her and mentioning that her name was not on the signup roster. According to Bauer, she subsequently met with Barnett and told her she was free to put her name on the signup roster at any time.

The complaint alleges, and the General Counsel contends, that the removal of Barnett's name from the signup roster sometime between September 16 and February 28, and purportedly requiring her to secure authorization from Bauer to sign up for work at the ICU, were discriminatorily motivated and violated Section 8(a)(1). I am not convinced that the removal of Barnett's name from the roster was motivated by unlawful considerations.

Barnett admits that between September and February 28, she did not sign up for any ICU shifts, but contends that she did not do so was because her name had been removed from the signup roster. I doubt this was the true reason for Barnett's refusal to sign up for shifts at the ICU during the above period. Thus, Barnett did not strike me as being particularly shy about asserting her rights or complaining when she felt she had being wronged. Barnett, for example, asserted her right to distribute literature at MCI and quickly placed a call to the Union's counsel to report the incident. Further, on February 28, Barnett complained to Bauer about not finding her name on the signup roster. Yet, there is no indication that Barnett ever complained to Bauer at any time prior to February 28, about not finding her name on the signup roster. I am convinced that if Barnett had truly been interested in working shifts at the ICU during the months in question, e.g., November 1999 through February 2000, she would have, on finding her name missing from the ICU signup roster, immediately complained to Bauer and not waited until almost 4 months later to do so. Moreover, consistent with the established practice credibly testified to by Bauer, all Barnett had to do on finding her name missing from the signup roster during the months in question was to add her name to the roster or request that the staffing committee do so. Nothing in Barnett's testimony suggest that she did either of the two.

Barnett's claim that her name did not appear on the signup roster between September 1999 and February 2000, is, in any event, not entirely accurate, for Barnett's name clearly was on the signup roster for the month of October, as she signed up to work three shifts that month, and also appears on the December signup roster, as shown in Charging Party's Exhibit 12. This inconsistency in Barnett's testimony is further compounded by her statement, in response to the General Counsel's query on whether her name appeared on signup sheets prior to March 2000, that "in 1999, I saw my name on the sheets." (Tr. 413.) Finally, Bauer testified, without contradiction and credibly in my view, that it was the staffing committee, consisting of staff nurses, which made the decision to remove a name from the signup roster based on whether an individual had worked in the prior month.[44] Thus, it would appear that the employee-led staffing committee, not management, may have been responsible for the failure of Barnett's name to appear on the signup roster in any given month. In these circumstances, I find no evidence to support the General Counsel's assertion that Bar-

[44] The General Counsel contends that Bauer was not a very credible witness and that her testimony should be discounted whenever it conflicts with Barnett's testimony. To be sure, from a demeanor standpoint, Bauer was not a very impressive witness. She was at times evasive, argumentative, and somewhat hostile to the General Counsel's questioning. However, there were certain unrefuted elements of her testimony which I found convincing and have accepted as credible. Thus, her testimony regarding how names are removed from the signup roster struck me as truthful. Barnett, while more convincing than Bauer, nevertheless had her less than credible moments on the witness stand. Thus, I found Barnett was being evasive when asked by Respondents' counsel if Bauer had offered her some shifts during their February 28, discussion. Barnett's repeated "I don't recall" response simply lacked the ring of truth and struck me as being both nonresponsive and evasive. The partial crediting of Bauer's and Barnett's testimony is of no great consequence, for there is nothing unusual in a trier of fact crediting a portion of a witness' testimony and discrediting other portions. *Royal Manor Convalescent Hospital*, 322 NLRB 354, 366 (1996); *Boyertown Packaging Corp.*, 303 NLRB 441, 450 (1991); *Hill & Hill Truck Line, Inc.*, 120 NLRB 101, 118 (1958).

nett's name was removed from the ICU signup roster for discriminatory reasons, and shall recommend dismissal of this allegation.

Nor do I agree with the General Counsel that Bauer changed the manner by which Barnett was to sign up for shifts when Bauer told Barnett she would have to go to her office if she wanted to sign up for an ICU shift. Bauer testified, without contradiction and credibly in my view, that when Barnett came to her on February 28, she had already received the final schedule from the staffing committee and that, consistent with past practice, the schedule was being kept in her office. Thus, Bauer's instruction to Barnett, that she would have to come to her office if she wished to sign up for ICU work for the coming month, was consistent with what Bauer credibly testified was the established procedure employees seeking to have their names added to the final schedule regularly followed. Neither the General Counsel nor the Charging Party has presented any evidence to refute Bauer's testimony regarding this past practice. Accordingly, I find no evidence that Bauer treated Barnett in a discriminatory manner by telling Barnett to go to her office if she wished to sign up for ICU shifts. Accordingly, I shall recommend dismissal of this allegation.

2. The 8(a)(1) allegations

a. The no-solicitation/no-distribution policy

Menorah's no-solicitation/no-distribution policy is identical to HM's policy which, as found above, is itself unlawful. For the reasons discussed above regarding HM's policy, I find Menorah's policy to be overly broad and presumptively invalid. Menorah's defense, that paragraph B,2,a clarifies the more general no-solicitation/no-distribution language of paragraph B,2, and thus removes any ambiguity in the rule, was similarly raised by Respondent Research in defense of its own rule and found to be without merit. For the reasons discussed above regarding Research's defense, Menorah's argument is likewise rejected as without merit. Further, Menorah, who bears the burden of establishing that its ban on employee solicitation and distribution in nonpatient care areas was needed to prevent a disruption of patient care or disturbance of patients, has presented no evidence whatsoever to justify the ban. Accordingly, I find Menorah's no-solicitation/no-distribution rule to be unlawful and a violation of Section 8(a)(1).

b. The removal of union literature from mailboxes

In late October, employee Tuska-Wagner, accompanied by employee Leslie Daniels, was placing union literature in internal employee mailboxes when Director of Nursing Susan Malick approached and asked what they were doing. Tuska-Wagner answered that she was putting some reading material in the mailboxes, and Malick responded, "We don't allow that because I don't allow Avon and Girl Scout information; I don't allow any of those things and I don't allow this, its not in our policy." She recalls Malick stating that they could put part of it up on the bulletin board, and then proceeded to remove the literature from the mailboxes, assisted by Daniels. Tuska-Wagner, who has been employed at Menorah for 3 years, claims that she has, during the course of her employment, received numerous work and nonwork-related items in her mailbox, including birthday party notices, baby shower things, educational material, and updates from Menorah and the other Health Midwest hospitals.

Malick recalls seeing Tuska-Wagner and Daniels placing flyers in the mailboxes and telling them that "we do not allow employees to have anything but hospital business in their mailboxes." According to Malick, the employees simply said okay and asked where they could place the literature, and Malick told them they could post it on the bulletin board. Malick testified that she frequently removes personal notices and literature, such as Avon booklets, from the mailboxes, and similarly removes and discards items such as pens, pharmaceutical literature, and other literature, including union material, that have been left laying around at nurses' stations or the table in the breakroom because "this is solicitation" and "we can't have this stuff laying around."[45] On cross-examination, Malick admitted that her stated prohibition on the use of mailboxes to disseminate personal items is not contained in the express language of Menorah's no-solicitation/no-distribution policy. She further conceded that her removal of union literature from mailboxes occurred that one time only and that, thereafter, she permitted the mailboxes to be used for distribution of union literature. (Tr. 1485–1486.)

Tuska-Wagner claims that she notified Human Resources Supervisor Frankie Hagen of the mailbox incident and asked her about the policy regarding use of employee mailboxes. Hagen told Tuska-Wagner she was not sure what the policy was but would get back to her on it. On November 5, Tuska-Wagner called Hagen to ask if she had found out anything about the use of mailboxes, and Hagen told her that "it was not common practice to put non-official Health Midwest items in mailboxes." Confused by Hagen's response, Tuska-Wagner again asked whether she could or could not put other items in the mailboxes, but Hagen repeated that it was not a common practice to do so. Hagen did not testify.

I place little credence in Malick's testimony as it was both confusing and self-contradictory. As credibly testified by Tuska-Wagner, the nurses' mailboxes were routinely used by employees to circulate or distribute messages of a personal nature. Malick's testimony about having subsequently changed her mind and allowed union literature to be placed in mailboxes was tantamount to an admission that such conduct was fully permissible and not prohibited by Menorah's no-solicitation/no-distribution policy, as she originally believed. Her removal of the union literature in late October is therefore found to have been unlawful. While Malick claims that this was a one-time event and that she subsequently allowed employee mailboxes to be used for distribution of union literature, a finding of a violation is nevertheless appropriate here for Menorah never properly repudiated Malick's unlawful conduct as required under *Passavant Memorial Area Hospital*, supra. While Malick may have changed her mind and now permits

[45] The General Counsel moved to amend the complaint at the hearing to include as a separate violation of Sec. 8(a)(1) Malick's admission that she removed union literature from nurses' stations on numerous occasions. The motion was granted over Respondents' objection. (Tr. 1481–1483.)

employees to use the nurses' mailboxes to distribute union literature, there is no evidence to indicate that Malick informed employees of this change or, if she had, when that decision was made. Accordingly, I find that Malick's unlawful conduct has not been effectively repudiated and that Menorah, through Malick, violated Section 8(a)(1) by removing union literature from the nurses' mailboxes. Further, Malick's admitted conduct of routinely removing union literature from nurses' stations constituted an additional violation of Section 8(a)(1), for no showing has been made that Menorah's nurses' stations are immediate patient care areas which would justify a ban on the solicitation or distribution activities at said stations, nor evidence produced to show that a ban on such activity was necessary to prevent a disruption in patient care or a disturbance of patients.

c. The cafeteria incident

On October 27, Barnett and Tuska-Wagner, who were off that day, went to Menorah's cafeteria to solicit employees and distribute union literature. They were accompanied by Union Representatives Falbo and Michael Krivosh. Tuska-Wagner recalls that employee Leslie Daniels subsequently joined them in their endeavor. Arriving around 11 a.m., Barnett and Tuska-Wagner placed union literature, pamphlets, and brochures on a cafeteria table, and posted two union signs, one on a column next to their display table, the other taped to the back of her chair. Barnett testified, with corroboration from Tuska-Wagner, that a security guard appeared a few minutes later, followed shortly thereafter by management officials, Malick and Sheryl Sloan. A short while later, Managers Lair and Stewart also entered the cafeteria. A few minutes later, Menorah's vice president of nursing services, Dolores Sabia, approached and asked what was going on. Krivosh told Sabia she would have to direct her questions to the two nursing employees, Barnett and Tuska-Wagner. Sabia then turned to Barnett and stated, "Teresa, you know better than this; you need to gather your things and leave." Barnett replied that she had a copy of Hospital's policy which stated she had a right to be there and, after pulling out a copy of Menorah's policy (GC Exh. 21) and showing it to Sabia, Barnett read the provision stating that employees were allowed to distribute literature in the cafeteria during nonworking time. Sabia turned and began to leave, but returned and asked Barnett for her copy of the policy. Barnett declined to do so stating she did not want to give out her only copy.

Sabia then left but returned some 5 minutes later, accompanied by the director of finance, and told Barnett that under the hospital's policy she was not permitted to distribute anything she wanted but instead had to get permission as to the type of information she was allowed to distribute. Barnett replied that Sabia's comment about needing to get permission was a violation of the Act, that she did not need permission from anyone as to the type of material she could distribute and was free to distribute whatever she wanted. Sabia reiterated her position that permission was needed, and when Barnett asked who she had to see about obtaining permission, Sabia identified Human Resources Vice President Gayla Bond as the one she needed to see. Barnett then turned to Tuska-Wagner and asked what they were going to do, whether they should stay or leave. Krivosh in the meantime asked Sabia what would happen if they refused to leave, and Sabia responded that they would be escorted out by hospital security. Sabia then asked Barnett to quietly gather up her things so as to avoid a confrontation or commotion. At that point, Krivosh and Falbo left the cafeteria. Barnett and Tuska-Wagner, however, packed their material in boxes but remained in the cafeteria to have lunch. Barnett recalls that as she and Tuska-Wagner were packing their things, she noticed some flashbulbs going off and on looking up observed Allison with a camera in hand apparently taking pictures of them.

On November 1, Barnett met with Gayla Bond and Hagen, in the latter's office to discuss the October 27, incident and to get clarification regarding the Hospital's no-solicitation/no-distribution policy. Bond told Barnett that she "did not need permission to talk to employees during non-working time" or to "distribute information to employees during non-working times in areas like the break room, locker rooms, and cafeteria." However, she stated that employees were not permitted to set up a table, put materials on tables, or hang up signs, but could distribute literature in the cafeteria in a "non-disruptive manner." She further told Barnett that at other HM facilities, she would be considered as a nonemployee, and was not allowed to go to their breakrooms or distribute literature or engage in solicitation of any kind at those other facilities. (Tr. 402–403.)

Tuska-Wagner also recalled meeting with Hagen in early November, and the latter telling her that employees did not need prior approval to speak with fellow RNs about unionization, but that she, Hagen, "did not want a table or anything that resembled a booth in the cafeteria," and that employees could not use a table, or put up posters or signs, or "anything along those lines." (Tr. 648.) Hagen told Tuska-Wagner that she preferred that employees went table to table and handed things out individually in a nondisruptive manner. She also told Tuska-Wagner that employees were not permitted to stand by the entrance to the cafeteria and talk to employees as they entered and exited. When Tuska-Wagner pointed out that going table to table might be more disruptive because employees wouldn't have a chance to decide if they did or did not want a union, Hagen responded that "that is how they wanted it done; that was the preferred method." (Tr. 652.)

Barnett's and Tuska-Wagner's above undisputed testimony regarding the cafeteria incident and their subsequent conversations with Bond and Hagen is credited. Based on said testimony, I find that Menorah, through Sabia, violated Section 8(a)(1) of the Act by prohibiting Barnett and Tuska-Wagner from soliciting employee support for the Union and distributing union literature in its cafeteria, and insisting that they first obtain permission and approval from management before engaging in such protected activities. *Teletech Holdings*, supra; *Lake Holiday Manor*, supra; *Blossom Nursing Center*, supra; *Brunswick Corp.*, supra. Neither the subsequent assurances provided by Bond to Barnett or by Hagen to Tuska-Wagner, that they need not obtain permission to solicit or distribute literature in the cafeteria, constituted an effective disavowal or repudiation of Sabia's unlawful conduct under the standards outlined in *Passavant Memorial Area Hospital*, supra. I also agree with the General Counsel's assertion on brief (p. 72) that Allison's unexplained conduct of taking photos of Barnett and Tuska-

Wagner as they were packing up their union literature and taking down the union signs could reasonably have been viewed by Barnett and Tuska-Wagner, as well as by any other employees who happened to be in the cafeteria at the time, as attempts by Menorah's management to keep tabs on the union supporters. Accordingly, I find that Allison's conduct in photographing the employees unlawfully created an impression of surveillance, and violated Section 8(a)(1).[46]

F. Overland Park[47]

1. The no-solicitation/no-distribution policy

Overland Park's restriction on employee solicitation and distribution at the workplace, in pertinent part, reads as follows: (See GC Exh. 67[a]; also GC Exh. 4.)

> The solicitation of employees and the distribution of written or printed materials of any nature . . . by and to employees of our organization, is prohibited at all times in all patient care and treatment areas of our organization. This includes elevators, stairs, corridors, entrances, exits, main lobby, sitting and waiting rooms, and other areas adjoining or accessible to patient rooms and patient care or treatment areas. The solicitation of employees by employees in other areas of our organization is restricted to non-working time during the employees' scheduled hours. Employees are not to come to our facility during non-scheduled hours for the purpose of solicitation and distribution. The phrase "non-working time" as used here includes the non-working time of both the employee or employees doing the solicitation or distribution and the employee or employees to whom such solicitation or distribution is directed.

While not questioning the validity of Overland Park's prohibition on employee solicitation and distribution in patient care and treatment areas, the General Counsel nevertheless contends that the above policy's ban on that activity in areas of the hospital such as "stairs, entrances, exits, main lobby, and other areas adjoining or accessible to patient rooms and to patient care and treatment areas" "exceeds the lawful bounds of prohibition" required for such a rule to be considered valid under current Board and court precedent. (GC Br. 92.) I agree with the General Counsel, for areas of a hospital such as stairs, entrances, exits, and main lobbies are generally not viewed as "immediate patient care areas" to which a ban on solicitation and distribution would be presumptively justified. *Southern Maryland Hospital*, 293 NLRB 1209, 1219 (1989) (main entrance); *Rocky Mountain Hospital*, 289 NLRB 1347, 1360 (1988) (lobby); *Presbyterian/St. Lukes Medical Center*, 258 NLRB 93, 98 (1981) (first-floor lobby, visitors' lounge, stairways); *Eastern Maine Medical Center*, 253 NLRB 224, 227 (1980) (main lobby). Overland Park has presented no evidence to show that the extension of its ban on employee solicitation and distribution to the above-named nonpatient care areas was needed to prevent a disruption of patient care or a disturbance of patients.

Regarding the further language in the above provision banning solicitation in "other areas adjoining or accessible to patient rooms and to patient care and treatment areas," I find that language too vague and ambiguous to support a presumption of validity. Arguably, this language could be read to prohibit solicitation and distribution of union literature in hospital elevators and stairs, generally not considered patient care areas,[48] since elevators and stairs obviously provide access to floors where the patients' rooms and patient treatment and care areas are located. The Board has stated that [a]ny ambiguity in a particular prohibition "which sweeps so broadly as to put in doubt an employee's right to engage in union solicitations protected by the Act without fear of punishment by his or her employer is construed against the employer which formulated that prohibition." *Altorfer Machinery Co.*, 332 NLRB 130 (2000); Also *Eastern Maine Medical Center*, supra at 225.

The General Counsel further contends, and I agree, that the prohibition in the above rule on employees "[coming] to our facility during nonscheduled hours for the purpose of solicitation and distribution" is also unlawfully broad. In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that an employer's no-access rule for off-duty employees will be deemed valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Thus, except where justified by business reasons, a rule that denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. Here, the language at issue does not provide the clarity required under *Tri-Medical* to constitute a valid no-access rule for off-duty employees. The rule, for example, does not define the term, "facility." Thus, it is unclear if the term "our facility" in the rule applies strictly to the interior portions of hospital, or whether it also includes the outside areas of the hospital such as the parking lots, adjacent sidewalks, and outside walkways. As the judge in *Eastern Maine Medical Center*, supra at 1361, noted, with Board approval, "to be considered as not unduly restrictive of Section 7 rights, such a [no-access] provision must apparently, on its face, be limited to access to the interior of the facility." See also *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998). Overland Park's no-access rule, as noted, contains no such limitation and

[46] While not alleged as a separate violation in the complaint, this conduct was fully litigated at the hearing and is therefore properly before me for resolution.

[47] The General Counsel's unopposed motion to withdraw complaint par. 5(d)(iv), alleging that supervisor Hicks disparately prohibited employees from being at Overland Park's facility on days they were not scheduled to work, is hereby granted (GC Exh. 101 fn. 72).

[48] While the Board has upheld bans on solicitation in elevators and stairway areas of a hospital, it has done so not because it deems them to be "immediate patient care areas" but because the hospital in question had met its burden of showing that the ban was justified because the elevators and stairs at issue were predominantly used for the movement of patients and emergency equipment. See *Presbyterian/St. Luke's Medical Center*, supra. Indeed, the Board in *Presbyterian/St. Luke's* went on to find that the hospital's further ban on solicitation in areas like main entrances, stairs, corridors, which were dedicated solely to patient care but which was for general use by everyone at the facility had not been justified and was invalid.

is, at best, ambiguous, rendering it invalid under *Tri-County Medical*, supra. Nor has Overland Park offered any business justification for maintaining such an overbroad no-access rule for off-duty employees. Accordingly, Overland Park's no-access rule for off-duty employees is invalid and unenforceable.

Finally, Overland Park's policy contains a provision requiring "any employee who discovers persons making unauthorized solicitations, distributions, or postings" to report it to "his/her Coordinator or the Human Resources Department immediately." This provision too is invalid. As the General Counsel correctly points out on brief, this "reporting" provision effectively requires employees to make a subjective determination of whether the solicitation or distribution activity they observe other employees engage in constitutes a breach of Overland Park's no-solicitation policy, parts of which, as found above, are facially invalid. Thus, the possibility that employees, unaware of the unlawful nature of several of the policy's provisions, would report lawful incidents of solicitation and distribution by other employees to Respondent is very real. Such a rule clearly has an inhibiting and chilling effect on employee exercise of their Section 7 rights, for employees might very well be reluctant to engage in such lawful activity for fear that they would be reported to, and possibly disciplined by, the Respondent for such activity. Accordingly, I find that the "reporting" requirement in the policy has the effect of unlawfully restraining and coercing employees in the exercise of their Section 7 rights, and thus violates Section 8(a)(1) of the Act. *Hawkins-Hawkins Co.*, 289 NLRB 1423, 1424 (1988); *Dunes Hotel*, 284 NLRB 871, 878 (1987); *Montgomery Ward*, 269 NLRB 598 (1984). By maintaining and, as shown below, enforcing its above unlawful no-solicitation/no-distribution policy, Overland Park is found to have violated Section 8(a)(1) of the Act, as alleged.

2. The writeups of Anita Carr and Sharyn Johnson

Carr is employed as a registered nurse at Overland Park's cardiac cath lab. On October 26, she and Johnson received verbal warnings from Overland Park's CEO, Kevin Hicks, for soliciting union support and distributing union literature during their off-duty hours at various nurses' stations,[49] and because an employee had complained of feeling "compromised" by their union activities (see GC Exhs. 2[a], 3). Carr admits that she, Johnson, and a third employee, RN Jill Hollrah, distributed union literature and solicited nurses at the various nursing stations on October 23, from 12 midnight to 4 a.m. on October 23. Hicks did not personally witness their activities but rather based his decision to issue the writeups on a report he received from Overland Park's vice president of patient care, Sarah Fields. (Tr. 26.) Hicks gave two reasons for deciding to issue the writeups. First, that the activity "occurred at a nursing station," which he contends was an "inappropriate place for . . . solicitation to occur," and second, that "it occurred at a time when [Carr and Johnson were] not regularly scheduled to work . . . and had come back to the hospital for that purpose." Hicks, however, did not cite the report of an employee feeling compromised by Carr's and Johnson's union activities as a reason for the verbal warning although it is clearly reflected in the writeup.

Fields, like Hicks, did not have first-hand knowledge of Carr's and Johnson's activities, and testified that she learned of it around 4 a.m. on the day of the incident from the on-duty supervisor, Kasey Morrison, who reportedly learned of it from an employee identified only as Darbi. According to Fields, Darbi purportedly told Morrison that the union activity was taking place at the nurses' stations, and that she, Darbi, had felt "uncomfortable" with the union remarks Carr and Johnson made to her. On receiving Morrison's report, Fields instructed her that Carr and Johnson should move their activities to the breakroom. (Tr. 76–78, 86.) Fields claims she and Hicks then discussed the concerns they had with Carr's and Johnson's visit to the nurses' stations, as well as the timing of the visits, and also reviewed the hospital's solicitation and distribution policy. According to Fields, her chief concern about the activities undertaken by Carr and Johnson was one of safety. She explained that Carr and Johnson had failed to check in with security when they entered the facility during their off-duty hours. (Tr. 83.) They concluded that Carr's and Johnson's conduct amounted to a violation of the policy and agreed to issue them verbal warnings. Carr then prepared the writeups. Although Hicks, as noted, testified that there were only two reasons for the writeups, Fields included in the writeup as another reason for the discipline Darbi's alleged complaint about feeling compromised by Carr's and Johnson's union activities.[50] Fields and Hicks admitted that neither of them questioned Carr or Johnson about the October 23 events before deciding to issue the verbal warnings. Fields and Hicks thereafter met with Carr on October 26, at which time she was given the warning, attached to which was a copy of the hospital's above-described no-solicitation/no-distribution policy Hicks recalls telling Carr that the warning was being issued in part because "she was in violation of Overland Park's rules by being at its facility distributing union material at a time that she was not scheduled to work." (Tr. 26.) Hicks and Fields held a similar meeting with

[49] Carr admits she and Johnson engaged in their activities at the 2 West, 2 South ICUs, and mother/baby nurses' stations (Tr. 114).

[50] Fields' testimony regarding the Darbi incident is somewhat confusing and not very credible. Fields admits she never actually spoke with Darbi to get her version of events, and instead heard of the incident from Morrison. She subsequently claimed that she also spoke with Darbi's supervisor, Kathy Conder. Conder purportedly reported to Fields that Darbi had indicated that she was "sick of the conversation" with Carr and Johnson and didn't want to participate in it. According to the Fields, her description in the write-ups of Darbi having felt compromised came not from Darbi herself but rather from Conder who used the term because Darbi had allegedly "felt like she was in a compromised position because she could not get out of the conversation, [and] felt like she had to participate." Her entire description of this incident has the very distasteful odor of fabrication. Neither Conder, Morrison, or Darbi were called to corroborate Field's testimony in this regard. For her part, Carr, who was never asked to provide her version of events before the decision to issue the writeups was made, had no recollection of having had an encounter with an individual like Darbi who might have appeared distressed by her union talk. In these circumstances, I place no credence whatsoever in Fields' testimony regarding the Darbi incident, and consequently find that Overland Park has not established that the Darbi incident in fact occurred.

Johnson on November 1, during which he gave her the identical verbal warning that had been issued to Carr days earlier (GC Exh. 3).

Carr testified that on October 26, her supervisor, Fran Marencik, led her to Fields' office where she met with Fields and Hicks. Marencik remained in the office, according to Carr. Hicks proceeded to tell Carr that he hoped she would not feel intimidated or threatened by the fact that she was outnumbered, and Carr responded that she did not feel threatened because she was among friends. Hicks then explained the reason for writeup. Carr recalls Hicks stating that it had come to his attention that she had been passing out literature at the nurses' station and that such conduct "was a violation of the solicitation and distribution policy." Carr acknowledged engaging in union talk with employees and distributing literature at the Hospital's nurses' stations and admitted her conduct contravened the Hospital's no-solicitation/no-distribution policy. Hicks proceeded to hand Carr a copy of the policy, expressed his intent to enforce it, and informed Carr that she was not allowed to be at the nurses' station during nonworking hours. Fields then spoke up and mentioned to Carr that certain union literature had been found in a surgical area restroom to which patients and employees had access and that this was not an appropriate area for such literature. Hicks added that it was Carr's responsibility to know where the proper areas were for the placement of such literature. Carr admitted knowing what her responsibility was in that regard but remarked that it was not her responsibility to maintain the literature after she had placed it in the appropriate places. Carr further testified that she found the writeup to be "fairly objective," and recalls that Hicks and Fields gave her an opportunity at that meeting to give her side of what occurred on October 23, and to ask questions about the writeup. (Tr. 115–116.) She also recalled reading the part in the writeup about an employee feeling compromised by her activity but testified she had no knowledge who the employee was or of having had any discussion with an employee on October 23, who might have felt compromised. In fact, she denied having an angry or hostile exchange with anyone during the course of her October 23, activities. Johnson did not testify in this proceeding, nor was the individual who purportedly first called Morrison to complain either fully identified or called as a witness.

I agree with the General Counsel that the disciplinary writeups of Carr and Johnson were unlawful. Thus, I reject as without merit Overland Park's claim that it was justified in issuing the writeups to Carr and Johnson because of their failure to comply with its no-access rule for off-duty employees, for said rule is, as found above, invalid and unenforceable under *Tri-County Medical Center*, supra, and any disciplinary action taken pursuant to an unlawful no-solicitation rule is likewise unlawful. *Saia Motor Freight Line, Inc*., supra. Overland Park's further defense, that Carr and Johnson were lawfully disciplined for engaging in such activities at the nurses' stations, also lacks merit. Nurses' stations, as previously discussed, are generally not considered immediate patient care areas, and a ban on employee solicitation and distribution in such areas is therefore presumptively invalid unless Overland Park can establish that the ban was needed to avoid a disruption in patient care or a disturbance of patients. Overland Park, I find, has made no such showing here. Accordingly, I find that the writeups issued to Carr and Johnson violated Section 8(a)(3) and (1) of the Act.

3. Additional 8(a)(1) allegation

On November 18, Carr, Johnson, and employee Stephanie Lininger, all of whom were not scheduled to work that day, went to Overland Park's cafeteria to solicit employee support for the Union and distribute literature. They were accompanied by Union Organizer Krivosh. Upon arriving, somewhere around 11 a.m., these three employees used a table to place their union literature, and propped up on a chair a sign containing the Union's mission statement. Carr claims that soon after setting up the display, Hicks approached and, after acknowledging knowing both Carr and Johnson, asked Lininger her name and whether she worked for Overland Park. After Lininger identified herself as an employee of the Hospital, Hicks asked all three employees if they were scheduled to work that day, and each replied they were not.

Addressing himself to Carr and Johnson, Hicks told them that while he had not discussed this particular issue with them during their October 26 disciplinary meetings, "according to the policy that I gave you, you are not supposed to be here soliciting or distributing on your non-scheduled day to work." Hicks then showed them a copy of the Hospital's policy, stating that as CEO of the Hospital, he was going to enforce the policy and asked them to leave. Carr responded that she already had a copy of and was being guided by Health Midwest's corporate policy which, in her view, permitted her to be in the cafeteria during nonscheduled worktime. As she attempted to hand Hicks a copy of HM's corporate policy, Hicks refused to accept it, stating, "I am enforcing the policy that I gave you and according to that policy, you are not allowed to be here. I am going to have to ask you to leave and you definitely can't have your signs up." When Carr asked if there was a definite policy banning the use of signs, Hicks stated he was not sure and would check on it, but that when he returned the signs had to be down. Carr then asked what would occur if they were not down, but Hicks repeated that they had better be down, and left the area.

However, he returned some 15 minutes later by which time Carr and Johnson had taken down the signs. On his return, Hicks told Carr and Johnson (Lininger had already left) that as CEO of the Hospital, he was going to enforce the policy and demanded that they leave the premises. Carr declined to leave, stating she had a right to be there. Hicks, who from Carr's perspective appeared to be getting upset, again insisted that they leave, but Carr replied that the Hospital's policy violated the law because she had a right to be in the Hospital. Hicks responded that if Carr had a problem with the Hospital's policy, there were proper grievance channels she could follow. Carr answered back that that had already been done on her behalf by the Supreme Court in its *Beth Israel* decision. When Carr sought to provide him with literature pertaining to that decision, Hicks became upset, demanded that she and Johnson leave, and asked what they were going to do. Carr replied that she was staying put. Both sides kept repeating their respective positions, and at one point, Hicks asked how they would feel if he

got "a bunch of supervisors to stand around your table." Carr responded that she had no problem with that, and asked if Hicks wanted to read her literature. Hicks, who apparently was sitting down by now, got up, took a handful of the literature from the table, and remarked, "You are going to have to leave." Krivosh intervened at this point, telling Hicks that he was violating Carr's and Johnson's rights, and advising that they were leaving. Hicks asked Krivosh who he was, and the latter, according to Carr, replied either, "I am Michael," or "That doesn't matter, we will leave now." When Hicks extended his hand and introduced himself to Krivosh, Krivosh simply told him they were leaving, picked up the union material, and departed.

Hicks' testimony regarding this incident corroborates Carr's version of events. Thus, he admits having an encounter with Carr and Johnson in the Overland Park cafeteria, but could not recall when it occurred, or if Lininger was present. He recalls telling Carr and Johnson that they were not permitted to distributed literature during their nonscheduled workday, and basing his decision on the language in the above-cited no-solicitation/no-distribution policy which, inter alia, states that "[t]he solicitation of employees by employees in other areas of our organization is restricted to nonworking time during the employees' scheduled hours. Employees are not to come to our facility during non-scheduled hours for the purpose of solicitation and distribution." (See GC Exh. 4.) Hicks confirms that Carr made mention of Health Midwest's policy and recalls telling her that he intended to enforce Overland Park's, not Health Midwest's, policy. He had some, albeit vague, recollection of mentioning to Carr about having supervisors sitting around their table. Finally, he admits directing Carr and Johnson to remove the signs, and asking them to leave the premises.

Hicks' conduct in prohibiting Carr and Johnson from soliciting and distributing union literature in Overland Park's cafeteria during their nonscheduled work hours, and in evicting them from the hospital premises, was clearly unlawful, for it was based on a no-access rule for employees which, as the General Counsel correctly points out and as found above, does not pass muster under *Tri-County Medical Center*, supra, as it is not, on its face, limited to the interior portions of Overland Park's actual facility but could reasonably be read to include the exterior portions of the Hospital's premises. Hicks' above conduct therefore violated Section 8(a)(1) of the Act. Further, I agree with the General Counsel that Hicks' remark to Carr and Johnson, on how they would feel if he had supervisors surround their display table, was coercive and violative of Section 8(a)(1). As found above, Carr and Johnson were within their rights to solicit and distribute literature during their nonwork time in the cafeteria, a nonwork area. Hicks' above suggestion about having his supervisors surround Carr's and Johnson's display table, came in response to Carr's insistence that she had a right to be in the cafeteria distributing literature and was staying put, and was clearly intended to coerce Carr and Johnson into ending their Section 7 activity in the cafeteria. As such, Hicks' remark was unlawful and, as stated, a violation of Section 8(a)(1).[51]

G. Respondent Lee's Summit Hospital

1. The 8(a)(1) allegations

a. The no-solicitation/no-distribution policy

Lee's no-solicitation/no-distribution policy is virtually identical to that maintained by Respondents HM and Research. Accordingly, for the reasons stated above regarding the latters' policy, Lee's no-solicitation/no-distribution policy is found to be overly broad and presumptively invalid. As Lee neither claims, nor presented evidence to show, that its ban on employee solicitation and distribution in nonpatient care areas during nonworktime was necessary to avoid a disruption of patient care or disturbance of patients, its maintenance of such an overly broad rule violates Section 8(a)(1) of the Act. It further violated Section 8(a)(1) by distributing the Q&A memo (see discussion above about HM's distribution of the Q&A memo).

b. Supervisor Dean McKim's interrogation of employees Joan Wheeler and Dana Forred

The complaint alleges that Respondent Lee, through McKim, unlawfully interrogated RN's Wheeler and Forred, both of whom are directly supervised by McKim. Wheeler and Forred both provided testimony regarding this incident. Wheeler testified the incident occurred on January 17, in the breakroom as she ate lunch. The breakroom, she explained had bank of mailboxes for the general use of nurses. As she sat in the breakroom, Forred entered and they began some general talk about their children. Soon thereafter, McKim entered the breakroom, pulled some union literature that was stored in a nurse's mailbox and asked them what they thought of it. Forred replied, "[I]t's about time." Both Wheeler and Forred testified that McKim then went on to make additional comments as to what to expect if the Union came in. While there are some minor variations in their respective testimony as to what McKim said, Wheeler and Forred essentially corroborate each other regarding McKim's remarks.

A composite of their testimony reveals that following Forred's "it's about time" response to McKim's inquiry on how they felt about the Union, McKim went on to say that in some ways, "having the union at Lee's Summit Hospital would make my job easier." By way of example, McKim pointed out that if any disciplinary action had to be taken against a nurse, he would not have to handle it himself but would instead defer it

[51] While Hicks' comment was not specifically alleged as a violation in the complaint, the matter was fully litigated at the hearing and is therefore properly before me for consideration. The General Counsel contends that Hicks also threatened Carr and Johnson with unspecified reprisals by insisting they have the union signs down by the time he returned from checking on whether Overland Park had a policy prohibiting the posting of signs in the cafeteria. The General Counsel, I fear, reads too much into Hicks' remark, for I find nothing particularly coercive or threatening in said remark. Accordingly, I disagree with the General Counsel that Hicks' remark in this regard amounts to a violation of the Act.

the union steward, or that if a nurse needed an unexpected day off for any emergency at home, he would not have to get involved with it and would again defer the matter to the union steward. According to Wheeler, McKim further stated that "in a situation where we were short staffed and needed help, he would no longer be required to come in and help us because only dues-paying union nurses would be able to care for patients at the bedside," commented that the unionization of Lee's Hospital "would make it difficult to hire new nurses," and suggested that nurses who refused to work mandatory overtime could be fired once the union was on the scene. Along these lines, Forred recalls McKim stating that overtime would be mandatory once the Union came in, that the Union would dictate to employees when to strike, and that employees would not have a say in the matter. His last words to them, Wheeler recalls, was that by unionizing, the nurses "would cause the hospital to be shut down and that management and ancillary staff would be offered other positions at other facilities, but not necessarily the union nurses." When Wheeler asked whether he, McKim, really believed the Hospital would close down, McKim replied, "Yes I do, I believe that's what would happen." Forred recalls that following this latter remark by McKim, she commented that his remarks "could be construed as a threat." McKim replied, "I'm not threatening you, I just want you to know the facts." (Tr. 576–578, 583–586.) McKim was not called to testify. Accordingly, I credit Wheeler and Forred and find that McKim made the above remarks to them following his initial question regarding the union literature.

The complaint alleges, and I agree, that McKim unlawfully interrogated Wheeler and Forred by asking what they thought of the union flyer. The inquiry was clearly intended to ascertain how both felt about the Union. Forred's reply that it's about time suggests that Forred understood the question to mean how he and Wheeler felt about the Union. While not denying that the above incident took place, Respondent does argue that McKim's single inquiry on how Forred and Wheeler felt about the Union was neither coercive nor unlawful under *Rossmore House*, supra. I disagree, for McKim, as noted, did not confine her discussion to this one question but rather immediately followed the question with what I find were unlawful threats of more stringent working conditions (e.g., mandatory overtime, staff shortages), a closure of the facility, and a loss of jobs if the Union were brought in. In this regard, I reject as without merit Respondent Lee's contention that McKim was simply expressing his opinion as to the likely negative results that might occur if the Union was certified, for nothing in Forred's and Wheeler's description of McKim's remarks suggests that they were factually based or reflected "demonstrably probable consequences beyond Respondent Lee's control." *Gissel Packing Co.*, supra at 618. Consequently, I find that McKim's threats of more adverse working conditions, business closure, and job loss violated Section 8(a)(1) of the Act. Viewed against this background, McKim's initial inquiry of how Wheeler and Forred felt about the Union was neither harmless nor innocuous. Rather, given the unlawful threats that followed, I am convinced this "single question" by McKim was intended to serve as a prelude to McKim's real purpose of discouraging Forred and Wheeler, via the threats made by McKim, from supporting the Union. In these circumstances, and considering the background of hostility and other unlawful conduct in which it occurred, McKim's question is found to have been coercive and a violation of Section 8(a)(1).

H. Respondent VNA/VNS

VNA/VNS, as noted, is a home health care agency owned and operated by Respondent Health Midwest which delivers home health care to patients in eleven counties around the Kansas City, Missouri metropolitan area using registered nurses, physical, occupational, and speech therapists, medical social workers, and home health aides. While its principal office, as stated, is in Kansas City, Missouri, it also maintains an office in Lexington, Missouri, some 50 to 60 miles east of Kansas City. Its Kansas City location is situated in a building owned by Trinity Lutheran Hospital from which VNA/VNS leases its facility. (See GC Exh. 68[b].) As noted, on January 19, the Union filed a petition seeking to represent VNA/VNS' nurses, which was served on VNA/VNS on January 21. In addition to the various unfair labor practice allegations discussed below, VNA/VNS is also alleged by the Union to have engaged in objectionable conduct which interfered with the election held March 30, requiring that it be set aside and that a new election be conducted. I address first the complaint allegations.

1. The 8(a)(1) allegations[52]

a. The no-solicitation/no-distribution policy

As previously noted, VNA/VNS' policy, with minor modification (see discussion at sec. II,A above), is virtually identical to Respondent HM's corporate policy. For the reasons set forth above regarding the invalidity of HM's corporate policy, VNA/VNS' is likewise found to be overly broad and unlawful under the holdings in *Beth Israel Hospital v. NLRB*, and *St. John's Hospital*, supra, as its prohibition on employee solicitation and distribution in areas to which patients have access, like HM's policy, clearly extends to nonpatient care areas, and VNA/VNS has offered no evidence to justify that the ban on solicitation and distribution in nonpatient care areas was needed to avoid a disruption of patient care or disturbance of patients.

On brief, VNA/VNS argues that because its nurses provide nonacute care to patients in their homes rather than in its offices, "the only location where the challenged portion of the solicitation and distribution policy could be read to prohibit organizing activities would be in the homes of the patients VNA serves" Such a policy prohibiting solicitation and distribution in the homes of patients, it argues, is not overbroad or objectionable. (R. Br. 53.) Its argument is without merit. There is, for example, no evidence that Respondent VNA/VNS ever advised its employees to disregard the express language of its rule prohibiting solicitation and distribution in areas typically found in a hospital setting, or that its no-solicitation/no-distribution policy should be construed by them as extending to patients' homes. Indeed, the operative words here are con-

[52] The General Counsel's unopposed motion to withdraw, for lack of evidence, complaint par. 5(g)(vii), alleging that Supervisor Cindy Miller unlawfully interrogated employees sometime in November is granted. (GC Br. 17.)

tained in Respondent's own argument, to wit, that the policy *could be read*, not that it should be or was intended to be read, as applicable to home settings rather than hospital settings. Clearly, if VNA/VNS intended its no-solicitation policy to apply only to home care settings, it could have easily modified its existing policy to reflect that intent. As it did not do so, the policy remains as written, leaving employees to read and understand the policy to mean that they were precluded from exercising their Section 7 right to solicit and distribute union literature not only in patient care areas of a hospital facility, but also in nonpatient care areas of that facility.[53] Accordingly, by maintaining an overly broad no-solicitation/no-distribution policy, VNA/VNS is found to have violated Section 8(a)(1) of the Act, as alleged.

b. Alleged unlawful conduct by Supervisor Cheryl McKee

McKee serves as VNA/VNS' manager of central intake and of the hospital home health coordinators and has supervisory authority over nurses, including RNs Jean Buford and Rita Murphy. Buford and Murphy testified regarding statements made to them by McKee in late October or early November. Buford recalls McKee asking her and Murphy into her office and stating that she wanted to discuss some union activities that were going on at VNS. According to Buford, McKee told her and Murphy that if they joined a union, it could affect their jobs. McKee, Buford further recalls, mentioned that if they formed a union, insurance companies that currently had contracts with VNA/VNS "would not want to do business with our company, and VNS may lose its insurance contracts . . . because they would be fearful of working with a company that would strike." Buford testified she felt McKee was trying to intimidate them and was frightened by her remarks because supervisors had previously told employees that "if we don't please Blue Cross, we can lose our contract." (Tr. 863–872.) Murphy provided limited testimony regarding this particular meeting.[54] Thus, she recalls McKee rhetorically asking them if insurance companies would want to sign contracts with a home health agency whose nurses might go on strike."

Although called as a witness, McKee was not questioned about, and consequently did not deny, the remarks attributed to her by Buford and Murphy. Accordingly, I credit Buford and Murphy and find, in agreement with the General Counsel, that McKee effectively threatened Buford and Murphy that supporting or bringing in the union would result in a loss of jobs. I find nothing in Buford's or Murphy's description of McKee's remarks to suggest that the latter was simply making a fact-based prediction of economic consequences beyond VNA/VNS' control if the Union were brought in. *Gissel Packing*, supra. The threat of job loss was connected solely to the Union's arrival. Given Buford's admission that she felt intimidated and frightened by McKee's comment, McKee's threat may indeed have achieved its intended effect. McKee's remarks were therefore unlawful and a violation of Section 8(a)(1).

Employee Jean "Nora" Hersh has worked for VNA/VNS as an RN for 10 years. She testified to having a conversation with her supervisor, McKee, concerning the Union sometime in November. According to Hersh, during this November conversation McKee asked her to step outside the office building and then asked her if she was aware of the union activity taking place at VNA/VNS. Hersh recalls McKee explaining that she wanted to talk outside because "we could not talk about Union activity in the building, in our department in particular, because we had freestanding walls, and not solid walls."[55] Hersh responded to McKee's inquiry by stating she had heard rumors, at which point McKee asked how she felt about it. Hersh told McKee she would listen to the pros and cons of a union but that was leaning towards supporting the Union as she had family members who were affiliated with a union. She recalls McKee stating that she did not have to answer any of her questions, but gathered from McKee's facial expressions that the latter wanted her to respond. Hersh's testimony regarding this incident was not contested by McKee.

Hersh claims she had another encounter with McKee in or around mid-February as she was walking down a hallway in her office area. On that occasion, McKee saw her and asked aloud what her position was regarding the Union. Hersh responded that she was still prounion and that her father and brother both were union members and had done quite well for her family. McKee responded that that was when Hersh was still young, and not now that she was married. She then asked Hersh if her family had suffered at all now, and Hersh replied that her husband had recently been outsourced from his job of 21 years and lost all his benefits, and commented that if he had had a union he might have been able to keep some of his benefits. McKee replied, "If you'd had a Union, he probably would have lost his job."

A subsequent conversation between the two took place on March 22. Hersh testified, without contradiction, that she was called to McKee's office that day and, once there, McKee began discussing how the Union would strike if brought in, and stating that while the Union would probably include a no-strike provision in their contract, it could nevertheless strike before the contract went into effect. Hersh was reluctant to get into any discussion on the subject, and when McKee at one point

[53] The term "immediate patient care area" is, in my view, broad enough to include within its definition a patient's home when the home, rather than a hospital facility, is being used to medically treat the patient. In these circumstances, a ban on solicitation and distribution in a home care setting would, under *Beth Israel Hospital v. NLRB*, supra, be presumptively valid. Here, however, VNA/VNS' policy makes no reference whatsoever to home health care settings. Rather, a plain reading of the restrictions on solicitation and distribution contained in VNA/VNS' policy makes clear that they were intended to apply to hospital, not home health care, settings. (See GC Exh. 67[b].)

[54] Murphy provided limited testimony not because she had no further recollection of anything else being said by McKee during this meeting, but because the General Counsel chose not to pose any additional follow-up questions in an effort to exhaust her recollection of that incident. (Tr. 1294.)

[55] I read McKee's remark about not wanting to talk about the Union inside VNA/VNS' offices not as a ban on such discussion but rather as an effort on her part to avoid having what she was about to say to Hersh overheard by others. Thus, I do not agree with the General Counsel that McKee's remark about wanting to discuss the matter outside was itself unlawful.

asked, "Aren't you going to talk?" Hersh replied, "No comment." McKee asked Hersh if that's the way it was going to be, and Hersh again repeated that she had no comment to make. McKee, however, continued to pepper her with questions and after stating several more times that she had no comment, Hersh finally stated, "I just wish not to argue the situation with you, the issue." McKee replied that they did not have to argue, and Hersh responded, "Well, then I wish not to debate it with you." McKee then pulled out and showed to Hersh a pamphlet containing statistical information on the amount of weeks of work and the money lost by employees due to strikes. McKee further mentioned that their department would soon be receiving some personal computers, but that if the nurses went on strike and Hersh honored the strike, she would not be available to receive the training on the computers needed to perform her job. At some point, Hersh got up to leave and as she started to walk away, McKee commented, "Well, I can't believe that our working relationship has gotten this bad." Hersh turned around and replied that their working relationship has never been bad. According to Hersh, she and McKee had always been friendly with each other and gotten along well, and were able to have friendly discussions about their families, except when they discussed the union. (Tr. 828.)

I find that McKee's questioning of Hersh in November and again in February regarding her views on the Union, and her repeated attempts in March to engage Hersh in a discussion about the Union, constituted unlawful interrogations. In so finding, I note that these were not isolated incidents. Rather, as will be shown below, McKee's unlawful conduct was directed at other employees as well and, more importantly, occurred against a background of hostility and additional unlawful conduct engaged in by other VNA/VNS management personnel. In these circumstances, McKee's interrogations of Hersh were clearly coercive and violations of Section 8(a)(1). *Westwood Health Care Center*, supra. I also find that McKee's February remark about how Hersh's husband would have lost his job if he had had a Union amounted to an implied threat of a similar consequence to Hersh if she continued to support the Union and violated Section 8(a)(1). I further find that McKee's March comment to Hersh on how the Union's arrival would result in a loss of work and money, and her suggestion that Hersh might not receive the computer training needed to perform her job if she supported the Union during a strike also violated Section 8(a)(1), as they constituted retaliatory threats of loss of work, diminished compensation, and loss of benefits should the Union prevail. *Yolo Transport, Inc.*, 286 NLRB 1087, 1092 (1987). Finally, McKee's comment about the deterioration in their working relationship after Hersh refused to engage in any discussion about the Union would reasonably have conveyed to Hersh that McKee would now view their working relationship in an unfavorable light. I find McKee's remark in this regard constituted an implicit threat that Hersh would now be treated differently because of her refusal to engage in union talk with McKee, and violated Section 8(a)(1) of the Act.

RN Marilyn Farrell, employed as a hospital home health care coordinator by VNA/VNS primarily at Kansas University Medical Center (KUMC), is also supervised by McKee. She testified that on or about January 26, she was in the KUMC cafeteria with fellow employee Ruth Theis and McKee, and that the latter during that conversation told her and Theis that Health Midwest had already notified VNS that it would close VNS if the Union got in. Theis did not testify.

McKee was asked about and did recall having a conversation with Farrell and Theis on January 26, during which they discussed "potential concerns as far as Union activity." She explained that this conversation came about following some concerns expressed to her by various job applicants she had been interviewing. McKee claims that during these interviews, the applicants, who were formerly employed by St. Luke's Hospital, volunteered to her that they had been "downsized" by St. Luke's Hospital, another area hospital, and that they were concerned about the future of home health care and that, while still part of the St. Luke's Health system, feared they may not be in the future. McKee testified that she shared the concerns of these job applicants with Farrell and Theis, and told them "there was a potential that may happen with [VNA/VNS] or Health Midwest" because the latter were similar in their working capacities with St. Luke's Health System. McKee recalls that following her discussion of what the applicants had disclosed to her, Farrell asked if McKee was threatening them, and McKee purportedly responded that what she was saying was "not a threat, its just a potential assumption." McKee recalls further mentioning to Farrell and Theis that if the Union were to win the upcoming election, its victory, coupled with the anticipated changes that were expected in Medicare reimbursement methods, "may really affect the productivity at VNA and our ability to survive dollar-wise."

Clearly, McKee's version of the January 26, conversation differs from that provided by Farrell. Although McKee provided a more detailed version of that encounter, I found her account unpersuasive. Initially, nothing in McKee's version explains why she would have brought up the issue of the Union with Farrell and Theis following her alleged discussions with the job applicants from St. Luke's. Thus, even if I were to believe, and I do not, that McKee had such discussions with the former St. Luke's employees, nothing in her description of what they said to her suggests that St. Luke's problems were somehow union related. Thus, McKee's version reflects only that St. Luke's may have been "downsizing" its operations. I am more inclined to believe Farrell's assertion that McKee told her and Theis that Health Midwest had already decided to close its VNA/VNS operations if the Union got in. Regarding McKee's comment, no evidence was produced to establish that such a decision had in fact been made by Health Midwest or VNA/VNS. Further, if intended as a prediction, McKee's remark that VNA/VNS would close was not carefully phrased on the basis of objective fact to convey VNA/VNS' belief as to demonstrably probable consequences beyond its control, as required by *Gissel Packing*, supra. Accordingly, I find that McKee's remark constituted an unlawful threat that VNA/VNS would close its facility if the employees voted to bring in the Union. *Madison Industries*, 290 NLRB 1226, 1229–1230 (1988).

Farrell also testified that on March 24, she met with McKee in a VNS conference room to discuss some difficulties she was having adjusting to KUMC and felt that her coworker, Theis,

who had been at KUMC longer than Farrell, was not being very supportive. McKee suggested that Farrell may be going through things all new employees go through but that in time she, Farrell, would probably be more accepted at KUMC. She further suggested that maybe Farrell should bake some cookies so as to endear herself to the KUMC employees. Farrell stated her belief that there were other things at play, citing as examples Theis' alleged refusal to let Farrell know when she had a phone call, and her belief that Theis spoke negatively about her in conversations with other employees. McKee, at that point, told Farrell, "You know, your feelings on the Union aren't helping things, I'm sorry, your feelings on certain issues aren't helping things." When Farrell replied that she was able to separate her feelings about the Union from the workplace, McKee responded that "not everybody can do that, that people that were anti-union were feeling very strongly about not having a union, that they felt their future was in jeopardy." McKee then added that before a contract was signed, the nurses might have to go on strike, and then handed Farrell a document, similar to one McKee had handed to Hersh, reflecting how a strike would adversely impact Farrell's salary and cause her financial hardships. Farrell took the document and left.

I find McKee's March 24 comments to Farrell to be unlawful. VNA/VNS' suggestion on brief, that McKee was merely attempting to help Farrell feel more comfortable in her work environment, ignores the fact that McKee, rather than attempting to mediate whatever problem existed between Farrell and Theis, instead laid the blame for Farrell's difficulties on her support for the Union, and proceeded to tell Farrell how her support for the Union would lead to a strike should the Union win, which would, in turn, result in adverse job consequences, such as a loss of wages and financial hardship for Farrell. Thus, rather than helping Farrell feel more comfortable, McKee's remarks I am convinced would have had opposite effect. More importantly, McKee's threats of job loss and other financial hardship were, in my view, clearly designed to coerce Farrell into withdrawing her support for the Union. As such, they violated Section 8(a)(1) of the Act.

McKee is also alleged to have unlawfully interrogated RN employee Patricia Gallagher on or about February 18. Gallagher explained that McKee invited her to her office and then commented that she had seen Gallagher on TV and in the newspaper. Gallagher replied, "Oh, you saw that did you?" McKee said yes, and then asked, "What are your feelings or your thoughts about the Union?" Gallagher told McKee she had just begun to learn about it and was trying to keep an open mind. She further explained that she had been very cautious about not learning much of the Union yet because she needed to concentrate on learning her new job in Central Intake, and had told fellow workers who asked her to attend union meetings that she was not interested. Gallagher's testimony was not contested by McKee and is therefore credited and found to have constituted an unlawful interrogation in violation of Section 8(a)(1). As found above, McKee's conduct in this regard was simply one of many instances of coercive interrogations and other unlawful conduct committed by McKee, rendering it coercive. *Westwood Health Center*, supra.

On March 3, McKee had another meeting with Gallagher during which she gave the latter a copy of VNA/VNS' tardiness guidelines and stated that several employees, including Gallagher, had not been coming to work on time, and that this would have to change because with the Union coming in, "things were going to be stricter and we had to be there on time." Gallagher recalls that on March 13, she was late for work due to car trouble. She claims she notified McKee about her problem and her inability to find a ride to work, and asked if McKee could count this as a sick day as she was also recovering at the time from a recent operation. McKee told her she would have to come and was counting on her being at work. Gallagher eventually made it to work that day at around 11:30 a.m. and met with McKee. Gallagher sought to negotiate with McKee about not getting written up for her tardiness that day. McKee agreed not to write her up. One week later, after Gallagher had put in her timesheet for the week, McKee called her and stated that she had not written her up for being tardy on March 13, but would not negotiate with her in the future, and pointed out that "if the Union came in, there would be no further negotiations." Gallagher also recalls McKee stating that she knew Gallagher was for the Union and which employees would be voting for and against the Union. (Tr. 1001.) Finally, while she could not recall when it occurred, Gallagher recalled McKee also commenting that she knew Gallagher was angry at Health Midwest. Gallagher responded, "Well, you know as well as I do that Health Midwest frequently doesn't treat their employees very nicely." McKee then brought up the subject of negotiating over tardiness stating that "if the Union comes in, there will not be any further negotiations with her," and that "she would not be able to help us in any way, even to pick up a piece of paper to do a referral."

I find McKee's March comments about things becoming stricter, and that she would no longer negotiate with Gallagher over her tardiness or help employees in any way, were clear threats of harsher working conditions which VNA/VNS would impose on employees if they chose the Union to represent them, and not a permissible prediction made on the basis of objective facts to convey VNA/VNS' belief as to demonstrably probable consequences beyond its control. *Gissel Packing*, supra. The threats were therefore coercive and unlawful, and violated Section 8(a)(1) of the Act. *Fieldcrest Cannon*, 318 NLRB 470, 484 (1995); *St. Vincent's Hospital*, 244 NLRB 84 (1979); *Fidelity Telephone Co.*, 236 NLRB 166 (1978).

c. Alleged unlawful conduct by admitted Supervisor Cindy Miller

Miller is alleged to have unlawfully interrogated RN Tera Watkins about her union sympathies sometime in mid-January, and again on or about February 22; and interrogated RN Julie Giltner in or around late February. Miller is also alleged to have threatened Watkins on or around March 29, with more onerous working conditions if the Union were brought in. Both Watkins and Giltner testified; Miller did not.

Regarding the Watkins' incidents, the latter testified that she been working for VNA/VNS for a short period of time and had not yet met Miller who she identified as her "clinical manager." In mid-January, she went to Miller's office and introduced

herself to Miller and, after some small chat, Miller remarked, "I'm sure you're aware that there has been some Union activity at VNS." Watkins answered yes, that she had received some flyers in her mailbox and had spoken to nurses about it. Miller then proceeded to ask Watkins what she thought about the Union. Watkins sought to avoid giving Miller a direct answer by stating that she had learned about Unions while in college and at first thought it was a good idea, but that the more she got to learn her job she was no longer sure a union would be a good idea. The conversation ended at that point. I credit Watkins' undisputed account and find that Miller's mid-January questioning of Watkins on how she felt about the Union amounted to an unlawful interrogation. In so doing, I note that Miller's questioning of Watkins was simply part and parcel of a larger pattern of interrogations and other unlawful antiunion conduct engaged in by VNA/VNS. *Westwood Health Care Center*, supra. Watkins' attempt to avoid giving Watkins a direct answer to her question suggests that she may have feared revealing her prounion sympathies. In these circumstances, and given that the questioning occurred in Miller's own office, I find that the interrogation was coercive and in violation of Section 8(a)(1) of the Act.

Watkins testified to meeting with Miller again on February 22, soon after attending a meeting conducted by Supervisor Richard Roberson involving the Union, to review some matters discussed at a staff meeting. Watkins recalls that the first thing Miller did was to hand her a copy of the AFT constitution, a union financial statement, and other documents she could not identify. When Watkins remained silent on receipt of the documents, Miller asked her, "You're not going to talk to me about this, are you?" Watkins replied, "No," that she did not want to talk about it and was tired of talking and hearing about it, noting that she had just come from Roberson's meeting where the sole topic was the ongoing union activity. Miller then asked how the Roberson meeting had gone, and Watkins proceeded to mention some of the issues that were brought up, including the nurses' mistrust of management and how there were issues that the nurses felt should have, but were not, addressed. Watkins proceeded to tell Miller about the problems she herself was having at VNS, such as her workload, safety issues, travel to unsafe neighborhoods, etc. Miller at that point became aggravated with Watkins and with her face turning red, asked Watkins, "Well, what do you think the Union is going to do about that?" Watkins responded that at least there would be somebody that she could talk or go to if she had problems like that. According to Watkins, Miller conceded that she had a point. Miller's renewed attempt, a little over a month after her prior unlawful interrogation of Watkins, to draw the latter into another discussion of the Union despite the latter's stated unwillingness to do so, amounted to a further unlawful interrogation and violated Section 8(a)(1). I also find that Miller's rhetorical question, on what Watkins thought the Union could do on the issues Watkins felt needed addressing, implicitly conveyed to Watkins that support for the Union was an exercise in futility because the Union would be unable to solve her job-related concerns. Miller's remark in this regard is also found to be a violation of Section 8(a)(1). *Zartic, Inc.*, 277 NLRB 1478, 1480 (1986).

Finally, Watkins testified to receiving a voice mail from Miller on March 29, the day prior to the Board election stating she, Miller, had seen Watkins' picture on a prounion poster and commented that she believed the Union "was not the right way to go for nursing." Miller then criticized Watkins about not coming to the office often enough, and about her paperwork being sometimes a week or two late. Miller went on to tell Watkins that if the Union were voted in, her job performance may not be acceptable and that the Union might file a grievance if it believed Watkins was receiving special treatment. Miller then suggested that Watkins reconsider her position. Watkins claims she felt threatened by Miller's voice mail message and that on informing Miller about her feelings, Miller apologized, stating that she did not intend for the voice mail to be threatening but that she had tried on several occasions to discuss the matter with her but felt Watkins was avoiding her. Miller's remarks, I find, constituted a threat that the Union's arrival on the scene might lead to more stringent working conditions for Watkins, and violated Section 8(a)(1).

As to Giltner, the latter testified that sometime in mid- to late February, she was in Miller's office when Miller reminded her that she had a mandatory meeting with Roberson at 10 a.m. that morning. Giltner told Miller she had a very heavy load of patients on her schedule and that she could either go to the Roberson meeting, or tend to her patients. Miller then asked what Giltner's stance was on the Union, and Giltner replied she was prounion. Miller replied that there was therefore not much point in her attending the meeting, that she should proceed with her patients' visits, and that if any change occurred Miller would let her know. Giltner had a second conversation with Miller by phone on March 28, 2 days prior to the election, during which she mentioned seeing a prounion poster with Giltner's photo and signature, and wanted to verify if Giltner had authorized it. Giltner replied that she had, at which point Miller stated that she was just checking because this was something she needed to verify with everyone identified on the poster.

Miller's questioning of Giltner regarding her stance on the Union clearly served no legitimate purpose and was designed simply to ascertain whether or not she was a union supporter. Miller made no effort to explain the purpose of the meeting, although implicit in her response is that the mandatory meeting would be focusing on union matters. I find it highly unlikely, given Miller's other unlawful conduct, that Miller's question was merely an innocent attempt to ascertain whether or not to "justify" allowing Giltner to skip the meeting. Miller certainly knew what the meeting was about, otherwise she would have had no need to ask the question in the first place. Knowing full well that the purpose of the meeting was to address union issues, Miller could have made a determination on her own as to whether Giltner's attendance at this meeting was more important than having Giltner attend to her patients, and could therefore have excused Giltner from attending without asking Giltner where she stood on the union issue. Accordingly, I find that Miller's question to Giltner on where she stood on the Union was coercive and violated Section 8(a)(1).

d. Alleged unlawful conduct by admitted Supervisor Pat Tenner

RNs and fellow coworkers Jacqueline Mosier and Celeste Michelson testified to an incident that occurred in late January involving their immediate supervisor, Tenner. Both testified that as they were in a team room engaged in a personal conversation, Tenner approached them and made comments about the Union. Michelson recalls Tenner first handing them a small packet and stating that she would not spend too much time talking because she knew where Mosier and Michelson stood. Both Mosier and Michelson testified that Tenner then stated, "[I]f the Union got in, Health Midwest would cut us loose." Mosier recalls Tenner adding that she did not think VNA/VNS could survive. She also recalls telling Tenner, "Oh, Pat, Health Midwest won't cut us loose; they need a home health component," and Tenner answering, "Oh, I don't know about that." Tenner did not testify. Accordingly, I credit Mosier and Michelson and find that Tenner's remarks constituted an unlawful threat that Health Midwest would shut down its VNA/VNS operations if the Union got in. Nothing in Mosier's or Michelson's description of Tenner's comment about Health Midwest cutting VNA/VNS loose should the Union prevail was based on objective facts conveying VNA/VNS' belief as to demonstrably probable consequences beyond its control. *Gissel Packing*, supra. Tenner's remark is therefore found to have violated Section 8(a)(1).

e. Alleged unlawful conduct by admitted Supervisor Sarah Kerr

RN employee Marcia Garman testified that sometime in early to mid-December, her supervisor, Kerr, told her that "if the Union came into [VNA/VNS], she [Kerr] could lose her job." Garman expressed surprise at Kerr's remark and replied that she could not imagine that would happen. Kerr, however, stated that "if the Union came in, the nurses would make a lot of demands, and in order for VNA/VNS to meet the demands . . ., they would probably have to let some of the supervisors go." Kerr did not testify. VNA/VNS, in any event, does not deny the remarks were made. Rather, its description of Kerr's remarks as speculative is tantamount to an admission that Kerr made the remarks. (R. Br. 47.) I therefore credit Garman and find that Kerr's remark constituted an implied threat of more adverse working conditions should the Union prevail. By VNA/VNS' own admission, Kerr's statement that the nurses' bargaining demands would be so excessive as to cause VNA/VNS to let supervisors go, was speculative and not based on fact. Garman, therefore, had no way of ascertaining the truth of Kerr's assertion, but could reasonably have believed, given Kerr's supervisory position, that she was speaking with some authority, and expressing VNA/VNS' intent to dismiss supervisors should the nurses' demands at the bargaining table be excessive. Dismissing, and thereby reducing, the number of supervisors assigned to staff nurses would in all likelihood negatively impact the manner in which nurses performed their work, thereby adversely affecting their working conditions. In these circumstances, I find that Kerr's remarks were coercive and violative of Section 8(a)(1).

Garman testified, again credibly and without contradiction, to another conversation with Kerr on or around March 7, during which the latter told her that if the Union got in, VNA/VNS would not be so flexible with the nurses as it had been in the past. According to Garman, when nurses in the past needed time off for a doctor's or dentist's visit, Kerr had allowed them to take an hour or two without being docked for the time, provided there was sufficient staff available to cover the work. On other occasions, Kerr had been flexible by allowing nurses to make up the time by coming in earlier or working through their lunch break. Kerr, however, stated that with the Union's arrival, "they wouldn't be flexible with us anymore," that nurses would be docked for the time off, or would have to take either vacation or sick leave. Kerr went on to say that if nurses went out on strike once the Union came in, VNA/VNS would use the strike against them by freezing all raises and insurance benefits during the negotiation process. Under the current system, according to Garman, nurses received periodic raises based on a yearly evaluation in addition to a yearly cost of living increase.

The General Counsel contends, and I agree, that VNA/VNS, through Kerr, violated Section 8(a)(1) by telling Garman that if the Union came in, employees would no longer enjoy the flexibility they currently enjoyed, *Mercy General Hospital*, 334 NLRB 100 (2001), and by stating that wages and other benefits would be frozen. *Pyramid Management Group, Inc.*, 318 NLRB 607, 608 (1995).

Utilization nurse employee, Patricia Sue Smith, testified credibly and without contradiction, that on March 6, she sent Kerr an e-mail requesting the afternoon off to take her son to an orthodontic appointment. (GC Exh. 40.) Kerr called Smith and approved her request for time off. The following morning, Kerr, according to Smith, caught her in the hallway and stated, "Susie, I just want you to know that if the Union gets voted in, I [Kerr] may not be able to grant you time off like I did yesterday." Smith also testified that on March 22, she sent Kerr another e-mail requesting several days off as vacation days, one of which was March 30, the date of the Board's election. (GC Exh. 41.) Kerr then sent Smith an e-mail on March 23, approving, with some modification, the vacation days requested by Smith. (GC Exh. 42.)

On March 30, one of her requested and approved days off, Smith served as the Union's observer during the Board election. On April 4, Kerr summoned Smith to her office and presented her with a disciplinary writeup for being off on March 30. Smith objected stating she had in fact requested that day off in her e-mail. Kerr replied that if she had, she apologized for the error. Kerr began looking through her folder of employee e-mails but could not find Smith's e-mail. She then got up, went to her office, and returned a short while later with a folder which contained Smith's e-mail. Kerr told Smith that she had been right all along and apologized to Smith for the error.

The General Counsel contends, and I agree, that Kerr's March 7, remark to Smith about how she would not be able to grant Smith any time off if the Union came in, was unlawful and a violation of Section 8(a)(1). *Mercy General Hospital*, supra. I do not, however, agree with the General Counsel that Kerr's further conduct in questioning Smith about being off on

March 30 was unlawful. Thus, I am convinced that Kerr simply misread Smith's initial e-mail requesting time off. Kerr, as noted, immediately apologized to Smith for the mistake and no disciplinary action was ever taken against Smith due to this error. I find the allegation on wrongdoing by Kerr regarding this incident to be tenuous at best and insufficient to sustain an 8(a)(1) finding.

f. Alleged unlawful conduct by CEO and admitted Supervisor Richard Roberson

Gallagher testified to attending a staff meeting in late February during which Roberson told employees, "I promise you that if the Union comes in, I will be adversarial. Garman recalled attending a meeting conducted by Roberson during which Roberson made a similar remark to a group of some 15 nurses. Thus, she recalls Roberson stating that if the Union came to VNA/VNS, Health Midwest would get them the best attorneys that money could buy, and they would make negotiations very difficult for the nurses. Roberson then put up a pie chart purporting to show where VNA/VNS' money was going, and stated that there "there really wasn't any room left for the nurses to get any more than they had or were currently getting." Finally, she recalls Roberson commenting that things were going to be very adversarial between management and nursing if the Union came in. Gallagher's and Garman's testimony was unrefuted. On these facts, I am inclined to agree with the General Counsel that Roberson, through his remarks, sought to convey the impression that supporting the Union would be an act of futility because VNA/VNS intended to make negotiations very difficult, implicitly suggesting, in my view, it would not bargain in good faith, and because it had no money to give. His further remark about management becoming very adversarial with the nursing staff was a clear threat that employees could expect more arduous working conditions. The above remarks, I find, were coercive and violations of Section 8(a)(1). *Hahn Property Management Corp.*, 263 NLRB 586 (1982).

g. Alleged unlawful conduct by admitted Supervisor Carol Cronkhite

Uncontradicted testimony by employee Mary Ellen Hill reflects that she attended an employee meeting in late February conducted by Supervisor Cronkhite during which the latter told employees that if the Union was voted in, "people who needed allowances for child care would not have as much leeway as they presently have," and that "possibly supervisors would not be allowed to go and do home visits when the field staff [nurses] needed relief from home visits." I credit Hill's unrefuted testimony and find that Cronkhite's remarks, which VNA/VNS neither contends nor has shown them to be, based on objective facts, constituted unlawful threats of more adverse working conditions should the Union be brought in, in violation of Section 8(a)(1) of the Act.

h. Alleged unlawful conduct by RN Connie Grisham

Employee Grisham is a nonsupervisory employee of VNA/VNS. The record reveals that on March 29, the day before the election, Grisham used VNA/VNS' voice mail system to send an antiunion message systemwide to all of VNA/VNS nurses.[56] In her voice mail, Grisham identifies herself as an employee and gives her reasons for opposing the Union. Roberson testified that he became upset on learning of Grisham's message because Grisham was not authorized to use the voice mail system to send personal messages. He claims that on hearing the message on the morning of March 29, he consulted with legal counsel and, soon thereafter, spoke with John Timmerman, Grisham's immediate supervisor, and asked him to call Grisham in as he wanted to talk to her. Grisham showed up at Roberson's office the following day, March 30. At this meeting, Roberson claims he told Grisham that her use of the voice mail had been inappropriate, that it was not to be used to express an individual's personal opinions, and that he felt her conduct called for her to be counseled. Grisham apologized to Roberson stating she did not know the voice mail was not be used in that fashion. This, according to Roberson, ended the conversation.

The General Counsel contends that Grisham was an agent of Respondent VNA/VNS rendering the latter liable for the alleged misconduct. VNA/VNS concedes that had the message been sent by one of its supervisors, it would have violated the Act. It contends, however, that Grisham was not an agent of VNA/VNS when she sent the message and that her conduct is therefore not attributable to it. I find merit in VNA/VNS' contention.

In ascertaining whether an employee is acting as agent of an employer while making a particular statement, the Board applies common law principals of agency. The test used by the Board is whether "under all the circumstances, the employees would reasonably believe that the alleged employee agent was reflecting company policy and speaking and acting for management." *Cooper Industries*, 328 NLRB 145 (1999). "In making this determination, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." An employer may have an employee's statement attributed to it if the employee is held out as a conduit for transmitting information from management to the other employees. Id. Here, there is nothing in Grisham's statement to suggest that the latter was speaking for VNA/VNS when she transmitted her voice mail to all employees. Grisham's message makes clear that she was expressing her views on the Union after gathering her own facts regarding how it would benefit her. There is no record evidence to indicate that Grisham, at any time prior to transmitting her message, had acted on VNA/VNS' behalf in other matters, or served as a conduit of information for VNA/VNS. In sum, I find the General Counsel has not demonstrated that Grisham was acting as VNA/VNS' agent when she transmitted her voice-mail message so as to render VNA/VNS liable for her conduct, and shall recommend dismissal of this allegation.

i. The March 30 activities outside VNA/VNS' office

At around 5:30 a.m. on the morning of the Board's March 30 election, union organizers and VNA/VNS employees, along

[56] A tape recording of the message was received into evidence as GC Exh. 69. A transcript of that recording was also received into evidence as GC Exh. 16.

with employees of Menorah Hospital, gathered at the parking lot outside VNA/VNS' premises to greet and hand out flowers and balloons to employees as they entered the facility presumably to vote and report for work. Employee Deanna Jones testified she was part of the group, and had arrived around 6 a.m., about the time the polls were scheduled to open. She recalls seeing around 15 employees and some 5 union organizers already at the scene. Jones recalls that as the group was setting up the helium gas tank for balloons some 20–30 yards from the entrance, a couple of security guards approached and told them they had been instructed to ask the group to leave. At one point, Union Agent Krivosh, who was in the group, told the security guards the nurses were exercising their rights and had an absolute right to be there. Soon thereafter, Roberson appeared and engaged in discussions with members of the group. Jones recalls hearing Roberson stating that "this is very adversarial and that we needed to leave." In response to his adversarial remark, Jones and other employees yelled that they were simply handing out flowers and having a good time, that they worked for VNA/VNS and were not leaving. Roberson replied, "[Y]ou nurses need to go in the building and you need to go somewhere or go in the building or to work, you can't loiter here." Jones recalls Roberson commenting that he was going back inside and calling either his attorney or consultant. Following Roberson's departure, Krivosh called the group together and told them he did not want to create an environment where the police would be called, and told the employees they had an absolute right to stay, but that he and the other union agents would move away from the area to the public sidewalk. According to Jones, Roberson returned a short while later, accompanied by some security guards and by Jan White, and began talking to another group of employees which included employee Theresa Barnett. Jones claims she heard Roberson tell the group that they had to leave, that this was a public entrance and that the building was private property owned by Trinity Lutheran Hospital. White at that point tugged on Roberson's shirt as if to pull him away. Roberson, according to Jones, seemed to be getting upset during his discussion with the group.

Employee Mosier testified in like fashion as to the activities outside the VNA/VNS offices on the morning of March 30. Thus, she recalls security guards coming out and stating that they had been instructed to move the group to the curb because they were blocking the entrance. Barnett, Mosier recalls, told the guards they were not blocking the entrance and were not going to move. According to Mosier, Roberson came out soon thereafter and stated, "You VNS nurses get in the building, the rest of you get to the curb." Barnett responded, "We're engaged in lawful Union activity protected under Section 7 of the National Labor Relations Act, and we are not moving." Mosier recalls Barnett telling Roberson that he was making this confrontational. Mosier, like Jones, further recalls seeing White tug on Roberson's shirt and head back inside the building.

Barnett testified she arrived at the scene shortly after 5:30 a.m. to help hand out flowers to employees entering to vote. She stayed until 10 a.m., but returned and continued her activities around 12:30 p.m. Like Jones and Mosier, she recalls security guards coming out followed a short while later by Roberson. The security guards, according to Barnett, first inquired of the group if they were employees, but when Roberson came out, he told the entire group they had to leave the property. Barnett told Roberson that she had a right to be there as she was a Health Midwest employee, and did not intend to leave. Barnett further told Roberson that it was his and the security guards' presence which had caused employees to gather in a large group and resulting in a confrontation, to which Roberson purportedly replied, "If you think this a confrontation, you wait until the Union gets in." Roberson went inside at that point. A short while later, security guards came out again, asked the group of they were all employees of Health Midwest, and when the group in unison responded, "Yes," the security guards told them they were going to have to leave the property. Barnett responded that she was participating in protected activity under the Act. Barnett then noticed Roberson and White standing a few feet away. She recalls Roberson telling employees to get off the property or to go to the end of the driveway. Barnett again responded that she was not leaving and recommended that Roberson review Section 7 of the Act and he would understand why she was not leaving. Roberson and White then went back inside and the guards left the area.

Roberson's testimony regarding the events of March 30, understandably differ in some respects from that provided by Jones, Mosier, and Barnett. He recalls there being union organizers present that morning, along with some VNA/VNS employees he recognized and some individuals who identified themselves as Health Midwest employees. He testified he stepped outside where the employees were on three occasions, the first with a security guard, the second with White, and the third with White and a security guard. The security guards, he noted, were not employed by VNA/VNS but were instead hired by Health Midwest to protect the facility.[57] During his first trip outside, Roberson recalls telling the group that they had to leave, that "this was a public entrance, that they had no right to block it." Roberson recalls that one of the guards might have expressed the need to get the Kansas City police involved. He claims that he went back inside and returned a second time a short while later to instruct the group to move away from the entrance and that, if they wanted, they could go a green space adjacent to the parking lot near the cross street. Roberson did not recall any employee stating that they had a right to be there and would not move, nor did recall telling employees of VNA/VNS to go inside. He did recall someone mentioning the word adversarial, and reference being made to Section 7 of the Act.

I credit Jones, Mosier, and Barnett over Roberson regarding the events of March 30. Roberson seemed somewhat argumentative and not very cooperative. Roberson seemed angry at having been brought to testify. He constantly glared angrily and almost defiantly at the General Counsel, and repeatedly shook his head as if expressing disdain for the entire proceeding. His overall poor demeanor, coupled by his repeated, "I

[57] The record does not make clear who the security guards worked for. Although Roberson suggests they had been retained by Health Midwest, the building, as noted, is owned by Trinity Lutheran Hospital. There is no indication in the record of any relationship between Trinity Lutheran Hospital and Health Midwest.

don't know" to questions posed to him, lead me to reject his testimony as simply not credible. Jones, Mosier, and Barnett, while providing slightly different accounts of the March 30 incidents, nevertheless corroborated each other in most respects and, in my view, testified in an honest and truthful manner.

The General Counsel contends, and I agree, that Roberson's attempt to remove the VNA/VNS employees, the Health Midwest employees, and the union organizers from the areas in the parking lot adjacent to the building entrances was unlawful. Although a lessee of the building, VNA/VNS has not demonstrated, nor so much as argued on brief, that it possessed a sufficient interest over the area in question, e.g., the parking lot, entitling it to exclude said individuals from the property. *Food for Less*, supra; *Indio Grocery Outlet*, supra. Having failed to meet its burden of demonstrating the requisite property interest, VNA/VNS' attempt to exclude the various groups from the parking lot area adjacent to the buildings entrances violated Section 8(a)(1). I also agree with the General Counsel that Roberson's remark to Barnett, that VNA/VNS intended to be confrontational with the Union, constituted a veiled threat that VNA/VNS' approach to bargaining would not be a good faith one but rather confrontational in nature.

2. The 8(a)(3) allegations

a. Deanna Jones' January 26 writeup

At all relevant times herein, Jones was employed by VNA/VNS in its performance improvement department. Her primary duties involved dealing with compliance, regulatory, and reimbursement issues, and the performance of audits. In December, Jones was reviewing a chart audit to identify the documents that needed to be sent to Medicare for reimbursement of services. On reviewing the chart, Jones noticed that there were no 485s in the medical records.[58] Unable to find a form 485 for a particular patient, Jones sent the therapist who provided the treatment, Denise Kendall, a voice-mail message asking her to provide the 485 if available. On December 29, Kendall replied by voice mail that she was unable to locate the 480 in question. Jones subsequently spoke with Kendall in person and said that "it looks like we're going to have to write off these visits." Kendall became defensive and replied that she never gets to see the 485s and does not know if she has work orders or not, and suggested that Jones do something about the situation. Jones then went to her office and sent a voice-mail message to most of the therapists on her work roster telling them about the need for them to ensure that they received the 485s and suggesting that if matters did not improve they should organize or do something to resolve the problem.

Jones also sent Kendall a separate voice mail letting her know of the action she had taken. Jones also sent an e-mail to Director of Regulatory Affairs Sue Habinger and Clinical Manager Cronkhite, with copies to her immediate supervisor, Sarah Kerr, to Rehab Coordinator and Supervisor Denise Fine, and to Social Work Coordinator Nancy Cossey regarding the 485s. (See GC Exh. 30.) In her e-mail, Jones expresses her frustration at how the practice of therapists not receiving 485s has been allowed to continue, and suggests that, if necessary, therapists should file a grievance as a group to resolve the problem. Jones notes in her e-mail her intent to notify Roberson of the problem. That same day, Jones sent Roberson an e-mail revealing her concerns and frustration regarding the 485s. (GC Exh. 31.) Later on December 29, Fine responded by e-mail to Jones stating therein that the problem discussed by Jones in her earlier e-mail was in the process of being remedied. Thus, Fine notes in her e-mail that clinical secretaries and managers had been given instructions that 485s were to be photocopied and forwarded to all active disciplines. Fine goes on to acknowledge that "things aren't perfect yet" and that in her conversations with therapists, she had learned that "some secretaries are better than others about given them a copy of the 485." (GC Exh. 32.) On receipt of Fine's e-mail, Jones immediately sent another e-mail to Roberson, attaching to it Fine's response, apologizing to Roberson for her earlier memo to him because she had just learned from Fine that the problem was being fixed. (GC Exh. 33.) Later that day, Jones received an e-mail from Habinger notifying Jones that the problem about the 485s was being solved. Habinger concluded her e-mail by noting that "[t]his is an old/new problem which should be resolved now." (GC Exh. 35.) Jones claims that she heard no more about this incident until almost one month later, e.g., on January 26.

Jones, however, testified to an incident with Roberson that occurred on January 19. That day, Jones recalls, she met with some 8–10 employee union organizers in the VNA/VNS reception area and from there went to Roberson's office. Jones claims she tapped on the door, observed Roberson seated at his desk facing his computer, and asked to speak with him. Roberson gestured her inside and as he turned to face Jones, noticed that she was accompanied by a group of employees. Jones then handed Roberson a letter, a copy of which she read aloud to him, asking that he voluntarily recognize the Union as the employees' exclusive bargaining representative. (GC Exh. 36.) Before she could finish reading, Roberson, according to Jones, interrupted to say he was "very upset and angry" at them for doing this, that it had caught him at his worst. He then stated he would not agree to this because he didn't think it was good and that it was not what the agency needed. Jones recalls Roberson stating how much the agency had been through, that he didn't know what this is going to mean. He indicated that he had been trying to improve things, and pointed out by way of example that he was trying to get laptop computers for nurses to help with the paperwork, and was working on that just as they walked in. He then commented that now with the union stuff, he didn't know what was going to happen with the laptops, and didn't know if he would have time now to work on it. Jones recalls that at one point, Roberson turned to her and commented, "I'm really upset and angry about you doing this." Jones replied that they were not there to fight or argue with him, and that they could negotiate such matters later on. She then directed Roberson to the bottom of the letter and com-

[58] Before a therapist could provide physical therapy to a patient, he or she must have a form 485 from a physician authorizing the treatment. The form was apparently needed by VNA/VNS to receive compensation from the Federal Government pursuant under the Medicare/Medicaid programs. A therapist who provided therapy without a physician's authorization risked losing his or her license.

mented that the employees wanted to run the campaign without having to be pulled away from their work and without coercion, and suggested that he read the bottom portion of the letter she had given him containing the request for recognition. With that, Jones and the others left Roberson's office. Jones went back to her office and a short while later Roberson came by to speak with her. In her office, Roberson repeatedly told Jones that he was really angry and hurt by her conduct in coming to his office without prior notice, and after repeating this theme, told Jones, "Don't ever do this again."

Roberson's version of the above incident is that Jones and several other employees barged into his office and demanded recognition from him on the Union's behalf. He had no recollection, however, of what Jones said to him, claiming he was so "taken aback by these people barging into my office" that he just started reading whatever it was they were reading, but could not remember what was said. He does, however, recall asking Jones and the group what they were doing barging into his office, and telling them he did not intend to do anything, would not read their letter, and would not recognize anything. Roberson remembered little else about that encounter, stating his inability to recall stemmed from the fact that Jones' and the other employees' conduct in barging into his office was so disruptive and so against everything he had seen his nurses do, that it almost brought his secretary to tears. Roberson admits being aware prior to this incident of the Union's organizational campaign.

On January 26, Jones was called to Jan White's office and, with Kerr and Habinger present, given a disciplinary writeup for the December 29, e-mail to Habinger and Cronkhite. White testified that on January 5, she, Habinger, former HR director, Dennis Johnson, and Kerr met to discuss a written complaint filed by Denise Fine regarding the voice mails and e-mails Jones had sent. White claims Fine felt the messages had "created some stress and tension between the [Rehabilitation Therapy and Utilization Management] departments." According to White, she met three times with management to try to resolve this complaint and to review the facts regarding Jones' conduct. White testified that at the first meeting, she did not have a copy of Fine's complaint with her, and that she essentially asked those present if they had reviewed Jones' file and whether there had been any problems with Jones in the past. White claims she understood from the meeting that Fine believed Jones was creating a problem between her therapists and herself (Fine) regarding receipt of the 485s and had become frustrated by Jones' actions. White purportedly met a second time with the supervisors Kerr and Habinger on January 17, during which she expressed the view that Jones should receive an oral warning for her conduct. White claims she conducted an independent investigation into Fine's complaint by reviewing Jones' personnel file, along with any and all documentation Fine had submitted, including copies of the e-mails sent by Jones on December 29. On January 26, she called Jones into the office and gave her the oral warning writeup.

The writeup described Jones' tone in the e-mail as angry. It critiqued Jones for complaining about a method for handing 485s when a system had already been set up to address the problem, and stated that Jones' voice mail to the therapists had been based on incorrect information. (See GC Exh. 18.) White, according to Jones, explained that the delay in giving her the oral counseling writeup occurred because she had recently taken over the position around January 5 or 6, but had not assumed her duties because of a death in the family. She claims that she found the notice of corrective action that should have been given to Jones earlier still on her desk when she returned to work and decided to follow up on it. As Jones read the writeup, White stated that she wanted Jones to understand that they should be working as a team, and that if she had a problem or concern she should go to her supervisor and let her know and work together on it. After reading the writeup, Jones told White that she had based her statements in the e-mail about the 485s on comments made to her by a well-respected therapist, and that she herself knew that this had been a longstanding problem dating back to the 1980s. Jones then inserted her own remarks in the writeup and left.

Roberson testified that the day after Jones received her writeup, he and White met to discuss the matter. He recalls White informing him of the writeup during that meeting and saying something to the effect that Jones admitted, "[S]he was wrong in her broadcasting that message."

Jones recalls that Kerr also left and both went to a conference room where they had a lengthy conversation. According to Jones, Kerr began talking about a 4-hour "pride diversity" workshop she had attended and provided information about the workshop to Jones. At one point, Kerr mentioned that it might already be too late for Jones as she had already made up her mind about the Union. Kerr went on to say that she nevertheless felt it was important to let Jones know about the class, and how Health Midwest is spending a lot of money on the class, and that this was evidence that Health Midwest was interested in improving things. Kerr acknowledged that there were problems at the workplace, that it had been a tough 2 years with all the merging of the agencies, and went on to tell Jones that "now you've gotten our attention and you know that we've got to improve things and we're asking for another year," and that if things did not improve in a year, Jones could do it (e.g., the union drive) all over again. Kerr further told Jones that a "No" vote against the Union might actually be more beneficial and give Jones more power because VNA/VNS would not know if it would eventually have a union and would be under closer scrutiny, consequently giving her more power than if she did have a union. Kerr then repeated that it might already be too late for Jones because Jones had already made up her mind, but that as she had not yet voted, it was not really over "until the fat lady sings." Kerr went on to express her appreciation to Jones for being able to put her opinions about the Union aside and being able to work together. She added that she did not want Jones to think that she would have similar conversations like this every day with Jones but that she had wanted to share this information with that day and that they could now "just go on and carry on work as usual." (Tr. 609–610.) Kerr, as noted, did not testify. I credit Jones' above account regarding her conversation with Kerr.

The General Counsel contends, and Respondent VNA/VNS denies, that Jones was unlawfully issued the oral warning writeup because of her union activities. Applying a *Wright*

Line analysis, I find that the General Counsel has made a prima facie showing sufficient to support an inference that the writeup was motivated if not wholly, at least in part, by Jones' involvement with and leadership role in the Union's campaign. There can no be no doubt given the January 19 incident in Roberson's office that the Respondent VNA/VNS was fully aware of Jones' active involvement with the Union. Further, the numerous 8(a)(1) violations found herein to have been committed by VNA/VNS' supervisors and managers over an extended period of time provides ample proof of VNA/VNS' animosity towards the Union and its supporters. The timing of the warning, 1 week after Jones made her January 19 request for recognition on Roberson, supports an inference that the warning was unlawfully motivated by her union activities. The fact that VNA/VNS waited almost 3 weeks before informing Jones that it did not approve of her e-mails and voice mails of January 30, lends further support to such an inference. In sum, I find that the General Counsel has satisfied his *Wright Line* burden, and that the burden now rests with Respondent VNA/VNS to establish that it would have issued the writeup regardless of Jones' union activity.

VNA/VNS has not, in my view, satisfied its burden here. Initially, I was unimpressed by White's testimony as to the circumstances surrounding issuance of the writeup. Her explanation as to the reasons for the writeup was somewhat confusing and contradictory. White, for example, failed to provide a straight answer as to what exactly Jones had done to merit the writeup. Thus, asked why the writeup was issued, White explained that it was the e-mail Jones sent the therapists that triggered the writeup. White was clearly wrong in this regard for Jones never e-mailed the therapists but rather sent individual voice mails to only certain therapists. Indeed, the writeup itself is wrong for it states that Jones broadcasted a voice mail "to all therapists," when clearly she did not. Rather, Jones testified, credibly and without contradiction, that she sent the voice mail to a select group of therapists, and that she did so individually, rather than through a general broadcast. Although White claimed to have reviewed a log used to record voice mails that are sent out, the log was never produced. White also claimed that the writeup was initiated based on a complaint she received from Supervisor Fine around January 5, regarding the December 29 e-mail and voice mails sent by Jones. Fine, however, never testified, nor was the complaint allegedly prepared by her ever produced, leading me to infer that Fine was not called because her testimony would not have supported VNA/VNS' explanation for the writeup, and that no such complaint was submitted by her to White, as testified to by the latter. In short, White's testimony lacks any independent corroboration. White's uncertainty at the hearing as to what it was that Jones had actually done wrong to merit the writeup undermines the writeup's very validity, as does the fact White, by her own admission, never bothered to obtain Jones' version of events before issuing her the writeup.

Finally, I agree with the General Counsel that there was nothing offensive or false about the e-mail messages Jones sent on December 29, to the supervisors. As noted, in her response memo to Jones, Fine readily admits that a problem regarding distribution of the 485s to nurses had in fact existed but was in the process of being remedied. Further, Habinger's statement in her e-mail to Jones, admitting that the distribution of the form 485 was "an old/new problem" supports Jones' claim as to the existence of such a problem. In short, I find Respondent VNA/VNS has not demonstrated that it would have issued Jones the warning even if Jones had not been a union supporter. I therefore further find that the warning issued to Jones was indeed motivated by her union activities and violated Section 8(a)(3) and (1) of the Act, as alleged.

b. The March 29 disciplinary writeup of Mary Porter

Porter worked for VNA/VNS as a visiting field nurse making home visits to patients pursuant to a physician's order. She was also an active union supporter. Thus, her name and photo were included in a poster, along with other union supporters, that had been posted at VNA/VNS' facility during the week of March 27 and March 28. (See GC Exh. 29.) Porter recalls that on March 28, Supervisor John Timmerman called her aside and commended her on the work she had done the previous week particularly since she was apparently working in a newer territory, asked her to keep up the good work, and whether there was anything he could do to help her out. Porter replied that she was currently doing OK, but was currently at her limit in terms of patients to be seen, and would let him know if she needed help. Timmerman told her to let him know if he could help her out in any way.

On March 29, Porter received a call on her pager from Julie Azinger. On returning Azinger's call from her cell phone, Azinger told her she needed Porter to do an admissions. Porter responded that she didn't think she could handle another admission because she was currently behind on her paperwork from the four admissions she had done the previous week. She told Azinger that while she was available to do a visit, she could not do another admission. According to Porter, the admissions process requires the completion of some 17 forms and is a very lengthy process lasting some 2 hours. Soon thereafter, on returning from her lunch break, she received a message from Timmerman to call him. A short while later, she received another message to call the home office to pick up a voice-mail message. As she was on highway heading south, she pulled over and answered the message and spoke with Timmerman. Timmerman told her she was needed to do an admissions that same afternoon. Porter told Timmerman that she did not think she could handle another admission as she was already behind on her paperwork from the four admissions she had the week before. She recalls telling Timmerman that she was still unaccustomed to the new territory she was covering and that while she might be able to take on another visit, she did not feel she could do the admissions because of the extensive amount of work involved. When Timmerman asked if she was refusing to the admissions, Porter replied that she was not refusing but simply stating that she did not think she would be able to handle the additional work. Timmerman told Porter that he wanted to speak to her the following day.

Porter met with Timmerman and another supervisor, Evelyn Cooper, at around 8:30 a.m. on March 30, at which time Timmerman gave her a disciplinary writeup for her refusal to do an admissions the previous day. Timmerman told her that

her offense was classified as a category I offense punishable by discharge. He further stated that Porter had been insubordinate which was grounds for dismissal but that he was letting her off easy. Porter protested to Timmerman that giving her a notice of corrective action was wrong as she had never previously been told that declining or refusing a visit was grounds for disciplinary action. She further told Timmerman that she had, in the past, refused visits and/or admissions and not only had she not been disciplined for such refusals, it had not even been called to her attention that they had a problem with refusals. Porter testified that in the past she had both accepted add-on patients for admissions and likewise declined to accept additional admissions on numerous occasions. She estimated that she had on at least 24 other occasions declined to accept additional patient admissions or visits without repercussions or being cautioned against it. Nurses Mosier, Watkins, Giltner, and Charley Ducklow similarly testified to having on past occasions turned down requests by staffing coordinators and supervisors to take on an additional patient and were never reprimanded or disciplined for doing so.[59]

The General Counsel, I find, has made a prima facie showing under *Wright Line* sufficient to support an inference that the writeup issued to Porter on March 30, for refusing to take on an additional admissions assignment was motivated by antiunion considerations. The evidence, in particular, the poster visibly placed in VNA/VNS' facility containing her name and photo identifying her as a union supporter, establishes Porter as having been engaged in union activity when the writeup was issued. Further, while there is no direct evidence showing that Respondent VNA/VNS had actual knowledge of Porter's union sympathies, Watkins' and Giltner's above-described credited claims that Supervisor Miller contacted and questioned them about their photos on the same poster, makes patently clear that VNA/VNS' management was fully aware of the poster and that the employees shown thereon, including Porter, were union supporters. Finally, the numerous 8(a)(1) violations committed by VNA/VNS amply establishes its antiunion animus. The timing of writeup, just a day or so after the union poster showing Porter as a supporter, and on the very day the Board's election was being held, and just 2 days after Timmerman had praised Porter for her good work and offered to help her out in any way he could, provides a strong inference that the writeup was unlawfully motivated by union considerations.

VNA/VNS, for its part, has not presented any credible evidence to rebut the General Counsel's prima facie case. Thus, there is no evidence to show that its discipline of Porter was consistent with any past practice. Indeed, the opposite appears to be true, for Porter's claim of having refused similar assignments in the past without any adverse consequence was, as noted, corroborated by nurses Mosier, Watkins, Giltner, and Ducklow who testified that they too had declined to accept additional assignments without suffering any repercussions. VNA/VNS did introduce into evidence as Respondent's Exhibit 1, a notice of corrective action issued to Porter in November 1998 for "refusing to take a client's call," presumably to support its position that Porter had previously been disciplined for similar conduct. Respondent's Exhibit 1, in my view, does not support VNAVNS' case, for the writeup issued to Porter on March 30, was not for refusing to answer a client's call, but rather allegedly for refusing to take on an additional admissions patient. More importantly, the 1998 warning was issued to Porter not by VNA/VNS but by a prior employer. VNA/VNS' need to produce Porter's disciplinary record from a prior employer regarding an unrelated disciplinary matter, coupled with its failure to produce records of its own showing employees were regularly disciplined for refusing assignments, leads me to believe that, as testified to by Porter and the other nurses, no such discipline has been imposed on employees in the past for declining to take additional assignments of new admissions or new patients. A blatant disparity in treatment is sufficient to support a prima facie case of discrimination. *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998) In sum, I find that Respondent VNA/VNS has not satisfied its burden of showing that it would have issued the writeup to Porter on March 30, even if she had not been a union supporter. Timmerman, I am convinced, learned of Porter's union involvement soon after praising her work and used Porter's refusal to take an additional assignment as a pretext to retaliate against her for her decision to support the Union. Accordingly, I find that the writeup issued to Porter was unlawful and a violation of Section 8(a)(3) and (1) of the Act.

c. The writeups of Gallagher and Hersh

The record reflects that on May 1, Gallagher and Hersh received disciplinary writeups from their supervisor, McKee, for excessive tardiness. (GC Exhs. 45, 55.) Respondent VNA/VNS maintains written tardiness guidelines for employees which defines the tardiness standard and the disciplinary action to be taken based on an employee's tardiness record. (R. Exh. 7.) Thus, the standard, found in paragraph A,1 of Respondent's Exhibit 7, defines the tardiness standard as "no more than two occasions of tardiness within 10 consecutive work shifts or no more than seven occasions of tardiness within 40 consecutive work shifts." A "consecutive work shift" refers to the employee's scheduled work shift. The disciplinary action to be taken for breach of the tardiness standard is set forth in C,1 and C,2 of Respondent's Exhibit 7, and reads as follows:

> 1. An oral counseling should occur when an employee's tardiness record reaches the tardiness standard. . . ." When the employee's tardiness record reaches this point and comes to the attention of the supervisor, the supervisor should counsel the employee concerning his/her tardiness record. Documentation of the meeting should be included in the department's employee file.
>
> 2. An oral warning concerning tardiness should be given if the following two conditions are met:

[59] Porter testified, without contradiction, that at one point near the end of the meeting, Cooper stated to Porter that "[s]ome people are not cut out for home care." The General Counsel contends, on brief, that Cooper's comment violated Sec. 8(a)(1) because it was disparaging, provocative, demeaning, and intended to provoke Porter into an argument. (GC Br. 44.) I disagree. While I credit Porter's claim that Cooper made the remark, I view Cooper's remark as nothing more than an expression of opinion wholly unrelated to Porter's union activity.

(a) If the employee is tardy on three or more occasions within 10 consecutive work shifts, or eight or more occasions within 40 consecutive work shifts, and

(b) If the employee had an oral counseling regarding tardiness (refer to C,1 above) within the past year. (If the oral counseling occurred more than one year prior to the employee's again exceeding the tardiness standard, the employee should receive an oral counseling.)

The tardiness standard is no more than two occasions of tardiness within 10 consecutive work shifts or no more than seven occasions of tardiness within 40 consecutive work shifts.

Except for the different tardiness dates, the writeups issued to Gallagher and Hersh contain essentially the same information. Both describe the tardiness conduct as a "Category IV" offense and classify the discipline meted out as an "oral warning." VNA/VNS' disciplinary guidelines, received into evidence as Respondent's Exhibit 8, lists an oral warning as the first of a four-step progressive disciplinary process used in category IV type offenses which include, inter alia, "excessive tardiness." (R. Exh. 8, p. 11.) Gallagher's writeup states she was tardy on April 7 and 14; Hersh's warning shows her to have been late to work on April 10, 14, and 24. Neither Gallagher nor Hersh deny being tardy on the dates shown on their writeups.

Gallagher is a part-time employee, working Mondays, Wednesdays, and Fridays. She came under McKee's supervision in November 1999, after being hired into the central intake department.[60] McKee testified that since she began supervising Gallagher in November 1999, and continuing through May 1, when she was issued the writeup, Gallagher had been consistently late to work 50 percent of the time. (Tr. 1818–1819.) She subsequently changed her estimate to reflect that Gallagher was late 25 percent, not 50 percent, of the time. (Tr. 1839.) McKee claims that employees were not required to punch a timeclock or record their time of arrival on timesheets, but that she nevertheless knew whether employees such as Gallagher were late because it was her practice every morning to pass by the employee work stations to see if they had arrived. She conceded, however, that there were times when she did not make her rounds either because of a meeting or because she was too busy at her desk. She testified that about 1 month after Gallagher began work, she gave Gallagher an informal evaluation of her work. She could not, however, recall discussing any attendance or tardiness concerns she may have had about Gallagher during that informal meeting. According to McKee, during a March 3 meeting, she provided Gallagher with a copy of, and explained, VNA/VNS' attendance policy. In her brief description of her meeting with Gallagher, McKee gave no indication that she discussed or cautioned Gallagher regarding her tardiness problem.

Hersh has been employed by VNA/VNS for 9 years. McKee claims she had been receiving numerous complaints throughout 1999 and early 2000 from Nurses Murphy and Buford about Hersh being tardy to work on numerous occasions. Murphy, according McKee, complained to her some 20–30 times during 1999 about Hersh's tardiness. McKee recalled two such conversations with Murphy, one of which purportedly occurred in the summer of 1999, the other on December 27, 1999. Buford's complaints regarding Hersh were fewer in number than Murphy's, and allegedly occurred during October/November 1999.

On May 1, McKee, as noted, issued disciplinary writeups to Gallagher and Hersh. Gallagher recalls meeting with McKee at the latter's office cubicle on May 1, and McKee showing her a calendar showing that Gallagher had been late on April 7 and 14. Gallagher admitted to McKee having been one-half hour late on one day, and 10 minutes late on the other. According to Gallagher, McKee then handed her the writeup, described it as an oral warning, and asked her to sign it. Gallagher refused to do so, stating that her latenesses were due a medical condition, insomnia, and would take the matter up with the Human Resources Director Janice White. McKee purportedly responded that Gallagher was free to discuss the matter with White, but that she did not believe VNA/VNS' policy on tardiness "makes any allowance for any medical problems like that." McKee did not refute any of Gallagher's above testimony, but does contend that Gallagher actually received an "oral counseling," a lesser form of discipline, and not an "oral warning," and that she checked off the "oral warning" box on the writeup only because the form did not list "oral counseling" as an option. There is, however, nothing in McKee's testimony to suggest that she told Gallagher she was only being given an oral counseling. In fact, Gallagher's undisputed testimony, as noted, makes clear McKee told her she was receiving an "oral warning," not an "oral counseling."

Hersh's description of her May 1 meeting with McKee during which she received the writeup for being late on April 10, 14, and 24 was similar to Gallagher's description of her separate meeting with McKee that same day. Hersh recalls McKee stating that her three tardies in April occurred within 10 days requiring that a notice of corrective action be issued, and then informed Hersh was being issued an "oral warning" which would be signed by McKee's supervisor, Sheryl Jones, and placed in Hersh's personnel file. Hersh admits being 15 minutes late to work on the 3 days shown in the writeup, but testified, without contradiction, that this had been her practice during her entire 10-year tenure with VNA/VNS,[61] and that she had never before been disciplined or cautioned about being tardy. McKee, however, has supervised Hersh for about 1-1/2 years.

Hersh does recall having an annual appraisal discussion on January 24, with McKee during which McKee told her she needed to improve on her tardiness, and that she reminded

[60] McKee was confused as to Gallagher's start date in her department, stating initially that Gallagher began in November 1999, but adding during cross-examination that it could have been in February 1999. (Tr. 1814.) Only when shown Gallagher's 1999 attendance calendar (GC Exh. 85) did McKee concede that Gallagher began work in her department in early November.

[61] While testifying that she more often than not arrived some 15 minutes, e.g., 9:15 a.m., Hersh admitted there may have been days when she arrived later than 9:15 a.m., and days when she arrived on time.

McKee that the latter had, the year before, told employees that arriving to work 15 minutes late "was not an issue." When Hersh asked why McKee was making the change, McKee did not respond. McKee nevertheless recommended on Hersh's evaluation that the latter needed to "improve tardiness," explaining to Hersh that "some people in the department were concerned about it." (Tr. 834.) Hersh received her written appraisal on February 14, which contained, among other things, a notation stating she had been "consistently late, on an average of 10–15 minutes," and a recommendation that she "improve tardiness." Despite these comments, Hersh was found to have met the standards of performance in this area of her job responsibilities. (GC Exh. 48.) Hersh testified that at a subsequent March 3 department meeting, she received from McKee a copy of VNA/VNS' tardiness policy, with portions of it highlighted, and a note stating she had "noticed an improvement in [Hersh's] tardiness." Despite McKee's positive note, Hersh testified that at no time prior to March 3, had she altered her practice of reporting to work 15 minutes late.

The General Counsel has made a prima facie showing under *Wright Line* that the writeups issued to Gallagher and Hersh on May 1, were unlawfully motivated by antiunion considerations. Both Gallagher and Hersh, as previously discussed, were known by McKee to be union activists or supporters. Further, the numerous above-described unfair labor practices committed by VNA/VNS supports a finding that it harbored animus towards the Union and its supporters. Finally, McKee offered no explanation for why, having tolerated Gallagher's and Hersh's tardiness for so long, she suddenly found their conduct unacceptable. While there is certainly no principle requiring that misconduct once tolerated at all must be tolerated forever, see, *Clinton Electronics Corp.*, 332 NLRB 479, 491 (2000), VNA/VNS here does not contend, nor does McKee claim in her testimony, that the tardiness warnings issued to Gallagher and Hersh on May 1, were part of any new, across-the-board effort or policy by VNA/VNS to crack down on all employee latenesses and to more strictly enforce its existing tardiness rules. The only attempt at an explanation by McKee in this regard is her claim of having received complaints from several employees regarding Hersh's repeated practice of arriving late for work. However, even if I were to believe, which I do not, that McKee received such complaints about Hersh's latenesses, it is highly unlikely that said complaints are what prompted McKee to issue the May 1 warning to Hersh, for these alleged complaints occurred as far back as the summer of 1999, and as recent as February 2000, some 3 months prior to the warnings being issued. Had McKee truly been troubled by these complaints or deemed them to be a serious problem, I do not doubt she would have acted more promptly and not waited until May 1, to take corrective measures. As to Gallagher, McKee's testimony is devoid of any similar explanation for her sudden decision to discipline Gallagher for conduct which had long been tolerated. In the absence of any explanation for VNA/VNS' sudden decision, one month after the Board's election, to strictly enforce a tardiness rule which, from all indications, had long been ignored, a reasonable inference may be drawn that the May 1 warnings issued to Gallagher and Hersh had little or nothing to do with their tardiness record but were instead retaliatory in nature. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1027, 1028 (1996); *Transit Management Services*, 298 NLRB 721, 733 (1990).

Respondent VNA/VNS has presented no credible evidence to rebut the General Counsel's prima facie case. There is no disputing, and indeed, Gallagher and Hersh readily admit, that they were late for work on the dates shown in the writeups. However, as found above, this had been standard operating procedure for both Gallagher and Hersh for quite some time, and they had never before been disciplined or seriously admonished for their conduct, a fact not contested by McKee. McKee, as noted, offered no explanation for her sudden decision in May to discipline Gallagher and Hersh for what McKee herself admits was their longstanding practice of reporting late for work. McKee's testimony, was in any event, so full of inconsistencies as to render it unworthy of belief. McKee, for example, testified that she maintains an absentee calendar on each employee where she recorded when employees were out sick, on vacation, or tardy. However, review of the 1999 absentee calendars she kept on Gallagher and Hersh reveals no tardy entries for the entire year. (GC Exhs. 83, 85.) Yet, it is patently clear from both Gallagher's and Hersh's testimony, as well as from McKee herself, that both employees were consistently tardy for work throughout all of 1999.

What then can be made of the total lack of any tardy entries on their attendance calendars? McKee's attempt at an explanation is simply not credible. Thus, while initially admitting she used the calendar to record sick, vacation, and tardies, she asserted on cross-examination that in 1999 she was not recording employee latenesses on their calendars. (Tr. 1826.) On redirect examination, McKee altered course somewhat and explained, inconsistently in my view, that she used the calendar "primarily to document the sick and vacation times" and did not mark down tardiness "unless they are starting to become an issue." Her testimony in this regard makes little sense given McKee's further claim that during 1999, Gallagher was late to work 25 percent of the time, and Hersh "was not performing acceptably with regard to when she was reporting to work." If, indeed, Gallagher's and Hersh's tardiness behavior was as bad as McKee describes it, why then did she fail to record their tardies in their calendars? One plausible explanation is that McKee simply viewed Gallagher's and Hersh's practice of arriving to work 10–15 minutes late each day either as not violating VNA/VNS' tardiness policy, or as nothing more than a minor tolerable infraction not meriting disciplinary action. This explanation is consistent with Hersh's undisputed and credited claim that she reminded McKee during her January 24 meeting of her statement to employees the year before that arriving 15 minutes late to work was not an issue for her. McKee's claim that Hersh "was not performing acceptably" regarding her reporting time is undermined by the January performance appraisal wherein McKee, while commenting that Hersh needed to improve in her tardiness conduct, nevertheless rated Hersh as having met VNA/VNS' departmental and agency policies, including presumably its tardiness policy.

Further undermining VNA/VNS' claim regarding the legitimacy of the writeups is McKee's assertion the writeups were nothing more than "oral counselings" and not "oral warnings."

Her testimony is simply not credible, for both Gallagher and Hersh testified, credibly and without contradiction, that McKee specifically told them the writeups were "oral warnings." McKee's explanation, that she checked the "oral warning" category because the form lacked a place to record an "oral counseling," is rejected as not credible, for McKee could easily have crossed out the word "warning" and inserted "counseling" if indeed that was her intent.[62] Further, the fact that McKee classified their conduct as a category IV offense strongly suggests that McKee had issued them "oral warnings," not "oral counselings."

I am persuaded that McKee intended and did in fact issue "oral warnings" to Gallagher and Hersh, and that White's subsequent decision to downgrade the writeup to an "oral counseling" was prompted not by any alleged inconsistencies between VNA/VNS' tardiness and disciplinary guidelines, but rather because VNA/VNS would have been unable to justify the warnings under its disciplinary policy. That policy, as noted, requires that an oral warning could issue only if the employee had at least three tardies within ten consecutive work shifts *and* had received an oral counseling regarding tardiness within the past year. VNA/VNS here neither contends nor has produced evidence to show that Gallagher and/or Hersh had received an oral counseling during the 12-month period preceding the May 1 writeups.

In sum, the inconsistencies in McKee's and White's testimony, VNA/VNS' failure to explain its sudden decision to issue Gallagher and Hersh oral warnings for conduct it had long been willing to tolerate, the timing of their issuance just 1 month after the Board's election, and the lack of a credible explanation for downgrading the writeups from oral warnings to an oral counselings, leads me to conclude that the writeups were retaliatory in nature and that VNA/VNS simply used Gallagher's and Hersh's tardiness as a pretext to justify the warnings. Accordingly, I find that the warnings issued to Gallagher and Hersh on May 1, were unlawful and violated Section 8(a)(3) and (1) of the Act.

3. The objections to the election in Case 17–RC–11816

As noted, the Charging Party Union lost the Board-conducted election held in Case 17–RC–11816 on March 30, by a 3-vote margin. The Union contends, in timely filed objections to the election, that during the critical period between the filing of the petition on January 19, and the March 30 election, VNA/VNS engaged in improper conduct which interfered with the employees' free choice and seriously affected the election's outcome. (See GC Exh. 1[JJJ].) It argues that the election should be set aside and a new one conducted. I agree.

As found above, during the critical period in question, VNA/VNS, through its various supervisors and managers, including its CEO Roberson, committed numerous violations of Section 8(a)(1) and (3) of the Act that included threats of job loss, of harsher treatment, of lesser flexibility in granting employees time off for personal matters, of a more adversarial relationship with employees, of a strike which would cause employees to lose wages and suffer financial hardship; of a loss of flexibility in granting employees time off; of a closure of its facility; interrogation of employees regarding their union sympathies, issuing disciplinary warnings to union supporters in retaliation for their union activities; telling employees, on the morning of the election, that it intended to be more confrontational with the Union; and evicting from areas outside its offices over which it had no control employee and nonemployee union supporters who lawfully gathered to solicit and distribute union paraphernalia. The above-described unlawful conduct engaged in by VNA/VNS during the critical period parallels the conduct which the Union has alleged as objectionable and as warranting setting aside the election. The Board's stated policy is to "direct a new election whenever an unfair labor practice occurs during the critical period since conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Wellstream Corp.*, 313 NLRB 698, 712 (1994). Accordingly, I shall recommend that the election held on March 30 in Case 17–RC–11816, be set aside, and that a new election be held.

CONCLUSIONS OF LAW

1. Respondents Health Midwest, Research, Baptist, MCI, Menorah, Overland Park, Lee's, and VNA/VNS are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union herein, Nurses United for Improved Patient Care, is a labor organization within the meaning of Section 2(5) of the Act.

3. Nursing Practice Committee (NPC) is a labor organization within the meaning of Section 2(5) of the Act.

[62] In fact, White testified that both Gallagher and Hersh grieved their warnings to her and that she subsequently downgraded the discipline imposed to an "oral counseling" and did so by crossing out the words "oral warning" and inserting "oral counseling" in their place. White's explanation for doing so was not very convincing. Thus, she testified to having held a grievance meeting met with Gallagher and telling the latter that she was changing the "oral warning" to an "oral counseling." She claims she did so because she felt that VNA/VNS' tardiness and disciplinary guidelines were inconsistent with each other. White, however, never clearly explained what those inconsistencies were. White further testified that she discussed the matter with McKee and that the latter stated she viewed the writeup as an "oral counseling" but could find no place on the form to mark it as such. According to White, she informed Gallagher that the change of the discipline from "oral warning" to "oral counseling" was "a validation of the conversation [McKee] had had with her." The problem with White's testimony in this regard is that McKee in her testimony makes no mention of having told Gallagher she was receiving an "oral counseling," and Gallagher herself testified that McKee simply told her she was receiving an "oral warning." White provided similar testimony with respect to her grievance meeting with Hersh. Thus, she explained that she downgraded Hersh's write-up to an "oral counseling" because of what she viewed as inconsistencies in the tardiness and discipline guidelines. White also crossed out one of the tardy dates (April 21) because "it didn't have relevance to the oral counseling." She did not, however, explain why, if Hersh had been tardy on April 21, as claimed by McKee, that tardy suddenly became irrelevant. I found White's testimony in this regard not worthy of belief. Indeed, the fact that White's decision to downgrade the writeups was made after VNA/VNS was served with a subpoena from the General Counsel seeking, inter alia, documents pertaining to the writeups, renders her decision highly suspect, and leads me to believe that White may have been engaging in some form of damage control.

4. Respondent Health Midwest has violated Section 8(a)(1) of the Act by promulgating, maintaining, and distributing to employees of its affiliated hospitals an overly broad and invalid no-solicitation/no-distribution policy, by circulating its November 22 Q&A memo, and by attempting to interfere, through the April 7 and 20, 2000 Hiersteiner memos, with the Board's investigative processes.

5. Respondent Research Medical Center:

(a) Has violated Section 8(a)(1) of the Act by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy; distributing the November 22 Q&A memo to employees; preventing employees from soliciting and distributing union literature in its cafeteria during their nonworktime; creating the impression it was keeping its employees' union activities under surveillance; interrogating employees regarding their union activities; disparately prohibiting use of employee mailboxes for the distribution of union literature; preventing an employee from storing union literature at a work station while allowing other nonunion material to be stored; prohibiting employees from discussing the Union among themselves and threatening them with discipline if they did so; threatening employees with adverse job consequences, including loss of jobs, less supervisory flexibility, if they selected the Union to represent them; and by removing, under threat of arrest, union organizers who were distributing union literature at the entrances to its facility.

(b) Has violated Section 8(a)(2) and (1) of the Act by establishing, lending assistance to, and dominating NPC.

6. Respondent Baptist has violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an overly broad no-solicitation/no-distribution policy which prohibits employees from soliciting and distributing union literature during their nonworktime in nonpatient care areas of its facility, and by directing employee Rachel Cox on October 19, 1999, not to discuss the Union with other employees.

7. Respondent MCI has violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an overbroad and unlawful no-solicitation/no-distribution policy, and by threatening employees with arrest and loss of their nursing licenses for soliciting and distributing union literature in the nonpatient care areas of its facility during their nonworktime.

8. Respondent Menorah:

(a) Has violated Section 8(a)(1) by promulgating, maintaining, and enforcing an overbroad and unlawful no-solicitation/no-distribution policy, disparately removing union literature from employee mailboxes, and prohibiting employees from soliciting or distributing union literature in its cafeteria without prior approval from management.

(b) Has violated Section 8(a)(3) and (1) of the Act by issuing disciplinary writeups to employees Teresa Barnett and Angela Tuska-Wagner on October 12, 1999, for soliciting and distributing literature to employees during their nonworktime and in the nonpatient care areas of other Health Midwest facilities.

9. Respondent Overland Park:

(a) Has violated Section 8(a)(1) by promulgating, maintaining, and enforcing an overbroad and unlawful no-solicitation/no-distribution policy, distributing the November 22 Q&A memo, preventing Anita Carr and Sharyn Johnson from exercising their Section 7 right to solicit and distribute union literature in its cafeteria, and attempting to intimidate and coerce Carr and Johnson into discontinuing their protected activity by threatening to have its supervisors surround them in the cafeteria as they solicited other employees and distributed union literature.

(b) Has violated Section 8(a)(3) and (1) of the Act by issuing disciplinary writeups to employees Anita Carr and Sharyn Johnson on October 26, 1999, for engaging in union activities.

10. Respondent Lee's has violated Section 8(a)(1) of the Act by promulgating and maintaining a policy an overbroad and invalid no-solicitation/no-distribution policy, distributing the November 22 Q&A memo to employees, interrogating employees Joan Wheeler and Dana Forred on January 17, regarding their union sympathies, threatening employees with more adverse working conditions, closure of the facility, and with loss of jobs should the Union be brought in, Respondent Lee's violated Section 8(a)(1) of the Act.

11. The following employees of VNA/VNS constitute a unit appropriate for collective-bargaining purposes:

> All full-time and regular part-time registered nurses employed by VNA and/or VNS of Health Midwest which provide clinical or support services for clinical services, including registered nurses employed from 2801 Wyandotte Street, Kansas City, Missouri and Lexington, Missouri, but *excluding* all other professional employees of VNA/VNS of Health Midwest, office clerical employees, guards, and supervisors as defined in the Act, and all other employees.

12. Respondent VNA/VNS:

(a) Has violated Section 8(a)(1) of the Act by maintaining and enforcing an overly broad no-solicitation/no-distribution policy.

(b) Has further violated Section 8(a)(1) through Supervisors Cheryl McKee, Cindy Miller, Pat Tenner, Sarah Kerr, and its CEO Richard Roberson, and on repeated occasions between late October 1999 and March 30, 2000, by threatening employees with job loss, harsher treatment in the workplace, and closure of operations if the Union came in; threatening that the Union's arrival would lead to a strike that would adversely affect employee wages and cause financial hardship; threatening that it would longer be flexible in granting employees time off; interrogating employees regarding their union sympathies; telling employees it was futile to support the Union because the Union would not solve their job-related concerns; threatening to be more adversarial with employees if they brought in the Union; implicitly threatening not to bargain in good faith by telling employees it intended to become more confrontational with the Union should it be brought in; and by prohibiting employees and nonemployees from soliciting or distributing union literature in areas outside its facility over which it had no control.

(c) Has violated Section 8(a)(3) and (1) of the Act by issuing a disciplinary writeup to employee Deanna Jones on January 26, 2000, to employee Mary Porter on March 29, 2000, and to employees Patricia Gallagher and Nora Hersh on May 1, 2000, in retaliation for their activities on behalf of the Union.

(d) Except as found herein, VNA/VNS has not engaged in any other unfair labor practices.

(e) Between January 19, 2000, when the petition in Case 17–RC–11816 was filed, and March 30, 2000, when the Board held the election, VNA/VNS engaged in objectionable conduct which interfered with the employees' free choice in, and affected the outcome of, the election.

13. The above-described unfair labor practices found to have been committed by the various Respondents herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in numerous violations of the Act, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents will be ordered to rescind their unlawful no-solicitation/no-distribution policies and the November 20 Q&A memo distributed to employees. Further, Respondent Research will be ordered to immediately disestablish and to cease giving assistance or other support to the Nursing Practice Committee; Respondent Menorah will be required to remove from its files the unlawful October 12, 1999 disciplinary write-ups issued Teresa Barnett and Angela Tuska-Wagner, and to notify them in writing that it has done so; Respondent Overland Park will be ordered to remove the October 26, 1999 disciplinary writeups issued to employees Anita Carr and Sharyn Johnson and to notify them in writing of its actions; and Respondent VNA/VNS will be ordered removed from its files the disciplinary writeups issued to employee Deanna Jones on January 26, 2000, to employee Mary Porter on March 29, 2000, and to employees Patricia Gallagher and Nora Hersh on May 1, 2000, and to notify them in writing that it has done so. Finally, the Respondents shall be required to post an appropriate notice at their respective facilities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[63]

ORDERS[64]

A. Respondent Health Midwest, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, and distributing to its various affiliated hospitals and their employees a no-solicitation/no-distribution policy containing overly broad and unlawful rules, circulating or disseminating to employees memos containing ambiguous and vague interpretations of its unlawful rules, and interfering, through circulation of written memos, with the Board's investigative processes by requiring employees to report to management if contacted by a Board agent, and promising to provide them with legal counsel.

(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) Rescind the overly broad and unlawful rules in its no-solicitation/no-distribution policy, the Q&A memo distributed to employees on November 22, 1999, and the April 7 and 20, 2000 Hiersteiner memos.

(b) Within 14 days after service by the Region, post at its facility in Kansas City, Missouri, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.[65]

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

B. Respondent, Research Medical Center of Health Midwest, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, restraining, and coercing its employees in the exercise of their Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits employees from soliciting union support and distributing union literature during their nonworktime and in nonpatient care areas, and which requires that they first obtain approval before engaging in such protected activities.

(b) Preventing employees from soliciting and distributing literature during their nonworktime in the cafeteria; creating the impression it was keeping its employees' union activities under surveillance; interrogating employees regarding their union activities; disparately prohibiting use of employee mailboxes for the distribution of union literature or storage and not allowing an employee to store union literature at a work station while allowing other nonunion material to be stored; prohibiting em-

[63] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

[65] The first unfair labor practice committed by HM and the other Respondents occurred on May 8, 1999, when, according to the parties' stipulation, they first distributed or made available to all employees copies of what has been found herein to be unlawful no-solicitation/no-distribution policies. (GC Exh. 67.)

ployees from discussing the Union among themselves and threatening them with discipline if they did so; threatening employees with adverse job consequences, including loss of jobs, less supervisory flexibility, if they selected the Union to represent them; and by removing, under threat of arrest, union organizers who were distributing union literature at the entrances to its facility.

(c) Dominating, assisting, or otherwise supporting the Nursing Practice Committee.

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

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

(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo circulated to employees on November 22.

(b) Immediately disestablish and cease giving assistance or any other support to the Nursing Practice Committee.

(c) Within 14 days after service by the Region, post at its facility in Kansas City, Missouri, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.

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

C. Respondent, Baptist Medical Center/Health Midwest, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, restraining, and coercing employees in the exercise of their Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits them from soliciting and distributing union literature during the nonworktime in nonpatient care areas of its facility, and which requires them to obtain approval before engaging in such protected activity.

(b) Prohibiting employees from discussing the Union with other employees.

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

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

(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo circulated to employees on November 22.

(b) Within 14 days after service by the Region, post at its facility in Kansas City, Missouri, copies of the attached notice marked "Appendix C." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.

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

D. Respondent, Medical Center of Independence/Health Midwest, Independence, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, restraining, and coercing employees in the exercise of their Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits them from soliciting and distributing union literature during the nonworktime in nonpatient care areas of its facility, and which requires them to obtain approval before engaging in such protected activity.

(b) Enforcing an unlawful no-access provision or any unlawful provision in its no-solicitation/no-distribution policy so as to deny employees of other HM facilities the right to solicit and distribute literature in employee breakrooms or other nonpatient care areas of its facility during their nonworktime, and threatening them with arrest or a loss of their nursing license if they continued to engage in such activity.

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

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

(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo circulated to employees on November 22.

(b) Within 14 days after service by the Region, post at its facility in Independence, Missouri, copies of the attached notice marked "Appendix D." Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.

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

E. Respondent, Menorah Medical Center/Health Midwest, Overland Park, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, restraining, and coercing employees in the exercise of their Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits them from soliciting and distributing union literature during the nonworktime in nonpatient care areas of its facility, and which requires them to obtain approval before engaging in such protected activity.

(b) Prohibiting employees from soliciting other employees or distributing union literature in its cafeteria without permission, and creating an impression of surveillance by taking photographs of employees engaged in such protected activities.

(c) Issuing disciplinary writeups to employees Teresa Barnett and Angela Tuska-Wagner, or any other employee, in retaliation for their union activities.

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

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

(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo circulated to employees on November 22.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful writeups issued to Teresa Barnett and Angela Tuska-Wagner on October 12, 1999, and within 3 days thereafter notify them in writing that this has been done and that the writeups will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facility in Overland Park, Kansas, copies of the attached notice marked "Appendix E." Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.

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

F. Respondent, Overland Park Regional Medical Center/Health Midwest, Overland Park, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of their Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits them from soliciting and distributing union literature during the nonworktime in nonpatient care areas of its facility and which requires them to obtain approval before engaging in such protected activity, and maintaining and enforcing an overly broad no-access rule for off-duty employees.

(b) Issuing disciplinary writeups to employees Anita Carr and Sharyn Johnson, or any other employee, in retaliation for their union activities.

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

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

(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo circulated to employees on November 22.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful writeups issued to Anita Carr and Sharyn Johnson on October 26, 1999, and within 3 days thereafter notify them in writing that this has been done and that the writeups will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facility in Overland Park, Kansas, copies of the attached notice marked "Appendix F." Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.

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

G. Respondent, Lee's Summit Hospital, Lee's Summit, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, restraining, and coercing employees in the exercise of their Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits them from soliciting and distributing union literature during the nonworktime in nonpatient care areas of its facility, and which requires them to obtain approval before engaging in such protected activity.

(b) Interrogating employees regarding their union activities, and threatening employees with more adverse working conditions, loss of jobs, and closure of its facility if the union were brought in.

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

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

(a) Rescind the overly broad and unlawful no-solicitation/no-distribution policy and the Q&A memo circulated to employees on November 22.

(b) Within 14 days after service by the Region, post at its facility in Lee's Summit, Missouri, copies of the attached notice marked "Appendix G." Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.

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

H. Respondent, Visiting Nurse Association/Visiting Nurse Services of Health Midwest, Kansas City and Lexington, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, restraining, and coercing employees in the exercise of their Section 7 rights by maintaining and enforcing an overbroad and unlawful no-solicitation/no-distribution policy which prohibits them from soliciting and distributing union literature during the nonworktime in nonpatient care areas of its facility, and which requires them to obtain approval before engaging in such protected activity.

(b) Threatening employees with job loss, harsher treatment, closure of operations, and a strike if the Union were brought in; threatening that a strike would adversely impact their wages and cause them financial hardship; threatening to no longer be flexible with employees if they brought in the Union; telling employees it was futile to support the Union; interrogating employees about their union activities or sympathies; threatening to be more adversarial with employees; implicitly threatening not to bargain in good faith by stating it would become more confrontational with the Union should employees select it as their bargaining representative; and prohibiting employees and nonemployees from soliciting or distributing literature in the outside areas of its facilities over which it has no control.

(c) Issuing disciplinary writeups or warnings to employees Deanna Jones, Mary Porter, Patricia Gallagher, and Nora Hersh, or any other employee, in retaliation for their union activities.

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

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

(a) Rescind its overly broad and unlawful no-solicitation/no-distribution policy, the Q&A memo circulated to employees on November 22, and the Hiersteiner memos circulated to employees on April 7 and 20, 2000.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful writeups issued to Deanna Jones on January 26, 2000, to Mary Porter on March 29, 2000l, and to Patricia Gallagher and Nora Hersh on May 1, 2000, and within 3 days thereafter notify them in writing that this has been done and that the writeups will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facilities in Kansas City and Lexington, Missouri, copies of the attached notice marked "Appendix H." Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 1999.

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

3. The election held on March 30, 2000 in Case 17–RC–11816 is set aside and the matter is remanded to the Regional Director for further action consistent with this decision.