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**Battle Creek Health System and Local 79, Service Employees International Union, AFL-CIO.**  
Cases 7-CA-45473, 7-CA-45515, 7-CA-45830,  
and 7-CB-13488

May 12, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On September 2, 2003, Administrative Law Judge Paul Buxbaum issued the attached decision.<sup>1</sup> The Respondent Union filed exceptions and a supporting brief. The General Counsel and the Respondent Employer filed answering briefs. The Respondent Union filed a brief in reply.<sup>2</sup>

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions, and to adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent Union, Local 79, Service Employee International Union, AFL-CIO, Detroit, Michigan, its officers, agents, and representatives; and the Respondent Employer, Battle Creek Health System, Battle Creek, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> In Case 7-RD-3364, the judge, inter alia, sustained several of the Employer's objections to the Union's preelection conduct and directed a new election. On December 31, 2003, the Petitioner, Joyce R. Berridge, filed a request to withdraw decertification election petition. On January 15, 2004, the Board granted the Petitioner's request to withdraw her petition and thus severed Case 7-RD-3364 from this proceeding. Member Schaumber dissented from granting this request to withdraw the decertification petition and would have granted the Employer's motion to direct a new election.

<sup>2</sup> No exceptions were filed to the judge's findings that the Respondent Employer violated Sec. 8(a)(1) of the Act by issuing or maintaining a policy requiring employees to report to management prior to discussing conditions of employment with other employees, and instructing employees to report harassment by union members to management.

<sup>3</sup> The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf.d. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Dated, Washington, D.C., May 12, 2004

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Peter C. Schaumber, Member

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Dennis P. Walsh, Member

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Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Patricia A. Fedewa, Esq.*, for the General Counsel.

*Thomas J. Barnes, Esq.* and *Kurt M. Graham, Esq.*, of Grand Rapids, Michigan, for Battle Creek Health System.

*Bruce A. Miller, Esq.*, of Detroit, Michigan, for Local 79, Service Employees International Union, AFL-CIO.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Battle Creek, Michigan, from April 21-24, 2003. The Union filed the initial charge against the Hospital, case 7-CA-45473, on September 24, 2002. It filed another charge, Case 7-CA-45515, on October 7, 2002, and a third charge, Case 7-CA-45830, on January 21, 2003. On October 9, 2002, the Hospital filed a charge against the Union, Case 7-CB-13488.

On October 7, 2002, Joyce F. Berridge filed a petition, case 7-RD-3364, seeking decertification of the Union.<sup>1</sup> Pursuant to this petition, an election was held on December 20, 2002. On December 27, 2002, the Hospital filed objections to that election. The Acting Regional Director issued a fourth order consolidating cases, second consolidated amended complaint, report on objections, second order consolidating unfair labor practice and representation cases for hearing, and notice of consolidated hearing on March 10, 2003.<sup>2</sup> (GC Exh. 1(z).)

The General Counsel alleges that the Hospital committed unfair labor practices consisting of forbidding employees from discussing terms and conditions of employment, asking employees to report to management regarding the protected, concerted activities of other employees, engaging in coercive interrogation of employees, and disciplining an employee because

<sup>1</sup> Berridge did not actively participate in this case either as a party or witness.

<sup>2</sup> On April 18, 2003, counsel for the General Counsel advised counsel for the Union that she intended to amend the complaint, adding an additional paragraph containing further allegations against the Union. (GC Exh. 2). At the hearing, I granted her motion to amend the complaint, having concluded that there was no prejudice to the Union since it was on notice as to the need to defend against the substance of the new allegations because they formed part of the previously alleged course of improper conduct by a union official and were very similar to allegations already contained in the Hospital's objections to the election. See: *Folsom Ready Mix*, 338 NLRB No. 181, fn. 1 (2003).

he engaged in union activities. The Hospital's conduct is asserted to have violated Section 8(a)(1) and (3) of the Act. The General Counsel also alleges that the Union committed unfair labor practices consisting of threats of physical harm, property damage, loss of employment, and imposition of fines against bargaining unit members who participated in the effort to decertify the Union or who crossed any future picket line maintained by the Union. This conduct is asserted to have violated Section 8(b)(1)(A) of the Act. In addition, the Hospital alleges that this conduct by the Union, coupled with other improper conduct, compromised the results of the decertification election held on December 20, 2002. The Hospital's additional allegations of objectionable conduct by the Union consist of the announcement of a bounty for the theft or destruction of any decertification petition, the theft of such a petition, an assault upon the Hospital's counsel during a collective-bargaining session, threats of bodily harm against an employee and her family member, harassment of an employee who had voted against the Union in the election, and misconduct in the polling area, including engaging in impermissible electioneering and wearing improper insignia. Both the Hospital and the Union filed answers to the complaint, denying the respective material allegations.

After preparation of the transcript of the trial proceedings, counsel for the Hospital filed a motion to correct the transcript. This was unopposed, and I grant it with the minor alterations set forth in the accompanying footnote.<sup>3</sup> In addition, two other errors of transcription require comment. Counsel for the Hospital is reported as telling me that the witness he was examining suffered from a "mental condition." (Tr. 907.) Actually, he informed me that the witness had a "medical condition" that necessitated the taking of a short recess. On a far lighter note, at the conclusion of the trial, I am reported to have praised all counsel for their "professionalism and servility." (Tr. 1090.) Perhaps like other presiding judges, it is true that I have occasionally daydreamed about lawyers behaving in such a submissive manner. Notwithstanding, I actually complimented these lawyers for their "professionalism and *civility*." There was nothing servile in their diligent pursuit of their respective clients' interests.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Hospital, and the Union, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Battle Creek Health System, a corporation, provides a variety of health care services to the public at its facilities in Battle Creek, Michigan, where it annually has gross revenue in excess of \$250,000 and purchases goods valued in excess of \$50,000 from points located outside the State of Michigan and

causes such goods to be shipped directly to its Battle Creek facilities. The Hospital admits<sup>4</sup> and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Hospital is a health care institution within the meaning of Section 2(14) of the Act. The Union admits<sup>5</sup> and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE EVENTS INVOLVED IN THESE PROCEEDINGS

Battle Creek Health System is a relatively large employer, having approximately 1600 employees. During the period under consideration, 272 of these employees were members of a bargaining unit of service and maintenance workers represented by Local 79 of the Service Employees International Union, AFL-CIO. Local 79 is an even larger organization, providing representation for many bargaining units located in Michigan involved in work settings such as health care, building services, and nursing home care. The local is estimated to have 16,000 members.

The Hospital and the Union have entered into a series of collective-bargaining agreements, including an agreement whose term ran from December 23, 1999 through September 30, 2002. (GC Exh. 7.) Among its many provisions, this agreement required the Hospital to recognize up to 10 union stewards and a chief steward. It also required recognition of a union bargaining committee.

During the summer of 2002, a number of bargaining unit members began an effort to obtain the decertification of the Union as their collective-bargaining representative. This effort was not organized in any formal manner. Nevertheless, a number of women assumed leadership roles.<sup>6</sup> Among these active participants were Nancy Fleming, Elizabeth Ramsey, Angelina Mendez, Shannon Organ, and Joyce Berridge. Proponents of decertification began circulating a petition to this effect. This petition, which contained the signatures of supporters of decertification, disappeared. The Hospital contends that it was stolen. The evidence does not reveal precisely what happened to the document. It is, however, noteworthy that a union steward, Sheri Tyndal, testified that she had a conversation with another steward, Trudi Mietz, during which Mietz told her that she knew the petition had been "stolen" and that she had a "pretty good idea who had it." (Tr. 930.)

In response to the loss of the petition, the supporters of decertification began circulating a replacement. Fleming testified that, in August 2002, Mietz began making threats against those who were in favor of decertification. According to Fleming, Mietz continued making such threats on a daily basis over the following months. These threats were often made in an outdoor employee break area known as the "smoke shack." The intimidating comments consisted of warnings that cars owned by decertification partisans would be damaged, tires would be

<sup>4</sup> See: Hospital's answers, pars. 3 and 4 of GC Exh. 1(d), and pars. 2, 3, and 4 of GC Exh. 1(s).

<sup>5</sup> See: Union's answer, par. 5. (GC Exh. 1(q)).

<sup>6</sup> In his opening remarks, counsel for the Hospital put it this way—"this case is the story of a few brave women." (Tr. 46.) In sharp contrast, counsel for the Union characterized them as the "horsewomen of the anti-union apocalypse." (U. Br. at fn. 3.)

<sup>3</sup> At p. 369, LL.14-15, the testimony should be, "The witness is being shown Employer's 5 for identification." At p. 370, L. 25, the witness said, "I don't know what they were." At p. 516, L. 17, counsel asks the witness about "conversations." At p. 627, L. 16, the witness said, "Sometimes they will say excuse me . . ."

slashed, and homes would be vandalized. Threats were also made against specific individuals. Mietz stated that “[s]omeone needs to slap that fat bitch from dietary that has the petition, and take it, take the petition.” (Tr. 641). Fleming testified that she understood this to be a reference to Mendez. In addition, Mietz made threats specifically directed against Organ, warning that she was “going to slash her tires, key her car and make life miserable for Shannon.” (Tr. 639.) Beyond discussion of specific types of adverse actions, Mietz also made generalized predictions of dire consequences for decertification supporters, including comments that they would “pay” for their actions, that persons would “make life hell” for them. (Tr. 637, 641.) Finally, Fleming reported that Mietz offered a bounty for the theft or destruction of the renewed decertification petition. Specifically, she promised a money reward for anyone who turned the petition over to a member of the union negotiating committee.

Fleming’s descriptions of Mietz’ threats and pattern of intimidation of bargaining unit members were corroborated and supplemented by an array of other testimony. Patricia Stemali, a patient care assistant, testified that she spoke to Mietz in September. Their conversation occurred in a break room on the third floor of the hospital building. As a new employee, Stemali was worried about her job status if the Union went on strike. She raised this concern with Mietz since she knew Mietz was a steward. She asked Mietz what would happen if the Union established a picket line. Mietz warned Stemali that if she crossed such a picket line, “she would personally take care of me and that the union could fire me for passing the picket line.” (Tr. 485.) Stemali took this to mean that Mietz “was going to hurt me if I didn’t be careful.” (Tr. 485.) Mietz’ comment was made in a very loud voice and was overheard by the other employees in the break room.

On September 30, 2002, Mietz approached Organ. Organ testified that Mietz told her to rethink her opposition to the Union. Mietz threatened Organ with loss of her job if she continued to assist in the decertification effort. Organ also reported that Mietz informed her of a \$450 bounty for recovery of the decertification petition. She asked Organ to let her know if she was aware of the person who had possession of the petition. Organ also testified that several days later, Mietz approached her and another coworker, Cheryl Bock. In Organ’s presence, Mietz told Bock that the Union would impose a fine of \$1000 on anyone found in possession of the petition on hospital property.

According to the testimony of Mendez, in early October Mietz was engaged in another conversation with coworkers in the smoke shack. Mietz asserted that if the Union became aware of who had the petition, “we’d be fired or they’d destroy our homes, our cars.” (Tr. 507.) Mietz warned that the Union would do what was necessary to stop the decertification effort and that they would make “our life a living hell.” (Tr. 508.) Finally, she stated that in the event the Union established a picket line, they would throw bottles and cans at anyone crossing that line. Mendez testified that later on the same day she was outside the smoke shack and overheard Mietz speaking to other employees in the smoke shack. Mietz said that she had heard a rumor that a dietary department employee had the de-

certification petition.<sup>7</sup> She offered to “pay somebody a hundred dollars to slap her and run with it [the petition] just to get rid of the decert.” (Tr. 510.) She also made other threats involving fines and job loss. Mendez also reported that Mietz’ threats continued on a daily basis until Mietz left the hospital’s employ in December.<sup>8</sup>

Because allegations regarding Mietz’ course of conduct involving threats and intimidation of bargaining unit members are central to any assessment of the parties’ actions in this case, I will now analyze the credibility of the testimony of those witnesses who accuse Mietz of this misconduct. I begin by noting that evidence of Mietz’ misdeeds came from various sources. The accounts are highly consistent with each other and reflect Mietz’ use of a pattern of speech repeatedly focusing on the same themes. From the demeanor of the witnesses who heard Mietz’ assertions, I perceived that the threats had a substantial emotional impact. This impact was consistently observable in the behavior of the various persons who recounted what they had heard.<sup>9</sup> Finally, I note that the Union failed to present any evidence whatsoever indicating that the reported threats were not made. While Mietz no longer works at the Hospital, both counsel for the General Counsel and counsel for the Union reported that they had recently been in contact with her. She was not subpoenaed to testify and her testimony was not presented by the Union. The Board has referred to the adverse inference that may be drawn when a party fails to call a witness who may reasonably be presumed to be favorably disposed to its position as a “settled” doctrine of law. *Daikichi Sushi*, 335 NLRB 622 (2001). I find it appropriate to apply this inference to the failure of the Union to produce Mietz’ testimony. For all of these reasons, I conclude that the multiple consistent accounts of Mietz’ course of conduct consisting of threats and intimidation directed at supporters of decertification are credible and accurate.

Shortly after Mietz began her campaign of threats, another union steward, Joy Kinney, became embroiled in a minor controversy that would serve as the setting for the Hospital’s first relevant management interaction with Mietz. Kinney testified that while on duty, she almost slipped and fell on water that had spilled from a broken pipe. This occurred on September 2. Subsequently, Kinney developed back pain and sought permission to complete an incident report regarding the source of her pain.<sup>10</sup> John Fear, the director of food service, told Kinney that “you can’t fill out an incident report five days after the fact.”<sup>11</sup>

<sup>7</sup> Based on Mietz’ physical description of this employee, Mendez testified that she assumed that the employee Mietz was discussing was herself.

<sup>8</sup> The circumstances of Mietz’ departure from the Hospital are unusual. She was not terminated, nor did she resign. It appears that she simply disappeared from the work setting in mid-December.

<sup>9</sup> This appears to have had its greatest impact on Organ. She testified that she resigned from her job at the Hospital due primarily to what she characterized as this harassment.

<sup>10</sup> Under the Hospital’s procedures, it appears that such an incident report was necessary in order to trigger medical examination and treatment.

<sup>11</sup> Although Fear admitted telling this to Kinney, he maintained that he did not refuse to permit her to complete an incident report. I do not

(Tr. 222—223.) Faced with Fear’s refusal to allow the filing of a report, Kinney took the matter to another supervisor, Katherine Stein. Stein permitted Kinney to file the incident report. Once he became aware that Stein had accepted the report, Fear contacted the Occupational Medicine Department to schedule an evaluation for Kinney. He testified that they told him that Kinney often filed incident reports late.

Based on what he had learned, Fear testified that he resolved to meet with Kinney to discuss her compliance with proper procedures for the filing of incident reports. At approximately the same time, Fear also received certain information from Mendez. Mendez told him that she had been in the smoke shack and heard Mietz tell a group of employees that Fear had refused to permit Kinney to file an incident report. From his subsequent actions, I infer that Fear decided to proverbially “kill” two birds with one stone. He scheduled a meeting with Kinney and invited Mietz to attend as Kinney’s union representative. While Fear told Mietz about the subject of his proposed discussion with Kinney, he did not advise her that her own conduct was under scrutiny.

Fear’s meeting was held on September 17. He testified that at the outset of the meeting he advised Kinney that this was not a disciplinary session, but simply a “coaching.” After addressing Kinney regarding the proper procedures for the filing of incident reports, Fear turned to another subject. He testified that he told Kinney that “I wasn’t very happy to hear that she was telling people that I had refused to fill out an incident report.” (Tr. 236.) Fear then turned his attention to Mietz, telling her, “[Y]our conduct as a Union steward is very unprofessional.” (Tr. 108.) He indicated that he was referring to an incident in the smoke shack where Mietz had told people that Fear had refused to allow Kinney to file an incident report. He asserted that this conduct had violated principles of confidentiality. On examination of Fear by counsel for the General Counsel, the following colloquy took place:

COUNSEL: [I]t was your expectation that if she [Mietz] received any future information regarding either you or another—another manager, or an employee in dietary, that you wanted her to speak with you first?

FEAR: Prior to speaking about it to the general public, yes.

(Tr. 242.) Mietz responded by telling Fear that she could discuss anything she wished on her breaktime. At trial, Fear expressed some understanding of the impact of his decision to address his concerns about Mietz in the meeting regarding Kinney. He observed that “perhaps I embarrassed Trudy [sic] by saying that.” (Tr. 238.)

One week after this meeting, the Hospital made its first formal response to Mietz’ threats against employees. This response followed management’s receipt of a variety of reports regarding the misconduct. Fear testified that in early September he had received verbal complaints from Fleming, Ramsey, Mendez, and Dan Jenks. Among the reported statements by Mietz were threats to “slap the shit out of that person” who was

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credit this assertion as it does not make sense. Kinney’s contention that Fear denied her request to file a report is consistent with Fear’s own report of what he told her.

circulating the decertification petition, threats to slash tires, offers of a bounty for the petition, and general warnings that there would be “hell to pay” for those who supported decertification. (Tr. 264, 270.) Fear described his view of the situation as:

... an environment that seemed to be very hostile. And I had people that were frightened and scared. And people were coming to managers on a fairly regular basis. For awhile, it was almost on a daily basis, letting us know what was going on, things that they were hearing. And they were voicing their concerns.

(Tr. 272.) By the same token, Chantel Thom, the Hospital’s employee labor relations specialist, reported that, beginning in September, management began to receive very frequent reports of threatening statements and behavior by Mietz.

On September 24, the Hospital issued a memorandum entitled, Union Activity—Questions and Answers. (GC Exh. 4.) The memo first addressed the status of collective bargaining and issues regarding possible picketing by the Union. The next topic was decertification activity. After describing its view of the decertification process and legal requirements, it posed this question: “*What if Associates [employees] circulating a decertification petition are harassed by Union members?*” (Emphasis in the original.) The full response to this question was, “Report it immediately to Human Resources for appropriate action.” (GC Exh. 4, p. 3.) The document then turned to discussion of other issues.

On the same day that the Hospital issued this communication to its employees, the Union filed the first unfair labor practice charge. This alleged that Fear had unlawfully intimidated and coerced Mietz during the meeting of September 17.<sup>12</sup> (GC Exh. 1(a).)

Organ testified that on September 30, Mietz solicited Organ to change her opinion about the decertification effort and to provide information to her regarding the location of the petition. She also reported that Mietz threatened her with loss of employment. Later that day, Organ had a second encounter with a union official. While eating her lunch in the hospital cafeteria, she was approached by Linda Darkey, a steward. Darkey discussed the decertification petition, advising Organ that “there was quite a bit of money out on it.” (Tr. 763.) Darkey asked Organ if she knew who had the petition.<sup>13</sup>

On October 1, the day after the expiration of the parties’ collective-bargaining agreement, the Union held a meeting to decide whether to authorize a strike. Fleming, who was an alternate member of the Union’s negotiating committee, attended

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<sup>12</sup> The charge also alleged a variety of other misconduct that was not incorporated into any of the General Counsel’s complaints filed in this case.

<sup>13</sup> I have already found that Organ’s testimony about Mietz’ conduct was credible. I reach the same conclusion regarding her testimony about Darkey. While this testimony was not corroborated in the same manner as testimony about Mietz, it was similarly uncontroverted. Darkey was not called as a witness. Furthermore, since Organ is no longer employed at the Hospital, she appears to lack any motive to curry favor with her former employer or anyone else associated with this case.

this meeting. She testified that Norbert Przybylowicz, executive assistant to the president of Local 79, addressed the meeting. He informed the members that a decertification petition was circulating and stated that “they would make those members pay.” (Tr. 645.) Fleming reported that he did not specify the manner in which this would be accomplished.<sup>14</sup>

One week after this meeting, two significant steps in this litigation were taken. The Union filed its second charge against the Hospital, alleging that the Question & Answer memo of September 24 had restrained and coerced employees engaged in protected activity and had constituted “aid and assistance to a campaign to decertify the union.” (GC Exh. 1(c).) On the same day, Berridge filed a petition seeking decertification of the Union. (GC Exh. 1(e).) Two days later, the Hospital filed its unfair labor practice charge against the Union. This alleged that the Union had participated in the theft and destruction of the original decertification petition, had offered a bounty for the second petition, and had engaged in a pattern of threats and intimidation of supporters of decertification and opponents of possible picketing activities. (GC Exh. 1(g).)

The evidence reflects that by this time the Union’s leadership had been made aware of the allegations regarding Mietz’ pattern of threats and intimidation of bargaining unit members. Ray Murdaugh, the Union’s business consultant,<sup>15</sup> testified that he received a copy of the unfair labor practice charge filed by the Hospital. He shared this with the bargaining committee and discussed it with Chief Steward Bob Brunette. Murdaugh testified that Brunette told him that the charges were “a bunch of garbage.” (Tr. 392.) Murdaugh reported that he asked several other people about the charges and they claimed to lack knowledge about them. He also testified that he questioned Mietz about the charges and that she denied them.

Further allegations of misconduct by Mietz were presented to Chief Steward Brunette at a meeting on or about October 13. At that time, Fleming gave Brunette a letter of resignation from the bargaining committee. The letter cited “personal reasons” for her resignation. (Emp. Exh. 9.)<sup>16</sup> Fleming testified that at the time she tendered this letter to Brunette, she told him that she “was not going to be a part of a Union that threatens people . . . with violence, that these were my coworkers and my friends.” (Tr. 677.) She also testified that she informed Brunette about the nature of Mietz’ misconduct. Brunette responded that he had not heard about any threats and did not believe her account. She told him that he ought to visit the smoke shack himself. Brunette observed that a decertification petition should not have been filed while collective-bargaining negotiations were underway. Fleming responded by noting that

if the first decertification petition had not been stolen, the timing would not have been so unfavorable.

Further indications of disturbing activity by Mietz came to the attention of the Union’s leadership on November 15. On that date the Hospital issued a flyer entitled, “*Additional Q & A[’s] Regarding Union Negotiations.*” (Emphasis in the original.) This described the Hospital’s position regarding a variety of issues. It informed the employees that:

BCHS [Battle Creek Health System] filed charges with the NLRB because of serious threats by some union representatives against their fellow members who supported a decertification petition. BCHS will not tolerate harassment or intimidation of or by any of its associates, which is why we filed a complaint with the NLRB. We are confident that the BCHS complaints against the union will be upheld.

(U. Exh. 2, par. 14.) This document also posed a question as to what employees should do if the union “pressures” them regarding decertification. The response advises employees who feel “pressured or threatened” to “contact their supervisor and file appropriate incident reports.” (U. Exh. 2, par. 16.)<sup>17</sup> Brunette testified that he believed that the statements made in this flyer regarding union misconduct were “all lies” and “propaganda.” (Tr. 348, 364.)

On November 19, Union President Willie Hampton addressed the membership at a meeting convened to discuss contract negotiations. Numerous witnesses testified that Hampton also discussed the unfair labor practice charges filed against the Union. Some witnesses indicated that Hampton read the charges to the membership. Other witnesses disagreed, reporting that he discussed the charges but did not read them verbatim. I credit the testimony of Mendez on this issue as it resolves these discrepancies in a logical manner. She testified that Hampton used the written charges as reference material during his talk, but described the charges in his own words. Mendez and Fleming testified that some of the union leaders laughed at the charges.<sup>18</sup> Mendez reported that Hampton “chuckled.” (Tr. 520.) Fleming described Hampton’s conduct as “making it like it was a big joke that these charges were filed against the Union.” (Tr. 680.) At this point, Mendez addressed the meeting, telling those present that she did not think it was funny that people were being threatened. She stated that she had been among those who were threatened.<sup>19</sup> Steward Darkey responded that management was also threatening people. Hampton also stated that management was threatening union supporters.

<sup>14</sup> This account was uncontroverted. Przybylowicz testified about other matters, but he was not questioned regarding the meeting on October 1.

<sup>15</sup> Murdaugh testified that as business consultant to Local 79 his duties included the negotiation of contracts, settlement of grievances, conduct of union meetings, and provision of services to union members.

<sup>16</sup> As both the Union and the Employer are respondents in this case, I will designate the Employer’s exhibits as “Emp.” The Union’s exhibits will be designated as “U.”

<sup>17</sup> This flyer was not exclusively critical of the Union. It noted that substantial progress had been made in contract negotiations and observed that “we expect to reach a reasonable compromise” resulting in a new collective-bargaining agreement. (U. Exh. 2, par. 3.)

<sup>18</sup> This testimony was at least partially corroborated by Brunette. He testified that he did not have much recollection of these events, but did remember Hampton talking about the offer of a bounty for the petition. He indicated that he thought this was “kind of funny.” (Tr. 374.)

<sup>19</sup> This account by Mendez was corroborated by Murdaugh who testified that he did recall Mendez reporting that people were being threatened.

On November 26, the Union filed further charges against the Hospital, alleging that on September 17, Fear had unlawfully interrogated Mietz about her union activities. (GC Exh. 1(i).) Additionally, the Union charged that, in its memorandum of September 26, the Hospital had “requested employees to report protected conduct to it.” (GC Exh. 1(k).) On December 10, the Regional Director approved a Stipulated Election Agreement regarding the decertification petition.<sup>20</sup>

While the decertification issue progressed, the Union and the Hospital were also engaged in collective-bargaining negotiations. The parties met on December 10. The two sides were seated opposite each other with 10 to 15 feet separating the tables. During this session, a heated discussion took place between Murdaugh and the Hospital’s attorney, Thomas Barnes. They traded accusations of attempts to intimidate their respective bargaining committees.<sup>21</sup> Barnes stood up and pointed or shook his finger at Murdaugh. Given the considerable distance between the two men, Barnes’ conduct did not invade Murdaugh’s personal space and could not have given him any reasonable belief that he was in danger.<sup>22</sup> Nevertheless, as Murdaugh himself put it, he “lost it.” (Tr. 415.) He moved rapidly from the center of his table, crossed over to the management side of the room and brushed past a number of people including a pregnant woman. Upon reaching the center of the management table, he reached out and made physical contact with Barnes. Various witnesses characterized the nature of this touching differently. Kinney described it as a touch, similar to a mild push. Fear said that Murdaugh pushed Barnes with both hands. Brunette described it as a shove. Of greatest probative value, Murdaugh himself candidly described what he did and what he had intended. He testified that he went around the table and:

I was mad, and I made an attempt to hit him [Barnes], and I don’t know whether I hit him or not because there was somebody between us. I may have reached out. I can’t remember whether I did or not. By that time . . . John McDougal, who was probably one of the bigger guys there, he comes—he come[s] from behind me and he grabs me and more or less pulled me away and so we were separated.

(Tr. 415.) After the men were separated, the police were summoned. The investigating officer discussed the matter with both men. Apologies and handshakes were exchanged. No criminal charges were filed.

This incident had an emotional impact on those present. Kinney testified that a number of members of the union bargaining committee were crying. Fear reported that the man-

<sup>20</sup> The Regional Director had originally placed the representation case “in abeyance” until the unfair labor practice charges were resolved. (Emp. Exh. 14.) The Hospital requested that the representation case proceed. (Emp. Exh. 15.) The Regional Director agreed to this request. (Emp. Exh. 16.)

<sup>21</sup> There was considerable testimony along the lines of “who started it.” It simply does not matter in any legal sense. Both men said things better left unsaid, but Murdaugh chose to convert discussion into physical misconduct.

<sup>22</sup> Murdaugh conceded that when Barnes made the hand gesture, the two men “weren’t close.” (Tr. 430.)

agement negotiators were “visibly shaken or upset.” (Tr. 300.) After the incident, the union negotiating committee made an internal agreement not to report these events to other people. Not unexpectedly, the evidence reveals that this agreement was impossible to keep. Indeed, Mendez testified that Kinney told her about the incident on the very next day. Her testimony was supported by the testimony of a union member and supporter, Ray Reed. Reed also indicated that he learned about the incident from Kinney.<sup>23</sup> Fleming also testified that she learned about the incident from union members who were discussing it in the smoke shack.

On the day after this unfortunate episode, the Hospital issued a document called, “Straight talk about the Decertification Election.” Among other items, the document reported that:

The negotiation session on December 10, ended early as a result of a highly inappropriate incident. The union business agent from Muskegon [Murdaugh] became angry, crossed the room, and shoved the BCHS attorney [Barnes]. The union business agent had to be restrained and local police were summoned. This type of violent and illegal behavior by the union will not be tolerated.

(Emp. Exh. 7.) The document concluded by expressing support for the decertification effort, urging employees to “Vote ‘NO’ *this Friday!*” (Emphasis in the original.) While this account of the negotiating session incident was issued on the day following the session, it was not the first notice of the incident. Both Reed and Fleming testified that they heard about the incident from union members before the Hospital issued this document.

The next union meeting was held on December 17.<sup>24</sup> Approximately 20 members attended, along with various union officials including Murdaugh and Przybylowicz. Three proponents of decertification, Fleming, Ramsey, and Mendez, arrived later and sat together. As was to be expected, Murdaugh was questioned about the incident with Barnes. According to Kinney, Murdaugh responded to a member’s question by stating that he “might have gotten out of hand. But at the time, he was defending his bargaining team.” (Tr. 183.) He indicated that he was not going to let the Hospital’s lawyer insult his bargaining committee. Murdaugh, himself, testified that at this meeting, he described the incident to the membership as a “slight altercation.” (Tr. 390.) Mendez testified that at this point, Reed offered the view that “violence was tolerable, acceptable if that’s what it took.”<sup>25</sup> (Tr. 527.) At this point, the discussion became more general with various employees voicing dissatisfaction about their employer. Ramsey addressed the meeting, voicing her support for decertification, and observing

<sup>23</sup> Kinney denied telling Reed about the incident. Given the testimony of both Reed and Mendez, I do not credit this denial.

<sup>24</sup> By coincidence, on this date the Regional Director filed the first complaint and notice of hearing against the Union. (GC Exh. 1(m).) This alleged a pattern of threats by Mietz.

<sup>25</sup> Reed denied making this comment. However, he also denied that there was any discussion of the incident involving Murdaugh and Barnes. Many witnesses, including Murdaugh himself, confirmed that such a discussion occurred. I credit Mendez’ testimony. As will be described later, her account on this point is consistent with my findings regarding Reed’s overall pattern of behavior on this date.

that if people did not like working for the Hospital, they should seek other employment. Reed responded by telling Ramsey that nobody would hire her.

Fleming testified that Reed's comments upset her and she turned to Ramsey and asked, "Who is this asshole?" (Tr. 655.) Accounts differ as to what happened next. According to Fleming, Reed said, "You just called me an asshole. And I am going to kick your fucking ass. Nobody calls me an asshole." (Tr. 657.) He added threats that he would beat her and her husband. Ramsey testified that Reed said that somebody needed to teach Fleming a lesson and that her "old man [ought] to have his ass kicked, to let her out of the house." (Tr. 899.) Mendez reported that Reed said he would "come over there and show you an ass hole and then he made the remark that he would whup her husband's ass, too." (Tr. 532.)

By contrast with these accounts, Reed contends that he merely responded to Fleming by saying, "Don't call me an asshole." (Tr. 62.) Steward Kinney reported that Reed simply advised Fleming that he did not "appreciate you calling me an asshole." (Tr. 114.) A union supporter, Senka Fettig, described Reed's response as, "hey, lady, don't call me asshole, lady." (Tr. 446.)

From these varying accounts, it is apparent that Reed responded to Fleming's unpleasant remark by telling her not to refer to him by this epithet. The question is whether he went on to make threats against Fleming and her spouse. I find that the threats were made. Testimony of union officials sheds light on this controversy. Murdaugh reported that Reed responded to Fleming by telling her that, "Lady, I'm not an asshole." He went on to testify that, "I think a few other words were spoken. I can't remember exactly what they were . . ." <sup>26</sup> (Tr. 383.) Przybylowicz's account is somewhat similar. He testified that Reed said, "Lady, I'm no asshole. And he was going to continue to say something, but I interrupted." (Tr. 464.) Indeed, the consensus of the witnesses was that Przybylowicz, who was presiding at the meeting, intervened to terminate the discussion. I find it reasonable to infer that he did so because what Reed was "continu[ing] to say" was improper.

Shortly after this exchange, the meeting terminated. Przybylowicz testified that at this point, "Ray Reed and Ray Murdaugh were standing around joking." <sup>27</sup> By contrast, Przybylowicz noted that the three decertification supporters "couldn't wait to get out the door, for whatever reason." (Tr. 466.) I credit testimony showing that the reason these women left in such a hurry was their fear of Reed's intimidating behavior, coupled with the fact that, as Mendez put it, "nobody tried to stop Ray Reed from talking to her [Fleming] like that." (Tr. 532.) The three women exited the building and walked through the parking lot. Ramsey got into her auto and drove away. Mendez had brought Fleming to the meeting. By unfortunate chance, Mendez had unknowingly parked her auto next to

Reed's truck. Reed sat in his truck. Mendez and Fleming entered the car. They waited for Reed to drive away. <sup>28</sup>

Mendez testified that Reed rolled down his window and started yelling at her. She began yelling back. Two men intervened to halt any further incident. Fleming testified that during this heated discussion, Mendez asked Reed if he had a problem and Reed responded that "I'm going to come over there and give you a fucking problem." (Tr. 662.) Interestingly, Reed's own description of events in the parking lot demonstrates his provocative behavior. He reports that he got into his truck and noticed that Mendez was "looking at me out of the corner of her eye." Although he started to drive away, he noted that she was still "giving me a look." Instead of driving on, he backed up, rolled down his window and asked Mendez, "Is there a problem?" (Tr. 65.) Heated words were exchanged and two interveners broke up the argument.

As I have described, accounts of the events of December 17 differed. I credit the testimony of Fleming, Mendez, and Ramsey for a number of reasons, including those reasons already mentioned. In addition, I note that their testimony was largely consistent. Furthermore, the climate and tone they described fit within the overall context surrounding this meeting. The evidence has established that the decertification effort and the collective-bargaining difficulties had provoked a hostile and threatening response and that the Union's leadership had not taken meaningful steps to address the situation. All of this is consistent with the events as recounted by the three women. In addition, as I have noted, Murdaugh, Przybylowicz, and even Reed himself, provided evidence that tended to corroborate the women's accounts. Lastly, my observations of Reed's demeanor as a witness support this conclusion. Reed came across as a pugnacious, and even belligerent, individual. From his observed demeanor, it was easy to imagine him doing what he described in the parking lot when confronted with what he perceived as a cross look. By the same token, it was also easy to picture him using profane and threatening language in response to what was admittedly an insulting and inappropriate comment by Fleming. I find that, on December 17, Reed repeatedly threatened Fleming and her husband due to a remark she made during a heated discussion about the collective-bargaining process and the decertification effort. I further find that union officials heard the threats, did nothing to express disapproval of those threats, <sup>29</sup> and, in the case of Murdaugh, engaged in behavior that would create an appearance of support for Reed.

In the days following the December 17 union meeting, Ramsey, Mendez, and Fleming each reported Reed's threatening behavior to hospital managers. On December 18, Ramsey provided a written statement to Fear. Mendez told Fear about these events and requested an incident report form. She completed the form and it was provided to the human resources

<sup>26</sup> On cross-examination, Murdaugh changed his testimony, claiming that Reed told Fleming he was not an asshole, but said nothing further. I do not credit this second version. In my view, it simply reflects Murdaugh's realization that his earlier testimony tended to corroborate the testimony of the decertification supporters.

<sup>27</sup> Murdaugh confirmed that after the meeting broke up, he and Reed "laughed and talked with each other." (Tr. 384.)

<sup>28</sup> They wanted Reed to leave first, since they were concerned that he might follow them to Fleming's home.

<sup>29</sup> It is true that Przybylowicz cut Reed off, but he did nothing to indicate disapproval of Reed's behavior.

department within a week. Fleming also filed an incident report.<sup>30</sup> She testified that she took this step:

Because Ray Reed was threatening my family. And I felt that he was going to follow me home. And I didn't know what he would do at work.

(Tr. 742.) The events were also a topic of discussion in the workplace. For example, Fleming testified that as many as 25 employees discussed the incident with her.

On December 20, 3 days after this contentious union meeting, the decertification election was held. Polling was conducted in a conference room on the second floor of the outpatient center. Voting sessions were scheduled for four blocks of time: 6:30 to 8 a.m., 10 to 11:30 a.m., 2:30 to 3:30 p.m., and 6:30 to 7:30 p.m. The Board agent responsible for supervising the election conducted preliminary instructional sessions with observers for the Union, the Hospital, and the supporters of decertification.

The Regional Director reported that there were 272 eligible voters. Of these, 204 cast ballots, exactly 75 per cent of those eligible. There were 109 votes in favor of continuing representation by the Union, with 92 opposed. Three ballots were challenged, an insufficient number to affect the outcome. (GC Exh. 1(z).) On December 27, the Hospital filed objections to the election, alleging a variety of misconduct by persons affiliated with the Union. (GC Exh. 1(r).) The facts underlying those objections that involve conduct alleged to have occurred prior to the day of the election have already been described.<sup>31</sup> I will now set forth my findings regarding the remaining objections that involve alleged misconduct on the day of the election.<sup>32</sup> These allegations fall into three categories: misconduct by two union election observers, misconduct by Murdaugh, and misconduct by a member of the Union's bargaining committee, Joanne Ciampa.

The Hospital cites two instances of asserted election misconduct by Kinney, who was serving as an observer for the Union. She chose to wear three union buttons that were each approximately 4 square inches in area. The buttons bore the Union's identifying information and the slogan, "Stronger together." She also wore a lanyard around her neck that was imprinted with union logos. Attached to the lanyard were two ballpoint pens that also bore the Union's logo.<sup>33</sup> On examination, Kinney agreed that as voters approached the table, they were able to read the various union-related materials she was wearing.

Nobody commented on Kinney's attire until the first two voting sessions were concluded. In particular, Kinney testified that the Hospital's counsel, Barnes, observed her attire early that morning and did not make any comment. During the interval between the second and third sessions, the Board agent warned Kinney that Barnes might have objections to her wear-

ing the union-related items. Kinney testified that Barnes heard this comment and responded by making a dismissive gesture. Kinney stated that the agent thereupon told her it was her choice as to whether to continue to wear the items. She elected not to remove them, and continued to wear them during the remaining two voting sessions. In addition, Mendez testified that she observed both Kinney and another union observer, Darkey, wearing union-related items during the voting. Darkey was wearing one union button.

The Hospital also cites another aspect of Kinney's behavior as an election observer. It is uncontroverted that the Board agent instructed the observers, including Kinney, not to engage in any conversations with voters. During the last balloting session, a voter told Kinney that she was going away on a trip and wanted to know how she could learn of the results of the election. Kinney testified that she did not respond. She indicated that one of the Hospital's observers told the voter that the results would be available by calling a certain phone number. Kinney's account of this incident was contradicted by the testimony of two election observers for the Hospital. These observers, Jan Burdick and Audrey Mort, both reported that the voter first addressed Kinney, asking her how to learn the election's outcome. They also testified that Kinney answered the voter's question, informing the voter of the phone number to call. The Board agent then instructed Kinney to cease talking.

Union Business Consultant Murdaugh is alleged to have engaged in impermissible electioneering. He attended the Board agent's preelection instructional session and testified that the agent advised that there could be no electioneering in the polling area. He also testified that he saw posters prohibiting such electioneering. He stated that one of these posters was placed at the first floor elevator station. These elevators would take persons up to the second floor location of the polling place.

The allegations against Murdaugh focus on the third and fourth voting sessions. Union Steward Sheri Tyndal testified that she voted in the early afternoon. This would have been during the voting session from 2:30 to 3:30 p.m. After voting, she drove away. While in her vehicle, she encountered management officials, including Thom. She informed them that she had just seen Murdaugh in the outpatient atrium on the first floor while the polls were open. She greeted him but he did not respond. He did not appear to be moving toward the polling area. Tyndal expressed surprise at his presence since she was under the impression that no management or union representatives were supposed to be in the area during the voting.

In sharp contrast to Steward Tyndal's account, Murdaugh testified that he was not standing by the outpatient building's elevators at that time. Furthermore, he denied seeing Tyndal at any time on the day of the election. Despite this, Tyndal's version is corroborated by highly probative nontestimonial evidence. The Hospital maintained a security camera and videotaping system focused on the atrium of the outpatient center. The parties have stipulated that the videotape from that camera shows Murdaugh on the first floor of the outpatient center, "walking across the atrium directly to the elevator." (Tr. 994.) The time of this activity is recorded as 3:19 p.m.

The Hospital contends that Murdaugh engaged in far more serious election misconduct during the final voting session. It

<sup>30</sup> Fleming filed her incident report on December 26, since she had been on vacation prior to that. Fleming's report containing her detailed description of the events is Emp. Exh. 8.

<sup>31</sup> I am referring to Objections 1, 2, 5, and 6.

<sup>32</sup> These are Objections 3, 4, 7, and 8. Objection 9 is a concluding catch-all allegation.

<sup>33</sup> Kinney confirmed that she wore these items.

is undisputed that, as the final session commenced, Murdaugh asked the Board agent if he could remain in the physical therapy room located across the hall from the voting place. Murdaugh testified that the agent said that he could use the room, but he decided not to. Kinney testified that the agent told Murdaugh that “it would be in the best interests if he left, so that he wouldn’t be influencing the people to vote.” (Tr. 196.) Burdick testified that the agent told Murdaugh “that he should not be within the vicinity of the voting area. And that was up to him, whether or not he did that.” (Tr. 948.) Fleming, who was serving as an election observer, reported that when Murdaugh asked the agent if he could use the room across the hall, the agent told him that it was his choice.

At this point, there is another sharp divergence in the testimony of those involved. Fleming testified that Murdaugh then walked away and encountered a group of prospective voters. She observed him to “walk down the line of people, and [he] was shaking hands, and was talking to them.” (Tr. 686.) Mendez, who was also serving as an election observer, testified that at the beginning of the final voting session, she saw Murdaugh approach a group of approximately 20 people who were waiting to cast their ballots. He spoke with a number of them, and shook hands with 3 or 4. Murdaugh flatly denies this conduct. He was asked if there were any voters standing in line at this time. His response was that “I think I do not remember at the fourth session any voters standing in line.” (Tr. 1087.) He was then asked if he ever shook hands with or talked to voters who were standing in line. He denied any such behavior, noting that “if I were to do that, that is in violation of the election rules.” (Tr. 1088.) I do not credit Murdaugh’s denials. His testimony was evasive and his credibility has been greatly eroded by his lack of candor as to other points in controversy. By contrast, Fleming and Mendez have been found to be credible informants for reasons already discussed.

The remaining allegation of misconduct by Murdaugh on the day of the election concerns the period near the end of the last voting session. Murdaugh testified that he was:

thinking that the polls [were] supposed to close a[t] seven o’clock—I’m not sure whether it was seven o’clock or 7:30—and, when I looked at my watch, it said it was seven o’clock and so I proceeded in the hospital.

(Tr. 409.) Actually, the polls were not scheduled to close until 7:30 p.m.<sup>34</sup> Having decided to enter the outpatient building at 7 o’clock, he encountered an employee, Cy Lutz, who was standing by the door. They discussed the weather. Murdaugh testified that he then took the elevator up to the second floor. He saw that the polls were still open. At this point, he reported that he was escorted away from the area by two security guards. He denied having encountered a security guard while on the first floor.

As has been consistently true regarding the events of this day, other witnesses and evidence contradict Murdaugh’s ac-

count. Security Officer Carla Jean Berner testified that after Murdaugh entered the outpatient center, her superior directed her to stop him. She approached him on the first floor and asked him to leave. He told her that he wished to go upstairs. She told him to leave, and he acted as if he were leaving. Despite this, he actually got on the elevator to go upstairs. Officer Berner took the stairs and used her radio to call for assistance. She and another responding officer met Murdaugh as he got off the elevator on the second floor. The other officer asked him to leave and he complied.

It will be recalled that Murdaugh flatly denied having any encounter or conversation with a security guard while on the first floor. The videotape of the security camera trained on the first floor atrium undercuts his account. The parties have stipulated that, at 7:22 p.m., it shows Murdaugh entering the building and stopping to talk to Lutz. He is then seen walking directly to the elevator. The tape also shows a female security guard following him as he goes out of the camera’s line of sight.

The Hospital’s third allegation of union misconduct on the day of the election is based on an incident report filed by an employee, Teresa Reeve. Reeve is a critical care assistant who has been employed by the Hospital for approximately 7 years. On the day of the election, she cast her ballot and was in the process of returning to her worksite. While in a hallway connecting the outpatient center with the inpatient portion of the facility, she encountered Joanne Ciampa.<sup>35</sup> Ciampa is the lead health unit coordinator. She has been employed by the Hospital for approximately 24 years and serves on the Union’s bargaining committee. The two women were acquainted, since Ciampa had training responsibilities involving Reeve. Also present during their encounter were Senka Fettig and Julie Swiss. Ciampa and Reeve had not previously discussed the decertification issue.

Reeve testified that Ciampa asked her how she had voted. She said she voted against the Union. Ciampa told Reeve that she did not realize the effect of such a vote. Ciampa also “grabbed” Reeve’s arm. (Tr. 973.) In her testimony, Reeve agreed with a characterization of this action as being “pretty vigorous,” but not painful. (Tr. 977.) Reeve also indicated that Ciampa was not “attacking” her. (Tr. 980.) Instead, she expressed her opinion as to Ciampa’s purpose by stating:

I felt that by her grabbing me it was a way for her to try to get her point across to me, of which my opinion was different from hers.

(Tr. 981—982.) Afterward, Reeve pulled her arm away and departed. Reeve acknowledged that during their conversation, Ciampa had agreed that Reeve had a right to her own opinion as to the benefits of union representation.

Ciampa also described this incident. She testified that she asked Reeve how she had voted, noting that she hoped that Reeve’s vote was for the Union. Reeve responded negatively, adding in regard to the Union, “screw’em.” (Tr. 1058.)

<sup>34</sup> Murdaugh’s cavalier attitude to all this is well illustrated by the fact that he testified that on the morning of election day, the Board agent suggested that everyone synchronize their watches to her time. Murdaugh testified that, despite this request, he did not do so.

<sup>35</sup> An eyewitness, Senka Fettig, described the location of their encounter as “quite far away” from the polling place and on another floor. This is not controverted.

Ciampa reminded Reeve that she was a member of the negotiating committee and Reeve repeated her observation, “screw’em.” (Tr. 1058.) Ciampa testified that she then observed that, “okay, everybody has the right to their own opinion.” (Tr. 1058.) Whereupon, she departed.

Immediately after these events, Reeve filed an incident report with the director of patient care services, Carol DiBiaggio. (Emp. Exh. 10.) Reeve was interviewed by Thom, telling Thom that Ciampa had “put her hand on [Reeve’s] arm.” (Tr. 797.) Reeve noted that Ciampa had agreed that Reeve was “entitled to your own opinion” regarding the Union. (Tr. 797.) Later that day, a meeting was held among Thom, Ciampa, DiBiaggio, Brunette, and Judy Holscher, Ciampa’s immediate supervisor. According to Thom’s account of the meeting, Ciampa denied touching Reeve’s arm, but added that she was a “touchy feely person” and may have “put my arm on her.”<sup>36</sup> (Tr. 801.) DiBiaggio testified that as the meeting neared its conclusion, Ciampa did admit touching Reeve, stating that “she meant it as a gesture” and demonstrating how she did it.<sup>37</sup> (Tr. 1042.) No disciplinary action was taken against Ciampa as a result of this meeting.

In the testimony of the various witnesses, there was dispute as to whether Ciampa had touched Reeve. Fetting, who was present, denied that Ciampa had touched Reeve at all. She also reported that Ciampa’s hands were full since she was carrying a purse, coat, and books. Ciampa testified that after the meeting about the incident, she thought it over. She concluded that she could not have touched Reeve because her hands were too occupied with the items she was carrying. Although she made this determination after rethinking the matter, she never reported her conclusions to DiBiaggio or other management officials.

In resolving the differences in these accounts, I generally credit Reeve’s testimony, along with the testimony of the management witnesses who were present at the meeting. I do so because those accounts are consistent with Ciampa’s original statements. Those statements indicated that she could not precisely remember touching Reeve, but that such a touching was consistent with her own acknowledgement that she was a “touchy feely” person. I do not credit her later reconstruction, since this was an exercise in self-justification. The fact that her hands were occupied with the items she was carrying would not preclude the type of brief touch involved in this matter. I find that she could have, and did, shift the items to permit a brief outreach with her hand. By the same token, my conclusions also lead me to find that the touching was of slight duration and intensity.

Thom testified that, a week after the election, she received an incident report regarding Reed’s conduct at the union meeting on December 17. On the same date, the Hospital filed its objections to the election. (GC Exh. 1(r).) Thom took no action regarding the allegations against Reed until mid-January. She

indicated that the delay resulted from the intervening Christmas and New Year’s holidays, her need to discuss the matter with her superiors, and problems involved in scheduling a meeting since Reed worked on the night shift. Thom reported that a meeting was eventually scheduled for January 16.

Reed testified that on the day prior to this meeting, his supervisor, Keith Long, approached him and asked if he had experienced a problem at a union meeting. Reed replied, telling Long that he “had a little discussion with somebody” at the meeting. (Tr. 69.) Long informed Reed that there would be a meeting concerning this matter on the following day. Reed requested the presence of a union representative, and Long told him he would arrange for Brunette to attend in this capacity.

The meeting was held on the next day. Reed, Long, Brunette, Thom, and Paul Ratliff, Reed’s immediate supervisor, attended. Brunette testified that Thom may have commenced the meeting by “comment[ing] why we were there, investigating possible workplace violence.” (Tr. 319.) Thom testified that she informed Reed that she had received an incident report concerning threats he made against Fleming during a union meeting. She said she “was here to get his side of the story about what happened.” (Tr. 809.) She then explained the Hospital’s workplace violence policy to Reed, telling him what steps to take if a coworker threatened him or called him names. She began reading the contents of the incident report to Reed, but he interjected in order to explain his side of the story. He displayed a paper that he asserted contained a list of persons who could vouch for his conduct at the union meeting. Thom asked for the list and Reed refused to provide it.<sup>38</sup> Thom testified that she was startled when, during their discussion, Reed asked her,

So, if she [Fleming] calls me an asshole, I am supposed to follow the [workplace violence] policy, before I snap her little neck?

(Tr. 811.) Reed’s version of this exchange was somewhat different. He reported that he asked Thom whether, in the event Fleming came up to him and slapped him, he would have to consult with Thom before he “retaliate[d],” against Fleming. (Tr. 75.) I credit Thom’s account, noting that it is consistent with Reed’s behavior and with my observations of his demeanor. I also note that, even if one were to credit Reed’s testimony, it reflects his pugnacious stance. Although phrased more gently than Thom’s version of his words, Reed’s own account indicates that during a meeting designed to discuss serious allegations against him and to explain to him the employer’s workplace violence policy, he chose to attempt to ridicule that policy.

Thom testified that she never asked Reed for any information about what took place during the union meeting, except for the events directly related to his confrontation with Fleming. Reed confirmed this, agreeing that the discussion involved only the events concerning Fleming. Thom also testified that there was

<sup>36</sup> In her testimony, Ciampa confirmed this account, saying that she told Thom that she “didn’t remember touching her, but then I am a touchy/feely person and I could have touched her arm. I just could not remember.” (Tr. 1060.)

<sup>37</sup> At trial, Ciampa denied making such a demonstration.

<sup>38</sup> Reed confirmed this. He testified that he showed Thom the paper, but refused to give it to her. In my view, this is an example of the sort of behavior that leads to the conclusion that Reed has a pugnacious attitude and style of presenting himself.

no disciplinary action taken against Reed and no formal record placed in his file.<sup>39</sup> Reed confirmed that he was not informed of any disciplinary consequences arising from the meeting or the underlying incident.

Thom also testified that she held a meeting with Fleming regarding the incident at the union meeting. She told Fleming that using words such as “asshole” was “completely against our policy, and that she shouldn’t do that.” (Tr. 814.) She also informed Fleming about the workplace violence policy, indicating that “[i]t was basically the same things that I had told Mr. Reed.” (Tr. 815.) Fleming was not subject to disciplinary action and nothing was placed in her file.

On January 21, the Union lodged its remaining unfair labor practice charge against the Hospital, alleging employer misconduct involving the discipline of Reed. (GC Exh. 1(v).) On March 10, the Regional Director issued his final complaint, report regarding the objections to the election, order of consolidation, and notice of hearing. (GC Exh. 1(z).) While these steps in the litigation progressed, the Union and the Hospital continued their collective-bargaining efforts with the assistance of a Federal mediator. These efforts were successfully concluded on April 11. On April 17, the parties’ new collective-bargaining agreement was ratified. Its duration is from April 17, 2003 through April 16, 2004.

### III. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel contends that both the Hospital and the Union engaged in unfair labor practices. I conclude that, in order to place the conduct of hospital officials in its proper context, it is necessary to first examine the charges against the Union.

#### A. *The Unfair Labor Practice Charges Filed Against the Union*

The General Counsel contends that the Union, through its agent Trudi Mietz, engaged in a pattern of threats against bargaining unit members. These threats are alleged to have commenced at the end of September 2002 and to have continued through the middle of December of that year. (GC Exhs. 1(z) and 2.) The threats were designed to deter two forms of conduct, participation in the decertification effort and the crossing of any future picket line maintained by the Union. The most serious of the threats included warnings and predictions that employees would suffer physical injury, and damage to their vehicles and property. Additional threats included fines imposed by the Union and loss of employment. It is also alleged that more generalized threats were uttered, including a warning that bargaining unit members would be “taken care of” if they engaged in an effort to obtain decertification of if they crossed a picket line. (GC Exhs. 1(z) and 2.) Finally, the General Counsel asserts that Mietz’ statements made on behalf of the Union violated Section 8(b)(1)(A) of the Act.

For reasons I have already described, I credit the testimony of the bargaining unit members, including Fleming, Mendez, Stemali, and Organ, regarding the threats made by Mietz. Their

<sup>39</sup> Thom acknowledged that she retains a file containing notes from the meeting made by Long and herself. She agreed that if Reed were investigated about a later complaint, her file could be retrieved and considered.

testimony showed that, even earlier than alleged by the General Counsel, Mietz began making threats against those who supported decertification. Threats were made against specific individuals and were made in the presence of many bargaining unit members. Mietz’ intimidating statements formed a frequent accompaniment to her daily visits to the smoke shack, an employee break area. In addition, she made threats inside the hospital building at bargaining unit members’ work areas. Among the more severe threats were warnings of physical assault against Mendez and against anyone who attempted to cross a picket line, destruction of Organ’s property, damage to the homes and vehicles of union opponents, and loss of Organ and Stemali’s jobs. I find that there is overwhelming and persuasive evidence that both before and during the period of months alleged by the General Counsel, Mietz engaged in a pattern of behavior consisting of daily threats disseminated widely among bargaining unit members.

In its answer to the complaint and post trial brief, the Union does not seriously dispute the fact that Mietz engaged in a pattern of uttering threats against union opponents. Indeed, counsel for the Union candidly concedes that,

[t]here is general agreement that Trudy Mietz was rude, impertinent, insulting, impudent, brazen, ill-mannered, and even sassy.

(U. Br. at p. 19.) While the extent of Mietz’ threats cannot be seriously doubted, the Union raises a variety of other defenses to the unfair labor practice charges. First and foremost, it asserts that Mietz was not “acting within the scope of her agency and that such remarks were ultra vires of her agency.” (Union’s answer to complaint, GC Exh. 1(q).) It is further alleged that the Union “never authorized or ratified such conduct.” (GC Exh. 1(q).) Finally, the Union claims that Mietz’ statements were merely “hyperbole” and that bargaining unit members understood them to be such. (GC Exh. 1(q).) In particular, it is noted that the Union lacked the power to terminate any employee and that Mietz’s warnings in this regard could not have restrained or coerced anyone.

In order to find the Union legally responsible for Mietz’ misconduct, I must determine whether she was its agent. In *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983), the Court provided a comprehensive outline of the principles of agency applicable under the Act. It noted that the existence of an agency relationship must be analyzed as a question of fact within the general framework of common law agency principles, including the doctrine of apparent authority. Agency is established if the evidence shows that the union “instigated, authorized, solicited, ratified, condoned or adopted” the statements at issue. *Kitchen Fresh*, supra at 355, citing *NLRB v. Miramar of California*, 601 F.2d 422, 425 (9th Cir. 1979). The Court concluded its discussion by observing that,

[a]t the minimum, the party seeking to hold the union responsible for an employee’s conduct based upon the theory of apparent authority must show that the union cloaked the employee with sufficient authority to create a perception among the rank-and-file that the employee acts on behalf of the union . . . and that the union did not disavow or repudiate the employee’s statements or actions.

*Kitchen Fresh*, supra at 355. (Citations omitted.)

The Union's chief steward for this bargaining unit, Brunette, testified that Mietz held two positions within the organization. She was a member of the bargaining committee and a steward. Her role as a member of the bargaining committee is significant since this is an elected position.<sup>40</sup> The Board has observed that the holding of such an elective office is "persuasive and substantial evidence" of agency. *Penn Yan Express*, 274 NLRB 449 (1985). By the same token, the Board has placed great probative value on an alleged agent's position as steward. In a decision whose venerability is underscored by its outdated use of gender-specific language, the Board noted that a steward is "the first union representative the members look to, and the man from whom they take their cues insofar as union policy is concerned." *Teamsters Local 886*, 229 NLRB 832, fn. 5 (1977), enf. 586 F. 2d 835 (3d Cir. 1978), quoting *Carpenters Local 2067*, 166 NLRB 532, 540 (1967).

Beyond any generalized presumption arising from the title of steward, I note that the Union's constitution and bylaws specifically address key aspects of the authority vested in its stewards. Tellingly, the constitution states that, "[t]he steward-worksite leader is the most important leader of the Union at the worksite." (Constitution and bylaws, art. XV, sec. 6, GC Exh. 5.) Among the enumerated duties of stewards is the necessity to keep members informed about union activities and plans. Of particular relevance here, stewards are charged with the responsibility to:

educate and inform employees who are working at their worksite and covered by the collective bargaining agreement regarding the advantages of becoming and remaining members of the Union.

(Constitution and bylaws, art. XV, sec. 6, GC Exh. 5.) I find that the Union's constitution and bylaws specifically authorized Mietz to represent the Union in its effort to defeat the decertification effort by persuading bargaining unit members to continue to support their current collective-bargaining representative. Of course, I recognize that, while the Union vested Mietz with actual authority to represent it in the campaign against decertification, there was no evidence that higher union officials directed her to employ threats in this cause. Nevertheless, principles of agency do not require this quantum of evidence. As another administrative law judge noted in a case affirmed by the Board,

the fact that the Respondents did not specifically authorize the issuance of threats does not preclude the existence of Respondent's responsibility. "[R]esponsibility attaches if, applying

the 'ordinary law of agency,' it is made to appear the union agent was acting in his capacity as such."

*Boilermakers Local 5*, 249 NLRB 840, 848 (1980), vacated without opinion 690 F.2d 1060 (D.C. Cir. 1982). (Internal citations omitted.) See also: *Teamsters Local 886*, supra at 832-833 ("It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.") When she uttered her threats, Mietz was acting in her capacity as the worksite leader responsible for persuading bargaining unit members as to the advantages of remaining members of the Union. Her threats are properly held against the Union by application of principles of actual authority.

In addition to possessing actual authority, Mietz was also clothed with apparent authority. Such apparent authority arises from the fact that the Union knew of Mietz' pattern of threats and failed to take meaningful action to either disavow her conduct or prevent its continuation. The evidence demonstrates that the Union became aware of Mietz' threats in a number of ways. For example, on October 13, Fleming presented Brunette with her resignation from the bargaining committee. She testified credibly that she told Brunette about Mietz' threats. He responded that he did not believe her. She suggested that he visit the smoke shack himself to investigate. There is no evidence to indicate that he did so.

The Union was also placed on notice through the filing of the Hospital's unfair labor practice charges. Murdaugh testified that he showed these charges to Brunette who told him they were "a bunch of garbage." (Tr. 392.) Murdaugh reported that he asked several other people about the charges and they told him they did not know anything. He also asked Mietz, who denied making any threats. Nevertheless, he testified that he did recall that during the November 19 union meeting, Mendez reported being the victim of threats. He also testified that a bargaining unit member, Gary Crow, told him that someone had called his spouse and threatened her.

Union President Hampton was also aware of the allegations contained in the unfair labor practice charges. He discussed the charges at a union meeting and made light of them. Despite this, Mendez took this occasion to tell Hampton that she was among those who had been threatened. Hampton expressed no concern and took no investigatory action.

Steward Tyndal testified that Organ complained to her that Mietz was issuing threats against her. Mietz herself told Tyndal that people were saying that she was threatening to vandalize cars. Tyndal told Mietz that "if it was actually going on, that she needed to back off." In response, Tyndal reported that Mietz "really didn't say much." (Tr. 938.) Despite this, Tyndal made no reports to her superiors and took no additional action.

I conclude that numerous union officials were aware of the serious allegations against Mietz. They received troubling information from a variety of sources. They made no significant effort to investigate these reports, nor did they take the opportunity to communicate with bargaining unit members regarding the allegations. In a classic example of a missed opportunity to do so, the Union's president was present during a meeting with bargaining unit members when Mendez raised the issue. Neither he nor any of the officials present made any

<sup>40</sup> Ordinarily, the position of steward is also elective. It appears that the Union had difficulty in recruiting sufficient stewards. As a result, members who volunteered were accepted as stewards. In this manner, Mietz volunteered and was appointed. Brunette testified that upon such appointment, a form is sent to the Union's headquarters in Detroit. All of this appears consistent with the Union's constitution and bylaws, which do not require that stewards be elected. See: Constitution and bylaws, art. XV, sec. 3 (GC Exh. 5). There is nothing to suggest that Mietz' appointment as a steward was in any way irregular.

effort to learn more or to express disapproval of conduct designed to coerce bargaining unit members. Furthermore, this apparent acceptance of Mietz' misconduct was mirrored in the Union's response to misconduct by others. The Union's officials remained similarly silent in the face of Reed's threats to a bargaining unit member made in their presence during a union meeting. Murdaugh's attempted assault on the Hospital's lawyer, also made in the presence of union officials, similarly failed to elicit any condemnation. These repeated failures to express disapproval of misconduct sent an implicit yet powerful message to bargaining unit members that the Union condoned and ratified the misconduct. As a result, the Union's behavior manifested to bargaining unit members that Mietz possessed apparent authority to engage in her pattern of threats against union opponents. As the Third Circuit has observed while affirming the Board's finding of unfair labor practices,

[w]hen union officers knowingly stand passive in the face of flagrant misconduct by a body of their members . . . without taking affirmative action to repudiate that misconduct, and when, as here, that passivity amounts to silent approbation, the Union may not escape liability by claiming the misconduct was that of its individual members and not of the Union itself.

*NLRB v. Bulletin Co.*, 443 F.2d 863, 867 (3d Cir. 1971), cert. denied 404 U.S. 1018 (1972). For these reasons, I conclude that Mietz possessed both actual and apparent authority as an agent of the Union when she issued her threats against bargaining unit members.

The Union also defends itself by asserting that bargaining unit members understood that Mietz's threats were simply "hyperbole" and that she lacked the means to carry out those threats. Counsel for the Union contends that "Trudy Mietz's continuous stream of banter flowed off employees like water from a duck's back." (U. Br. at 13.) The Board has held that the test to be applied is "whether a remark can reasonably be interpreted by an employee as a threat," regardless of the actual effect upon the listener. *Smithers Tire*, 308 NLRB 72 (1992). I have no difficulty in concluding that threats to "slap the shit" out of the person holding the decertification petition and to "slap that fat bitch from dietary that has the petition" were neither hyperbole nor banter. (Tr. 257, 641.) They were quite clearly threats of bodily harm directed at persons opposed to the Union. By the same token, statements expressing an intention to throw bottles and cans at employees crossing a picket line or to vandalize cars<sup>41</sup> or homes are readily understood as threats. In addition, warnings of economic penalties such as fines or loss of employment were also coercive statements.<sup>42</sup> More general comments about making union opponents' lives

<sup>41</sup> In *Smithers*, supra at 73, the Board noted that threats against employees' automobiles can have "particular significance" given their use as transportation to and from the workplace.

<sup>42</sup> While Organ did testify that she did not credit Mietz' threat to cause her to lose her job, Stemali took the same threat seriously. Mietz was aware that Stemali was a recently hired probationary employee and I find that the threat to cause her to lose her job was coercive in these particular circumstances. See: *Lyon's Restaurants*, 234 NLRB 178, 179 (1978).

"hell" and making life "miserable" for union opponents were also threats, given the context of their utterance as part of a stream of more specific predictions of harm.<sup>43</sup> (Tr. 641, 637.)

Counsel for the Union suggests that the threats were not taken seriously since no written reports were made to management officials. I have already noted that the test for evaluation of the statements is objective. Thus, the effect upon a particular listener is not dispositive.<sup>44</sup> In this regard, I also note that it is a common experience of those associated with the justice system that victims of threats often fail to report them. Such failure to make reports is a foreseeable and frequently intentional by-product of the intended intimidation. In any event, many of Mietz' threats were, in fact, reported. Management officials testified regarding a stream of such reports. For example, Fear testified that he received such complaints "almost on a daily basis." (Tr. 272.) The evidence demonstrates that Mietz' statements regarding her intent to assault union opponents, destroy their property, subject them to economic harm, and otherwise make their lives miserable were threats intended to restrain and coerce bargaining unit members in the exercise of their rights under Section 7 of the Act. I conclude that Mietz' statements, made as an agent of the Union, violated Section 8(b)(1)(A) of the Act.

#### B. *The Unfair Labor Practice Charges Filed Against the Hospital*

The General Counsel alleges that the Hospital violated the Act in four instances. I find that three of these asserted violations are directly connected to the Union's unlawful conduct and must be assessed in this context. The remaining allegation bears little or no such connection. I will analyze this contention first.

On September 17, 2002, Director of Food Service Fear convened a meeting for the ostensible purpose of counseling Kinney regarding her failures to file timely incident reports. Mietz was invited to attend, supposedly to provide union representation to Kinney. In fact, I conclude that Fear arranged Mietz' presence, in part, to create an opportunity to discuss his displeasure that she had spoken to other employees about his criticism of Kinney's request to file an incident report several days after she claimed to have suffered a work-related injury. During this meeting, Fear chastised Mietz, calling her conduct "very unprofessional." (Tr. 108.) He informed her that her discussion of Kinney's problems in filing an incident report violated the employer's confidentiality policies. In speaking about this to Mietz, he articulated a policy that would require

<sup>43</sup> For example, see: *Double D Construction Group*, 339 NLRB No. 48, slip op. at 1-2 (2003), where, in the context of other coercive misconduct, the statement, "Remember your bills," was found to be an unlawful threat. The Board held that "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction."

<sup>44</sup> To the extent that the subjective effect on listeners is probative, I note that I was struck by the visible and impressive emotional impact of the threats as described by several witnesses during their testimony. Organ, Stemali, Mendez, and Fleming clearly conveyed the significant subjective impact of these threats through their demeanor and presentation while describing these events in their testimony.

her to report to him before speaking about such matters to the public.<sup>45</sup>

The General Counsel contends that Fear's instructions to Mietz interfered with the exercise of rights protected by Section 7 of the Act. I agree. Mietz' conversation that Fear claimed was improper took place in the employee break area among employees who were on break. It involved issues directly related to the terms and conditions of their employment. At least two important terms and conditions of employment were involved. First, Mietz raised concern that management was preventing Kinney from obtaining medical evaluation and treatment for an alleged work-related injury by denying her the opportunity to file an incident report. Second, her conversation involved discussion of the parameters of an important work rule, the requirement that employees document unusual occurrences by filing timely incident reports. I find that both aspects of Mietz's conversation involved terms and conditions of employment. In this connection, I note that the Board has not taken a narrow view that discussion of terms and conditions of employment is limited to such obvious items as wages and salaries. For example, in *Lockheed Martin Astronautics*, 330 NLRB 422 (2000), it held that an employer's warning that employees could not discuss the impact of a coworker's disability on their own working conditions was unlawful as a prohibition of protected activity.

I have also considered the relatively informal nature of Fear's admonition to Mietz. His instructions were not reduced to writing and were unaccompanied by any disciplinary action. Nevertheless, the Board has not hesitated to find violations of the Act in similar circumstances. In affirming the Board's finding of a violation where an employer verbally instructed employees not to discuss wages, the Sixth Circuit noted that the fact that the prohibition was "unwritten and routinely unenforced" did not alter the result. Indeed, the Court observed that "verbal warnings from a supervisor, who has the authority to discipline and to discharge, may be perceived by an employee as particularly coercive." *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 538, 539 (6th Cir. 2000). In mounting an otherwise vigorous defense of Fear's conduct, counsel for the Hospital candidly conceded that "John Fear may have made an overbroad comment to Trudi Mietz about her smoke shack discussion with other employees." (Emp. Br. at 81.) This is precisely the problem. Fear's instructions to Mietz regarding employee discussions was so overbroad that it interfered with the employees' Section 7 rights. As a consequence, I find that the Hospital violated Section 8(a)(1) of the Act.

The General Counsel contends that the Hospital also violated Section 8(a)(1) of the Act by issuing a written communication to employees on September 24, 2002. That document was phrased as a series of questions and answers about a wide variety of labor relations topics. Among the questions was one asking what would happen if employees participating in decertification activities "*are harassed by Union members?*" (Emphasis in the original.) The complete response was that em-

ployees should "[r]eport it immediately to Human Resources for appropriate action." (GC Exh. 4, p. 3.)

In defending this language, counsel for the Hospital notes that consideration of the context reveals no union animus. He further asserts that the Hospital's sole purpose in making these statements to bargaining unit members was to protect them from coercion by others. I am entirely sympathetic to these arguments. The tone of the complete document confirms counsel's assessment that it is free of expressions of animus. In fact, it is generally fair minded, promising to negotiate with the Union in good faith, informing employees that the Union has the right to engage in picketing, and warning that decertification activities must not be undertaken on worktime. I also agree with counsel for the Hospital that it is apparent from the context that the purpose of the discussion of harassment was to offer assistance to employees who were encountering coercive conduct by union agents and supporters. I note that this memorandum was written during the period when management was receiving numerous reports of threats being made against proponents of decertification.

Having agreed with counsel for the Hospital about these attendant circumstances and motivations, I am, nevertheless, constrained to find a violation of the Act. The Board's precedents establish a clear and easily followed guidepost for such employer communications. In *Automotive Plastic Technologies*, 313 NLRB 462 (1993), it found a violation of Section 8(a)(1) where the employer told employees to inform management if they were being "bothered" or "harassed" by union supporters. The Board held that this broad language would suggest to employees that they could report "lawful attempts by union supporters to persuade employees to sign union cards." 313 NLRB at 462. See also: *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). In fact, the case cited by the Hospital in support of its position, *S.E. Nichols, Inc.*, 284 NLRB 556 (1987), illustrates the Board's clear and easily understood distinctions regarding permissible employer language. In that case, the General Counsel objected to language in the employer's handbook that told employees to report to management if "you are threatened." The General Counsel also objected to verbal statements from the employer, telling employees to report "harassment" to management officials. The Board approved the language of the handbook, noting that it was not reasonably subject to an interpretation that would violate the Act. By contrast, it held that instructions to report harassment were "vague and ambiguous in the context of union organizing and reasonably could encompass perfectly lawful union efforts to persuade or even merely to inform employees about the asserted benefits of unionization." 284 NLRB at 557.

Although I find that the Hospital's purpose and motivation in issuing its instructions regarding harassment were not improper, it's choice of language contravened the clear requirements enunciated by the Board over a period of many years. The Hospital's failure to conform to this easily understood legal standard resulted in a violation of Section 8(a)(1) of the Act.

The General Counsel's two remaining allegations involve events that took place during a meeting on January 17, 2003. The purpose of the meeting was to address allegations that employee Reed had engaged in improper conduct. It is alleged

<sup>45</sup> It is apparent from the context that when Fear told Mietz not to speak to the "public," he meant that she should not speak to fellow bargaining unit members. (Tr. 242.)

that during this meeting supervisors coercively interrogated Reed<sup>46</sup> and discriminatorily disciplined him for engaging in union activities.

Turning first to the alleged coercive interrogation aspect, all parties agree that the standard to be applied is set forth in the leading case, *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). It must be recognized that allegations of improper interrogation typically arise when management officials question employees regarding their union sympathies, the union sympathies of coworkers, or the timing, location, attendance, and contents of union meetings. This case, arising during the course of an investigation of complaints of threats reported by three coworkers, poses a significantly different context. Fortunately, the Board in *Rossmore* took pains to emphasize the breadth of its “totality of circumstances” standard. It observed:

Experience convinces us that there are myriad situations in which interrogations may arise. Our duty is to determine in each case, whether, under the dictates of Sec. 8(a)(1), such interrogations violate the Act. Some factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. . . . These and other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be considered in applying the . . . test of whether under all the circumstances the interrogation tends to restrain, coerce, or interfere with rights guaranteed under the Act.

269 NLRB at fn. 20. (Citations omitted.) With this broad mandate, I will not view the questioning of Reed in isolation from the turbulent events taking place in this worksite.

Consideration of the background must begin with recognition that the Hospital maintained a preexisting written policy regarding violence. This policy was promulgated in August 2001. It defined violence in the workplace to include threats. In addition, it defined workplace violence in a manner that included threats “that occur outside of the workplace, but may impact the work environment at BCHS [Battle Creek Health System].” (GC Exh. 3, p. 2.) This document enunciates zero tolerance for misconduct, including even such misbehavior as “joking” about violence. Employees are instructed not to ignore threats or harassment and are told to report any potentially dangerous situation. Indeed, failure to do so could result in disciplinary action. When a report is made, the policy directs that an investigation be conducted. This is to include interviews with the complainant, any witnesses, and the alleged violator. If a violation is established, disciplinary sanctions can include termination of employment. (GC Exh. 3, p.3.)

<sup>46</sup> The General Counsel’s complaint refers to improper interrogation of “employees.” (GC Exh. 1(z).) Use of the plural refers to Reed and Chief Steward Brunette who was present as Reed’s union representative. Brunette had not attended the union meeting at which Reed was alleged to have misbehaved. He had no personal knowledge of these events and was not asked about them. I assume that his inclusion in the complaint is based on the theory that he would have witnessed and been affected by any management coercion of Reed.

It must next be recalled that the work environment was enmeshed in a contentious decertification campaign and difficult collective-bargaining negotiations. These had been marked by a pattern of threats of violence and by an actual attempted assault upon the Hospital’s attorney during a bargaining session. In this polluted atmosphere, it was reasonable and necessary for the Hospital’s management to maintain vigilance regarding any potential for further workplace-related violence.

With this background, it is appropriate to consider the events at issue. There is no dispute that a public argument between Reed and Fleming took place during a union meeting on December 17, 2002.<sup>47</sup> On the following day, Ramsey provided management with a written statement alleging that Fleming had been threatened. Eight days later, Fleming herself filed an incident report claiming that Reed had repeatedly told her that he was going to “kick your fucking ass” and made similar threats against her spouse. (Emp. Exh. 8, pp. 4 and 5.) Her account went on to describe a potentially explosive encounter between Reed and Mendez in the parking lot, an incident that portended violence had it not been broken up by two other employees. Her report concluded by expressing that she was “afraid for me & Angie [Mendez] and family, that he [Reed] was going to follow me home.” (Emp. Exh. 8, p. 7.) In addition, Mendez informed Fear about this alleged threatening behavior by Reed.

Both the General Counsel and the Union are critical of the Hospital’s procedural response to these reports. In particular, they object to the failure to interview Fleming and the significant delay between receipt of the reports and the scheduling of the meeting with Reed. Employee Labor Relations Specialist Thom testified that she received the incident report regarding Reed on December 27. Thom contended that she did not interview Fleming since Fleming’s written account was sufficiently detailed to obviate the need for further questioning. While I agree that it would have been wiser to comply with the written policy and conduct such an interview, I accept Thom’s explanation as reasonable, at least to the extent that I decline to infer any animus from the failure to interview Fleming. In reaching this conclusion, I have considered the fact that Fleming’s account was not only detailed, but was supported by accounts from two other employees.<sup>48</sup>

<sup>47</sup> I have previously explained my reasons for finding that the testimony of Fleming, Ramsay, and Mendez regarding these events was credible and that Reed’s account and the accounts of others that supported his version were not. I note that for purposes of assessing the Hospital’s conduct in questioning Reed regarding these events, resolution of the conflicting stories is immaterial. It is not contended that the Hospital’s misconduct consisted of investigating or disciplining an innocent employee. As I understand the General Counsel’s theory, the Hospital committed an unfair labor practice by coercively interrogating Reed irrespective of whether he threatened Fleming or not. Counsel for the General Counsel asserts that the reason for the interrogation was “to learn what happened at the Union meeting and to let Reed know that his Union activities were subject to Employer scrutiny.” (GC Br. at 13.)

<sup>48</sup> I must also observe that the General Counsel is attempting to have it both ways. Both Reed and Fleming were bargaining unit members who attended the union meeting in question. The General Counsel contends that management’s decision to have an investigatory meeting

Thom testified that there were a variety of reasons for the delay in scheduling a meeting with Reed. She conceded that she did not examine the incident report immediately, having just returned from the Christmas holidays. Further delay was occasioned by her need to discuss this admittedly thorny issue with her supervisors. Finally, she reported that it was difficult to schedule the meeting since Reed worked on the third shift. I credit Thom's explanations. This is not to suggest that I approve of the delay in resolving what appears to me to have been an urgent issue. Nevertheless, there is nothing in the record to suggest that the delay was motivated by any improper purpose. Nor do I find any ground to infer from the delay that the Hospital was not serious in enforcing the workplace violence policy and was simply using that policy as a pretext for a coercive interrogation of Reed. My conclusions in this regard are undergirded by examination of what actually occurred during this meeting.

Thom, along with Reed's two supervisors, Keith Long and Paul Ratliff, attended the January 17 meeting. In addition to Reed, Chief Steward Brunette was present. Reed had requested a union representative and Long arranged for Brunette to appear in this capacity. Thom asked Reed to provide his side of what had happened between himself and Fleming. She explained the workplace violence policy to Reed. Reed displayed a paper that he claimed contained a list of employees who would support his version of events. When Thom requested the list, Reed refused to provide it. Reed then subjected the workplace violence policy to scorn, observing that,

So, if she [Fleming] calls me an asshole, I am supposed to follow the [workplace violence] policy, before I snap her little neck?

(Tr. 811.) Significantly, Reed testified that he was not disciplined as a result of this meeting. Counsel for the Hospital asked Reed the following questions regarding the content of the discussions:

COUNSEL: And did anyone at that meeting ask you about the names of people that attended the Union meeting?

REED: They didn't ask me for names, no.

COUNSEL: Okay. Did anyone ask you what went on at that Union meeting, other than your confrontation, if I could just put it in those terms, with the three females [Fleming, Ramsey, and Mendez]?

REED: No, they did not.

(Tr. 83.) From this, I conclude that the extent of the questioning of Reed was carefully tailored to meet the legitimate objective of conducting an investigation into allegations from three employees that a fourth employee had violated the workplace violence policy.

Having examined the background of the interrogation and the nature of the information sought, I will now examine the remaining factors specifically mentioned in *Rossmore*. These

factors address the identity of the questioner and the place and method of the questioning. Once again, I conclude that the Hospital's conduct in these regards supports the legality of the interrogation. The questioner was the personnel official responsible for investigating this alleged violation of the workplace violence policy. It is true that Reed's two supervisors also attended. I find that their presence was not for the coercive purpose of intimidating Reed. Instead, their attendance reflected the Hospital's concern regarding the serious nature of the allegations and the potential for a future violent interaction between Reed and Fleming.<sup>49</sup> In my view, the presence of Reed's supervisors was appropriately directed at the goal of impressing him with the need to conform his conduct to the requirements of the workplace violence policy. The importance of such a strong and united presentation by management was underscored by Reed's dismissive attitude toward that policy as expressed during the meeting. Finally, I note that the method of interrogation was entirely consistent with a desire to enforce the workplace violence policy and inconsistent with a design to intimidate union supporters. Reed was given advance notice of the timing and purpose of the meeting. The Union's chief steward attended the meeting as Reed's union representative. Reed was given an opportunity to present his side of the story. Even when Reed became belligerent, managers uttered no threats and imposed no sanctions. In fact, the delay in scheduling the meeting supports the lack of any intent to coerce. The Hospital became aware of the allegations against Reed before the date of the decertification election. It conducted the meeting almost one month after that election. Surely, if the Hospital wished to coerce Reed into submission it would have desired to do so before he had the opportunity to vote and to discuss his opinions with other prospective voters.

In a recent case, the Board has expressed understanding of the need for employers to have the latitude to conduct investigations of alleged employee misconduct toward coworkers in order to preclude the creation of a hostile work environment. In *PPG Industries*, 337 NLRB 1247 (2002), a male union supporter addressed a female coworker as to her supposedly inadequate pay. He said, "They're f—ing you. They're screwing you. You need to sign one of my [union authorization] cards." *Ibid*. The female employee complained to management. This complaint was investigated and minor discipline was imposed. The Board affirmed the administrative law judge's finding of no illegality. The judge observed that,

Clearly, the employer otherwise was obligated to seriously consider an employee's complaint regarding a matter related to sexual harassment and it acted in a nondiscriminatory manner with a reasonable investigation, evidence of a supporting witness, and in accordance with its handbook and regular disciplinary policies.

Id at 1248. Similarly, I conclude that the Hospital's questioning of Reed was for a legitimate purpose, was not motivated by

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with Reed to inquire as to the events at issue was an unfair labor practice, while the decision to forego an investigatory meeting for the same purpose with Fleming was also an impropriety.

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<sup>49</sup> Thom testified that she recognized that Fleming and Reed did not work in the same department. However, she feared that they could have a chance encounter in the workplace, for example, in the Hospital's dining room.

animus, was done in substantial compliance with pre-existing policy, and was carefully tailored to avoid invasion of Section 7 rights or coercion of a union supporter. In reaching this conclusion, I grasp the nature of the General Counsel's concern that union meetings be clothed in the Act's protective embrace. However, I am convinced that the unique circumstances of this case, involving a history of threats and violence and multiple complaints of threats by Reed, justified the carefully limited actions undertaken by management in this instance.

Having concluded that management behaved lawfully in its interrogation of Reed, it largely follows that its decision to counsel Reed about the workplace violence policy was also lawful. In considering this additional allegation, I have applied the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Under *Wright Line*, in order to meet its initial burden of showing unlawful discrimination, the General Counsel must demonstrate by preponderance of the evidence that Reed engaged in protected activity, that the Hospital knew he had done so, and that the Hospital took an adverse employment action against Reed. Finally, "the General Counsel must establish a motivational link, or nexus, between [Reed's] protected activity and the adverse employment action." *American Gardens Management Co.*, 338 NLRB No. 76, slip op. at 2.

It is evident that Reed engaged in the protected activity of attending and participating in the union meeting on December 17. It is equally apparent that the Hospital knew of Reed's attendance and participation. Indeed, Fleming's detailed incident report informed management that Reed spoke out at the meeting in favor of violence against the employer. According to Fleming's report, in discussing the Hospital's negotiating team, Reed opined that "[w]e need to kick all their fucking asses." (GC Exh. 8, p. 3.)

The third prong of the General Counsel's burden poses a more difficult question. Reed and Brunette both testified that Reed was not given any formal disciplinary sanction at the January 17 meeting or thereafter. In today's work environment, the absence of formal sanction is not completely dispositive. As illustrated by the Hospital in this case, employers display a fondness for euphemisms<sup>50</sup> designed to sugarcoat a sometimes bitter pill. In this instance, the Hospital characterizes its activities at the January 17 meeting as an investigation into alleged violation of the workplace violence policy and a "coaching" of Reed regarding the requirements of the policy. As befits a euphemism, the precise impact of such coaching is somewhat unclear. Generally speaking, the Hospital's managers took the position that coaching did not rise to the level of an adverse disciplinary action. Nevertheless, a high management official, Director of Patient Care DiBiaggio, testified that it is typical for management to make "personal notes" regarding a coaching session. (Tr. 1025.) These notes do not become part of the employee's personnel file. However, the notes may be used in the future if need should arise. Furthermore, DiBiaggio agreed

with counsel for the Union that "coaching is a preliminary to what may be a disciplinary procedure." (Tr. 1028.) She also characterized coaching as,

[e]ssentially it is a warning that if, indeed, you know that you have done these [inappropriate] behaviors we are letting you know that this type of behavior per policy is inappropriate in the organization. Do you understand that, and if you do understand that, please acknowledge.

(Tr. 1041.) Adding to the uncertainty about the meaning and import of coaching, Fear testified that the Hospital has a pre-printed coaching form that can be used to document a coaching session. He also testified that a coaching session can start the process that ultimately results in discipline.

By its choice of language and by the lack of a precise understanding of the contours of the concept of coaching among its managers, the Hospital has created an ambiguity. I cannot say with assurance that the coaching session with Reed could not be used against him in the future. To the extent that it could constitute a blot on his employment record, it bears characteristics of an adverse action. On balance, I conclude that the more prudent course is to find that the General Counsel has met its burden of establishing that the coaching session bore sufficient resemblance to a disciplinary warning to merit consideration as an adverse employment action.<sup>51</sup>

For reasons already enunciated in my discussion of the alleged coercive interrogation of Reed, I conclude that the General Counsel has failed to meet its burden of establishing a nexus between Reed's protected activity and the employer's adverse coaching action. I find that the Hospital coached Reed due to its genuine belief that this was required in the impartial implementation of its pre-existing workplace violence policy. There is simply no evidence that management showed the slightest concern or irritation that Reed attended the union meeting, spoke out against management at that meeting, or otherwise participated in activities and conversations as a strong union supporter. The timing, procedural safeguards, and carefully limited nature of the coaching session all support this conclusion. Indeed, given Reed's less than satisfactory expression of his comprehension and acquiescence in the workplace violence policy, the management response can only be described as mild.<sup>52</sup>

Although I have found that the General Counsel has failed to show a nexus between Reed's union activities and sympathies and his coaching during the January 17 meeting, in the interest of decisional completeness, I will address the remaining aspect of the *Wright Line* standard. If one assumes, arguendo, that the

<sup>51</sup> For another view of the perplexities associated with evaluation of an employer's euphemistic terminology, see the Board's opinion and Member Devaney's dissent in *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993). In that case, the employer, another hospital, issued something called a "conference report" to employees found to have potential performance or behavior problems.

<sup>52</sup> One must wonder about the effectiveness of what was done. Reed testified that, although he was given a copy of the workplace violence policy at the meeting, he has never bothered to read it since he didn't "need this procedure to tell me how to act." (Tr. 74.)

<sup>50</sup> In another example, the Hospital refers to its employees as "Associates."

General Counsel's initial burden has been met, the evidence directs a conclusion that the Hospital has demonstrated that it would have taken the same action even in the absence of Reed's protected activities. In evaluating this question, the starting point must be the Hospital's preexisting workplace violence policy. That published policy defines workplace violence to include threats made outside with workplace. It directs that investigation of a reported violation include an investigatory interview with the alleged perpetrator. The policy further provides that disciplinary sanctions can be imposed for violation of the policy. As a result, management's actions regarding Reed conformed to its previously promulgated procedures.

In addition to conforming to the theoretical procedures of the written policy, I find that management's actions did not deviate significantly from past practices. Chief Steward Brunette was asked what the Hospital should do if allegations were made that an employee had engaged in violent conduct. He responded that, "[t]hey would notify me and have an investigation just like we did in the Dan Steward and the Mose case." (Tr. 336.) This closely tracks the Hospital's conduct upon receiving the allegations against Reed. The only evidence indicating a departure from this past practice of conducting investigations of allegations of violence concerns similar allegations made against Mietz. In this instance, the Hospital did not follow the requirements of the workplace violence policy. The official responsible for conducting these investigations, Thom, testified regarding the failure to conduct such an investigation of Mietz. She noted that the proper response to reports of Mietz' misconduct was discussed with the Hospital's attorneys. She went on to explain that,

[t]he reason that we didn't investigate Trudy [sic] Mietz's threats was because legal counsel's advice was not to at that point. We had already received [i.e. been charged with] a[n] unfair labor practice regarding Trudy [sic].

(Tr. 874.) As a result, Thom testified that the workplace violence policy had been "suspended" so far as Mietz was concerned. (Tr. 874.) I credit Thom's testimony that the failure to implement the policy as to Mietz was a solitary exception to the rule.<sup>53</sup> Implementation of the policy as to Reed was consistent with prior practice.<sup>54</sup>

In attacking the Hospital's treatment of Reed, I find that the General Counsel and the Union fail to accord sufficient weight to the importance of the workplace violence policy. In fact, the Hospital and the Union had enshrined the goals of that policy in

<sup>53</sup> Thom's contentions are corroborated by testimony from DiBiagio that Mietz was coached on several occasions regarding the complaints against her. These coaching sessions took place prior to the filing of the unfair labor practice charges. This supports a conclusion that the subsequent suspension of normal procedures relating to Mietz resulted from fear of further entanglement with the Board's processes.

<sup>54</sup> In reaching this conclusion, I do not mean to suggest that I condone the Hospital's failure to follow its policy regarding Mietz. While I understand that the employer wished to avoid additional unfair labor practice charges during the decertification campaign, its tactical choice was inconsistent with the worthy principles enunciated in the workplace violence policy.

their collective-bargaining agreement. In that agreement, the Hospital promised that:

[t]he Employer will use its best efforts to provide a safe and healthful workplace.

(Collective-bargaining agreement, sec. 33.02, GC Exh. 7, p. 35.) The carefully limited actions taken with regard to the allegations against Reed were consistent with established policy and past practice. I find that the Hospital would have taken (and did, in fact, take) these steps regardless of Reed's union sympathies and activities.

I conclude that the General Counsel has established that the Hospital violated the Act by enunciating an overbroad rule prohibiting employee discussions of terms and conditions of employment and by directing employees to report harassment by union supporters. I do not find that the Hospital engaged in any unlawful conduct by interrogating and coaching Reed in furtherance of its policy designed to prevent workplace violence.

#### IV. THE OBJECTIONS TO THE DECERTIFICATION ELECTION

The Hospital asserts that the Union fatally compromised the integrity of the decertification election by engaging in the conduct that resulted in the filing of the General Counsel's unfair labor practice charge<sup>55</sup> and by other improper behavior. I have already concluded that the General Counsel has established that the Union, through its agent Mietz, unlawfully restrained and coerced bargaining unit members. The misconduct occurred before and during the critical period under consideration.<sup>56</sup> This finding of unlawful conduct directly attributable to the Union carries considerable weight in assessing the Hospital's objections to the election. In *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), it was noted that, "it is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period" prior to an election. The only exception to this policy is for cases in which "it is virtually impossible to conclude that the misconduct could have affected the results of the election." The evidence of the Union's misconduct relied upon to establish the unfair labor practice finding is too serious to permit any determination that it could not have impacted the results of the election. Far from such a conclusion being "virtually impossible," I find that the unlawful conduct manifestly produced a deleterious effect on the fairness of the election.

I recognize that two former Board Members recently criticized the standard set forth in *Clark*. While affirming its continued existence, they proposed an alternate approach. *Safe-*

<sup>55</sup> I am referring to the Hospital's Objections 1 and 2. All of the allegations contained in these two objections have been proven, with the exception of the contention that "the Union and its agents stole and destroyed a decertification petition." (GC Exh. 1(r).) While the circumstances surrounding the disappearance of this petition are certainly suspicious, the evidence is insufficient to support the Hospital's accusation.

<sup>56</sup> I have considered conduct in the weeks prior to the critical period since it was part of the ongoing effort to intimidate union opponents and "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74 (1979). See also: *Buedel Food Products Co.*, 300 NLRB 638, fn. 2 (1990).

way, *Inc.*, 338 NLRB No. 63, slip op., fn. 3 (2002).<sup>57</sup> Therefore, I have also considered the evidence in light of the Board's general standard for assessment of conduct by a union that is alleged to have interfered with employees' free choice in an election. In *Avis Rent-A-Car System*, 280 NLRB 580 (1986), the Board listed relevant factors, including the number of incidents of misconduct, their severity, the number of victims of the misconduct, the timing of the events, the extent of dissemination of information about the misconduct, and its impact on employees. Mietz' threats were very frequent and were widely disseminated. They ranged in severity from unpleasant to highly disturbing, including threats of bodily harm. The threats were persistent and produced clear impact on bargaining unit members. In my view, the evidence establishes that the Union's unfair labor practices reasonably tended to interfere with the bargaining unit members' ability to make a free and uncoerced choice in the decertification election.

Having reached this result, consideration of the Hospital's remaining allegations of objectionable conduct is not strictly necessary. Given the importance of these allegations to the parties and my recommendation that a new election be held, I will assess the additional objections.

By its third objection, the Hospital contends that Kinney and Darkey, while acting as election observers, engaged in improper behavior by wearing various items containing union insignia. The idea that such conduct could reasonably be seen as interfering with voters' freedom of choice strikes me as somewhat farfetched.<sup>58</sup> Longstanding Board precedent persuasively explains the fallacy of such a fragile view of voters' independence. In *Western Electric Co.*, 87 NLRB 183, 184–185 (1949), the Board explained that:

the wearing of buttons or similar insignia at an election by participants therein is not prejudicial to the fair conduct of the election. As the identity of election observers, as well as the fact that they represent the special interests of the parties, is generally known to employees, we do not believe that the fact that the [union] button was worn by an observer prejudiced the result of the election.

See also *Electric Wheel Co.*, 120 NLRB 1644, 1647 (1958) (wearing of union button by election observer “did not constitute interference with employee freedom of choice”). I do not find that the wearing of union attire materially affected the fairness of the decertification election.

The Hospital's fourth objection also concerns behavior of Kinney. It is contended that Kinney's conversation with a voter constituted improper electioneering. I do not agree. The evidence showed that Kinney did not initiate the conversation at issue. Rather, a voter asked Kinney how to learn of the election results. Kinney simply responded to this inquiry. In its leading case on the issue of impermissible electioneering, the Board

directly addressed this type of situation, noting that a “chance, isolated, innocuous comment” to a voter is not improper. *Milchem, Inc.*, 170 NLRB 362, 363 (1968). Kinney's innocuous remark to a voter had no impact upon the fairness of the election.

The fifth objection arises from the physical altercation between Murdaugh and Barnes at the collective-bargaining session on December 10. I agree that Murdaugh's conduct on this occasion could reasonably have affected the voters' freedom of choice. Viewed in the context of the other misconduct by Mietz and the Union's ratification of her behavior through willful inactivity, Murdaugh's aggressive conduct materially contributed to a climate of coercion directed at supporters of decertification. The evidence also established that Murdaugh's action took place shortly before the election and was widely disseminated among the prospective voters. Applying the factors set forth in *Avis Rent-A-Car*, supra, I find that the conduct alleged in this objection reasonably tended to interfere with the fairness of the election.

In its sixth objection, the Hospital alleges that “[t]he Union” threatened an employee and her spouse with bodily harm on December 17. The reference is to Reed's threats of bodily harm directed against Fleming and her husband. While Reed was an active union supporter, there is no evidence that he was acting as an agent of the Union.<sup>59</sup> As a consequence, Reed's threats may only be considered under the standard for granting a new election based on misconduct by third parties. That test requires a finding that the misconduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible.” *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). There is no need to reach this issue given the abundance of evidence establishing that conduct by Union agents did reasonably tend to interfere with the employees' free and uncoerced choice in the election.

The Hospital next cites Murdaugh's conduct on the day of the election as grounds for setting aside the result. The evidence shows that Murdaugh placed himself at the polling place during the balloting on three occasions. In the first and third instances, there is no evidence that he did anything beyond being present in the proximity of the voting. Without suggesting approval of this behavior, I find that it was not coercive. As the Sixth Circuit has noted, “[p]resence alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election.” *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121–122 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974). By contrast, on the remaining occasion, Murdaugh appeared in the polling area during the voting process and proceeded to accost persons preparing to vote. Witnesses observed him speaking to prospective voters and shaking hands with several of them.

<sup>57</sup> For an indication that this issue continues to be a subject of discussion by current Board Members, see *Metaldyne Corp.*, 339 NLRB No. 43, slip op., fn. 4 (2003).

<sup>58</sup> It must be recalled that the Board holds that the wearing of union insignia while at work ordinarily constitutes protected activity under Section 7 of the Act. *USF Red Star*, 339 NLRB No. 54, slip op. at 3 (2003).

<sup>59</sup> I am not prepared to find that the Union's failure to denounce Reed's behavior constituted ratification of his conduct. Unlike Mietz's threats, Reed's conduct involved an improper response to a personal insult. He was responding as an individual and his behavior should not be chargeable to the Union. This is not to suggest that I approve of the Union's officials failure to intervene on Fleming's behalf.

The Board has recently reiterated the factors to be considered in determining whether conduct constitutes improper electioneering. Among the factors to be assessed are whether the conduct occurred at or near the polling place, the nature and extent of the alleged misconduct, whether the misconduct was committed by a party to the election, and whether the conduct took place in a designated area where electioneering was prohibited. *American Medical Response*, 339 NLRB No. 1, fn. 1 (2003), citing *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982), *enfd.* 703 F.2d 876 (5th Cir. 1983). Murdaugh's misconduct took place at the polling place and involved persons waiting to cast their votes. It was in the area designated to be free of electioneering. Murdaugh was an official of a party to the election. His conduct consisted of talking to and shaking hands with persons waiting to vote. In addition, I have considered the fact that, shortly before the election, Murdaugh engaged in assaultive conduct against the Hospital's counsel, an event that was widely discussed among the employees. I find that his presence and conduct in these circumstances reasonably tended to interfere with the voter's freedom of choice. I further find that Murdaugh's conduct violated the rule enunciated in *Milchem, Inc.*, *supra.*, since he engaged in sustained conversation with prospective voters waiting to cast their ballots, thereby contravening the Board's policy ensuring that "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible." *Milchem, Inc.*, 170 NLRB at 362.

The Hospital's final specific objection concerns the exchange between Chiampa and Reeve on the day of the election. It will be recalled that, at a location relatively remote from the polling place, Chiampa asked Reeve if she had voted. On being informed that Reeve had voted against the Union, Chiampa grabbed Reeve's arm and expressed dismay. While expressing her displeasure, she also conceded that Reeve had the right to her own opinion. As Chiampa was an elected union official, her conduct may be attributed to the Union.

I have concluded that Chiampa's physical contact with Reeve consisted of a brief, almost involuntary, touching consistent with Chiampa's general style of interaction with others. It was not intended to be intimidating, and I find that it was not coercive.<sup>60</sup> As Chiampa's conduct did not reasonably tend to interfere with the freedom of choice of employees, it cannot serve as the basis for a proper objection to the election.

In sum, I find that the Union's commission of unfair labor practices through the behavior of its agent, Mietz, constituted conduct that reasonably tended to interfere with the employees' freedom of choice in the decertification election. Additional conduct by another union official, Murdaugh, consisting of an

assault upon the Hospital's counsel shortly before the election date and electioneering among persons standing in line to vote on the day of the election also reasonably tended to interfere with the employees' right to make a free choice regarding their representation. Finally, I conclude that the Hospital's other allegations do not rise to the level required in order to find coercion or interference with the voters' ability to participate freely in the election.

#### CONCLUSIONS OF LAW

1. By threatening employees with bodily harm, destruction of their property, loss of employment, and other improper adverse consequences if they supported decertification of the Union or if they crossed a picket line, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

2. By engaging in the misconduct set forth above and other misconduct consisting of an assault upon the Hospital's counsel and improper electioneering, the Union interfered with the employees' ability to make a free and uncoerced choice in the decertification election held on December 20, 2002.

3. By imposing a verbal policy requiring employees to report to management prior to discussing conditions of employment with other employees, the Hospital engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By distributing a memorandum advising employees to report harassment by union members to management, the Hospital engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

5. The Hospital did not violate the Act in any other manner alleged in the complaint.

#### REMEDY

Having found that the Union has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Union be ordered to post notices in the usual manner and endorse sufficient copies to permit posting at the worksite by the Hospital, if it so chooses.

Having found that the Hospital has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I recommend that it be ordered to rescind its verbal policy requiring that employees report to management prior to discussing conditions of employment with other employees and that it be ordered to rescind its directive that employees report harassment by union members to management as set forth in its memorandum dated September 24, 2002. (GC Exh. 4, p. 3.) I also recommend that it be ordered to post a notice.

For the reasons discussed earlier in this decision, I also recommend that the election held on December 20, 2002, be set aside and that a new election be held on the terms set forth immediately below. I note that the Hospital requests that the notice of second election include an explanation of why the

<sup>60</sup> I recognize that Reeve felt that Chiampa's conduct constituted harassment. I cannot agree with her subjective interpretation. Realistically, the Board has recognized that hotly contested elections will be accompanied by "a certain measure of bad feeling." *Cal-West Periodicals, Inc.*, 330 NLRB 599, 600 (2000), citing *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984). Chiampa's expression of such feelings toward Reeve was within the bounds of reasonable dialogue. Nothing in Chiampa's comments or behavior suggested any threat and Chiampa explicitly conceded Reeve's right to her own negative opinion about the Union.

original election was set aside. As indicated by the Board's decision in *Lufkin Rule Co.*, 147 NLRB 341 (1964) and the NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11452.3, this requested relief is appropriate. Counsel for the Hospital also requests that the *Lufkin* notice include "specific examples of the Union's unlawful conduct." (Emp. Br. at p. 64.) No authority is cited in support of such an addition to the *Lufkin* language. I recommend that the standard format be employed as set forth in the Casehandling Manual. Prospective voters will certainly have access to additional information about the Union's conduct both through the posted notice regarding the unfair labor practice findings and through the ability of both the Hospital and the decertification supporters to address the voters regarding the issues involved in the second election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>61</sup> Direction of Second Election and Order.

#### DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate whenever the Regional Director deems appropriate. The Notice of Second Election shall include the following language:

The election conducted on December 20, 2002 was set aside because the National Labor Relations Board found that certain conduct of the Union interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations.

Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible voters are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election directed herein, and employees engaged in an economic strike that began more than 12 months before the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collec-

tive bargaining by Local 79, Service Employees International Union, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

#### ORDER

IT IS ORDERED that the Respondent, Local 79, Service Employees International Union, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with bodily harm, destruction of their property, loss of employment, or other improper adverse consequences if they support decertification of the Union or if they cross a picket line.

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

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

(a) Within 14 days after service by the Region, post at its union offices in Detroit, Lansing, and Muskegon, Michigan, copies of the attached notice marked "Appendix A."<sup>62</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Union's authorized representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Battle Creek Health System, if willing, at all places where notices to employees are customarily posted.

(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 Union has taken to comply.

<sup>61</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>62</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the Respondent, Battle Creek Health System, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Promulgating or maintaining a policy requiring employees to report to management prior to discussing conditions of employment with other employees.

(b) Instructing employees to report harassment by union members to management.

(c) In any like or related manner restraining or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, rescind its verbal policy requiring employees to report to management prior to discussing conditions of employment with other employees.

(b) Within 14 days from the date of this Order, rescind its written policy dated September 24, 2002, instructing employees to report harassment by union members to management.

(c) Within 14 days after service by the Region, post at its facility in Battle Creek, Michigan, copies of the attached notice marked "Appendix B."<sup>63</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Hospital's authorized representative, shall be posted by the Hospital 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 Hospital 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 Hospital has gone out of business or closed the facility involved in these proceedings, the Hospital shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Hospital at any time since September 17, 2002.

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 Hospital has taken to comply.

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

Dated, Washington, D.C. September 2, 2003

#### APPENDIX A

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

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

<sup>63</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten members or other employees with bodily harm, destruction of their property, loss of employment, or other improper adverse consequences if they support decertification of the Union or if they cross a picket line.

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

LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL  
UNION, AFL-CIO

#### 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 had found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT issue or maintain a policy requiring employees to report to management before they discuss conditions of employment with other employees.

WE WILL NOT instruct employees to report harassment by union members to management.

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

WE WILL, within 14 days from the date of the Board's Order, rescind the requirement that employees report to management before discussing conditions of employment with other employees.

WE WILL, within 14 days from the date of the Board's Order, rescind that portion of our memorandum dated September 24, 2002, that directs employees to report harassment by union members to management.

BATTLE CREEK HEALTH SYSTEM