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**JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center and Health Care Workers Union, Service Employees International Union, Local 399, AFL-CIO.** Case 31-CA-25336

July 19, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On September 26, 2002, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

ORDER

The National Labor Relations Board orders that the Respondent, JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring or asking employees to sign a decertification petition in order to receive wage increases or benefits.

(b) Threatening to report employees to the INS if they refuse to sign decertification petitions.

(c) Telling employees that they would be denied wage increases because of their union activity.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), *Excel Container*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We also supplement the judge's recommended remedy by requiring that employees be made whole as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), as well as *F. W. Woolworth Co.*, 90 NLRB 289 (1950), as appropriate, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We substitute a new notice for that of the administrative law judge, conforming the language to the Order as modified.

(d) Withholding wage increases from employees because of their union activity.

(e) Issuing warning notices to employees because of their union activity.

(f) Suspending employees because of their union activity.

(g) Discharging employees because of their union activity.

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

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

(a) Within 14 days from the date of this Order, offer employee Christina Del Los Santos full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make employee Christina Del Los Santos whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Grant employees Rudolfo Ortiz, Sylvia Calderon, and Roberto Galdamez the wage increases unlawfully denied them and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, unlawful suspensions, or unlawful discharge of Rudolfo Ortiz and Christina Del Los Santos, and within 3 days thereafter notify the employees in writing that this has been done and that the warnings, suspensions, or discharge will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the

<sup>3</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 Judge's Order."

Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2001.

(g) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. July 19, 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

#### APPENDIX

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union  
Choose representatives to bargain with us on  
your behalf

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require or ask employees to sign a decertification petition in order to receive wage increases or benefits.

WE WILL NOT threaten to report employees to the INS if they refuse to sign decertification petitions.

WE WILL NOT tell employees that they would be denied wage increases because of their union activity.

WE WILL NOT withhold wage increases from employees because of their union activity.

WE WILL NOT issue warning notices to employees because of their union activity.

WE WILL NOT suspend employees because of their union activity.

WE WILL NOT discharge employees because of their union activity.

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

WE WILL, within 14 days from the date of the Board's Order, offer employee Christina Del Los Santos full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make employee Christina Del Los Santos whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest.

WE WILL grant employees Rudolfo Ortiz, Sylvia Calderon, and Roberto Galdamez the wage increases unlawfully denied them and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings, unlawful suspensions, or unlawful discharge of Rudolfo Ortiz and Christina Del Los Santos, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings, suspensions, or discharge will not be used against them in any way.

JPH MANAGEMENT, INC, D/B/A MID-WILSHIRE  
HEALTH CARE CENTER

*Nathan Laks Esq., and Christy J. Kwon, Esq.,* for the General Counsel.

*Thomas A. Lenz, Esq., and Vincent P. Floyd, Esq., (Atkinson, Andelson, Loya, Ruud & Romo),* of Cerrito, California, for the Respondent.

*Karleen George, Deputy,* Nursing Home, SEIU Local 4346 and Local 399, Los Angeles, California, for the Union.

## DECISION

### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Los Angeles, California, on May 13, 14 and 15, and July 24 and 25, 2002. The original charge was filed by Health Care Workers Union, Service Employees International Union, Local 399, AFL-CIO (Union), on October 30, 2001. Thereafter, the Union filed various amended charges. On March 21, 2002, the Regional Director for Region 31 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center (Respondent) of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, (Act).<sup>1</sup> The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, a letter/brief has been received from Counsel for the General Counsel (General Counsel), and counsel for the Respondent has submitted a brief. Upon the entire record,<sup>2</sup> and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent is a corporation that owns and operates a nursing home for the elderly in Los Angeles, California. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of \$100,000, and annually purchases and receives goods valued in excess of \$40,000 directly from other enterprises located within the State of California, each of which other enterprises received such good in substantially the same form directly from points located outside the State of California. It is admitted and I find that the Respondent is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> At the conclusion of the hearing the Respondent and Union reached an agreement in settlement of the Sec. 8(a)(5) portions of the complaint. Thereafter, I approved the Union's partial withdrawal request and dismissed the Sec. 8(a)(5) portions of the complaint. The Respondent's unopposed motion to correct the transcript is hereby granted.

<sup>2</sup> The Respondent's unopposed motion to correct the transcript is hereby granted.

#### II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

#### III. ALLEGED UNFAIR LABOR PRACTICES

##### A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) and (3) of the Act by threatening employees, offering benefits to employees, denying raises to employees, causing employees to sign a decertification petition, issuing warnings to employees, suspending employees, and discharging employees because of their activity on behalf of the Union.

##### B. Facts and Analysis

Pursuant to a Board certification in Case 31-RC-6609 the Union<sup>3</sup> has been the collective-bargaining representative of all full-time and regular part-time dietary employees, housekeeping employees, nursing employees, clerical employees, laundry employees, maintenance employees and activity assistants employed by the Respondent.

The Union and Respondent were parties to a collective-bargaining agreement extending from July 1, 1996 through June 30, 1999. Following the expiration of this agreement the parties entered into contract negotiations for a successor contract. To date, no successor contract has been reached.<sup>4</sup>

The events in this proceeding occurred between approximately April through October, 2001.<sup>5</sup> During this period there were several instances of picketing by the Union in furtherance of its attempt to cause the Respondent to sign the successor agreement or to agree upon the terms of a new contract. Further, several employees began circulating a decertification petition. As the Respondent sets forth in its brief,

Late October 2001 was a high intensity period between Local 399 and Mid-Wilshire, who were in the middle of negotiations for a new agreement. During the month several incidents arose including the instant charge, a decertification petition,<sup>6</sup> a charge against the Union,<sup>7</sup> and a major Union rally.<sup>8</sup>

<sup>3</sup> A successor union is currently the collective-bargaining representative of the employees, however the name of the captioned Union has been retained in this proceeding since it is the Union that represented the employees during the time period involved.

<sup>4</sup> Pursuant to a charge filed by the Union alleging that the Union and Respondent had in fact negotiated a successor agreement which the Respondent refused to execute, a Board hearing was held to determine the merits of this controversy. The Board issued its decision on December 21, 2001 in *Mid-Wilshire*, 337 NLRB 72, finding that a successor contract had not been finalized, and dismissing this portion of the complaint.

<sup>5</sup> All dates or time periods are within 2001 unless otherwise indicated.

<sup>6</sup> The employees filed this petition on October 25, 2001 (Case 31-RC-1454).

<sup>7</sup> The charge was filed by the Respondent against the Union on October 30, 2001 (Case 31-CB-10933), and alleges, inter alia, that the Union threatened "violence and coercion."

The supervisory hierarchy at the facility during the time period in question is as follows: Samuel Park, assistant administrator, Oksoon Shin, director of nursing, and Lilian Pampolino, director of staff development. Park reports to Ms. Lee, owner of the Respondent. Pampolino is the immediate supervisor of the employees who testified in this proceeding, each of whom, unless otherwise indicated, is a certified nursing assistant (CNA).

Sylvia Calderon testified that she was called to Park's office in about April. During a 20-minute conversation Park told her that the employees did not need a union, that the Union could be removed, and that things would be okay if the employees placed their confidence in Ms. Lee, the owner, to do the right thing. Park said that the employees could have a 401(k) plan for what they had been paying the Union in union dues, that they could have better insurance, and that they would be able to save sick leave days for the end of the year. Then, later that afternoon, Park made these same comments to Calderon and five other workers at a meeting that afternoon. He said, according to Calderon, that we could have all of these benefits without the need of a union, and that he would write a letter and would sign it and it would contain everything he was proposing.

Roberto Galdamez also testified in about April, Park held a meeting over the intercom with Galdamez and five other CNAs. Park said that he wanted the Union out and wanted to give the employees things that the Union could not give them. He went on to offer the employees better insurance, pay for unused sick leave, a raise, and a 401(k). He said, "I want the Union out of here. Just think about it; let me know." The meeting lasted 15 minutes.<sup>9</sup>

In late May or early June the Respondent was given a periodic inspection by a California State agency that inspects health facilities. Prior to the inspection, Pampolino held meetings with the CNAs on each shift and told them that they could expect raises if their department performed well and received high marks during the inspection. Many employees apparently understood this to mean that if the department received high marks then each employee in the department would receive a raise. The Respondent, however, maintains the employees were told that individual employees who performed exceptionally during the inspection would receive raises, assuming that their department also received high marks.<sup>10</sup> After the inspection it appears that approximately 5 of the some 35 CNAs were given wage increases.

<sup>8</sup> The rally took place on the afternoon of October 22, 2001; four employees were disciplined for leaving work to attend the rally, *infra*. Also, the Respondent maintains that during the rally one of the union supporters, who was a Los Angeles City Councilman and a member of the Union, threatened and intimidated the Respondent's director of nursing.

<sup>9</sup> Apparently, because the aforementioned meetings occurred in April, prior to the 10(b) period, there are no complaint allegations regarding such comments by Park; accordingly, the testimony regarding Park's was received only for background purposes and as *indicia* of animus. I credit the testimony of Calderon and Galdamez and find that Park made the statements attributed to him by these employees.

<sup>10</sup> What was actually said to the employees is not an issue in this proceeding.

Rodolfo Ortiz is a current employee who has worked for the Respondent since 1993. He is the chief union steward. He testified that he is the most active union adherent at the facility. Other shop stewards, in addition to Ortiz, are Roberto Galdamez, Sylvia Calderon, and Karen Gaban. Ortiz testified that sometime after the state inspection, Pampolino said she wanted to talk to Ortiz and instructed him to follow her to the office. She told him not to tell anybody, and went on to say that some employees had received a raise but that "Sylvia [Calderon], and Roberto [Galdamez], and you cannot get any raises, because you are the leader (sic) of the Union." Then she asked him, "Why don't you go talk to Mr. Park about your raise." Ortiz, in turn, asked Pampolino why she didn't tell Park to negotiate a contract at the negotiating table that included a wage increase. Ortiz testified that he elected not to talk to Park about the matter as he believed this would be futile and that Park would not give him a raise because he was an active member of the union.

Sylvia Calderon, a union steward, testified that Ortiz related to her what Pampolino had told Ortiz, namely, that the stewards were not going to get a raise because they were union representatives. She verified this with Pampolino. Thus, she asked Pampolino why she had not received a raise as a result of the inspection. Pampolino said Park was not going to give her a raise, "that I already knew why," and told her to ask Park about his. Calderon did not do so because she did not feel comfortable going to his office.

Roberto Galdamez testified that about a week after the inspection he asked Pampolino why he had not received a wage increase, and Pampolino replied, "because we were stewards."

Pampolino is currently working for the Respondent as director of staff development. She hires and supervises the CNAs. Pampolino did not testify in this proceeding, and the Respondent has proffered no explanation for her failure to testify. As I stated at the hearing, under these circumstances I find that the testimony of Pampolino would have been adverse to the Respondent's interest in this proceeding,<sup>11</sup> and I credit the testimony of each of the General Counsel's witness regarding their conversations with Pampolino. Moreover, I do not credit Park's assertions, which are irrelevant in any event, that Pampolino was not authorized to speak for the Respondent regarding such matters. Clearly the employees understood that Pampolino, as the director of staff development and one of the three principal supervisors at the facility, was speaking on behalf of the Respondent and specifically relaying the position of Park or Ms. Lee, the Respondent's owner.

Accordingly, I find that Pampolino told three union stewards, Ortiz, Calderon, and Galdamez, that the reason they received no wage increase following the state inspection is in fact because each of them occupied the position of union steward. Moreover, Pampolino was the person designated by Park to recommend those individuals who merited raises, and there has been no evidence presented by the Respondent that the work of Ortiz, Calderon or Galdamez during the state inspection process

<sup>11</sup> *International Automated Machines*, 285 NLRB 1122 (1987).

was not superior and did not warrant a merit wage increase.<sup>12</sup> Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act by advising these three employees that they were denied merit wage increases because of their union activity. Further, I find that by denying these three employees merit wage increases in June, the Respondent has violated and is violating Section 8(a)(3) of the Act. I am mindful of the fact that only about 5 of the 35 CNAs were given wage increases after the inspection; however this fact alone is insufficient to demonstrate that any of the stewards would not have received such increases. Thus I find the General Counsel has presented compelling evidence, in the form of unequivocal statements by Pampolino, that the denial of the wage increases was discriminatorily motivated. And I further find that the Respondent has not sustained its burden of proof by demonstrating that in fact any or all of the stewards would not have received such increases. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Armando Avalos is a cook. He began working for the Respondent in 1983. Avalos testified that after the health inspection he was called in to Park's office. Park said he had good news and gave him a 20-cent raise. Park told him, "The twenty cents comes from the owner, not from the Union. That is for a good job, and keep doing a good job." I credit the testimony of Avalos, and do not credit the denial or explanation of Park. This evidence was introduced for purposes of showing union animus, and is not alleged as violative of the Act.

Maria Guadalupe Garcia began working for the Respondent on April 17. Pampolino hired her. In September she was due for a raise. During her discussion with Pampolino about the raise, Pampolino advised her of the decertification petition that was being circulated, and told her to "Sign 'no' to the Union, because Mr. Park doesn't like the Union. Don't tell Rodolfo [Ortiz]." After Garcia filled out a company form regarding her raise, Pampolino called Martin Perez, a housekeeping employee, and said, "Let's go talk to Mr. Park." The three of them entered the elevator. Then Pampolino stopped the elevator in mid-floor and asked Perez to "give her the paper" because, "Maria is going to sign no to the union." Martin presented the decertification petition to Garcia, and Garcia signed it. Garcia testified that she felt pressured by the situation and did not know what else to do. Then Pampolino removed the stop from the elevator. When they reached the first floor Martin left, and Pampolino and Garcia entered Park's office. Pampolino told Park, "Maria has signed 'No' to the Union," and has filled out

<sup>12</sup> The Respondent did show that one union steward, Karen Gaban, a cook in the dietary department, did receive a merit wage increase, and relies upon this evidence to support the argument that it did not deny wage increases to individuals simply because they were stewards. I deem such evidence to be insufficient for the proposition submitted, as it appears that six of the approximately eight dietary department employees did in fact receive a merit wage increase, largely because the department as a whole received an exceptional rating, and to have denied Gaban a wage increase under such circumstances would have been difficult to justify. Moreover, Gaban's immediate supervisor was the dietary department supervisor, and not Pampolino.

the form to receive a raise. Park said okay. Shortly thereafter, Garcia received a raise of 25 cents per hour.

I credit the testimony of Garcia. I find that Pampolino directed her to sign a decertification petition, caused Garcia to sign the petition in the elevator, and then brought her to Park's office and advised Park that Garcia had signed the petition and was entitled to a wage increase that Garcia subsequently received. Whether Garcia was in fact entitled to a wage increase at that particular time, as the Respondent contends, makes no difference. The gravamen of this violation is that the Respondent, by its conduct, caused Garcia to believe that the wage increase was, at least in part, a reward for her signature on the decertification petition. By such conduct, I find that the Respondent has violated Section 8(a)(1) of the Act.

Lucrecia Barrantes began working for the Respondent in May. She worked until the last day of April, 2002. Barrantes testified that in August, employee Martin Perez asked her to sign a petition against the Union and she said no. About a week later Pampolino instructed Barrantes and another CNA to accompany her to Room 24, a patient's room. Pampolino closed the door and asked, according to the testimony of Barrantes, "Why you don't sign the letter that said no to the Union, because Mr. Park, he doesn't like the Union." Pampolino told the two employees that they didn't have immigration papers, that she had helped their friends, and they needed to help her. Barrantes said that she didn't want to have a problem, but she didn't want to sign the petition either, and that if Pampolino wanted to call INS "that's your business, but for me, you can't force me to sign the letter." Barrantes testified that the meeting lasted about 20 minutes, and that the patient, who had a cane, became impatient with them for disturbing her, and told them to get out of her room.

I credit the testimony of Barrantes and find that Pampolino threatened to report her and another employee to the INS for being undocumented workers if they did not sign the decertification petition. By such threats the Respondent has violated Section 8(a)(1) of the Act.

On the afternoon of October 22, the Union held an unannounced rally at the facility. Perhaps 40 individuals were present. The Union had invited, among other outsiders, a Los Angeles councilman, who was also a member of the Union, to speak to Park about the employees' demands for a contract. However, Park either was not present or did not want to acknowledge his presence, and members of the group spoke with Director of Nursing Shin instead. Four on-duty CNAs left work and joined the rally for a period of time. These employees were subsequently given written warnings for leaving their posts and abandoning their patients and responsibilities.

It appears to be the position of the General Counsel, as well as the collective position of these four CNAs, that they were entitled to a scheduled 15-minute afternoon break, but were customarily too busy with patients to take a break and did not regularly do so; however, on this occasion they considered their attendance at the rally to constitute, in effect, their afternoon break to which they were entitled. The problem with this is that, I find, the rally did not coincide with their scheduled break times and/or they were present at the rally for longer than their scheduled 15-minute break. And the Charge Nurse who was on

duty complained to Director of Nursing Shin that some of the CNAs had left their posts and that because of this some of the patients' call lights were unable to be answered promptly.

Accordingly, I agree with the Respondent that the employees did leave their posts at unscheduled times and/or for longer than their scheduled 15-minute afternoon break. I am mindful of the evidence presented that there may have been other on-duty personnel who could or did fill in for the absent CNAs, and that no patients suffered any injury or were affected adversely during this period of time. Nevertheless, as the Respondent operates a health care facility, and consideration of the patients' needs must be given overriding consideration, I find the record evidence insufficient to support the complaint allegation that the warnings to the CNAs for temporarily leaving their posts and leaving patients either wholly unattended, or partially unattended by a reduced staff, were discriminatorily motivated by their union activity in electing to attend the rally. Accordingly, I shall dismiss these allegations of the complaint.

The Respondent has a progressive warning/disciplinary policy that is contained in an employee handbook.<sup>13</sup> Generally speaking, this policy provides that except for serious infractions that warrant summary dismissal, an employee is entitled to three warnings in a 12-month period. The third warning, regardless of whether it is similar to prior warnings, warrants a 3-day suspension, and the fourth warning warrants termination. After any given 12-month period, the employee begins with a clean slate, although the prior warnings are not physically removed from the employee's personnel file. Park testified that the Respondent's warning/disciplinary policy is not necessarily followed precisely, but is dependent upon the situation, particularly given the fact that qualified CNAs or other necessary employees are often not readily obtainable in the job market. Thus, exceptions to the policy are made according to the circumstances. In other words, the Respondent may modify the policy as it deems expedient. Park testified that the "[p]olicy is a guideline in terms of where we should follow but, yes, in terms of circumstances we could try to work with [the employees]."

The four employees who received warnings for leaving their workstations and attending the union rally are Rudolfo Ortiz, Christina Del Los Santos, Myrna Calaycoy, and Sofia Ruiz. I have found that the warnings given to these employees were not unlawful. Moreover, I find that the 3-day suspension of Sofia Ruiz for leaving her post to attend the union rally was not unlawful, as Ruiz, who was discharged by the Respondent sometime in early November for reasons unrelated to this proceeding, had six prior warnings for various infractions within 2001, and the 3-day suspension, under the circumstances, was not unwarranted.<sup>14</sup> The warnings and related discipline given to Ortiz and Del Los Santos are discussed below.

<sup>13</sup> There is a dispute regarding whether the employees and/or union representatives were aware of the handbook or the policies contained therein. However, as no union representatives testified to the contrary, I conclude, for purposes of this proceeding, that the Union was aware of the Respondent's reliance upon the progressive disciplinary policy contained in the handbook.

<sup>14</sup> Thus it is clear that the Respondent had been very lenient with Ruiz prior to her attendance at the rally, and had elected not to give her a 3-day suspension until her sixth written warning within 2001.

Rudolfo Ortiz, the chief union steward, was one of the CNAs who received a warning for leaving his post to attend the rally. Ortiz is considered to be an excellent CNA.<sup>15</sup> He had worked for the Respondent for some eight years prior to October, and had only one prior warning, which he received in 1995. On October 24, 2 days after the rally, Park called Ortiz to the office in order to apprise him of the warning he was to be given on a form entitled "Employee Warning Record." Park, Shin, Pampolino and Karen Geban, a union steward who had been asked by Park to attend the meeting, were in the office when Ortiz arrived. Shin testified that at first, Ortiz refused to enter the office but stood at the doorway and refused to enter. Park told him to calm down and come in and have a seat. After several requests from Park, Ortiz entered the office and sat down. Park explained the reason for the warning, and Ortiz replied, "Okay, okay, whatever you want to do." Then Park asked him to sign the warning and Ortiz refused to do so. Union Steward Geban was asked to sign the warning as a union representative or witness and Ortiz told her not to sign it. However, Geban did sign it and then left because her shift had ended and she had other commitments and could not remain any longer. At first, according to Shin, Ortiz spoke in a loud tone of voice but later calmed down. Then, according to Shin, Ortiz was given a second warning by Park for insubordination, "in light of the fact that he didn't sign [the first warning]." Ortiz again refused to sign the second warning. Then Park wrote out a third warning, again for insubordination, and immediately suspended Ortiz for 3 days, ostensibly in accordance with the Respondent's progressive disciplinary policy that three warnings during a 12-month period warranted a 3-day suspension.

Ortiz testified that at first he refused to enter Park's office because he saw his name on an "Employee Warning Record" form on Park's desk, and told Park he wanted to have a union business representative present, not a union steward, to help him with the problem. At this time both he and Park raised their voices, and Park insisted that he enter the office. Park said he was Ortiz' boss and Ortiz was an employee, and he had to come in. Ortiz did so, and again requested a union representative. Park said that Geban was his union steward. Then Park gave him a warning for taking an unauthorized or extended break to attend the rally. Ortiz said okay, but refused Park's demand that he sign the warning. Ortiz also told Geban not to sign the warning, but Geban did as Park instructed. Geban then left. Park told Ortiz to sign another warning for insubordination because of his refusal to sign the first warning.<sup>16</sup> Ortiz again refused to sign,

<sup>15</sup> Ortiz received an annual evaluation signed by Pampolino and Shin, dated October 11, containing the comment, "CNA Rodolfo is consistently superior but creates antagonist (sic) due he dictates to fellow workers."

<sup>16</sup> Park wrote on the second warning: "Employee failed to sign warning issued to him. (See warning [dated] 10/22/01). Facility has the responsibility to teach and identify violation to employee. In response employee failed to sign in acceptance." And under the space reserved for "Employee's Remarks Re: Violation," Park wrote, "Employee stated he understands and wants a copy of the paper. He refused to sign." (Original emphasis.)

saying that he wanted his union representative. Then Park gave him a third warning and suspended him for 3 days.<sup>17</sup>

Park testified that it is not necessary for employees to sign warning notices. Indeed, many employees, even the majority of employees, refuse to sign warnings or other documents and are not considered to be insubordinate because, as Park testified, “[A] lot of times these employees think signing a paper is signing their life away,” and believe that the Respondent will insert detrimental comments in the notices after they are signed. According to Park, the subsequent warning and suspension to Ortiz for insubordination was a judgment call he had to make; other supervisors may not have done the same thing. Thus, it was not the simple fact that Ortiz refused to sign the warnings, but the hostile attitude exhibited by Ortiz together with his nonchalant refusal to accept and understand the significance of leaving his duty station unattended. In other words, Ortiz appeared unresponsive to the admonition or instruction of Park, and, rather than acknowledging the nature of his infraction, did not treat Park with due deference and seemed preoccupied with the fact that he was denied the union representation he requested.<sup>18</sup>

I credit the testimony of Shin and Ortiz and find that Ortiz was in fact receptive to and did acknowledge the reasons for the first warning: He did not interrupt Park or prevent Park from advising him of the infraction; nor did he even argue that the warning was undeserved. Further, I do not credit Park’s explanation that the second and third warnings had nothing to do with Ortiz’ failure to sign the first or second warnings. In fact, as Park expressly verified on the warning notices, Ortiz’ failure to sign them was the very act of insubordination that precipitated them. Indeed, given the fact that Ortiz acknowledged that he understood the reason for the second warning, as noted by Park, thus indicating that Ortiz was attentive to Park’s comments, there could have been no other reason for the third warning other than Ortiz’ failure to sign the second warning. Clearly, has there been other reasons for Ortiz’ alleged insubordination, Park would have noted them on the warning form.<sup>19</sup>

Ortiz was a union steward and the leading union adherent; he had previously been denied a raise for the express reason that he was a steward; and the Respondent’s opposition to the Union is underscored by other serious unfair labor practices as found herein. Finally, there is simply no requirement that employees sign warning notices; many do not, and no other employee has ever been given a subsequent warning for refusing to sign a prior warning. Accordingly, I find that the second and

third warnings, and the 3-day suspension of Ortiz, were unlawfully motivated by the Respondent’s opposition to the Union in general, and to Ortiz in particular as the Union’s principal advocate.

Park, I find, also utilized the Respondent’s progressive disciplinary policy to discharge another employee, Christina Del Los Santos.

Christina Del Los Santos worked for the Respondent from 1996 until she was discharged in November. She was one of the CNAs who received a raise in June after the health department inspection. Del Los Santos testified that Pampolino spoke to her twice about signing the decertification petition. The first time was in about September. Pampolino approached her and asked her to sign the letter to get rid of the Union. Del Los Santos said she didn’t want to sign. The second time, about a week later, Pampolino again asked her to sign. On this occasion, Pampolino advised her that she would be the only Filipino who didn’t sign, and went on to say that if she did sign she would get more benefits and maybe her salary would be increased. Nevertheless, Del Los Santos again refused to sign, telling Pampolino that it was her right not to sign. Thereafter, according to Del Los Santos, Pampolino seemed to always be watching her, and following her, and telling her, “you’re going to have to do this or that.” This was unusual, as Pampolino had not exhibited such behavior toward her prior to her refusal to sign the decertification petition.

On October 5, Del Los Santos purportedly committed three separate rule infractions: changing shifts with another employee without specific written authorization; leaving the premises before the end of her shift;<sup>20</sup> and leaving a patient’s side-rail down.<sup>21</sup> Park testified that none of these infractions warrants dismissal, and all are subject to the progressive disciplinary policy. For reasons unclear in the record, Del Los Santos was given no written warnings regarding any of these matters from the time they occurred until November 2. In the interim, on October 22, Del Los Santos attended the aforementioned union rally and, I find, left her workstation unattended for a brief period of time. Then, on November 2, Park called her into the office, gave her three warnings for the first three infractions that had occurred a month earlier,<sup>22</sup> gave her a fourth warning for leaving her workstation to attend the rally, and then summarily dismissed her for having received four warnings in a 12-month period.

Park repeatedly testified that this was highly unusual, and agreed that Del Los Santos should have been given the warnings at an earlier date as near as possible to when the infractions occurred. In mid-October he spoke to Pampolino and he instructed her to issue the warnings and to follow the progressive disciplinary policy, but Pampolino did not do so. Then, due to his absence for several weeks in October and the absence of

<sup>17</sup> Park wrote on the third warning: “Employee failed to sign previous insubordination warning. (See warning 10/24/01). . . suspended three days . . . 10/27/01, 10/28/01, 10/29/01 . . .”

<sup>18</sup> There is no record evidence one way or the other regarding whether employees receiving warnings were entitled to representation by a union business representative, rather than a steward, upon request. There is record evidence that on at least one occasion an employee who was to receive a warning requested that the meeting be postponed until a union business could be present, and Park agreed to this request. Clearly, Ortiz’ request for a business representative was not unreasonable.

<sup>19</sup> The case cited by the Respondent in its brief, *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001) is inapposite.

<sup>20</sup> Although the record is not entirely clear, it appears that these first two infractions are related.

<sup>21</sup> While Del Los Santos disputes that she committed the infractions attributed to her, the culpability of Del Los Santos regarding such incidents is, under the circumstances, not pertinent to the issue of employer motivation.

<sup>22</sup> A 3-day suspension was technically imposed for the third infraction, however the suspension and discharge were concurrent.

Del Los Santos for a period of time, he had no choice but to give her all of the warnings belatedly and concurrently; and, strictly applying the disciplinary policy, he elected to terminate her. Park explained that, "It was kind of awkward because these warnings should have been given at the time when I've given (sic) to Lillian [Pampolino], but it wasn't (sic) . . . It was kind of ironic how all these warnings came to her all in one day or at the time when I discussed with her and I wanted to let her know what she has violated and, knowing that it hasn't been done so earlier, I mean, ultimately, it came to my burden where I had the responsibility to let her know."

I do not credit Park's testimony that it was incumbent upon him to strictly follow the disciplinary policy vis-a-vis De Los Santos. In fact, Park admittedly has discretion, and has exercised this discretion, as noted above, to apply or not apply the policy depending upon the circumstances.<sup>23</sup> Furthermore, he intentionally ignored the very reason for the progressive nature of the disciplinary policy, namely, to give employees written warnings as close to the time of a disciplinary incident as possible, so they may modify their behavior with the foreknowledge that subsequent infractions may lead to subsequent and progressive discipline. Clearly, I find, Park understood this, as he acknowledged that his handling of the matter was awkward and unusual. Nor has the Respondent demonstrated that either Park or any other administrator has ever behaved similarly in applying the disciplinary policy. And, Park did not explain why, under these unusual circumstances, he elected not to exercise his discretion in favor of leniency, particularly as it was the Respondent's own negligence that created the "awkward" situation. Nor would this have compromised the Respondent's right to issue a disciplinary warning to Del Los Santos for leaving her workstation to attend the rally.

Del Los Santos had worked for the Respondent for 5 years at the time of her discharge. She was a union advocate. Twice, in September, she refused Pampolino's request that she sign the decertification petition. Pampolino admonished her for this, advising that she would be the only Filipino who had refused to sign, and then offered her benefits to induce her to change her mind. Following these conversations, according to Del Los Santos, Pampolino monitored her work much more closely.<sup>24</sup> Then, on October 22, Del Los Santos joined the group of union advocates at the rally. Approximately 10 days later, rather than receiving only a first warning for leaving her workstation on October 22 to attend the rally, she was discharged; and her discharge was premised upon infractions that had occurred a month earlier, on October 5, for which she had never been issued warning notices, and in clear contravention of the very purpose for progressive discipline. On the basis of the forgoing, I find that the General Counsel has presented abundant and persuasive evidence of unlawful motivation. Further, I conclude that the Respondent has not met its *Wright Line*, supra, burden

<sup>23</sup> Indeed, as noted above, the Respondent had given employee Ruiz five written warnings before giving her a 3-day suspension for the sixth infraction, which happened to be occasion when she attended the union rally.

<sup>24</sup> Park testified that he had no idea whether Pampolino made these statements to Del Los Santos or thereafter monitored her work more closely.

of demonstrating that Del Los Santos was discharged for non-discriminatory reasons. I have found above that Park discriminatorily manipulated the progressive disciplinary policy vis-a-vis Ortiz for unlawful purposes. Similarly, I find he has utilized the policy to discharge Del Los Santos for reasons proscribed by the Act. Accordingly, I find that Del Los Santos was discharged in violation of Section 8(a)(3) of the Act as alleged.<sup>25</sup>

Finally, I shall dismiss the allegation that Pampolino unlawfully interrogated Calderon regarding her union activity when she asked Calderon whether she was going to attend or participate in the union picketing scheduled for November 28. While I find that, according to the testimony of Calderon, Pampolino did ask her this, it appears that the Respondent had legitimate scheduling concerns and simply wanted to know who to expect at work on the day in question. Moreover, Calderon was a union steward, and therefore could have reasonably understood that Pampolino's interrogation of her was not for the purpose of discerning her union sympathies.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) and (3) of the Act as set forth.

#### THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act by unlawfully coercing and influencing employees to sign a decertification petition, threatening to report employees to the INS if they refuse to sign the decertification petition, creating the impression that wage increases or other benefits were dependent upon the signing of the decertification petition, withholding wage increases from employees because of their union activity, giving written warnings to employees because of their union activity, suspending employees because of their union activity, and discharging employees because of their union activity, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Having found that the Respondent withheld wage increases from employees Rudolfo Ortiz, Sylvia Calderon, and Roberto Galdamez, unlawfully suspended Rudolfo Ortiz, and unlawfully suspended and discharged Christina Del Los Santos, I shall recommend that the Respondent offer Del Los Santos reinstatement to her former position, discharging replacements

<sup>25</sup> The Respondent maintains that the warning/discharge issues and other issues in this proceeding should be deferred to an arbitration process. As there is no contract currently existing between the parties there is no arbitration process to which the parties are bound. At the time the Union, on October 24, submitted a general grievance indicating its desire to contest the Respondent's conduct in issuing warnings and/or discharging employees, the Union believed an enforceable contract with a grievance procedure was in effect. It was later determined by the Board that in fact no such contract existed. Since that time the Union has not pursued the grievances, and is seeking remedial relief through the Board in the instant proceeding.

if necessary, without prejudice to her rights and privileges previously enjoyed, and that all of the foregoing employees be made whole for any loss of earnings or other benefits they may have suffered, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend an expunction order and the posting of an appropriate notice, attached hereto as "Appendix."

#### ORDER<sup>26</sup>

The Respondent, JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Requiring or asking employees to sign a decertification petition in order to receive wage increases or benefits.
  - (b) Threatening to report employees to the INS if they refuse to sign decertification petitions.
  - (c) Withholding wage increases from employees because of their union activity.
  - (d) Issuing warning notices to employees because of their union activity.
  - (e) Suspending employees because of their union activity.
  - (f) Discharging employees because of their union activity.
  - (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action which is necessary to effectuate the purposes of the Act
  - (a) Within 14 days from the date of this Order, offer reinstatement to employee Christina Del Los Santos, dismissing, if necessary, any employee hired to fill her position, and make her whole in the manner set forth in the remedy section of this decision.
  - (b) Within 14 days from the date of this Order, make employees Rudolfo Ortiz, Sylvia Calderon, and Roberto Galdamez whole in the manner set forth in the remedy section of this decision.
  - (c) Within 14 days from the date of this Order, remove from the personnel files of Rudolfo Ortiz, Sylvia Calderon, Roberto Galdamez, and Christina Del Los Santos any reference to their unlawful warnings, unlawful suspensions, or unlawful discharges.
  - (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of the Order.
  - (e) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."<sup>27</sup> Cop-

<sup>26</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>27</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 Na-

ies of the notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: September 26, 2002

#### APPENDIX

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT request that you sign a petition or paper to get rid of the Union as your collective-bargaining representative.

WE WILL NOT offer or promise you benefits if you sign a petition or paper to get rid of the Union as your collective-bargaining representative.

WE WILL NOT threaten to report you to the INS, or make any other threats of a similar nature if you refuse to sign a petition or paper to get rid of the Union.

WE WILL NOT create the impression wage increases may not be granted unless you sign a petition or paper to get rid of the union as your collective-bargaining representative.

WE WILL NOT deny wage increases to employees because they are union stewards or because they are actively in favor of the Union.

WE WILL NOT issue warning notices to employees because of their union activity.

WE WILL NOT suspend employees because of their union activity.

WE WILL NOT discharge employees because of their union activity.

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ational 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."

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL offer Christina Del Los Santos immediate reinstatement to her former position as a CNA, and we will pay her backpay and make her whole, with interest, for any loss of earnings and other benefits she may have suffered because of her unlawful suspension and discharge.

WE WILL increase the wages of Rudolfo Ortiz, Sylvia Calderon, and Roberto Galdamez, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered because of our unlawful conduct.

WE WILL remove from the personnel files any reference to the unlawful suspension and discharge of Christina Del Los Santos, or the unlawful warnings to Rudolfo Ortiz.

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

JPH MANAGEMENT, INC, D/B/A MID-WILSHIRE  
HEALTH CARE CENTER